

Accountability Report Card Summary 2009
California

California has the most complete state whistleblower law:

- Scoring 75 out of a possible 100 points; and
- Ranking 2nd (to the District of Columbia) out of 51 states examined.

California has broad coverage (20 out of 33 possible points) with maximum usability (33 out of 33) and strong remedies (21 out of 33) plus the one bonus point awarded for employee notification of rights.

California's full Whistleblower Report Card *page 2*
Narrative summary of California's law *page 7*

California Accountability Index Report card

Coverage, Usability & Strength — Rating on a 100 Point Scale

Whistleblower Protection Act, Cal. Gov. Code § 9149.20 *et. seq.* (2006);

California Whistleblower Protection Act, Cal. Gov. Code § 8547 *et. seq.* (2006);

Cal Lab. Code § 1102.5 *et. seq.* (2006); and Cal Code Civ. Proc. § 425.16 (2006)

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 ²
3. Abuse of authority (including violations of agency policy)	3 points	0 points
4. Waste of public funds or resources	3 points	3 points ³
5. Danger to health and/or public safety and/or environment	5 points	5 points ⁴

¹ California has several whistleblower statutes that involve violations of federal or state law, rules, or regulations. The Whistleblower Protection Act

(Statute I) protects state employees disclosing to a legislative committee. “improper government activity.” This term, in part, refers to any activity by a state government agency or by a state employee in the performance of his official duties, whether or not within the scope of his employment, which is in violation of state or federal law or regulation. Such activity, includes, but is not limited to, corruption, malfeasance, bribery, fraudulent claims, theft of government property, etc.

The California Whistleblower Protection Act (Statute II) protects **any good faith communication** that discloses or demonstrates an intention to disclose information that may evidence “an improper government activity.” (See definition earlier in this item). **(This statute also contains in one section a mini-whistleblower statute for University of California employee’s right to disclose improper activity. The California State University is covered by the provisions of Statue II.)**

Part of the California Labor Code also contains whistleblower provisions (Statute III). It protects disclosures to a government or law enforcement agency, where the state employee has reasonable cause to believe that the information discloses a violation of state or federal law or a violation or noncompliance with a state or federal regulation. (Disclosure to the employee’s state agency employer is considered a disclosure to a government or law enforcement agency.) **Also, Statute III provides for a whistleblower hotline in the Attorney General’s office, whereby persons can report possible violations of state or federal statutes, rules or regulations.**

Relatedly, a California statute (Statute IV) allows a person to make a special motion to strike a law suit aimed at affecting a person’s U.S and California constitutional right of petition or free speech.

² Both Statutes I and II define “improper government activity” to include any activity by a state government agency or by a state employee in the performance of his official duties, whether or not within the scope of his employment, which involves gross misconduct, incompetence, or inefficiency.

³ Statutes I and II define “improper government activity” to include any activity that is economically wasteful. (For full language of this definition, see 1 and 2 above.)

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 ⁵
9. Prohibition on “gag orders” to prevent employee disclosures	1 point	1 point ⁶
10. Whistleblower protection does not preclude collective bargaining or other rights	1 point	1 point ⁷
	<u>Maximum Score</u> <u>33 points</u>	<u>Awarded Score</u> <u>20 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	24 points ⁸

⁴ Statute II defines “protected disclosure” as any good faith communication that discloses or demonstrates an intention to disclose, and made for the purpose of remedying, any condition that may significantly threaten the health or safety of state employees or the public.

⁵ Statute III prohibits retaliation against an employee for refusing to participate in an activity that would result in a violation of state or federal law, or a violation or noncompliance with a state or federal rule or regulation. Statute II appears to protect any employee from official pressure to carry out an illegal order. It defines the term “illegal order” to mean any directive to violate or assist in violating any federal or state or regulation or any order to work or cause others to work in conditions outside their line of duty that would unreasonably threaten the health or safety of employees or the public.

⁶ Statute III establishes a prohibition of “gag orders.” An employer may not enforce, adopt, and make any rule or policy preventing an employee from disclosing information to a government or law enforcement agency. The legislative purposes for both Statutes I and II sound in a prohibition on “gag orders” by encouraging state employees to disclose information about irregular state government activities. Statute I encourages state employees to disclose improper government activities. Statute II declares that state employees should be free to report waste, fraud, abuse of authority, violation of law, or a threat to public health without fear of reprisal.

