

The Iowa Ombudsman's role in protecting Iowa's government whistleblowers

A whistleblower is an employee who expresses concerns about objectionable policies or practices that exist within his or her agency. Sometimes, an employee can resolve concerns internally, by bringing them to the attention of managers or supervisors. For a variety of reasons, however, this may not always be an option. Blowing the whistle to regulators or others outside the agency is sometimes the only way to have the concerns addressed – but it is also the approach most fraught with risk, since managers do not always welcome the outside scrutiny.

An employee, like any citizen, can bring concerns (or blow the whistle) to the Office of Ombudsman about administrative actions or wrongdoing by agency officials believed to be contrary to law, rule, or policy. The Ombudsman, however, generally is not able to investigate complaints from employees about their employment relationship, except for the limited whistleblower protection role discussed below.

The Ombudsman's "whistleblower protection" law, found at Iowa Code section 2C.11A, is available only to a small percentage of Iowa's public employees. Whether the Ombudsman should investigate a claim of retaliation depends on the following:

1 - Is the person a state employee?

If not, the complaint cannot be investigated by the Ombudsman.

2 - Is the state employee covered by a collective-bargaining agreement?

If so, the complaint cannot be investigated by the Ombudsman.

3 - Is the employee a merit system employee?

If so, the complaint cannot be investigated by the Ombudsman.

4 - Has the employee suffered an "adverse employment action?"

If not, the complaint cannot be investigated by the Ombudsman.

5 - In particular, has the employee been: 1) discharged? 2) denied an appointment or proposed appointment? 3) denied a promotion or proposed promotion? 4) denied any advantage in his position?

If not, the complaint cannot be investigated by the Ombudsman.

6 - Did the employee blow the whistle to: 1) a state lawmaker? 2) the Ombudsman? 3) any public official or law-enforcement agency?

If not, the complaint cannot be investigated by the Ombudsman.

7 - At the time of the whistleblowing, did the employee reasonably believe that the agency actions evidenced: 1) a violation of law or rule? 2) mis-management? 3) a gross abuse of funds? 4) an abuse of authority? 5) a substantial and specific danger to public health or safety?

If not, the complaint cannot be investigated by the Ombudsman.

8 - Is there cause to believe that the adverse employment action resulted from one of the above disclosures?

If not, the complaint cannot be investigated by the Ombudsman.

9 - Was the complaint filed with the Ombudsman within 30 days of the effective date of the adverse action?

If not, the complaint cannot be investigated by the Ombudsman.

Obviously, there are a lot of hurdles for a whistleblower to jump before the Ombudsman can investigate a complaint about retaliation. Here are a few options a whistleblower may have if the Ombudsman is unable to investigate his complaint:

1 - Seek relief through a union. Or, if the employee is not union, seek other administrative remedies such as grievances that should be spelled out in his employee handbook or the policies of his human-resources department.

2 - Explore the possibility of a civil lawsuit. Iowa Code sections 70A.28 and 70A.29 are general prohibitions on state and local government agencies taking adverse actions against whistleblowers, and both provide civil remedies.

3 - Complain to the county attorney or attorney general. A violation of 70A.28 & 70A.29 constitutes a simple misdemeanor.

Lastly, some advice for the would-be whistleblower:

1 – Be familiar with your internal HR policies and protections before blowing the whistle, internally or externally.

2 – Be aware of the provisions of Iowa Code sections 70A.28 and 70A.29 that spell out what sort of whistleblowing is protected, and what constitutes retaliation.

3 – If you fear the response you will get internally, blow the whistle first to the Ombudsman (or a legislator, law enforcement or elected officeholder). If these external authorities ask you to discuss your complaint with your managers or supervisors, inform your manager that outside authorities are aware of your complaint. This will serve to protect you from retaliation.

4 – Keep records of all your contacts, including timelines. Keep a detailed log of your verbal contacts and share your observations with a trusted witness, if possible. These records could be crucial if you ultimately face retaliation for your disclosures.

In policy and practice, the Ombudsman protects the identities of its complainants, including whistleblowers, from further disclosure unless it is impractical to do so. Depending on the circumstances of the complainant, it may be possible for the Ombudsman to make inquiries or launch an investigation without disclosing the name of the complainant. The Ombudsman will typically not make inquiries into a whistleblower's complaint until the whistleblower understands whether his identity must be disclosed, or is likely to become known, and the whistleblower still consents to the investigation.

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Relevant Iowa Code statutes on the Ombudsman's authority to investigate retaliation against a whistleblower

2C.11A SUBJECTS FOR INVESTIGATIONS -- DISCLOSURES OF INFORMATION.

The ombudsman shall investigate a complaint filed by an employee who is not a merit system employee¹ or an employee covered by a collective bargaining agreement² and who alleges that adverse employment action has been taken³ against the employee in violation of section 70A.28, subsection 2. A complaint filed pursuant to this section shall be made within thirty calendar days following the effective date of the adverse employment action.⁴ The ombudsman shall investigate the matter and shall issue findings relative to the complaint in an expeditious manner.

70A.28 PROHIBITIONS RELATING TO CERTAIN ACTIONS BY STATE EMPLOYEES -- PENALTY -- CIVIL REMEDIES.

2. A person shall not discharge an employee from or take or fail to take action regarding an employee's appointment or proposed appointment to, promotion or proposed promotion to, or any advantage in, a position⁵ in a state employment system administered by, or subject to approval of, a state agency⁶ as a reprisal⁷ for a failure by that employee to inform the person that the employee made a disclosure of information permitted by this section, or for a disclosure of any information by that employee to a member or employee of the general assembly, a disclosure of information to the ombudsman, or a disclosure of information to any other public official or law enforcement agency⁸ if the employee reasonably believes the information evidences a violation of law or rule, mismanagement, a gross abuse of funds, an abuse of authority, or a substantial and specific danger to public health or safety.⁹ However, an employee may be required to inform the person that the employee made a disclosure of information permitted by this section if the employee represented that the disclosure was the official position of the employee's immediate supervisor or employer.

¹ Whistleblower must not be a merit employee.

² Whistleblower must not be covered by a collective bargaining agreement.

³ There must have been an adverse employment action taken against the whistleblower.

⁴ Whistleblower's complaint must be filed with Ombudsman within 30 days of adverse action.

⁵ Whistleblower must have been discharged, or denied an appointment or promotion or "any advantage."

⁶ Whistleblower must be a state employee.

⁷ There must be a nexus between the whistleblowing and the adverse employment action.

⁸ Whistleblower must blow the whistle to lawmaker, Ombudsman, law enforcement or "public official."

⁹ Whistle must be blown for any of these specified reasons.

Iowa Code section 70A.28 is the general whistleblower statute for **all** state employees. It specifies what sort of retaliation is prohibited, whom a whistleblower must blow the whistle to, and the types of problems a whistleblower must blow the whistle about in order to benefit from the protections.

This statute provides for a **civil** remedy and/or a **criminal** remedy (retaliating against a whistleblower is a simple misdemeanor).

The administrative procedures that exist for state employees differ based on whether the employee is covered by a collective bargaining agreement, is part of the merit system, or neither:

Employees Covered By Collective Bargaining Agreements

Whistleblower protections exist within collective bargaining agreements with three union groups - - AFSCME, SPOC, and UE/IUP. These agreements can be seen on the DAS website at: http://www.das.hre.iowa.gov/collective_bargaining.html

Language against reprisals in the agreements is similar to 70A.28, although more abbreviated. See, Section 10 on Page 10 of the AFSCME agreement:

http://www.das.hre.iowa.gov/documents/union_contracts/afscme_contract_13-15.pdf

See, Section 8 on Page 5 of the UIP agreement:

http://www.das.hre.iowa.gov/documents/union_contracts/iup_social_services_contract_2013-15.pdf.

Alleged whistleblower-retaliation violations can be referred to union grievance processes, and ultimately, to an arbitrator, if necessary.

[Union heads or representatives would know more about use of their grievance procedures.]

Merit Employees

Iowa Code section 8A.417(4) prohibits retaliation against merit-employee whistleblowers in a similar fashion as section 70A.28, but it includes no specific remedies. An Administrative Law Judge at PERB tells us that merit whistleblowers could probably file grievances and appeals as outlined in section 8A.415, even if that Code section is primarily used to settle disputes over whether merit employees were properly fired for “just cause.”

[PERB staff would be able to provide more details about its procedures for merit employees.]

Non-merit Employees

Non-union, non-merit employees can appeal actions of whistleblower retaliation to PERB under section 70A.28(6). These employees can file complaints directly with PERB, or through the Office of Ombudsman under section 2C.11A. If the employee files a complaint with the Ombudsman, the Ombudsman's findings can be presented to PERB as part of the employee's appeal. PERB's consideration of the complaint would presumably be treated similarly to that made by a merit employee.

[PERB staff could provide more details about its role and procedures for non-merit employees.]