

Accountability Report Card Summary 2009
Delaware

Delaware has a relatively strong state whistleblower law:

- Scoring only 59 out of a possible 100 points; and
- Ranking 9th out of 51 (50 states and the District of Columbia).

Delaware has moderately broad coverage (14 out of 33 possible points) with a very high degree of usability (28 out of 33) and middling remedies (17 out of 33).

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

Delaware Accountability Index Report card

Coverage, Usability & Strength — Rating on a 100 Point Scale
 Protection of public employees reporting suspected violation of law- 29 Del. § 5115
 (2005); and
 Delaware Whistleblowers’ Protection Act- 19 Del. § 1701 (2005).

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 | 0 points |
| 3. Abuse of authority (including violations of agency policy) | 3 points | 0 points |
| 4. Waste of public funds or resources | 3 points | 3 points ² |
| 5. Danger to health and/or public safety and/or environment | 5 points | 3 points ³ |
| 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 |
| 9. Prohibition on “gag orders” to prevent employee disclosures | 1 point | 0 points |
| 10. Whistleblower protection does not preclude collective bargaining or other rights | 1 point | 1 point |

¹ Delaware has two whistleblower protection statutes. The first applies to full-time or part-time employees of the State. The second applies to all public and private employers including the state government. Under the first statute, no public employee shall be discharged, threatened, or otherwise discriminated against with respect to the terms or conditions of employment **because the employee reported, in a written or oral communication, to an elected official, a violation or suspected violation of law or regulation under the laws of the United States or of Delaware, unless the employee knows that the report is false.**

² Employee reports or is about to report an act or omission to protect any person from fraud, deceit, or misappropriation of public or private funds or assets under the control of the employer.

³ Employee reports or is about to report an act or omission to protect health, safety or environmental hazards on the employer’s premises or elsewhere.

| | | |
|--|--|--|
| | <u>Maximum Score</u> <u>33 points</u> | <u>Awarded Score</u> <u>14 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 |
| 3. Testimony in any official proceeding | 4 points | 4 points |
| 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 | 3 points |
| 6. Co-workers or supervisors within the scope of duty | 3 points | 3 points |
| 7. Anyone as provided in paragraphs 2 thru 6 (above) without prior disclosure to another state official or supervisor | 3 points | 3 points |

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) | 3 points ⁴ |
| 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 |

⁴ Second statute allows civil action to be brought within 3 years. First statute allows civil action within 90 days of the alleged prohibitive event.

| | | |
|--|--|--|
| | <u>Maximum Score</u> <u>33 points</u> | <u>Awarded Score</u> <u>28 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 | 0 points |
| 3. Opportunities for court challenge | 4 points | 4 points |
| 4. Trial by jury | 3 points | 0 points ⁵ |
| 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 ⁶ |
| 9. Transfer preference for prevailing whistleblower or ban on blackballing | 3 points | 0 points |
| 10. Punitive damages or other fines and penalties | 3 points | 0 points |
| 11. Personnel actions against managers found to have retaliated | 2 points | 0 points |
| | <u>Maximum Score</u> <u>33 points</u> | <u>Awarded Score</u> <u>17 points</u> |

Bonus Point (1 point): Posting or employee notice of whistleblower rights required.

| Factor | Maximum Score | Awarded Score |
|---------------|----------------------|----------------------|
| Posting | 1 point | 0 points |

Total points

100 points

59 points

⁵ Neither of two statutes requires a trial by jury for either party. However, issues in civil action might involve issues that are usually decided by juries. We did not review whether other Delaware statutes or the State's Constitution may provide for trial by jury.

⁶ First statute provides for injunctive relief.

April 16, 2009

State Legislation Protecting State Employee Whistleblowers

State- Delaware

Statute- Protection of public employees reporting suspected violation of law- 29 Del. § 5115 (2005) and Delaware Whistleblowers' Protection Act- 19 Del. § 1701 (2005).

Provisions- Delaware has two whistleblower protection statutes. The first applies to full-time or part-time employees of the State. The second applies to all public and private employers including the state government. Under the first statute, no public employee shall be discharged, threatened, or otherwise discriminated against with respect to the terms or conditions of employment because the employee reported, in a written or oral communication, to an elected official, a violation or suspected violation of law or regulation under the laws of the United States or of Delaware, unless the employee knows that the report is false. The term "elected official" refers to the Auditor of Accounts, a state official elected by popular vote and employees of his office **and does not include members of the legislature of Delaware. An employee who alleges a violation of the statute may bring a civil action for appropriate injunctive relief, actual damages, or both, within 90 days after the occurrence of the violation.**

The Delaware Whistleblowers' Protection Act applies to both public or private employers. It provides protection for legitimate whistleblower activities. The statute provides that an employer shall not discharge, threaten or otherwise discriminate against an employee regarding the employee's terms and conditions of employment because (1) the employee or a person acting on his behalf, reports, or is about to report, to a public body, verbally or in writing, a violation which the employee knows or reasonable believes has occurred or is about to occur, **unless the employee knows, or has reason to know, that the report is false;** (2) an employee participates or is requested by a public body to participate in an investigation, hearing, or inquiry by that public body, or a court action in connection with a violation; (3) an employee refuses to commit or assist in the commission of a violation; or (4) the employee verbally or in writing reports to the employer or to the employee's supervisor a violation, which the employee knows or reasonably believes, has occurred or is about to incur, **unless the employee knows or has reason to know that the report is false.**

The term "public body" includes an agency, department, division, bureau, board, commission, authority or other body in the executive branch of state government or an employee of such entities. **It also includes a legislator or employee of the legislative branch of state government and a federal agency or employee of that agency. The term "violation" means an act or omission by an employer, or an agent thereof, that is (1) materially inconsistent with, or a serious deviation from, standards implemented pursuant to a law, rule, or regulation promulgated under the laws of Delaware or the United States, to protect employees or other persons from health, safety, or environmental hazards while on the employer's premises, or elsewhere; or**

(2) materially inconsistent with, or a serious deviation from, financial management or accounting standards implemented pursuant to a rule or regulation promulgated by the employer or under the laws of Delaware or the United states, to protect any person, from fraud, deceit, or misappropriation of public or private funds or assets under the control of the employer.

A person who alleges a violation of the whistleblowers' law may bring a civil action for appropriate declaratory relief, or actual damages, or both, within 3 years after the occurrence of the violation. The term "damages" means damages for injury or loss caused by each violation of the statute. In its judgment, a court shall order, as it considers appropriate, reinstatement of the employee, back wages, reinstatement of fringe benefits, actual damages, expungement of records, or any combination of these remedies. The court may also order, if it considers appropriate, the payment of all or part of the costs of litigation, including attorney's fees.