⁷ Statute II provides that nothing in the Statute shall diminish the rights, privileges or remedies of any state whistleblower employee under any federal or state law or under any employment contract or collective bargaining agreement.

⁸ Statute II appears to allow disclosures to any person, although the State Auditor may conduct an investigation of improper government activities. Statutes I and III provide for specific disclosures as noted below. However, because Statute II does not restrict disclosures to any particular persons or groups, we have awarded 24 points for Factor 1 and have not awarded points for the other two statutes in the Factors that follow Factor 1. Factors 2-5 assign points for specific disclosures and are not as broad as the disclosures covered by Factor 1.

Or does the statute protect disclosures made to –

2. Any state executive or legislative body or person employed by such entities	4 points	0 points ⁹
3. Testimony in any official proceeding	4 points	0 points
4. Any state or federal law enforcement or investigative body or entity or its employees	3 points	0 points ¹⁰
5. Any federal or non-state governmental entity	3 points	0 points
6. Co-workers or supervisors within the scope of duty	3 points	0 points
7. Anyone as provided in paragraphs 2 thru 6 (above) without prior disclosure to another state official or supervisor	3 points	0 points

Does the state law –

8. Require an investigation by state auditor or other investigative entity of whistleblower disclosures	1 point	1 point ¹¹
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)	3 points ¹²
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)	5 points California False Claims Act. Govt. Code § 12650 <i>et. seq.</i> (2006).
	<u>Maximum Score</u> <u>33 points</u>	<u>Awarded Score</u> <u>33 points.</u>

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

⁹ Statute I disclosures are made to legislative committees. (See discussion in note 8.)

¹⁰ In Statute III, the state employee makes disclosures to a government or law enforcement agency. A report by an employee to his or her employer is a disclosure of information to a government or law enforcement agency. (See discussion in note 8.)

¹¹ Under Statute II the California State Auditor conducts an investigation when he obtains information about improper government activities. Under Statute III disclosures made to a government or law enforcement agency may lead in an investigation. Statute I disclosures could be made to an investigative committee of either part of the State legislature.

¹² Statute II requires that a reprisal complaint be filed with the State Personnel Board within 12 months of the most recent act of reprisal complained about. Statutes I and III do not contain statutes of limitations for bringing administrative complaints or causes of action for reprisals. Other California statutes may establish a time limit for these proceedings.

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 ¹³
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 ¹⁴
5. Burden shifting upon prima facie showing.	1 point	1 point ¹⁵
6. Make whole remedies (court costs, attorney fees, back pay; restoration of benefits, etc.)	3 points	0 points
7. Actual/compensatory damages	3 points	3 points
8. Interim relief, injunction or stay of personnel actions	3 points	0 points
9. Transfer preference for prevailing whistleblower or ban on blackballing	3 points	0 points
10. Punitive damages or other fines and penalties	2 points	2 points ¹⁶
11. Personnel actions against managers found to have retaliated	3 points	3 points ¹⁷

¹³ Statutes I and II prohibit retaliatory actions affecting employee's terms and conditions of employment.

¹⁴ Jury trial not specifically mentioned in any of the 3 statutes. Statutes I and II provides that an employee who violates the reprisal prohibition may be liable in an action for civil damages to an offended party (affected state employee). We did not determine whether the plaintiff/defendant in such an action might have a right to a jury trial in such cases under California law or it's Constitution. Statute II provides that before bringing a suit for damages, the state employee must have filed an administrative complaint with the State Personnel Board and the Board had issued or failed to have issued findings. A court may award punitive damages if the reprisal action was malicious. Under Statute III, an injured employee is not prevented from recovering damages from his employer for injury suffered through a violation of the prohibition on retaliation. This implies that the employee can bring a suit for damages caused by the employer's action. As with the other Statutes, a right to trial by jury might be available under California law or the State's Constitution.

¹⁵ Statutes II and III have such a provision.

¹⁶ Statute II provides for punitive damages in case of a malicious reprisal action. Also, any person who intentionally engages in an acts of reprisal because a state employee made a protected disclosure is subject to a fine not to exceed \$10,000 and imprisonment in the county jail for a period not to exceed a year. Under Statute III an employer, who violates the prohibition against reprisal actions, is guilty of a misdemeanor, punishable, in the case of an individual, by imprisonment in the county jail; not to exceed 1 year or a fine not to exceed \$1,000, or both. This does not appear to apply to the state governmental entity employer.

