

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 -- Reprisals~~ Employer
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~~

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

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

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

13 ~~a. If the court determines that a violation has or is occurring under subsection 1, the
14 court may order reinstatement of the employee, backpay for no more than two
15 years after the violation, reinstatement of fringe benefits, temporary or permanent
16 injunctive relief, or any combination of these remedies. Interim earnings or
17 amounts earnable with reasonable diligence by the employee from the same
18 employer must reduce backpay otherwise allowable. In any action under this
19 section, the court may award reasonable attorney's fees to the prevailing party as
20 part of the costs of litigation.~~

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

27 ~~6. The department of labor shall receive complaints of violations of subsection 1. In order
28 to receive assistance from the department of labor under this subsection, an employee
29 claiming to be aggrieved by a violation of subsection 1 shall file a complaint with the
30 department within three hundred days after the alleged act of wrongdoing. Except as
31 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~~

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

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

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

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

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

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

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

30 ~~(3) The process through which the state auditor will track whether the employer~~
31 ~~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.

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

5 2. An employee who intentionally furnishes false information is subject to disciplinary
6 action, including suspension or dismissal as determined by the employee's appointing
7 authority or designee. ~~An employee claiming reprisal under this section may appeal~~
8 ~~first to the human resource management services division and then to the district court~~
9 ~~in the manner prescribed by chapter 28-32, or to other appropriate offices and then to~~
10 ~~district court if the employee is not under the jurisdiction of the human resource~~
11 ~~management services division.~~

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

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

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

26 **34-11.1-04.3. Claims of employer retaliation - Recourse.**

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

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

1 2. Appeal to the human resource management services division or other appropriate
2 office at the state or local level as provided under subsection 1 or 2 of section
3 34-11.1-04.4; and

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

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

7 **34-11.1-04.4. Appeal to human resource management services division or other**
8 **appropriate office - Civil action.**

9 1. A state employee who is claiming retaliation under section 34-11.1-04 may appeal the
10 retaliation to the human resource management services division under chapter
11 54-44.3 and then to the district court in the manner prescribed under chapter 28-32.
12 This subsection does not apply to an employee under the jurisdiction of the state
13 board of higher education or the judicial branch of government.

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

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

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

21 **34-11.1-04.5. Claims of employer retaliation - Labor department - Voluntary**
22 **compliance.**

23 1. The labor department shall receive complaints of retaliation under section
24 34-11.1-04.1. In order to receive assistance from the labor department under this
25 section, an employee claiming to be aggrieved shall file a complaint with the
26 department within three hundred days after the alleged act of retaliation. An employee
27 is not prohibited from filing nor is required to file a complaint with the labor department
28 under this section before proceeding with any other legal remedy available.

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

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

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

6 **34-11.1-04.6. Claims of employer retaliation - State auditor investigation.**

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

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

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

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

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