

UTAH PROTECTION OF PUBLIC EMPLOYEES ACT**AMENDMENTS**

2022 GENERAL SESSION

STATE OF UTAH

LONG TITLE**General Description:**

This bill amends the Utah Protection of Public Employees Act.

Highlighted Provisions:

This bill:

- defines terms;
- specifies the parties' burdens of proof in a civil action where a violation of the Utah Protection of Public Employees Act is alleged; and
- makes technical and conforming changes.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:**AMENDS:**

26-61a-111, as last amended by Laws of Utah 2021, Chapter 344

67-21-2, as last amended by Laws of Utah 2013, Chapter 427

67-21-3, as last amended by Laws of Utah 2020, Chapter 365

67-21-3.5, as last amended by Laws of Utah 2018, Chapter 390

67-21-3.6, as enacted by Laws of Utah 2013, Chapter 427

67-21-3.7, as last amended by Laws of Utah 2018, Chapter 178

67-21-4, as last amended by Laws of Utah 2018, Chapter 178

67-21-6, as last amended by Laws of Utah 2013, Chapter 427

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **26-61a-111** is amended to read:

26-61a-111. Nondiscrimination for medical care or government employment --**Notice to prospective and current public employees -- No effect on private employers.**

(1) For purposes of medical care, including an organ or tissue transplant, a patient's use, in accordance with this chapter, of cannabis in a medicinal dosage form or a cannabis product in a medicinal dosage form:

(a) is considered the equivalent of the authorized use of any other medication used at the discretion of a physician; and

(b) does not constitute the use of an illicit substance or otherwise disqualify an individual from needed medical care.

(2) (a) Notwithstanding any other provision of law and except as provided in Subsection (2)(b), the state or any political subdivision shall treat an employee's use of medical cannabis in accordance with this chapter or Section 58-37-3.7 in the same way the state or political subdivision treats employee use of any prescribed controlled substance.

(b) A state or political subdivision employee who has a valid medical cannabis card is not subject to ~~[adverse]~~ retaliatory action, as that term is defined in Section ~~[67-21-2]~~ 67-19a-101, for failing a drug test due to marijuana or tetrahydrocannabinol without evidence that the employee was impaired or otherwise adversely affected in the employee's job performance due to the use of medical cannabis.

(c) Subsections (2)(a) and (b) do not apply where the application of Subsection (2)(a) or (b) would jeopardize federal funding, a federal security clearance, or any other federal background determination required for the employee's position, or if the employee's position is dependent on a license that is subject to federal regulations.

(3) (a) (i) A state employer or a political subdivision employer shall take the action described in Subsection (3)(a)(ii) before:

(A) giving to a current employee an assignment or duty that arises from or directly relates to an obligation under this chapter; or

(B) hiring a prospective employee whose assignments or duties would include an assignment or duty that arises from or directly relates to an obligation under this chapter.

(ii) The employer described in Subsection (3)(a)(i) shall give the employee or prospective employee described in Subsection (3)(a)(i) a written notice that notifies the employee or prospective employee:

(A) that the employee's or prospective employee's job duties may require the employee or prospective employee to engage in conduct which is in violation of the criminal laws of the United States; and

(B) that in accepting a job or undertaking a duty described in Subsection (3)(a)(i), although the employee or prospective employee is entitled to the protections of Title 67, Chapter 21, Utah Protection of Public Employees Act, the employee may not object or refuse to carry out an assignment or duty that may be a violation of the criminal laws of the United States with respect to the manufacture, sale, or distribution of cannabis.

(b) The Division of Human Resource Management shall create, revise, and publish the form of the notice described in Subsection (3)(a).

(c) Notwithstanding Subsection 67-21-3(3), an employee who has signed the notice described in Subsection (3)(a) may not:

(i) claim in good faith that the employee's actions violate or potentially violate the laws of the United States with respect to the manufacture, sale, or distribution of cannabis; or

(ii) refuse to carry out a directive that the employee reasonably believes violates the criminal laws of the United States with respect to the manufacture, sale, or distribution of cannabis.

(d) An employer may not take retaliatory action as defined in Section 67-19a-101 against a current employee who refuses to sign the notice described in Subsection (3)(a).

(4) Nothing in this section requires a private employer to accommodate the use of medical cannabis or affects the ability of a private employer to have policies restricting the use of medical cannabis by applicants or employees.

Section 2. Section **67-21-2** is amended to read:

67-21-2. Definitions.

As used in this chapter:

(1) "Abuse of authority" means an arbitrary or capricious exercise of power that:

(a) adversely affects the employment rights of another; or

(b) results in personal gain to the person exercising the authority or to another person.

~~[(2) "Adverse action" means to discharge, threaten, or discriminate against an employee in a manner that affects the employee's employment, including compensation, terms, conditions, location, rights, immunities, promotions, or privileges.]~~

94 ~~[(3)]~~ (2) "Communicate" means a verbal, written, broadcast, or other communicated
95 report.

