

Accountability Report Card Summary 2009
North Dakota

North Dakota has a below average state whistleblower law:

- Scoring 48 out of a possible 100 points, its scope is varied;
- Ranking 32nd out of 51 (50 states and the District of Columbia).

North Dakota has below average coverage (11 of 33 possible points) with a below average degree of usability (16 out of 33) and average remedies (21 out of 33).

North Dakota's full Whistleblower Report Card *page 2*
Narrative summary of North Dakota law *page 6*

North Dakota Accountability Index Report card

Coverage, Usability & Strength — Rating on a 100 Point Scale -
Public Employee Relations Act- N.D. Cent. Code, § 34-11.1-04 *et.seq* (2005) and
Employer Retaliation Prohibited- N.D. Cent. Code, § 34-01-20 (2005)

A Breadth of Coverage (33 points possible from 10 factors).

Does the statute cover disclosures of –

Factor	Maximum Points	Awarded Points
1. Violation of state or federal law, rules or regulations	6 points	6 points ¹
2. Gross mismanagement	3 points	0 points
3. Abuse of authority (including violations of agency policy)	3 points	0 points
4. Waste of public funds or resources	3 points	3 points
5. Danger to health and/or public safety and/or environment	5 points	0 points
6. Communication of scientific opinion or alteration of technical findings	5 points	0 points
7. Breaches of professional ethical canons	5 points	0 points

Does the statute provide –

8. Employee may refuse to carry out illegal or improper orders	1 point	1 point
9. Prohibition on “gag orders” to prevent employee disclosures	1 point	0 points
10. Whistleblower protection does not preclude collective bargaining or other rights	1 point	1 Point ²

²North Dakota has two statutes that prohibit retaliation against public employees for certain disclosures. The first statute provides that 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 job related (i) violation of federal or state law, rule, regulation, or ordinance or (ii) misuse of public resources.

The second statute provides that an employer may not discharge, discipline, threaten discrimination, or penalize an employee regarding the employee’s compensation, conditions, location, or privileges of employment because the employee (1) in good faith, reports a violation or suspected violation of federal or state law, ordinance, regulation, or rule to an employer, a governmental body, or a law enforcement official; (2) is requested by a public body or official to participate in an investigation, a hearing, or an inquiry; (3) refuses an employer’s order to perform an action that the employee believes violates federal or state law, ordinance, rule or regulation. In connection with (3), the employee must have an objective basis in fact for that belief and shall inform the employer that the order is being refused for that reason.

	<u>Maximum Score</u> <u>33 points</u>	<u>Awarded Score</u> <u>11 points</u>
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B. Usability: Scope of Protection (33 points possible from 10 factors)

Do the laws protect disclosures made to –

Factor	Maximum Points	Awarded Points
1. Any person or organization, including public media	24 points	0 points

Or does the statute protect disclosures made to –

2. Any state executive or legislative body or person employed by such entities	4 points	4 points ³
3. Testimony in any official proceeding	4 points	4 points ⁴
4. Any state or federal law enforcement or investigative body or entity or its employees	3 points	3 points ⁵
5. Any federal or non-state governmental entity	3 points	0 points
6. Co-workers or supervisors within the scope of duty	3 points	0 points
7. Anyone as provided in paragraphs 2 thru 6 (above) without prior disclosure to another state official or supervisor	3 points	3 points

Does the state law –

² Collective bargaining or other rights must be completed before a court action can be brought under the second statute.

³ The first statute provides that 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 second statute provides that an employer may not discharge, discipline, threaten discrimination, or penalize an employee because the employee (1) in good faith, reports a violation or suspected violation of federal or state law, ordinance, regulation, or rule to an employer, a governmental body, or a law enforcement official.

⁴ The second statute provides that an employer may not discharge, discipline, threaten discrimination, or penalize an employee because the employee is requested by a public body or official to participate in an investigation, a hearing, or an inquiry.

⁵ Under the first statute, the individual can report to a state's attorney or the North Carolina Attorney General. Under the second statute he can report to a law enforcement official.

8. Require an investigation by state auditor or other investigative entity of whistleblower disclosures	1 point	0 points
9. Have a statute of limitations of one year or longer for filing complaints	3 points (2 points if 6 months or longer and 1 point if 60 days or longer)	2 points ⁶
10. Allow qui tam or false claim actions for recovery of “bounty” in cases of fraud against the state	5 points (2 points if a qui tam statute of limited scope)	0 points
	<u>Maximum Score</u> <u>33 points</u>	<u>Awarded Score</u> <u>16 points</u>

C. Strength: Remedies against retaliation (33 points possible from 11 factors)

Does the statute provide for –

Factor	Maximum Points	Awarded Points
1. Prohibition on retaliatory actions affecting a state employee’s terms and conditions of employment	4 points	4 points
2. Opportunity for administrative challenge	4 points	4 points ⁷
3. Opportunities for court challenge	4 points	4 points ⁸
4. Trial by jury	3 points	0 points
5. Burden shifting upon prima facie showing.	1 point	0 points
6.. Make whole remedies (court costs, attorney fees, back pay; restoration of benefits, etc.)	3 points	3 points ⁹

⁶ An employee asserting a violation of this section may bring a civil action for injunctive relief or actual damages, or both, within 180 days after the alleged violation, completion of proceedings set out below involving the North Dakota Department of Labor, or completion of any grievance procedure available to the employee under any other agreement, statute, rule, or policy, whichever is later.

