

Accountability Report Card Summary 2009
Arizona

Arizona has a relatively strong whistleblower law:

- Scoring only 58 out of a possible 100 points; and
- Ranking 12th out of 51 (50 states and the District of Columbia)

Arizona has very moderately broad coverage (18 out of 33 possible points) with limited usability (14 out of 33) and strong remedies (26 out of 33).

Arizona's full Whistleblower Report Card *page 2*
Narrative summary of Arizona's law *page 5*

Arizona Accountability Index Report card
 Coverage, Usability & Strength — Rating on a 100 Point Scale
 § 38-531 *et. seq.* (2006)
 § 23-1501 (2006)
 § 23-425

A Breadth of Coverage (33 points possible from 10 factors).

Does the statute cover disclosures of –

Factor	Maximum Points	Awarded Points
1. Violation of state or federal law, rules or regulations	6 points	6 points ¹
2. Gross mismanagement	3 points	3 points
3. Abuse of authority (including violations of agency policy)	3 points	3 points
4. Waste of public funds or resources	3 points	3 points
5. Danger to health and/or public safety and/or environment	5 points	2 points ²
6. Communication of scientific opinion or alteration of technical findings	5 points	0 points
7. Breaches of professional ethical canons	5 points	0 points

Does the statute provide –

8. Employee may refuse to carry out illegal or improper orders	1 point	1 point ³
9. Prohibition on “gag orders” to prevent employee disclosures	1 point	0 points
10. Whistleblower protection does not preclude	1 point	0 points

¹ Arizona has two statutes that protect state employees from reprisal actions in whistleblower situations. The first statute provides that it is a prohibited personnel practice for an state employee who has control over personnel actions to take reprisal against a state employee who discloses information of a matter of public concern to a public body, which the employee reasonably believes evidences: (1) a violation of any law, or (2) mismanagement, a gross waste of monies, or an abuse of authority. The second statute has a more limited scope and applies to public and private sector employees. It provides that an employee has a claim for termination of employment if the termination was in retaliation for, among other things: (1) **the employee’s refusal to commit an act or omission that would violate the Constitution and laws of Arizona, and, (2) the disclosure by the employee, in a reasonable manner, that he/she has information or a reasonable belief that the employer or its employee, has violated, is violating, or will violate the Constitution or statutes of Arizona.**

² Reports of occupational health and safety violations are covered. A.R.S. § 23-425.

³ An employer cannot terminate the employment relationship if the whistleblower employee refuses to commit an act or omission that would violate the Constitution of Arizona or the statutes of the state.

collective bargaining or other rights		
	<u>Maximum Score</u> <u>33 points</u>	<u>Awarded Score</u> <u>18 points</u>

B. Usability: Scope of Protection (33 points possible from 10 factors)

Do the laws protect disclosures made to –

Factor	Maximum Points	Awarded Points
1. Any person or organization, including public media	24 points	0 points

Or does the statute protect disclosures made to –

2. Any state executive or legislative body or person employed by such entities	4 points	4 points- The Arizona Whistle-Blower Act provides that disclosure will be made to a public body, which is defined to include the state legislature or the governor.
3. Testimony in any official proceeding	4 points	1 points ⁴
4. Any state or federal law enforcement or investigative body or entity or its employees	3 points	3 points
5. Any federal or non-state governmental entity	3 points	0 points ⁵
6. Co-workers or supervisors within the scope of duty	3 points	3 points ⁶
7. Anyone as provided in paragraphs 2 thru 6 (above) without prior disclosure to another state official or supervisor	3 points	3 points

⁴ The Occupational Health and Safety statute provides protection for employees who testify based on a violation of the code.

⁵ The definition of “public body” in the Whistle-Blower Act includes a county attorney, the board of supervisors of a county, etc. We did not assign 3 points to this Factor because the focus of this Scorecard is on state public employees, not the employees of lesser jurisdictions in the state. Also, the second statute does not define “public body”. Consequently we could not assign points to this Factor.

⁶ Under the second statute disclosure could be made to the employer or a representative of the employer who the employee reasonably believes is in a managerial or supervisory position and has the authority to investigate the information provided and to take action to prevent further violations of the Arizona Constitution and the state’s statutes.