96 ~~[(4)]~~ (3) "Damages" means general and special damages for injury or loss caused by
97 each violation of this chapter.

98 ~~[(5)]~~ (4) "Employee" means a person who performs a service for wages or other
99 remuneration under a contract of hire, written or oral, express or implied.

100 ~~[(6)]~~ (5) (a) "Employer" means the public body or public entity that employs the
101 employee.

102 (b) "Employer" includes an agent of an employer.

103 (6) "Good faith" means that an employee acts with:

104 (a) subjective good faith; and

105 (b) the objective good faith of a reasonable employee.

106 (7) "Gross mismanagement" means action or failure to act by a person, with respect to
107 a person's responsibility, that causes significant harm or risk of harm to the mission of the
108 public entity or public body that employs, or is managed or controlled by, the person.

109 (8) "Judicial employee" means an employee of the judicial branch of state government.

110 (9) "Legislative employee" means an employee of the legislative branch of state
111 government.

112 (10) "Political subdivision employee" means an employee of a political subdivision of
113 the state.

114 (11) "Public body" means any of the following:

115 (a) a state officer, employee, agency, department, division, bureau, board, commission,
116 council, authority, educational institution, or any other body in the executive branch of state
117 government;

118 (b) an agency, board, commission, council, institution member, or employee of the
119 legislative branch of state government;

120 (c) a county, city, town, regional governing body, council, school district, local district,
121 special service district, or municipal corporation, board, department, commission, council,
122 agency, or any member or employee of them;

123 (d) any other body that is created by state or local authority, or that is primarily funded
124 by or through state or local authority, or any member or employee of that body;

(e) a law enforcement agency or any member or employee of a law enforcement agency; and

(f) the judiciary and any member or employee of the judiciary.

(12) "Public entity" means a department, division, board, council, committee, institution, office, bureau, or other similar administrative unit of the executive branch of state government.

(13) "Public entity employee" means an employee of a public entity.

(14) "Retaliatory action" ~~[is as]~~ means the same as that term is defined in Section 67-19a-101.

(15) "State institution of higher education" ~~[is as]~~ means the same as that term is defined in Section 53B-3-102.

(16) "Unethical conduct" means conduct that violates a provision of Title 67, Chapter 16, Utah Public Officers' and Employees' Ethics Act.

Section 3. Section **67-21-3** is amended to read:

67-21-3. Reporting of governmental waste or violations of law -- Employer action -- Exceptions.

(1) (a) An employer may not take ~~[adverse]~~ retaliatory action against an employee because the employee, or a person authorized to act on behalf of the employee, communicates in good faith:

(i) the waste or misuse of public funds, property, or manpower;

(ii) a violation or suspected violation of a law, rule, or regulation adopted under the law of this state, a political subdivision of this state, or any recognized entity of the United States; or

(iii) as it relates to a state government employer:

(A) gross mismanagement;

(B) abuse of authority; or

(C) unethical conduct.

(b) For purposes of Subsection (1)(a), an employee is presumed to have communicated in good faith if the employee gives written notice or otherwise formally communicates the conduct described in Subsection (1)(a) to:

(i) a person in authority over the person alleged to have engaged in the conduct

156 described in Subsection (1)(a);
157 (ii) the attorney general's office;
158 (iii) law enforcement, if the conduct is criminal in nature;
159 (iv) if the employee is a public entity employee, public body employee, legislative
160 employee, or a judicial employee:
161 (A) the state auditor's office;
162 (B) the president of the Senate;
163 (C) the speaker of the House of Representatives;
164 (D) the Office of Legislative Auditor General;
165 (E) the governor's office;
166 (F) the state court administrator; or
167 (G) the Division of Finance;
168 (v) if the employee is a public entity employee, but not an employee of a state
169 institution of higher education, the director of the Division of Purchasing and General Services;
170 (vi) if the employee is a political subdivision employee:
171 (A) the legislative body, or a member of the legislative body, of the political
172 subdivision;
173 (B) the governing body, or a member of the governing body, of the political
174 subdivision;
175 (C) the top executive of the political subdivision; or
176 (D) any government official with authority to audit the political subdivision or the
177 applicable part of the political subdivision; or
178 (vii) if the employee is an employee of a state institution of higher education:
179 (A) the Utah Board of Higher Education or a member of the Utah Board of Higher
180 Education;
181 (B) the commissioner of higher education;
182 (C) the president of the state institution of higher education where the employee is
183 employed; or
184 (D) the entity that conducts audits of the state institution of higher education where the
185 employee is employed.
186 (c) The presumption described in Subsection (1)(b) may be rebutted by showing that

the employee knew or reasonably ought to have known that the report is malicious, false, or frivolous.

