

EMPLOYEE WHISTLEBLOWER PROTECTIONS

Sample Policy 1

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{This sample policy addresses employee protections when they report or participate in the investigation or prosecution of various types of potential violations, improprieties, and safety issues. Various laws expressly protect public employees from being retaliated or discriminated against in these situations, and school boards generally conclude that they also have an independent interest in trying to ensure that employees do not fail to report safety issues or possible wrongdoing due to fear of retaliation.}

Protected Reports and Protected Participation. This policy and various applicable laws provide protection to any employee who, acting reasonably and in good faith, makes a protected report of or participates in an internal investigation, official external investigation, or legal proceeding involving allegations of any of the following in connection with any of the District's programs or operations:

1. Fraud or any gross mismanagement, waste, or abuse of District-controlled funds or other District resources, including federal funds for which the District is responsible as a recipient, subrecipient, contractor, or pass-through entity;
2. Any arbitrary and capricious exercise of authority relating to a federal contract or federal grant that is inconsistent with the mission of the applicable federal agency or with the successful performance of the federal contract or grant;
3. A violation of the federal False Claims Act;
4. Unlawful discrimination, including but not limited to unlawful harassment, that is based on a legally-protected status or characteristic;
5. Any situation which poses a substantial and specific danger to public health or safety, including any recognized hazard that is likely to cause death or serious physical harm to any person;
6. A possible violation of a state or federal safety or health standard (or any variance therefrom), including any occupational safety or health standard or any law or regulation relating to asbestos in schools;
7. A workplace injury, including pursuing a worker's compensation claim;
8. A failure to pay wages as required under law;
9. Insert either **OPTION 1** or **OPTION 2**:

OPTION 1:

"A possible violation of any state or federal law (including any state or federal regulation) that is not covered by a more specific item in this list, but for which any state or federal law provides whistleblower/nonretaliation protections to District employees;"

OPTION 2:

"A possible violation of a state or federal law (including any state or federal regulation) that is not covered by a more specific item in this list;"

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~~{Editor's Note: OPTION 2 for this item offers whistleblower protection for reports of possible violations of any state or federal law or regulation. It exceeds the requirements of any specific state or federal whistleblower protection law of which the WASB is aware, and, therefore, would serve as a policy-based extension of express state and federal whistleblower/nonretaliation protections. Selecting OPTION 2 could help to encourage the reasonable and good-faith reporting of possible legal violations, but could also prompt reports over minor issues and legal ambiguities. OPTION 1 is narrower and addresses only reports/disclosures of possible violations of laws and regulations that are not covered by other items in the list but for which a state or federal law offers express whistleblower/nonretaliation protections. In other words, OPTION 1 serves more as a "catch all" provision that captures existing legal obligations that are not otherwise expressly mentioned.}~~

10. If desired, insert either **OPTION 1** or **OPTION 2**:

OPTION 1:

"A possible violation of a Board policy, a Board-adopted rule/procedure, or an administratively-adopted rule/procedure of the District for which any state or federal law provides whistleblower/nonretaliation protections to District employees."

OPTION 2:

"A possible violation of any Board policy, Board adopted rule/procedure, or administratively adopted rule/procedure of the District."

~~{Editor's Note: OPTION 2 for this item offers whistleblower protection for reports of possible violations of any district policy or district procedure. It would serve as a policy-based extension of express state and federal whistleblower/nonretaliation protections. In comparison, OPTION 1 is substantially narrower and primarily serves to recognize that many district policies and procedures address topics (e.g., nondiscrimination, workplace safety, etc.) that are covered by legal requirements that offer whistleblower/nonretaliation protection. **IMPORTANT:** Do not select OPTION 2 in this item (i.e., covering all district policies and procedures) unless the district also selected OPTION 2 for the previous item (i.e., covering all laws and regulations). That is, it would be somewhat inconsistent for a district to offer broad whistleblower protection for reports and disclosures of possible violations of local policies, but not offer such broad protection for reports and disclosures of possible violations of state or federal law.}~~

A protected report of any situation or allegation covered by this policy includes any report, disclosure, provision of evidence, complaint, or request for an official internal or external investigation that is made:

1. To the employee's immediate supervisor, an administrator who is responsible for the activity, program, or operational area in question, the District Administrator, or the School Board;
2. Using any applicable District-established complaint procedures;
3. To a state or federal agency that has authority or responsibility over the matter;

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4. To a local, state, or federal law enforcement agency (including the U.S. Department of Justice or the Wisconsin Department of Justice);
5. To a member of Congress, a representative of a committee of Congress, the federal Government Accountability Office, or a federal agency's Office of Inspector General in any matter involving federal programs, federal contracts, or federal funds; or
6. To any court or grand jury or in any judicial or administrative proceeding relating to the allegation(s).

Protected reports include the provision of evidence/information as part of a governmental investigation or legal proceeding. A protected report may involve or relate to the conduct of any person, including District employees, Board members, volunteers, consultants, vendors, contractors, or other parties maintaining any business or programmatic relationship with the District.