Does the state law –

8. Require an investigation by state auditor or other investigative entity of whistleblower disclosures	1 point	0 points
9. Have a statute of limitations of one year or longer for filing complaints	3 points (2 points if 6 months or longer and 1 point if 60 days or longer)	0 points ⁷
10. Allow qui tam or false claim actions for recovery of “bounty” in cases of fraud against the state	5 points (2 points if a qui tam statute of limited scope)	0 points
	<u>Maximum Score</u> <u>33 points</u>	<u>Awarded Score</u> <u>14 points</u>

C. Strength: Remedies against retaliation (33 points possible from 11 factors)

Does the statute provide for –

Factor	Maximum Points	Awarded Points
1. Prohibition on retaliatory actions affecting a state employee’s terms and conditions of employment	4 points	4 points
2. Opportunity for administrative challenge	4 points	4 points
3. Opportunities for court challenge	4 points	4 points
4. Trial by jury	3 points	0 points ⁸
5. Burden shifting upon prima facie showing.	1 point	0 points
6.. Make whole remedies (court costs, attorney fees, back pay; restoration of benefits, etc.)	3 points	3 points
7. Actual/compensatory damages	3 points	3 points
8. Interim relief, injunction or stay of personnel actions	3 points	3 points
9. Transfer preference for prevailing whistleblower or ban on blackballing	3 points	0 points
10. Punitive damages or other fines and penalties	3 points	3 points ⁹
11. Personnel actions against	2 points	2 points ¹⁰

⁷ Only reference to a statute of limitations appears in the first statute. An administrative action must be started within 10 days of the effective action taken.

⁸ Neither statute mentions the right to trial by jury. However, the court actions permitted probably will involve issues that have traditionally been assigned to a jury to decide. We have not investigated whether the Arizona Constitution or other statutes provide for trial by jury in such court actions.

⁹ Civil penalty of up to \$5,000.

April 16, 2009

State Legislation Protecting State Employee Whistleblowers

State- Arizona

Statutes- (1) A.R.S. § 38-531 *et. seq.* (2006) (2) A.R.S. § 23-1501 (2006) and (3) A.R.S. § 23-425

Provisions- Arizona has two statutes that protect state employees from reprisal actions in whistleblower situations. The first, § 38- 531 *et. seq.* (2006), the Arkansas Whistle-Blower Act, provides an administrative mechanism for challenging such actions and authorizes court actions to provide injunctive relief. An Arizona court has held that a person may bring a suit under this statute without first exhausting administrative remedies. *Walters v. Maricopa County*, 195 Ariz. 476, 990 P.2d 677 (Ct. App. 1999). The second statute, § 23-1501 (2006), the Arizona Employment Protection Act, provides that an employee, whether a public or private sector employee, has a claim against an employer for termination of employment in certain whistleblower situations.

The first statute provides that it is a prohibited personnel practice for an state employee who has control over personnel actions to take reprisal against a state employee who discloses information of a matter of public concern to a public body, which the employee reasonably believes evidences: (1) a violation of any law, or (2) mismanagement, a gross waste of monies, or an abuse of authority. The disclosure by the public employee shall be in writing and contain the date of disclosure, the employee's name, the nature of the matter of public concern, and the date(s) when the matter(s) occurred. **The statute contains no requirement that the employee first disclose his concern to his employer or any supervisor. The term "public body is defined to include the state attorney general, the state legislature, the governor, a federal, state or local law enforcement agency and the county attorney.**

A state employee may file a complaint with an appropriate independent personnel board that the reprisal against him is a result of his disclosure of information to a public body. If a prohibited personnel practice is found to have occurred, the personnel action taken shall be rescinded and lost pay and benefits will be restored. The state employee may also bring a civil action seeking injunctive relief and if successful may recover attorneys' fees, costs, back pay, general and special damages, and full reinstatement to the employee's position. If reprisal is taken because the employees disclosed information in a manner prohibited by law or that was confidential by law, this action does not constitute a prohibited personnel practice. An employee who knowingly commits a prohibited personnel practice shall be ordered by the state personnel board to pay a civil penalty of up to \$5,000 and may be subjected to appropriate disciplinary action, including dismissal.

The second statute has a more limited scope and applies to public and private sector employees. It provides that an employee has a claim for termination of employment if the

termination was in retaliation for, among other things: (1) the employee's refusal to commit an act or omission that would violate the Constitution and laws of Arizona, and, (2) the disclosure by the employee, in a reasonable manner, that he/she has information or a reasonable belief that the employer or its employee, has violated, is violating, or will violate the Constitution or statutes of Arizona, to either the employer, or to a representative of the employer, who the employee reasonably believes is in a managerial or supervisory position and has the authority to investigate and to take action to prevent further violations, or to an employee of a public body or political subdivision of the state, or an agency of a political body or political subdivision. **The term "public body" is not defined in the second statute.** The claim for wrongful termination can be brought in Arizona courts and tort damages provided if the employee prevails.

The third statute appears in the Occupation Health and Safety chapter of Arizona's statutes. It protects all employees, including state and local government workers (A.R.S. §23-401). The statute provides that no employer may discharge or in any way discriminate against an employee because he has filed a complaint, instituted an action, or testified against such employer regarding an occupational health and safety violation. The Occupational Health and Safety code covers things such as exposure to asbestos and other forms of particulate matter. The statute provides that an action for discrimination may be brought within 30 days of the violation and that the commission shall investigate and return a decision within 90 days. Possible relief includes rehiring or reinstatement to former position with back pay.