(2) An employer may not take [~~adverse~~] retaliatory action against an employee because an employee participates or gives information in an investigation, hearing, court proceeding, legislative or other inquiry, or other form of administrative review held by the public body.

(3) An employer may not take [~~adverse~~] retaliatory action against an employee because the employee has objected to or refused to carry out a directive that the employee reasonably believes violates a law of this state, a political subdivision of this state, or the United States, or a rule or regulation adopted under the authority of the laws of this state, a political subdivision of this state, or the United States.

(4) An employer may not implement rules or policies that unreasonably restrict an employee's ability to document:

- (a) the waste or misuse of public funds, property, or manpower;
- (b) a violation or suspected violation of any law, rule, or regulation; or
- (c) as it relates to a state government employer:
 - (i) gross mismanagement;
 - (ii) abuse of authority; or
 - (iii) unethical conduct.

Section 4. Section **67-21-3.5** is amended to read:

67-21-3.5. Administrative review of retaliatory action against a public entity employee.

(1) A public entity employee who believes that the employee's employer has taken retaliatory action against the employee in violation of this chapter may file a grievance with the Career Service Review Office in accordance with Section 67-19a-402.5 and subject to Section 67-21-4.

(2) If the Career Service Review Office determines that retaliatory action is taken in violation of this chapter against the public entity employee, the Career Service Review Office may order:

- (a) reinstatement of the public entity employee at the same level held by the public entity employee before the retaliatory action;
- (b) the payment of back wages, in accordance with Subsection 67-19a-406(5)(b);

(c) full reinstatement of benefits;

(d) full reinstatement of other employment rights; or

(e) if the retaliatory action includes failure to promote, as described in Subsection 67-19a-101(11)(d), a pay raise that results in the employee receiving the pay that the employee would have received if the ~~[person]~~ employee had been promoted.

(3) A public entity employer has the burden to prove by substantial evidence that the public entity employer's action was justified.

(4) A public entity employee or public entity employer may appeal a determination of the Career Service Review Office as provided in Section 67-19a-402.5.

Section 5. Section **67-21-3.6** is amended to read:

67-21-3.6. Administrative review for political subdivision employees.

(1) (a) A political subdivision may adopt an ordinance to establish an independent personnel board to hear and take action on a complaint alleging ~~[adverse]~~ retaliatory action.

(b) The ordinance described in Subsection (1)(a) shall include:

(i) procedures for filing a complaint and conducting a hearing; and

(ii) a burden of proof on the employer to establish by substantial evidence that the employer's action was justified by reasons unrelated to the employee's good faith actions under Section 67-21-3.

(2) If a political subdivision adopts an ordinance described in Subsection (1), a political subdivision employee may file a complaint with the independent personnel board alleging ~~[adverse]~~ retaliatory action.

(3) If an independent personnel board finds that ~~[adverse]~~ retaliatory action is taken in violation of the ordinance described in Subsection (1)(a), the independent personnel board may order:

(a) reinstatement of the employee at the same level as before the ~~[adverse]~~ retaliatory action;

(b) the payment of back wages;

(c) full reinstatement of fringe benefits;

(d) full reinstatement of seniority rights; or

(e) if the ~~[adverse]~~ retaliatory action includes failure to promote, as described in Subsection 67-19a-101(11)(d), a pay raise that results in the employee receiving the pay that

the employee would have received if the person had been promoted.

Section 6. Section **67-21-3.7** is amended to read:

67-21-3.7. Administrative review for state institution of higher education employees.

(1) (a) As used in this section, "independent personnel board" means a board where no member of the board:

(i) is in the same department as the complainant;

(ii) is a supervisor of the complainant; or

(iii) has a conflict of interest in relation to the complainant or an allegation made in the complaint.

(b) A state institution of higher education shall adopt a policy to establish an independent personnel board to hear and take action on a complaint alleging [adverse] retaliatory action.

(c) The policy described in Subsection (1)(b) shall include:

(i) procedures for filing a complaint and conducting a hearing; and

(ii) a burden of proof on the employer to establish by substantial evidence that the employer's action was justified by reasons unrelated to the employee's good faith actions under Section 67-21-3.

(2) (a) An employee of a state institution of higher education may file a complaint with the independent personnel board described in Subsection (1)(b) alleging [adverse] retaliatory action.

(b) An independent personnel board that receives a complaint under Subsection (2)(a) shall hear the matter, resolve the complaint, and take action under Subsection (3) within the later of:

(i) 30 days after the day on which the employee files the complaint; or

(ii) a longer period of time, not to exceed 30 additional days, if the employee and the independent personnel board mutually agree on the longer time period.

(3) If an independent personnel board finds that [adverse] retaliatory action is taken in violation of the policy described in Subsection (1)(b), the independent personnel board may order, or recommend to a final decision maker:

(a) reinstatement of the employee at the same level as before the [adverse] retaliatory

280 action;

281 (b) the payment of back wages;

282 (c) full reinstatement of fringe benefits;

283 (d) full reinstatement of seniority rights; or

284 (e) if the [~~adverse~~] retaliatory action includes failure to promote, as described in

285 Subsection 67-19a-101(11)(d), a pay raise that results in the employee receiving the pay that
286 the employee would have received if the person had been promoted.

287 (4) A final decision maker who receives a recommendation under Subsection (3) shall
288 render a decision and enter an order within seven days after the day on which the final decision
289 maker receives the recommendation.

290 Section 7. Section **67-21-4** is amended to read:

291 **67-21-4. Choice of forum -- Remedies for employee bringing action -- Proof**
292 **required.**

293 (1) (a) Except as provided in Subsection (1)(b) or (d), and subject to Subsections (1)(d)
294 through (e), an employee who alleges a violation of this chapter may bring a civil action for
295 appropriate injunctive relief, damages, or both, within 180 days after the occurrence of the
296 alleged violation of this chapter.

297 (b) Except as provided in Subsection (1)(d):

298 (i) an employee of a political subdivision that has adopted an ordinance described in
299 Section 67-21-3.6:

300 (A) may bring a civil action described in Subsection (1)(a) within 180 days after the
301 day on which the employee has exhausted administrative remedies; and

302 (B) may not bring a civil action described in Subsection (1)(a) until the employee has
303 exhausted administrative remedies; and

304 (ii) an employee of a state institution of higher education:

305 (A) may bring a civil action described in Subsection (1)(a) within 180 days after the
306 day on which the employee has exhausted administrative remedies; and

307 (B) may not bring a civil action described in Subsection (1)(a) until the employee has
308 exhausted administrative remedies.

309 (c) Except as provided in Subsection (1)(d), a public entity employee who is not a
310 legislative employee or a judicial employee may bring a claim of retaliatory action by selecting

one of the following methods:

(i) filing a grievance with the Career Service Review Office in accordance with Section 67-19a-402.5; or

(ii) bringing a civil action for appropriate injunctive relief, damages, or both, within 180 days after the occurrence of the alleged violation of this chapter.

(d) (i) A claimant may bring an action after the 180-day limit described in this Subsection (1) if:

(A) the claimant originally brought the action within the 180-day time limit;

(B) the action described in Subsection (1)(d)(i)(A) failed or was dismissed for a reason other than on the merits; and

(C) the claimant brings the new action within 180 days after the day on which the claimant originally brought the action under Subsection (1)(d)(i)(A).

(ii) A claimant may commence a new action under this Subsection (1)(d) only once.

(e) A public entity employee who files a grievance under Subsection (1)(d)(i):

(i) may not, at any time, bring a civil action in relation to the subject matter of the grievance;

(ii) may seek a remedy described in Subsection 67-21-3.5(2); and

(iii) waives the right to seek a remedy or a type of damages not included in Subsection 67-21-3.5(2).

(f) A public entity employee who files a civil action under Subsection (1)(d)(ii) may not, at any time, file a grievance with the Career Service Review Office in relation to the subject matter of the civil action.

(2) An employee who brings a civil action under this section shall bring the action in the district court for the county where the alleged violation occurred, the county where the complainant resides, or the county where the person against whom the civil complaint is filed resides or has the person's principal place of business.

~~[(3) To prevail in an action brought under this section, the employer shall prove by substantial evidence that the employer's action was justified.]~~

(3) (a) An employee who brings an action under this section has the burden of proving by a preponderance of the evidence that the employee, in good faith, engaged in protected reporting and suffered a retaliatory action.

(b) If the employee satisfies the burden described in Subsection (3)(a), the employer has the burden of proving by substantial evidence that the employer's action was justified.

(c) If the employer satisfies the burden described in Subsection (3)(b), the employee has the burden of proving by a preponderance of the evidence that the employer's justification is pretextual.

Section 8. Section **67-21-6** is amended to read:

67-21-6. Civil fine.

(1) (a) A person who violates this chapter is liable for a civil fine of not more than \$500.

(b) The person who takes [~~an adverse~~] a retaliatory action against an employee in violation of this chapter, and not the public body that employs the employee, shall, after receiving notice and an opportunity to be heard, pay the civil fine under this Subsection (1).

(c) If a person is ordered to pay a civil fine under this Subsection (1), the employer may dismiss the person who took the [~~adverse~~] retaliatory action in violation of this chapter.

(2) A civil fine ordered under this chapter shall be submitted to the state treasurer for deposit in the General Fund.

(3) The civil fine described in this section may be imposed if a violation of this chapter is found by:

(a) an independent personnel board described in Subsection 67-21-3.6(1)(a) or 67-21-3.7(1)(a);

(b) the Career Service Review Office; or

(c) a court.