⁷ An employee whose collective bargaining agreement, employment contract, or public rights provides a process through which recourse for prohibited retaliatory conduct is available must exercise that process to completion before commencing a court action.

⁸ An employee asserting a violation of this section may bring a civil action for injunctive relief or actual damages, or both, within 180 days after the alleged violation, completion of proceedings set out below involving the North Dakota Department of Labor, or completion of any grievance procedure available to the employee under any other agreement, statute, rule, or policy, whichever is later.

However, an employee whose collective bargaining agreement, employment contract, or public rights provides a process through which recourse for prohibited retaliatory conduct is available must exercise that process to completion before commencing a court action as described previously. If that process provides for judicial review by statutory appeal, then recourse to a court action is not available.

7. Actual and/or compensatory damages	3 points	1 point ¹⁰
8. Interim relief, injunction or stay of personnel actions	3 points	3 points
9. Transfer preference for prevailing whistleblower or ban on blackballing	3 points	0 points
10. Punitive damages or other fines and penalties	2 points	2 points ¹¹
11. Personnel actions against managers found to have retaliated	3 points	0 points
	<u>Maximum Score</u> <u>33 points</u>	<u>Awarded Score</u> <u>21 points</u>

Bonus Point (1 point): Posting or employee notice of whistleblower rights required.

Factor	Maximum Score	Awarded Score
Posting	1 point	0 points

Totals

100 Points

48 points

⁹ If the court determines that a violation has or is occurring under this statute, the court may order, as it deems appropriate, reinstatement of the employee, back pay for no more than 2 years after the violation, reinstatement of fringe benefits, temporary or permanent injunctive relief, or any combination of these remedies. The court may also award reasonable attorney's fees to the prevailing party as part of the costs of the litigation.

¹⁰ An employee asserting a violation of the statute may bring a civil action for injunctive relief or actual damages, or both. However, the statute does not mention "actual damages" as a remedy the court can apply if the whistleblower wins the suit. We have consequently only awarded "1" point for this Factor.

¹¹ Under the first statute a violation of the provisions of the statute is a class B misdemeanor.

April 16, 2009

State Legislation Protecting State Employee Whistleblowers

State- North Dakota

Statute- Public Employee Relations Act- N.D. Cent. Code, § 34-11.1-04 *et.seq.* (2005) and Employer Retaliation Prohibited- N.D. Cent. Code, § 34-01-20 (2005)

Provisions- North Dakota has two statutes that prohibit retaliation against public employees for certain disclosures. The first statute provides that 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 job related (i) violation of federal or state law, rule, regulation, or ordinance or (ii) misuse of public resources. For having made a written report, no employee will be dismissed from employment; have salary increases or employment-related benefits withheld; be transferred or reassigned; be denied a promotion that the employee otherwise would have received; be demoted; or be discriminated against in any term or condition of employment. Employers are also prohibited from restricting or attempting to restrict access of any employee to any member or committee of the legislative assembly.

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 a designee. No employee may suffer a penalty or threat of a penalty because the employee exercised rights under this statute. Nothing in the statute impairs, or limits any other right or legal remedy of an employee. A violation of the provisions of the statute is a class B misdemeanor. The statute does not specifically prescribe what administrative or judicial remedies an employee has to contest or appeal any retaliatory action.

The second statute provides that an employer may not discharge, discipline, threaten discrimination, or penalize an employee regarding the employee's compensation, conditions, location, or privileges of employment because the employee (1) in good faith, reports a violation or suspected violation of federal or state law, ordinance, regulation, or rule to an employer, a governmental body, or a law enforcement official; (2) is requested by a public body or official to participate in an investigation, a hearing, or an inquiry; (3) refuses an employer's order to perform an action that the employee believes violates federal or state law, ordinance, rule or regulation. In connection with (3), the employee must have an objective basis in fact for that belief and shall inform the employer that the order is being refused for that reason. An employer who willfully retaliates in violation of this provision is guilty of an infraction.

An employee asserting a violation of this section may bring a civil action for injunctive relief or actual damages, or both, within 180 days after the alleged violation, completion

of proceedings set out below involving the North Dakota Department of Labor, or completion of any grievance procedure available to the employee under any other agreement, statute, rule, or policy, whichever is later. If the court determines that a violation has or is occurring under this statute, the court may order, as it deems appropriate, reinstatement of the employee, back pay for no more than 2 years after the violation, reinstatement of fringe benefits, temporary or permanent injunctive relief, or any combination of these remedies. The court may also award reasonable attorney's fees to the prevailing party as part of the costs of the litigation. An employee whose collective bargaining agreement, employment contract, or public rights provides a process through which recourse for prohibited retaliatory conduct is available must exercise that process to completion before commencing a court action as described previously. If that process provides by statute for judicial review of the decision, then recourse to a court action is not available.

A person claiming to be aggrieved by a violation of the prohibition in this statute shall file a complaint with the Department of Labor within 300 days after the alleged wrongdoing. The Department may attempt to obtain voluntary compliance through informal advice, negotiation, or conciliation. An employee is not prohibited from filing, or required to file, a complaint with the Department of Labor before proceeding under any other provision of the statute.