

August 2009

WHISTLEBLOWER PROTECTION LAWS - BACKGROUND MEMORANDUM

Section 2 of 2009 Senate Bill No. 2267 (attached as an [appendix](#)) provides for a study of the state's whistleblower protection laws, including whether the laws adequately address the public policy issues related to whistleblower protection. Senate Bill No. 2267 also amended North Dakota Century Code (NDCC) Section 34-11.1-04, which prohibits reprisals against public employees for reporting a job-related violation of a law or rule or a job-related misuse of public resources.

BACKGROUND North Dakota Law

In general, a whistleblower protection law protects an employee who reports misconduct or a violation of law by an employer or a fellow employee. Under North Dakota law, there are two provisions that are commonly referred to as whistleblower protection laws.

North Dakota Century Code Section 34-01-20 provides protection to any employee who in good faith reports a violation or suspected violation of a federal, state, or local law, ordinance, regulation, or rule to an employer, a governmental body, or a law enforcement official; who is requested by a public body or official to participate in an investigation, a hearing, or an inquiry; or who refuses an employer's order to perform an action that the employee believes violates local, state, or federal law, ordinance, rule, or regulation.

North Dakota Century Code Section 34-11.1-04, before being amended by the 2009 Legislative Assembly, provided that a state or political subdivision employee "may, without fear of reprisal, report in writing to the employee's respective agency head, a state's attorney, the attorney general, or an employee organization the existence of:

- a. A job-related violation of local, state, or federal law, rule, regulation, or ordinance.
- b. The job-related misuse of public resources."

North Dakota Century Code Section 34-11.1-04 further provided that "[a]n employee dismissed under this subsection may appeal first to the state personnel board and then to the district court in the manner prescribed by chapter 28-32, or to other appropriate offices and then to district court if the employee is not under the jurisdiction of the state personnel board."

Senate Bill No. 2267 amended NDCC Section 34-11.1-04 to allow any employee of the state, except an employee under the jurisdiction of the State Board of Higher Education or the judicial branch, who claims reprisal for filing a report under that section to appeal in the manner prescribed for a classified employee grievance under Chapter 54-44.3. Under that chapter, an employee may appeal a decision by an agency for a hearing before an administrative law judge appointed by the director of the Office of

Administrative Hearings. An employee may appeal a decision of an administrative law judge to the district court under Chapter 28-32.

Senate Bill No. 2267 also established a procedure under which the Labor Department is required to receive complaints of violations of NDCC Section 34-11.1-04 and attempt to obtain voluntary compliance with the section through informal advice, negotiation, or conciliation. To receive assistance from the Labor Department, an individual claiming to be aggrieved must file a complaint with the department within 300 days after the alleged act of wrongdoing.

2009 Failed Legislation

The 2009 Legislative Assembly considered Senate Bill No. 2258, which failed to pass the Senate. The bill would have established an investigative procedure for a report of a violation of law or misuse of public resources by a public employee by allowing an employee to file a report with the employee's employer, an employee organization, the Attorney General, the State Auditor, the Labor Commissioner, or a law enforcement official. The bill would have required the recipient of the report to forward the report to the State Auditor for investigation. After concluding the investigation, the State Auditor would have been required to provide a report to the employee and the employer that would include a determination of whether the alleged violation of law or the alleged job-related misuse of public resources occurred, whether the employer would be required to take any actions to remedy the alleged violation or misuse of public funds, and the process through which the State Auditor would track whether the employer implemented remedial actions that may have been required.

Senate Bill No. 2258 would have allowed an employee who claims reprisal for filing a report to bring a civil action for injunctive relief or actual damages, or both, within 180 days after the alleged violation or completion of any grievance procedure available to the employee under a collective bargaining agreement, employment contract, or other policy. The bill provided that if a court were to determine that the employer violated the employee's rights, the court could order reinstatement of the employee, backpay for no more than two years after the violation, reinstatement of fringe benefits, temporary or permanent injunctive relief, or any combination of the remedies. In addition, the bill would have authorized a court to award reasonable attorney's fees to the prevailing party.

Senate Bill No. 2258 also would have required the Labor Department, upon receipt of a timely complaint of reprisal for filing a report, to determine whether the

employee was seeking assistance in obtaining voluntary assistance or whether the employee was seeking an administrative decision. If the employee was seeking voluntary assistance, the bill would have required the Labor Department to determine whether the complaint may be substantiated. The bill would have required the department to attempt to obtain voluntary compliance through informal advice, negotiation, or conciliation if the complaint was determined to be substantiated. If the employee had sought an administrative decision, the bill would have required the Labor Department to review a complaint and issue an administrative decision, which may have included an order of reinstatement, backpay for no more than two years after the violation, reinstatement of fringe benefits, temporary or permanent injunctive relief, or any combination of the remedies. Under the proposal, an employee would have been prohibited from bringing a separate civil action for injunctive relief if the employee sought an administrative decision.

NEIGHBORING STATES' WHISTLEBLOWER PROTECTION LAWS

Minnesota

Under Minnesota law, an employer may not discharge, discipline, threaten, discriminate against, or penalize an employee regarding compensation or terms, conditions, location, or privileges of employment because the employee in good faith reports a violation or suspected violation of a law or refuses to participate in any activity that the employee in good faith believes to be a violation of law. Under Minnesota law, a discharged employee must request within 15 days a written explanation of the reason for the discharge. If the employer fails to notify a discharged employee of the true reason for the discharge within 10 working days of the employee's request, the employer may be fined \$25 per day, up to \$750. The employee may bring a civil action to recover damages and attorney's fees and may receive injunctive relief.

Montana

The state of Montana does not have a general whistleblower protection law. Under the Montana law addressing the filing of false financial claims, a governmental entity may not adopt or enforce a rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency with regard to or from acting in furtherance of an investigation of the filing of a false claim. Under that law, a governmental entity may not discharge, demote, suspend, threaten, harass, or deny promotion to or in any other manner discriminate against an employee in the terms and conditions of employment because of the employee's disclosure of information to a government or law enforcement agency.

South Dakota

The state of South Dakota does not have a whistleblower protection law.

POTENTIAL STUDY APPROACH

In conducting this study, the committee may seek information from the Risk Management Division of the Office of Management and Budget, Human Resource Management Services, the Labor Commissioner, and representatives of public employees. Because the amendments to NDCC Section 34-11.1-04 through Senate Bill No. 2267 only became effective August 1, 2009, the committee may determine that periodic updates during the interim regarding implementation of the law may be necessary to determine the impact of the changes. After evaluation of the impact of the changes to Section 34-11.1-04 and the receipt of testimony from interested individuals and groups, the committee may develop recommendations and draft legislation, if necessary to implement the recommendations, to address any concerns identified.

ATTACH:1