Retaliation and Discrimination Prohibited. No official, employee, or agent of the District may retaliate or discriminate against any employee because the employee has made a protected report or participated in a protected investigation or proceeding. Prohibited retaliation and discrimination include but are not limited to discharging, demoting, denying benefits to, threatening, coercing, or taking any other materially adverse employment action against an employee because of the employee's protected activity. However, except as otherwise limited by state or federal law, this policy is not intended to prohibit or limit the District from taking any adverse employment action (1) for conduct that is **not** undertaken reasonably and in good faith; or (2) that is based on non-protected reasons and that would have occurred even in the absence of the employee's protected report or protected participation.

Intra-District Reporting Required. The District requires employees to promptly inform an appropriate District official of the circumstances relating to a protected report/disclosure that the employee has made to an external governmental official or entity, including through the employee's participation in an official investigation or legal proceeding, **unless** either of the following exceptions applies:

1. An applicable law or a judicial or governmental order prohibits the employee from disclosing the relevant information to the District; or
2. The employee is exercising a protected legal right not to disclose the relevant information to the District as the individual's employer. Stated another way, this uncommon exception would apply only if a state or federal law grants the employee an affirmative and protected legal right to refrain from disclosing the relevant information to the District in spite of the District's general rule and expectation requiring such disclosure.

In addition, a state law, federal law, or separate District policy may independently require an employee to report some of the circumstances and possible misconduct/violations covered by this policy to an appropriate District official even when the employee has **not** otherwise engaged in protected participation or otherwise made a protected report to an external governmental official or entity.

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In any situation where intra-District reporting is neither (1) prohibited by law nor (2) mandated by any law or any District policy, disclosing information or concerns about potential safety issues or possible violations, misconduct, or improprieties to appropriate District officials is permissible and encouraged.

{Editor's Note: Particularly if the district elects to specify (in the first section of this policy) that it offers whistleblower/nonretaliation protection for reports/disclosures of possible violations of any law or any district policy/procedure, it is probable that the district would not want to mandate that employees must internally report each and every possible violation that arises. Some violations can be very minor and some are easily correctable/remedied. Ultimately, a mandate to report all possible legal and policy violations that an employee becomes aware of is probably impractical to enforce; and, if such a mandate were to be taken literally by every employee, it could even have undesirable consequences in terms of the volume of reports that might be generated. For these reasons, this paragraph of this sample does NOT impose such a mandate. Instead, this paragraph relies on reporting obligations established in laws and in other policies that address specific topics/issues.}

Unless more specific reporting procedures are supplied by law or by a separate District policy or procedure (e.g., in the District's nondiscrimination policies and procedures), the District's expectation is that such intra-District reports will be clearly and directly communicated to the District Administrator or to another administrator who is responsible for the applicable activity, program, or operational area. However, if the report concerns possible misconduct by the District Administrator or if the District Administrator would otherwise be affected by a conflict of interest in the matter, then the report or concern shall be submitted to a different administrator who is responsible for the applicable activity, program, or operational area and/or to the School Board President. It is strongly recommended that the employee make such a report in writing and/or that the employee ensures that he or she receives written confirmation from a District official that the report was made and received as intended. In directing employees to make the intra-District reports referenced in this policy, the District shall in no way prevent or interfere with an employee making a protected report to any external governmental official or entity that has authority or responsibilities regarding the matter in question.

Upon receiving any such intra-District report, District supervisors, administrators, and Board members must evaluate potential legal obligations to report or otherwise disclose information about possible violations or alleged misconduct to relevant state and/or federal authorities.

Assistance of Legal Counsel. *[Insert if desired and if consistent with procedures for engaging legal counsel found in other policies: "With notice to the Board,"] either the District Administrator or the ~~Board President~~ **Administration Designee** may engage the assistance of District legal counsel in connection with addressing any report, investigation, or legal proceeding related to a report or other allegation of a possible safety issue or any of the violations, misconduct, or other improprieties addressed under this policy. *{Editor's Note: This entire paragraph may be unnecessary if the board has adopted a more general policy that addresses the use of legal counsel and if that policy already grants sufficient authority to the district administrator and board president to use their judgment to engage legal counsel as needed.}**

Other Protections. The failure to expressly list in this policy any activity that is similarly protected from retaliation or discrimination under any state or federal law or under another Board policy is not intended to diminish such separately-established protection. With respect to federal

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programs, federal contracts, and federal funds, this policy is intended and shall be interpreted to provide the full protections required under 41 U.S.C. §4712 and 2 C.F.R. §200.217.

Legal References:

Wisconsin Statutes

[Section 101.055\(8\)](#)

[Section 102.35\(2\)](#)

[public employee safety and health; including employee protections]
[prohibited retaliation and discrimination in connection with respect to workers compensation claims]

Federal Law

[2 C.F.R. §200.113](#)

[in connection with federal funding, mandatory disclosures of credible evidence of the commission of a violation of certain federal criminal laws or the civil False Claims Act]

[2 C.F.R. §200.217](#)

[federal OMB Guidance regulation addressing whistleblower protections]

[31 U.S.C. §3729 et. seq.](#)

[federal False Claims Act]

[41 U.S.C. §4712](#)

[federal whistleblower protections applicable to employees of federal contractors and employees of recipients of federal funding]

Cross References:

[Insert appropriate cross references to the policy as applicable to your district.]

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Adoption Date: