

HOUSE BILL NO. 1455

Introduced by

Representatives M. Nelson, Hager

1 A BILL for an Act to create and enact chapter 32-48 of the North Dakota Century Code, relating
2 to the creation of a judicial remedy in a qui tam action; and to provide for a report.

3 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

4 **SECTION 1.** Chapter 32-48 of the North Dakota Century Code is created and enacted as
5 follows:

6 **32-48-01. Definitions.**

7 As used in this chapter:

8 1. "Claim" means any request or demand, whether under a contract or otherwise, for
9 money or property which:

10 a. Is presented to an officer, employee, or agent of the state or a local government;

11 b. Is made to a contractor, grantee, or other recipient, if the money or property is to
12 be spent or used on the state or a local government's behalf or to advance a
13 state or local government program or interest, and if the state or local
14 government:

15 (1) Provides or has provided any portion of the money or property requested or
16 demanded; or

17 (2) Will reimburse such contractor, grantee, or other recipient for any portion of
18 the money or property which is requested or demanded; or

19 c. Does not include requests or demands for money or property which the state or a
20 local government has already paid to an individual as compensation for
21 government employment or as an income subsidy with no restrictions on that
22 individual's use of the money or property.

23 2. "False claim" means any claim that is, either in whole or part, false or fraudulent.

- 1 3. "Local government" means any county, city, town, village, school district, board of
2 cooperative educational services, or local public benefit corporation or other municipal
3 corporation or political subdivision of the state, or of the local government.
- 4 4. "Material" means having a natural tendency to influence, or be capable of influencing
5 the payment or receipt of money or property.
- 6 5. "Obligation" means an established duty, whether or not fixed, arising from an express
7 or implied contractual, grantor-grantee, or licensor-licensee relationship, from a
8 fee-based or similar relationship, from statute or regulation, or from the retention of
9 any overpayment.
- 10 6. "Original source" means a person that:
- 11 a. Before a public disclosure under section 32-48-03 has voluntarily disclosed to the
12 state or a local government the information on which allegations or transactions
13 in a cause of action are based; or
- 14 b. Has knowledge that is independent of and materially adds to the publicly
15 disclosed allegations or transactions and which has voluntarily provided the
16 information to the state or a local government before or simultaneous with filing
17 an action under this chapter.
- 18 7. "Person" means any natural person, partnership, corporation, association or any other
19 legal entity or individual, other than the state or a local government.
- 20 8. "State" means the state of North Dakota and any state department, board, bureau,
21 division, commission, committee, public benefit corporation, public authority, council,
22 office, or other governmental entity performing a governmental or proprietary function
23 for the state.
- 24 9. "Willfully" means a person engages in conduct intentionally, knowingly, or recklessly as
25 defined in section 12.1-02-02.

26 **32-48-02. Liability for certain acts.**

- 27 1. Subject to the provisions of subsection 2 any person that:
- 28 a. Willfully presents, or causes to be presented, a false or fraudulent claim for
29 payment or approval;
- 30 b. Willfully makes, uses, or causes to be made or used, a false record or statement
31 material to a false or fraudulent claim;

- 1 c. Conspires to commit a violation of this section;
- 2 d. Has possession, custody, or control of property or money used, or to be used, by
- 3 the state or a local government and willingly delivers, or causes to be delivered,
- 4 less than all of the money or property;
- 5 e. Is authorized to make or deliver a document certifying receipt of property used, or
- 6 to be used, by the state or a local government and, intending to defraud the state
- 7 or a local government, makes or delivers the receipt without completely knowing
- 8 the information on the receipt is true;
- 9 f. Willingly buys or receives as a pledge of an obligation or debt, public property
- 10 from an officer or employee of the state or a local government knowing the officer
- 11 or employee violates a provision of law when selling or pledging such property;
- 12 g. Willingly makes, uses, or causes to be made or used, a false record or statement
- 13 material to an obligation to pay or transmit money or property to the state or a
- 14 local government; or
- 15 h. Willingly conceals or willingly and improperly avoids or decreases an obligation to
- 16 pay or transmit money or property to the state or a local government, or
- 17 conspires to do the same; is liable to the state or a local government, as
- 18 applicable, for a civil penalty of not less than six thousand dollars and not more
- 19 than twelve thousand dollars, as adjusted to be equal to the civil penalty allowed
- 20 under the federal False Claims Act [31 U.S.C. 3729, et seq.] as amended, as
- 21 adjusted for inflation by the Federal Civil Penalties Inflation Adjustment Act of
- 22 1990 [28 U.S.C. 2461], plus three times the amount of all damages, including
- 23 consequential damages the state or local government sustains because of the
- 24 act of that person.
- 25 2. The court may not award more than two times the amount of damages sustained
- 26 because of the act of the person described in this section, upon finding:
- 27 a. The person committing the violation of this section had furnished all information
- 28 known to the person about the violation, to those officials responsible for
- 29 investigating false claims violations on behalf of the state and any local
- 30 government that sustained damages, within thirty days after the date on which
- 31 the person first obtained the information;

- 1 b. The person fully cooperated with any government investigation of the violation;
2 and
3 c. At the time the person furnished information about the violation, no criminal
4 prosecution, civil action, or administrative action had commenced with respect to
5 the violation, and the person did not have actual knowledge of the existence of
6 an investigation into the violation.
- 7 3. A person that violates this section is also liable for the costs, including attorney's fees,
8 of a civil action brought to recover a penalty or damages.
- 9 4. a. This section only applies to claims, records, or statements made under title 57 if:
10 (1) The net income or sales of the person against which the action is brought
11 equals or exceeds one million dollars for any taxable year subject to any
12 action brought pursuant to this chapter;
13 (2) The damages pleaded in the action exceed three hundred and fifty
14 thousand dollars; and
15 (3) The person is alleged to have violated subdivisions a, b, c, d, e, f, or g of
16 subsection 1. Nothing in this paragraph may be deemed to modify or restrict
17 the application of the paragraph to any act alleged that relates to a violation
18 of title 57.
- 19 b. The attorney general shall consult with the tax commissioner before filing or
20 intervening in any action under this chapter which is based on the filing of false
21 claims, records, or statements made under the tax law. If the state declines to
22 participate or to authorize participation by a local government in such an action
23 pursuant to subsection 1, the qui tam plaintiff shall obtain approval from the
24 attorney general before making any motion to compel the tax commissioner.

25 **32-48-03. Civil actions - False claims.**

- 26 1. The attorney general may investigate violations under this chapter. If the attorney
27 general determines a person violated or is violating this chapter, the attorney general
28 may bring a civil action on behalf of the state or on behalf of a local government
29 against the person. A local government may investigate violations that may have
30 resulted in damages to the local government under this chapter and may bring a civil
31 action on behalf of the local government or on behalf of any subdivision of the local

1 government to recover damages sustained by the local government as a result of the
2 violations. An action may not be filed under this subsection against the federal
3 government, the state, a local government, or any officer or employee acting in the
4 employee's or officer's official capacity. The attorney general shall consult with the
5 department of human services before filing any action related to the Medicaid
6 program.

- 7 2. a. Any person may bring a qui tam civil action for a violation of this chapter on
8 behalf of the person and the people of the state or a local government. An action
9 may not be filed pursuant to this subdivision against the federal government, the
10 state, a local government, or any officer or employee acting in the officer's or
11 employee's official capacity.
- 12 b. A copy of the complaint and written disclosure of substantially all material
13 evidence and information the person possesses must be served on the attorney
14 general in accordance with title 28 and the North Dakota Rules of Civil
15 Procedure. Any complaint filed in the state must remain under seal for at least
16 sixty days and may not be served on the defendant until the court so orders. The
17 seal may not preclude the attorney general, a local government, or the qui tam
18 plaintiff from serving the complaint, any other pleadings, or the written disclosure
19 of substantially all material evidence and information possessed by the person
20 bringing the action on relevant state or local government agencies, or on law
21 enforcement authorities of the state, a local government, or other jurisdictions, so
22 that the actions may be investigated or prosecuted, except that the seal applies
23 to the agencies or authorities served to the same extent as the seal applies to
24 other parties in the action.
- 25 c. If the allegations in the complaint allege a violation of this chapter involving
26 damages to a local government, the attorney general may at any time provide a
27 copy of the complaint and written disclosure to the attorney for the local
28 government. If the allegations in the complaint involve damages to a city with a
29 population of one hundred thousand or more or only to the state and the city, the
30 attorney general shall provide the complaint and written disclosure to the counsel
31 of the city within thirty days. The state may elect to supersede or intervene and

1 proceed with the action, or to authorize a local government that may have
2 sustained damages to supersede or intervene, within sixty days after the state
3 receives the complaint and the material evidence and information. If the
4 allegations in the complaint involve damages to a city with a population of one
5 hundred thousand or more, the attorney general may not supersede or intervene
6 in the action without the consent of the counsel of the city. The attorney general
7 may, for good cause shown, move the court for extensions of the time during
8 which the complaint remains under seal under this subdivision. Any motions may
9 be supported by affidavits or other submissions.

10 d. Before the expiration of the sixty-day period or any extensions obtained under
11 subdivision c, the attorney general shall notify the court the attorney general:

12 (1) Intends to file a complaint against the defendant on behalf of the state or a
13 local government, be substituted as the plaintiff in the action, and convert
14 the action in all respects from a qui tam civil action brought by a private
15 person into a civil enforcement action by the attorney general under this
16 section;

17 (2) Intends to intervene in the action, as of right, so as to aid and assist the
18 plaintiff in the action; or

19 (3) If the action involves damages sustained by a local government, intends to
20 grant the local government permission to:

21 (a) File and serve a complaint against the defendant, and be substituted
22 as the plaintiff in the action and convert the action in all respects from
23 a qui tam civil action brought by a private person into a civil
24 enforcement action by the local government under this section; or

25 (b) Intervene in such action, as of right, so as to aid and assist the plaintiff
26 in the action. The attorney general shall provide the local government
27 with a copy of the notification at the same time the court is notified.

28 e. If the state notifies the court of an intention to file a complaint against the
29 defendant and be substituted as the plaintiff in the action, or to permit a local
30 government to do so, the complaint, whether filed separately or as an
31 amendment to the qui tam plaintiff's complaint, must be filed within thirty days

1 after the notification to the court. For statute of limitations purposes, any
2 complaint filed by the state or a local government must relate back to the filing
3 date of the complaint of the qui tam plaintiff, to the extent the cause of action of
4 the state or local government arises out of the conduct, transactions, or
5 occurrences set forth, or attempted to be set forth, in the complaint of the qui tam
6 plaintiff.

7 f. If the state notifies the court of an intention to intervene in the action, or to permit
8 a local government to do so, then the motion to intervene, whether filed
9 separately or as an amendment to the qui tam plaintiff's complaint, must be filed
10 within thirty days after the notification to the court. For statute of limitations
11 purposes, any complaint filed by the state or a local government, whether filed
12 separately or as an amendment to the qui tam plaintiff's complaint, must relate
13 back to the filing date of the complaint of the qui tam plaintiff, to the extent the
14 cause of action of the state or local government arises out of the conduct,
15 transactions, or occurrences set forth, or attempted to be set forth, in the
16 complaint of the qui tam plaintiff.

17 g. If the state declines to participate in the action or to authorize participation by a
18 local government, the qui tam action may proceed subject to judicial review under
19 this section and the North Dakota Rules of Civil Procedure. The qui tam plaintiff
20 shall provide the state or any applicable local government with a copy of any
21 document filed with the court on or about the date the document is filed, or any
22 order issued by the court on or about the date the order is issued. A qui tam
23 plaintiff shall notify the state or any applicable local government within five
24 business days of any decision, order, or verdict resulting in judgment in favor of
25 the state or local government.

26 3. If the state decides to participate in a qui tam action or to authorize the participation of
27 a local government, the court shall order that the qui tam complaint be unsealed and
28 served at the time of the filing of the complaint or intervention motion by the state or
29 local government. After the complaint is unsealed, or if a complaint is filed by the state
30 or a local government pursuant to subsection 1, the defendant must be served with
31 the complaint and summons pursuant to title 28. A copy of any complaint that alleges

1 damages were sustained by a local government must also be served on the local
2 government. The defendant shall respond to the summons and complaint within the
3 time allotted under the North Dakota Rules of Civil Procedure.

4 4. If a person brings a qui tam action under this section, no person other than the
5 attorney general or a local government attorney acting under this section, may
6 intervene or bring a related civil action based upon the facts underlying the pending
7 action. Nothing in this subsection may be deemed to deny anyone the right, upon
8 leave of court, to file briefs amicus curiae.

9 5. a. If the attorney general elects to convert the qui tam civil action into an attorney
10 general enforcement action, the state has the primary responsibility for
11 prosecuting the action.

12 b. If the attorney general elects to intervene in the qui tam civil action, the state, the
13 person that commenced the action, and any local government that sustained
14 damages and intervenes in the action, shall share primary responsibility for
15 prosecuting the action.

16 c. If the attorney general elects to permit a local government to convert the action
17 into a civil enforcement action, the local government has primary responsibility for
18 investigating and prosecuting the action. If the action involves damages to a local
19 government but not the state and the local government intervenes in the qui tam
20 civil action, the local government and the person that commenced the action
21 share primary responsibility for prosecuting the action.

22 d. Under no circumstances may the state or a local government be bound by an act
23 of the person bringing the original action. Subject to the limitations set forth in this
24 subsection, the person may continue as a party to the action.

25 e. Under no circumstances may the state be bound by the act of a local government
26 that intervenes in an action involving damages to the state.

27 f. If neither the attorney general nor a local government intervenes in the qui tam
28 action, the qui tam plaintiff is responsible for prosecuting the action, subject to the
29 attorney general's right to intervene at a later date and upon a showing of good
30 cause.

- 1 6. Notwithstanding the objections of the person initiating the action, if the person has
2 been served with the motion to dismiss and the court has provided the person with an
3 opportunity to be heard on the motion, the state may move to dismiss the action. If the
4 action involves damages to both the state and a local government, then the state shall
5 consult with the local government before moving to dismiss the action.
6 Notwithstanding the objections of the person initiating the action, if the person has
7 been served with the motion to dismiss and the court has provided the person with an
8 opportunity to be heard on the motion and the action involves damages sustained by a
9 local government but not the state, the local government may move to dismiss the
10 action.
- 11 a. Notwithstanding the objections of the person initiating the action, if the court
12 determines, after an opportunity to be heard, that the proposed settlement is fair,
13 adequate, and reasonable with respect to all parties under all the circumstances,
14 the state or a local government may settle the action with the defendant.
- 15 b. Upon a showing by the attorney general or a local government that the original
16 plaintiff's unrestricted participation during the course of the litigation would
17 interfere with or unduly delay the prosecution of the case, would be repetitious or
18 irrelevant, or upon a showing by the defendant that the original qui tam plaintiff's
19 unrestricted participation during the course of the litigation would be for purposes
20 of harassment or would cause the defendant undue burden, the court may, at the
21 court's own discretion, impose limitations on the original plaintiff's participation in
22 the case, by:
- 23 (1) Limiting the number of witnesses the person may call;
24 (2) Limiting the length of the testimony of such witnesses;
25 (3) Limiting the person's cross-examination of witnesses; or
26 (4) Otherwise limiting the participation by the person in the litigation.
- 27 c. Notwithstanding any other provision of law, if the attorney general or a local
28 government elects to supersede or intervene in a qui tam civil action, the attorney
29 general and the local government may elect to pursue any remedy available with
30 respect to the criminal or civil prosecution of the presentation of false claims,
31 including any administrative proceeding to determine a civil monetary penalty. If

1 any such alternate civil remedy is pursued in another proceeding, the person
2 initiating the action has the same rights in the proceeding as the person would
3 have had if the action had continued under this section.

4 d. Notwithstanding any other provision of law, if the attorney general elects to
5 supersede or intervene in a qui tam civil action, or to permit a local government to
6 supersede or intervene in the qui tam civil action, upon a showing by the state or
7 local government that certain actions of discovery by the person initiating the
8 action would interfere with the state's or a local government's investigation or
9 prosecution of a criminal or civil matter arising out of the same facts, the court
10 may stay such discovery for a period of not more than sixty days. The court may
11 extend the period of the stay upon a further showing that the state or a local
12 government has pursued the criminal or civil investigation or proceedings with
13 reasonable diligence and any proposed discovery in the civil action will interfere
14 with the ongoing criminal or civil investigation or proceedings.

15 7. a. If the attorney general elects to convert the qui tam civil action into an attorney
16 general enforcement action or to permit a local government to convert the action
17 into a civil enforcement action by the local government, or if the attorney general
18 or a local government elects to intervene in the qui tam civil action, the person
19 that initiated the qui tam civil action is entitled to receive between fifteen and
20 twenty-five percent of the proceeds recovered in the action or in settlement of the
21 action. The court shall consider the extent to which the plaintiff substantially
22 contributed to the prosecution of the action when determining the percentage of
23 the proceeds to which a person commencing a qui tam civil action is entitled. If
24 the court finds the action was based primarily on disclosures of specific
25 information, other than information provided by the person bringing the action,
26 relating to allegations or transactions in a criminal, civil, or administrative hearing,
27 in a legislative or administrative report, hearing, audit, or investigation, or from
28 the news media, the court may award such sums as the court considers
29 appropriate, but in no case more than fifteen percent of the proceeds, taking into
30 account the significance of the information and the role of the person bringing the

1 action in advancing the case to litigation. The person also shall receive an
2 amount for reasonable expenses including reasonable attorney's fees.

3 b. If the attorney general or a local government does not elect to intervene or
4 convert the action and the action is successful, the person who initiated the qui
5 tam action is entitled to receive between twenty-five and thirty percent of the
6 proceeds recovered in the action or settlement of the action. The court shall
7 consider the extent to which the plaintiff substantially contributed to the
8 prosecution of the action when determining the percentage of the proceeds to
9 which a person commencing a qui tam civil action is entitled. The person also
10 shall receive an amount for reasonable expenses including attorney's fees.

11 c. With the exception of a court award of costs, expenses, or attorney's fees, any
12 payment to a person under this section must be made from the proceeds.

13 d. If the attorney general or a local government does not proceed with the action
14 and the person bringing the action conducts the action, the court may award to
15 the defendant reasonable attorney's fees and expenses if the defendant prevails
16 in the action and the court finds the claim of the person bringing the action was
17 clearly frivolous, clearly vexatious, or brought primarily for purposes of
18 harassment.

19 **32-48-04. Costs, expenses, disbursements, and attorney's fees.**

20 In any action brought pursuant to this chapter, the court may award a local government that
21 participates as a party in the action an amount for reasonable expenses the court finds to have
22 been necessarily incurred plus reasonable attorney's fees. All such expenses, fees, and costs
23 must be awarded directly against the defendant and may not be charged from the proceeds, but
24 may be awarded only if a local government prevails in the action.

25 **32-48-05. Exclusion from recovery.**

26 If the court finds the qui tam civil action was brought by a person that planned or initiated
27 the violation of this chapter upon which the action was brought, then the court may, to the extent
28 the court considers appropriate, reduce the share of the proceeds of the action which the
29 person would otherwise be entitled to receive under this chapter. The court may consider the
30 role of the person in advancing the case to litigation and any relevant circumstances pertaining
31 to the violation. If the person bringing the qui tam civil action is convicted of criminal conduct

1 arising from the person's role in the violation of this chapter, that person must be dismissed from
2 the qui tam civil action and may not receive any share of the proceeds of the action. The
3 dismissal may not prejudice the right of the attorney general to supersede or intervene in the
4 action and to civilly prosecute the same on behalf of the state or a local government.

5 **32-48-06. Certain actions barred.**

- 6 1. The court shall dismiss a qui tam action under this chapter if:
- 7 a. The action is based on allegations or transactions that are the subject of a
8 pending civil action or an administrative action in which the state or a local
9 government is already a party;
- 10 b. The state or local government has reached a binding settlement or other
11 agreement with the person that violated this chapter resolving the matter and the
12 agreement has been approved in writing by the attorney general, or by the
13 applicable local government attorney; or
- 14 c. Against a member of the legislature, a member of the judiciary, or an executive
15 branch official if the action is based on evidence or information known to the state
16 at the time the action was brought.
- 17 2. The court shall dismiss a qui tam action under this chapter unless opposed by the
18 state or an applicable local government or unless the qui tam plaintiff is an original
19 source of the information and if substantially the same allegations or transactions as
20 alleged in the action were publicly disclosed:
- 21 a. In a state or local government criminal, civil, or administrative hearing in which
22 the state or a local government or an agent of the state is a party;
- 23 b. In a federal, state, or local government report, hearing, audit, or investigation that
24 is made on the public record or disseminated broadly to the general public,
25 provided that the information may not be deemed as publicly disclosed in a report
26 or investigation because the information was disclosed or in the possession of
27 public officials or public agencies;
- 28 c. In the news media, provided that the allegations or transactions are not publicly
29 disclosed in the news media merely because information of allegations or
30 transactions have been posted on the internet or on a computer network.

1 **32-48-07. Liability.**

2 The state or a local government may not be liable for any expenses incurred by a person
3 bringing a qui tam civil action under this chapter.

4 **32-48-08. Report to legislative management.**

5 The attorney general shall provide an annual report to the legislative management of any
6 funds recovered under this chapter.

7 **32-48-09. Remedies.**

8 1. Any current or former employee, contractor, or agent of any private or public employer
9 who is discharged, demoted, suspended, threatened, harassed, or in any other
10 manner discriminated against in the terms and conditions of employment, or otherwise
11 harmed or penalized by an employer, or a prospective employer, because of lawful
12 acts done by the employee, contractor, agent, or associated others in furtherance of
13 an action brought under this chapter or other efforts to stop one or more violations of
14 this chapter, is entitled to all relief necessary to make the employee, contractor, or
15 agent whole. Relief under this section includes:

16 a. An injunction to restrain continued discrimination;

17 b. Hiring, contracting, or reinstatement to the position the person would have had,
18 but for the discrimination, or to an equivalent position;

19 c. Reinstatement of full fringe benefits and seniority rights;

20 d. Payment of two times back pay, plus interest; and

21 e. Compensation for any special damages sustained as a result of the
22 discrimination, including litigation costs and reasonable attorney's fees.

23 2. For purposes of this section, a "lawful act" includes, obtaining or transmitting to the
24 state, a local government, a qui tam plaintiff, or private counsel solely employed to
25 investigate, potentially file, or file a cause of action under this chapter, documents,
26 data, correspondence, electronic mail, or any other information, even though the act
27 may violate a contract, employment term, or duty owed to the employer or contractor,
28 so long as the possession and transmission of such documents are for the sole
29 purpose of furthering efforts to stop one or more violations of this chapter. Nothing in
30 this subsection may be interpreted to prevent a law enforcement authority from
31 bringing a civil or criminal action against a person for violating a provision of law.

1 3. An employee, contractor, or agent described in this section may bring an action in the
2 appropriate venue for the relief provided in this section.

3 **32-48-10. Limitation of actions - Burden of proof.**

4 1. A civil action under this chapter must be commenced within ten years after the date on
5 which the violation of this chapter is committed. Notwithstanding any other provision of
6 law, for the purposes of this chapter, an action under this chapter is commenced by
7 the filing of the complaint.

8 2. In the pleading of an action brought under this chapter, the qui tam plaintiff may not be
9 required to identify specific claims that result from an alleged course of misconduct, or
10 any specific records or statements used, if the facts alleged in the complaint, if
11 ultimately proven true, would provide a reasonable indication that one or more
12 violations of this chapter are likely to have occurred and if the allegations in the
13 pleading provide adequate notice of the specific nature of the alleged misconduct to
14 permit the state or a local government to effectively investigate and defendants to
15 fairly defend the allegations.

16 3. In an action brought under this chapter, the state or a local government that
17 participates as a party in the action, or the person bringing the qui tam civil action,
18 shall prove by a preponderance of the evidence all essential elements of the cause of
19 action, including damages.

20 **32-48-11. Law enforcement authority - Duties.**

21 This chapter does not:

22 1. Preempt the authority or relieve the duty of other law enforcement agencies to
23 investigate and prosecute suspected violations of law;

24 2. Prevent or prohibit a person from voluntarily disclosing information concerning a
25 violation of this chapter to a law enforcement agency; or

26 3. Limit any of the powers granted elsewhere in this chapter and other laws to the
27 attorney general, state agencies, or local governments to investigate and take
28 appropriate action relating to possible violations of this chapter.

29 **32-48-12. Rules.**

30 The attorney general may adopt any rules necessary to implement this chapter.