

Sixty-second
Legislative Assembly
of North Dakota

HOUSE BILL NO. 1234

Introduced by

Representative Glassheim

1 A BILL ~~for an Act to amend and reenact section 34-11.1-04 of the North Dakota Century Code,~~
2 ~~relating to whistleblower protection for public employees;~~ for an Act to create and enact sections
3 34-11.1-04.3, 34-11.1-04.4, 34-11.1-04.5, and 34-11.1-04.6 of the North Dakota Century Code,
4 relating to whistleblower protection for public employees; and to amend and reenact section
5 34-11.1-04 of the North Dakota Century Code, relating to whistleblower protection for public
6 employees.

7 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

8 ~~SECTION 1. AMENDMENT. Section 34-11.1-04 of the North Dakota Century Code is~~
9 ~~amended and reenacted as follows:~~

10 ~~34-11.1-04. Violations for misuse reported by employee -- ReprisalsEmployer~~
11 ~~retaliation prohibited -- Furnishing false information -- Reporting and investigating of state~~
12 ~~wrongdoing -- Labor department investigation -- Civil action for relief.~~

13 ~~1. An employee may, without fear of reprisal, report in writing to the employee's~~
14 ~~respective agency head, a state's attorney, the attorney general, or an employee-~~
15 ~~organization the existence of:~~

16 ~~a. A job-related violation of local, state, or federal law, rule, regulation, or ordinance.~~

17 ~~b. The job-related misuse of public resources.~~

18 ~~2. For having made a report under subsection 1, no employee will:~~

19 ~~a. Be dismissed from employment.~~

20 ~~b. Have salary increases or employment-related benefits withheld.~~

21 ~~c. Be transferred or reassigned.~~

22 ~~d. Be denied a promotion that the employee otherwise would have received.~~

23 ~~e. Be demoted.~~

24 ~~f. Be discriminated against in any term or condition of employment.~~

1 ~~3. An employer may not discharge, discipline, intimidate, penalize, discriminate against,~~
2 ~~threaten any of these prohibited actions against, or otherwise retaliate against an~~
3 ~~employee regarding the employee's compensation or benefits, conditions, location,~~
4 ~~terms, duties, or privileges of employment because:~~

5 ~~a. The employee, or a person acting on behalf of an employee, reports to the~~
6 ~~employer, employee organization, the attorney general, the state auditor, the~~
7 ~~labor commissioner, or a law enforcement official:~~

8 ~~(1) A violation or suspected violation of federal, state, or local law, ordinance,~~
9 ~~regulation, or rule; or~~

10 ~~(2) A job-related misuse of public resources.~~

11 ~~b. The employee is requested by a public body or official to participate in an~~
12 ~~investigation, a hearing, or an inquiry.~~

13 ~~c. The employee refuses an employer's order to perform an action the employee~~
14 ~~believes violates local, state, or federal law, ordinance, rule, or regulation. The~~
15 ~~employee must have an objective basis in fact for this belief and shall inform the~~
16 ~~employer that the order is being refused for that reason.~~

17 ~~2. An employee who intentionally furnishes false information is subject to disciplinary~~
18 ~~action, including suspension or dismissal as determined by the employee's appointing~~
19 ~~authority or designee.~~

20 ~~3. An employee claiming reprisal under this section subsection 1 may appeal first to the~~
21 ~~human resource management services division and then to the district court in the~~
22 ~~manner prescribed by chapter 28-32, or to other appropriate offices and then to district~~
23 ~~court if the employee is not under the jurisdiction of the human resource management~~
24 ~~services division.~~

25 ~~4. The labor department shall receive complaints of violations of this section and may~~
26 ~~attempt to obtain voluntary compliance with this section through informal advice,~~
27 ~~negotiation, or conciliation. To receive assistance from the labor department, a person~~
28 ~~claiming to be aggrieved by a violation of this section shall file a complaint with the~~
29 ~~department within three hundred days after the alleged act of wrongdoing. An~~
30 ~~employee is not prohibited from filing, or required to file, a complaint with the labor~~

department under this subsection before proceeding under other provisions of this section.

~~5. An employee of the state may appeal a claim of reprisal under this section in the manner prescribed for a classified employee under chapter 54 44.3. This subsection does not apply to an employee under the jurisdiction of the state board of higher education or the judicial branch of government.~~

~~5. An employee asserting a violation of subsection 1 may bring a civil action for injunctive relief or actual damages, or both, within one hundred eighty days after the alleged violation, completion of proceedings under subsection 6, or completion of any grievance procedure available to the employee under the employee's collective bargaining agreement, employment contract, or any public employee statute, rule, or policy, whichever is later.~~

~~a. If the court determines that a violation has or is occurring under subsection 1, the court may 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 these remedies. Interim earnings or amounts earnable with reasonable diligence by the employee from the same employer must reduce backpay otherwise allowable. In any action under this section, the court may award reasonable attorney's fees to the prevailing party as part of the costs of litigation.~~

