

## THE LAW PROTECTS WHISTLEBLOWERS AND EMPLOYERS NEED LEGITIMATE PROTECTION

If you have ever fired, demoted, or disciplined an employee, the thought of subsequent legal action likely crossed your mind. While North Dakota is an at-will employment state, there are many exceptions. One of these limitations is that you cannot retaliate against your employees. While this sounds like common sense, what does it actually mean?

Anti-retaliation laws are commonly referred to as “whistleblower” protection statutes. North Dakota’s whistleblower statute is Section 34-01-20 of the North Dakota Century Code. It prohibits an employer from: 1) taking an adverse employment action against an employee for reporting illegalities to appropriate individuals; 2) participating in an investigation initiated by a public body or official; or 3) refusing to perform an action that the employee believes to be illegal. However, the North Dakota Supreme Court recently confirmed this statute “was not intended to protect an employee who acts for a purpose other than exposing an illegality.” Ramirez v. Walmart, 2018 ND 179, 915 N.W.2d 674.

Unfortunately, you may encounter a situation where an employee exhibits unacceptable performance over a period of time. The employee may suspect you are unhappy and even expect to get fired. In an effort to save their job, the employee may assert illegal workplace conduct. In this hypothetical situation (which happens frequently), you are placed in a difficult situation. On one hand, you need to terminate this employee because they are a detriment to the operation of your office. On the other hand, you do not want to break the law by firing a “whistleblower.” How do you prevent this situation from turning into an embarrassing and expensive lawsuit?

First, contact an attorney and explain the situation thoroughly so they can make a determination as to whether or not you should proceed with the termination. The attorney will ask you for that employee’s file. To avoid liability, you will have to be able to show a legitimate nonretaliatory reason for the adverse employment decision. Documentation of employee conduct is vital to prove your actual motives. In fact, Federal Courts have noted an employer carries the “burden of production” to establish it had a legitimate nonretaliatory reason for its employment action. This means the employer has to produce evidence that the decision was not motivated by the employee’s participation in a “whistleblower” activity. Even if there are valid reasons to terminate an employee, these reasons can be difficult to prove without documentation.

Be honest in employee evaluations and document performance deficiencies. If you have a meeting with an employee to discuss performance or attitude problems, make note of it. While the paperwork may seem like an inconvenience at the time, you will realize its value if you end up fighting a retaliation lawsuit. *Provided by Brian D. Schmidt, Attorney at Law and partner at Smith Porsborg Schweigert Armstrong, Moldenhauer & Smith.*

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## ARE YOUR PLAYGROUNDS READY?

As spring turns into summer and the days become longer, public playgrounds see the return of children and their families. As they embark upon them to run, play, and socialize, it is important you feel confident your playgrounds are safe for visitors.

Each year more than 200,000 kids are treated in emergency rooms for playground-related injuries. Understanding the hazards associated with your playground should be top priority. Many of these accidents could have been prevented with proper risk management.

Here are some items to be aware of, as you prepare your parks for the upcoming season:

### **Signage:**

- Signs stating adult supervision required are highly recommended. Adult supervision is important to the safety of children on playgrounds. Young children cannot always gauge distances properly and are not capable of foreseeing dangerous situations, while older children like to test their limits. Adult supervision will help mitigate risk in these situations.
- Properly mark playground equipment appropriate for specific age groups. It is recommended that playgrounds have separate areas to serve 2 to 5 year olds and 5 to 12 year olds. This will also provide guidance to adults as to the age appropriateness of the equipment.
- Be sure playground rules are visible to all visitors. They should be general in nature and easy to understand.



### **Fall Surface:**

- Playground surfaces are one of the most important factors in reducing both the frequency and severity of injuries. Children are going to fall; injury can be reduced or mitigated with a proper fall surface.
- Appropriate surfaces are loose fill, such as, wood chips, sand, pea gravel, and shredded tires, or unitary surfaces such as, rubber tiles, rubber mats, and poured in place rubber. Inappropriate surfaces include concrete, blacktop or asphalt. Grass, soil, and packed earth surfaces are not recommended as weather and wear can affect their capacity to provide cushion. It is recommended that loose fill material be 12 inches deep under and around playground equipment. Appropriate surfacing should be located directly underneath the playground equipment and extend 6 feet in all directions. Slides and swings have a longer use zone, so surfacing should extend accordingly.
- All playground equipment concrete footings should be properly covered and not be visible.

### **Maintenance:**

- All playground equipment should be inspected and maintained regularly. Playgrounds with higher traffic should be inspected more frequently. Broken equipment should be repaired immediately or at the very least roped off until fixed.

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- Wooden equipment must be treated regularly to avoid splintering and rotting. Splinters or falling through a rotted piece of wood can cause significant injury.
- Metal equipment should be treated to keep from rusting. Rust causes the metal to weaken and compromises the integrity of the piece of equipment.
- Be aware of protruding bolts or fixtures as they can cause cuts to a child or cause clothing to become entangled.
- Equipment with moving parts should be checked for pinch points which could pinch or crush a child's hands and fingers.

### **Design:**

- Playgrounds should be designed for three different age groups: infants and toddlers under two, 2 to 5 year olds, and 5 to 12 year olds. These areas should be clearly marked with signage, as mentioned earlier, to avoid any confusion for both children and supervising adults. Equipment that is designated for older children is too big and complex for the younger children and, on the flip side, equipment designed for younger children is too small and compact for bigger, older children.
- Guardrails should be in place on all elevated surfaces and ramps to avoid unintentional falls. They should be designed to prevent intentional climbing by children. For example, spindles should be vertical instead of horizontal as to not create a ladder. Regularly check guard rails and protective barriers for sturdiness. All openings should measure less than 3 ½ inches or wider than 9 inches to avoid getting stuck.
- Avoid overcrowding of the playground equipment. Equipment that is placed too close together causes congestion and, in the event of a fall, leads to children hitting other equipment instead of the appropriate fall surface. This can lead to more severe injuries.
- Make sure your equipment does not have any blind spots where children can hide out and not be seen. Crawl spaces, tunnels and boxed areas should have slots, plexiglass, or another type of transparent material which allows for the child to be seen.

Public playgrounds are a great place for families to enjoy spring and summer days. They are an important piece of any city or town. Be confident your park is safe and ready for the season!

If you have any questions concerning playgrounds in your city or town, please contact NDIRF Director of Member Services Corey Olson at 701-751-9107 or by email at [corey.olson@ndirf.com](mailto:corey.olson@ndirf.com). ■





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INSURANCE  
RESERVE FUND  
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BISMARCK ND 58502**

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## **NDIRF CONTINUES PARTNERSHIP WITH NDFA**

The North Dakota Insurance Reserve Fund is proud to continue its partnership with the North Dakota Firefighter's Association (NDFA) to provide the Emergency Vehicle Operation Course (EVOC) to firefighters across the state of North Dakota. Nationally, vehicle accidents are the 2nd leading cause of firefighter deaths and the EVOC training helps tackle the problem by providing valuable insight into properly operating many different varieties of emergency vehicles under different conditions.

In 2018, the NDFA conducted 35 EVOC classes to 406 students from approximately 50 different departments throughout the state. Their goal is to reach out to every firefighter in the state and provide this training. We are pleased to contribute to the success of this program and help the NDFA achieve their goal.



Pictured is NDIRF CEO Brennan Quintus (right) presenting a check to NDFA Training Director, Robert Knuth (left). ■