

**Accountability Report Card Summary 2009**  
**Montana**

Montana has an uneven state whistleblower law:

- Scoring 54 out of a possible 100 points;
- Ranking 17<sup>th</sup> out of 51 (50 states and the District of Columbia).

Montana's statute has very limited coverage (6 out of 33 possible points) with a high degree of usability (32 out of 33) and average remedies (16 out of 33). Montana also allows qui tam or false claim actions for recovery of "bounty" in cases of fraud against the state.

*Montana's full Whistleblower Report Card*  
*Narrative summary of Montana law*

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## Montana Accountability Index Report card

Coverage, Usability & Strength — Rating on a 100 Point Scale  
Wrongful Discharge from Employment Act- Mont. Code Anno. § 39-2-901 *et. seq.*  
(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	0 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 environment	5 points	5 points <sup>1</sup>
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 <sup>2</sup>
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	0 point <sup>3</sup>
	<b><u>Maximum Score</u></b> <b><u>33 points</u></b>	<b><u>Awarded Score</u></b> <b><u>6 points</u></b>

<sup>1</sup> The same statute applies to the discharge of private and public sector employees. A discharge from employment is wrongful if, among other things, it was in retaliation for the employee’s refusal to violate public policy or for reporting a violation of public policy. “Public policy” means a policy in effect at the time of discharge concerning the public health, safety, or welfare established by constitutional provision, statute, or administrative rule.

<sup>2</sup> A discharge from employment is wrongful if, among other things, it was in retaliation for the employee’s refusal to violate public policy.

<sup>3</sup> This statute also does not apply to an employee covered by a collective bargaining agreement or a written contract of employment for a specific term. This means this statute does not provide the exclusive remedy for wrongful discharge from employment.

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

Do the laws protect disclosures made to –

<b>Factor</b>	<b>Maximum Points</b>	<b>Awarded Points</b>
1. Any person or organization, including public media	24 points	24 points <sup>4</sup>

**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
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
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 <sup>5</sup>

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 <sup>6</sup>
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

<sup>4</sup> The statute does not mention to whom the employee should report a violation of public policy affecting the public health, safety, or welfare. We think that it would be accurate to conclude that the statute must have meant that report could go to any person or organization, justifying an award of 24 points for this Factor.

<sup>5</sup> The statute does not provide that the employee’s reporting of a violation of public policy must be to any organization, person, or entity mentioned in Factors 2-6 above.

<sup>6</sup> A court action can be filed within 1 year from the date of discharge. However, the employer must first exhaust the employer’s written internal procedures. If these procedures are not completed within 90 days from the date the employee initiates them, the employee may file a cause of action and the internal procedures are considered exhausted.

	<b><u>Maximum Score</u></b> <b><u>33 points</u></b>	<b><u>Awarded Score</u></b> <b><u>32 points</u></b>
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**C. Strength: Remedies against retaliation (33 points possible from 11 factors)**

Does the statute provide for –

<b>Factor</b>	<b>Maximum Points</b>	<b>Awarded Points</b>
1. Prohibition on retaliatory actions affecting a state employee's terms and conditions of employment	4 points	4 points <sup>7</sup>
2. Opportunity for administrative challenge	4 points	4 points <sup>8</sup>
3. Opportunities for court challenge	4 points	3 points
4. Trial by jury	3 points	0 points <sup>9</sup>
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	0 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 <sup>10</sup>
11. Personnel actions against managers found to have retaliated	3 points	0 points
	<b><u>Maximum Score</u></b> <b><u>33 points</u></b>	<b><u>Awarded Score</u></b> <b><u>16 points</u></b>

<sup>7</sup> This sounds in terms and conditions of employment. "Discharge" includes a constructive discharge (voluntary termination of employment by an employee because of an intolerable situation) and any other termination of employment, including resignation, elimination of the job, layoff for lack of work, failure to recall or rehire, and any other cutback in the number of employees for a legitimate business reason.

<sup>8</sup> If the employer has written internal rules, these must be exhausted before bringing a court action.

<sup>9</sup> Statute does not mention trial by jury. Most of the relief to be provided is equitable, except for punitive damages, in the case of an employer's actual fraud or actual malice in the discharge of the employee. The statute provides that there is no right under any legal theory to damages for wrongful discharge, for pain and suffering, emotional distress, compensatory damages, punitive damages (except as previously set out) or any other form of damages. . If an employer had committed a wrongful discharge, the employee may be awarded lost wages and fringe benefits for a period of not to exceed 4 years from the date of discharge.

The statute also provides that except as stated above, no claim for discharge may arise from tort or express or implied contract.

<sup>10</sup> Punitive damages, in the case of an employer's actual fraud or actual malice in the discharge of an employee.

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

<b>Factor</b>	<b>Maximum Score</b>	<b>Awarded Score</b>
Posting	1 point	0 points

**Totals**

**100 points**

**54 points**

**April 16, 2009**

**State Legislation Protecting State Employee Whistleblowers**

**State-** Montana

**Statute-** Wrongful Discharge from Employment Act- Mont. Code Anno. § 39-2-901 *et. seq.* (2005)

**Provisions-** The same statute applies to the discharge of private and public sector employees. A discharge from employment is wrongful if, among other things, it was in retaliation for the employee's refusal to violate public policy or for reporting a violation of public policy. "Public policy" means a policy in effect at the time of discharge concerning the public health, safety, or welfare established by constitutional provision, statute, or administrative rule. (A discharge is also wrongful if it was not for good cause and the employee had completed the employer's probationary period of employment, or, the employer violated the express provisions of its own written personnel policy.) "Discharge" includes a constructive discharge (voluntary termination of employment by an employee because of an intolerable situation) and any other termination of employment, including resignation, elimination of the job, layoff for lack of work, failure to recall or rehire, and any other cutback in the number of employees for a legitimate business reason.

The statute does not apply to a discharge that is subject to any other state or federal statute that provides a procedure or remedy for contesting the dispute. These situations prohibit discharge for filing complaints, charges, or claims with administrative bodies or that prohibit unlawful discrimination based on race, national origin, age, disability, creed, religion, political belief, color, marital status, and other similar grounds. This statute also does not apply to an employee covered by a collective bargaining agreement or a written contract of employment for a specific term.

If an employer maintains written internal procedures under which an employee may appeal a discharge within the organizational structure of the employer, the employee must first exhaust these procedures before filing a civil action. A civil action must be filed within 1 year after the date of discharge. If an employer had committed a wrongful discharge, the employee may be awarded lost wages and fringe benefits for a period of not to exceed 4 years from the date of discharge. The employee may recover punitive damages otherwise allowed by law if it is established by clear and convincing evidence that the employer engaged in actual fraud or actual malice if the discharge was for the employee's refusal to violate public policy or reporting a violation of it. Except as previously provided in this paragraph about what the employee may recover, damages for wrongful discharge shall not include pain and suffering, emotional distress, compensatory damages, compensatory damages, or any other form of damages. In addition, no claim for discharge may arise from tort or express or implied contract.

A party may make a written offer to arbitrate a dispute that otherwise could be adjudicated under the statute. If a valid offer to arbitrate is made and accepted, arbitration is the exclusive remedy for the wrongful discharge dispute. Consequently, there is no right to bring or continue a law suit brought under the statute. The arbitrator's award is final and binding, subject to review of the arbitrator's decision under the provisions of the Uniform Arbitration Act.