¹⁷ Statute II provides that after the State Auditor has completed an investigative report, he shall send a copy of the report to the official responsible for hiring a state agency's employees. Such person may file a notice of adverse action against the person making the reprisal action.

	<u>Maximum Score</u> 33 points	<u>Awarded Score</u> 21 points
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Bonus Point (1 point): Posting or employee notice of whistleblower rights required.

Factor	Maximum Score	Awarded Score
Posting	1 point	1 point ¹⁸

Total Points

100 Points

75 Points

¹⁸ Only Statute III provides for a display of employees' rights under whistleblower laws.

April 16, 2009

State Legislation Protecting State Employee Whistleblowers

State- California

Statutes - Whistleblower Protection Act, Cal. Gov. Code § 9149.20 *et. seq.* (2006); California Whistleblower Protection Act, Cal. Gov. Code § 8547 *et. seq.* (2006); and Cal. Lab. Code §1102.5 (2006)

Provisions- California has several statutes protecting state public employees' whistleblower rights. Two statutes bear the title Whistleblower Protection Act and the third statute applies provisions of the California Labor Code to state public employees. **The Whistleblower Protection Act provides that it is the intent of the legislature that state employees and other persons should disclose, to the extent not expressly prohibited by law, improper government activities.** It prohibits a state employee, including individuals employed by the California State University and the University of California, to use the employee's official authority to intimidate, threaten, coerce, or command for the purpose of interfering with another employee's right to disclose to a legislative committee "improper government activities."

"Improper government activities" refers to an activity by a government agency or by an employee that is undertaken in the performance of the employee's official duties, whether or not that action is within the scope of his or her employment, and that (1) is in violation of any state or federal law or regulation, or (2) is economically wasteful, or involves gross misconduct, incompetence, or inefficiency. Any state employee who violates the prohibition on intimidating another employee may be liable in an action for civil damages, brought against him by the offended party.

In enacting the California Whistleblower Protection Act, the state legislature finds and declares that (1) state employees should be free to report waste, fraud, abuse of authority, violation of law, or threat to public health without fear of retribution and (2) public servants best serve the citizenry when they can be candid and honest without reservation in conducting the people's business. An employee may not directly or indirectly use his official authority to intimidate, threaten, or coerce another employee from reporting "improper government activity" or any condition that may significantly threaten the health or safety of employees or the public if disclosure was made for the purpose of remedying that condition. The definition of an "improper government activity" is the same as under the Whistleblower Protection Act. Protection under the Act is afforded to all current employees and former employees who met the statute's criteria during employment. Any state employee who violates this prohibition may be liable in an action for civil damages brought against him by the offended party. Punitive damages may be awarded when the employee's actions are shown to be malicious.

A state employee may also file a written complaint with his or her supervisor, manager, or the appointing power alleging actual or attempted acts of reprisal. Any person who intentionally engages in acts of reprisal is subject to a fine not to exceed \$10,000 and imprisonment for a period not to exceed one year. The State Auditor investigates and reports on improper government activities. The California Whistleblower Protection Act also provides protection from reprisals for employees of the University of California system and the California State University system.

The provisions of the California Labor Code concerning an employee's right to disclose information to government or law enforcement agencies also applies to State employees. An employer may not adopt or enforce any rule, regulation, or policy preventing an employee from making such a disclosure where the employee has reasonable cause to believe that the information discloses a violation of a state or federal statute, or a violation or noncompliance with a state or federal rule or regulation. An employer also may not retaliate against such an employee in such a circumstance and also if the employee refuses to participate in an activity that would result in a violation of a state or federal statute, or a violation or noncompliance with a state or federal rule or regulation.

Under this statute the Office of Attorney General is to maintain a whistleblower hotline to receive calls concerning violations of federal or state statutes, rules, or regulations. An employer who violates the statute is guilty of a misdemeanor and if an individual, is subject to a fine not to exceed \$1,000 or up to a year in jail, or both. If the employer is a corporation, the punishment is a fine not to exceed \$5,000.