~~b. An employee whose collective bargaining agreement, employment contract, or public employee rights provide a process through which recourse for conduct prohibited by subsection 1 is available shall exercise that process to completion before commencing an action under this subsection, and if that process provides for judicial review by statutory appeal, then recourse under this subsection is not available.~~

~~6. The department of labor shall receive complaints of violations of subsection 1. In order to receive assistance from the department of labor under this subsection, an employee claiming to be aggrieved by a violation of subsection 1 shall file a complaint with the department within three hundred days after the alleged act of wrongdoing. Except as provided under this section, an employee is not prohibited from filing, nor is required to~~

~~file, a complaint with the department of labor under this subsection before proceeding with any other legal remedy available.~~

~~a. An executive branch state employee whose collective bargaining agreement, employment contract, or public employee rights provide a process through which recourse for conduct prohibited by subsection 1 is available:~~

~~(1) May file a complaint with the department of labor for assistance in obtaining voluntary assistance under subdivision c; and~~

~~(2) May not file a complaint under this subsection seeking an administrative decision.~~

~~b. Except as provided under subdivision a, if an executive branch state employee files a complaint of violation of subsection 1 with the department of labor upon receipt of the complaint the department of labor shall establish whether the employee seeks assistance in obtaining voluntary assistance or whether the employee seeks an administrative decision.~~

~~(1) If the employee seeks voluntary assistance, the department of labor shall review the complaint to determine whether the complaint may be substantiated. If the department determines the complaint may be substantiated, the department shall attempt to obtain voluntary compliance with this section through informal advice, negotiation, or conciliation. A department of labor determination under this paragraph is not an appealable order.~~

~~(2) If the employee seeks an administrative decision, the department of labor shall review the complaint and shall issue an administrative decision. The department's decision may 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 these remedies. Interim earnings or amounts earnable with reasonable diligence by the employee from the same employer must reduce backpay otherwise allowable. Additionally, the decision may award reasonable attorney's fees to the prevailing party. A party may appeal the decision in the manner prescribed by chapter 28-32. If an employee seeks an~~

~~administrative decision under this paragraph, the employee may not bring a
separate civil action for injunctive relief or actual damages.~~

~~c. If an employee not covered under subdivision b files a complaint of violation of
subsection 1 with the department of labor, the department shall review the
complaint to determine whether the complaint may be substantiated. If the
department determines the complaint may be substantiated, the department shall
attempt to obtain voluntary compliance with this section through informal advice,
negotiation, or conciliation. The department's determination under this
subdivision is not an appealable order.~~

~~7. If an executive branch state employee, or a person acting on behalf of that employee,
makes a report under subdivision a of subsection 1 to the attorney general, the labor
commissioner, or a law enforcement official, and if the recipient of the report is not the
employer, the recipient of the report shall forward the report to the state auditor. If the
employee is employed by the state auditor, for purposes of this subsection the
attorney general shall fulfill the investigation and reporting duties under this
subsection.~~

~~a. Upon the state auditor's receipt of a report under this subsection, the state
auditor shall investigate the alleged violation or suspected violation of federal,
state, or local law, ordinance, regulation, or rule or the alleged job-related misuse
of public resources. The state auditor may not disclose the employee's name to
the public until this investigation is complete.~~

~~b. Following an investigation under this subsection, the state auditor shall provide
the state auditor's finding to the reporting employee and to the state employer.
The state auditor's report must include:~~

~~(1) A determination of whether the alleged violation of federal, state, or local
law, ordinance, regulation, or rule or the alleged job-related misuse of public
resources occurred;~~

~~(2) Whether the employer is required to take any actions to remedy the alleged
violation or misuse of public funds; and~~

~~(3) The process through which the state auditor will track whether the employer
is implementing actions that may be required under paragraph 2.~~

~~c. A state auditor report issued under this subsection is an appealable order
under chapter 28-32.~~

SECTION 1. AMENDMENT. Section 34-11.1-04 of the North Dakota Century Code is amended and reenacted as follows:

**34-11.1-04. ~~Violations for misuse reported by employee -- Reprisals~~Employer
retaliation prohibited - Furnishing false information--Labor department.**

1. ~~An 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.~~

2. ~~For having made a report under subsection 1, no employee will:~~

~~a. Be dismissed from employment.~~

~~b. Have salary increases or employment-related benefits withheld.~~

~~c. Be transferred or reassigned.~~

~~d. Be denied a promotion that the employee otherwise would have received.~~

~~e. Be demoted.~~

~~f. Be discriminated against in any term or condition of employment.~~

3. An employer may not discharge, discipline, intimidate, penalize, discriminate against,
threaten any of these prohibited actions against, or otherwise retaliate against an
employee regarding the employee's compensation or benefits, conditions, location,
terms, duties, or privileges of employment because:

a. The employee, or a person acting on behalf of an employee, in good faith reports
to the employer, employee organization, the attorney general, the state auditor,
the labor commissioner, a state's attorney, or a law enforcement official:

(1) A violation or suspected violation of federal, state, or local law, ordinance,
regulation, or rule; or

(2) A job-related misuse of public resources.

b. The employee is requested by a public body or official to participate in an
investigation, a hearing, or an inquiry.

c. The employee refuses an employer's order to perform an action the employee believes violates local, state, or federal law, ordinance, rule, or regulation. The employee must have an objective basis in fact for this belief and shall inform the employer that the order is being refused for that reason.

