

Accountability Report Card Summary 2009
Massachusetts

Massachusetts has a relatively good state whistleblower law:

- Scoring 63 out of a possible 100 points; and
- Ranking 4th out of 51 (50 states and the District of Columbia).

Massachusetts's statute has incomplete coverage (13 out of 33 possible points) with a very good degree of usability (25 out of 33) and very good remedies (24 out of 33) plus the one bonus point awarded for employee notification of rights. Massachusetts also has False Claims Act for the recovery of "bounty" in cases of fraud against the state.

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Massachusetts Accountability Index Report card

Coverage, Usability & Strength — Rating on a 100 Point Scale
Administration of the Government, Labor and Industries,
Miscellaneous Provisions-ALM GL ch. 149, § 185 (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
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	0 Points
5. Danger to health and/or public safety/and/or the environment	5 points	5 Points
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
	<u>Maximum Score</u> <u>33 points</u>	<u>Awarded Score</u> <u>13 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

¹ Once whistleblower brings a court action, all these other rights are waived.

Or does the statute only 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 ²
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	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 ³
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-ALM GL ch.12 § 5A <i>et. seq.</i> (2005)
	<u>Maximum Score</u> <u>33 points</u>	<u>Awarded Score</u> <u>25 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 Statute provides that employee can make disclosure or threaten to disclose information to a supervisor.

³ Two-year statute of limitations to bring court action.

2. Opportunity for administrative challenge	4 points	4 Points ⁴
3. Opportunities for court challenge	4 points	4 Points
4. Trial by jury	3 points	3 Points
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	2 points	0 Points
11. Personnel actions against managers found to have retaliated	3 points	0 Points
	<u>Maximum Score</u> 33 points	<u>Awarded Score</u> 24 Points

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

Factor	Maximum Score	Awarded Score
Posting	1 point	1 Point-ALM GL ch.149 § 185(g) (2006)

Total Points

100 Points

63 Points

⁴ However these remedies waived once a suit is brought.

April 16, 2009

State Legislation Protecting State Employee Whistleblowers

State- Massachusetts

Statute- Administration of the Government, Labor and Industries, Miscellaneous Provisions- ALM GL. ch. 149, § 185 (2005)

Provisions- The Commonwealth of Massachusetts and its agencies shall not take any retaliatory action against an employee of governmental entities because the employee does any of the following: (1) discloses or threatens to disclose to a supervisor or to a public body an activity, policy, or practice that the employee reasonably believes is in violation of a law, or a rule or regulation promulgated pursuant to law, or which the employee reasonably believes poses a risk to public health, safety, or the environment; (2) provides information or testifies before a public body conducting an investigation into matters of the type referred to in paragraph (1); (3) objects to, or refuses to participate in, matters of the type referred to in paragraph (1). “Retaliatory action” refers to any adverse action taken with respect to an employee’s terms and conditions of employment. A “public body” refers to any federal or state legislature, judiciary, regulatory, administrative or public agency or authority, law enforcement agency or prosecutorial office, or any division, bureau, office, or committee of any of the previously described public bodies. It also includes any member or public employee of the U.S. Congress or the State of Massachusetts legislature, or of the federal or state judiciary.

The protection against retaliatory action for the disclosure or threat of disclosure of information referred in (1) above shall not apply to an employee who makes a disclosure to a public body unless the employee has brought the matter to the attention of a supervisor of the employee by written notice and has afforded the employer a reasonable a reasonable opportunity to correct the matter in question. This notice to the employer is not required if the employee (i) is reasonably certain that the matter is known to one or more of the supervisors of the employer and the situation is emergency in nature; (ii) reasonably fears physical harm as a result of the disclosure provided; or (iii) makes a disclosure to a public body which is part of the federal or state judiciary or a law enforcement agency for the purpose of providing evidence of what the employee reasonably believes to be a crime.

An employee aggrieved by a violation of the statute may within two years bring a civil action with a right to a jury trial. All remedies available in common law tort actions shall be available to a prevailing plaintiff. The court may also issue preliminary and permanent injunctions, reinstate the employee to the same or equivalent position and to full benefits and seniority rights, provide three times lost wages, and order the employer to pay reasonable costs, and attorneys’ fees. Nothing in the statute shall be deemed to diminish the employee’s rights or remedies under any federal or state law or regulation, under any collective bargaining agreement or employment contract. However the commencement of

a private action by the employee shall be deemed a waiver by the employee of the rights and remedies available to him under any contract, collective bargaining agreement, state law, rule or regulation, or under the common law.

Massachusetts has a False Claims Act, which allows a person to bring an action alleging that individuals, companies, or contractors had defrauded the State or any of its units, entities, or other bodies. The person may share a percentage of any recovery that may be obtained. ALM GL ch.12 5A *et. seq.* (2005).