2. An employee who intentionally furnishes false information is subject to disciplinary action, including suspension or dismissal as determined by the employee's appointing authority or designee. ~~An employee claiming reprisal under this section may appeal first to the human resource management services division 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 human resource management services division.~~

~~4.~~ The labor department shall receive complaints of violations of this section and may attempt to obtain voluntary compliance with this section through informal advice, negotiation, or conciliation. To receive assistance from the labor department, a person claiming to be aggrieved by a violation of this section shall file a complaint with the department within three hundred days after the alleged act of wrongdoing. An employee is not prohibited from filing, or required to file, a complaint with the labor department under this subsection before proceeding under other provisions of this section.

~~5.~~ An employee of the state may appeal a claim of reprisal under this section in the manner prescribed for a classified employee under chapter 54-44.3. This subsection does not apply to an employee under the jurisdiction of the state board of higher education or the judicial branch of government.

SECTION 2. Section 34-11.1-04.3 of the North Dakota Century Code is created and enacted as follows:

34-11.1-04.3. Claims of employer retaliation - Recourse.

As provided under this chapter, an employee claiming retaliation under section 34-11.1-04 may do one or more of the following:

1. File a complaint with the labor department for assistance in obtaining voluntary compliance as provided under section 34-11.1-04.5;

2. Appeal to the human resource management services division or other appropriate office at the state or local level as provided under subsection 1 or 2 of section 34-11.1-04.4; and

3. Bring a civil action as provided under subsection 3 of section 34-11.1-04.4.

SECTION 3. Section 34-11.1-04.4 of the North Dakota Century Code is created and enacted as follows:

34-11.1-04.4. Appeal to human resource management services division or other appropriate office - Civil action.

1. A state employee who is claiming retaliation under section 34-11.1-04 may appeal the retaliation to the human resource management services division under chapter 54-44.3 and then to the district court in the manner prescribed under chapter 28-32. This subsection does not apply to an employee under the jurisdiction of the state board of higher education or the judicial branch of government.

2. An employee who is not covered under subsection 2 may appeal to the appropriate office at the state or political subdivision level and then to the district court.

3. An employee who is not covered under subsection 1 or 2 may bring a civil action for injunctive relief or actual damages or both in the same manner as provided under subsection 3 of section 34-01-20.

SECTION 4. Section 34-11.1-04.5 of the North Dakota Century Code is created and enacted as follows:

34-11.1-04.5. Claims of employer retaliation - Labor department - Voluntary compliance.

1. The labor department shall receive complaints of retaliation under section 34-11.1-04.1. In order to receive assistance from the labor department under this section, an employee claiming to be aggrieved shall file a complaint with the department within three hundred days after the alleged act of retaliation. An employee is not prohibited from filing nor is required to file a complaint with the labor department under this section before proceeding with any other legal remedy available.

2. If an employee files a complaint of retaliation with the labor department, the department shall review the complaint to determine whether the complaint may be substantiated. If the department determines the complaint may be substantiated, the

department shall attempt to obtain voluntary compliance with this section through informal advice, negotiation, or conciliation. The department's determination under this subsection is not an appealable order.

SECTION 5. Section 34-11.1-04.6 of the North Dakota Century Code is created and enacted as follows:

34-11.1-04.6. Claims of employer retaliation - State auditor investigation.

If an executive branch state employee, or a person acting on behalf of that employee, makes a report under subdivision a of subsection 1 of section 34-11.1-04.1 to the attorney general, the labor commissioner, a state's attorney, or a law enforcement official, and if the recipient of the report is not the employer, the recipient of the report shall forward the report to the state auditor. If the employee is employed by the state auditor, for purposes of this section the attorney general shall fulfill the investigation and reporting duties under this section.

1. Upon the state auditor's receipt of a report under this section, the state auditor shall investigate the alleged violation or suspected violation of federal, state, or local law, ordinance, regulation, or rule or the alleged job-related misuse of public resources. The state auditor may not disclose the employee's name to the public until this investigation is complete.

2. Following an investigation under this section, the state auditor shall provide the state auditor's finding to the employee and to the employer. The state auditor's report must include:

- a. A determination of whether a violation of federal, state, or local law, ordinance, regulation, or rule or the alleged job-related misuse of public resources occurred;
- b. Whether the employer is required to take any actions to remedy a violation or misuse of public funds; and
- c. The process through which the state auditor will track whether the employer is implementing actions that may be required under subdivision b.

3. A state auditor report issued under this section is an appealable order under chapter 28-32.