

Accountability Report Card Summary 2009
Nebraska

Nebraska has an uneven state whistleblower law:

- Scoring 54 out of a possible 100 points, but its scope is varied;
- Ranking 17th out of 51 (50 states and the District of Columbia).

Nebraska's statute has fair coverage (17 out of 33 possible points) with moderate usability (14 out of 33) and above average remedies (22 out of 33), plus the one bonus point awarded for employee notification of rights..

Nebraska's full Whistleblower Report Card
Narrative summary of Nebraska law

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Nebraska Accountability Index Report card

Coverage, Usability & Strength — Rating on a 100 Point Scale
 State Government Effectiveness Act- R.R.S. Neb. § 81-2701 *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	6 points ¹
2. Gross mismanagement	3 points	3 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
5. Danger to health and/or public safety and/or 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	0 points
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 points
	<u>Maximum Score</u> <u>33 points</u>	<u>Awarded Score</u> <u>17 points</u>

¹ The primary purpose of the Nebraska State Government Effectiveness Act is to encourage public officials and employees to disclose information concerning possible violations of law and fiscal waste or mismanagement in state government to elected state officials or the Public Counsel and to prohibit reprisals for such disclosures by state employees.

A public employee may provide a written allegation of wrongdoing to the Public Counsel or an elected state official, which may conduct a preliminary investigation and determine whether reasonable ground exist to support the employee’s allegation. “Wrongdoing” shall include any action by a state agency or employee which (a) is a violation of any law, (b) results in gross mismanagement or gross waste of funds, or (c) creates a substantial and specific danger to public health and safety.

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	4points	4 points ²
3. Testimony in any official proceeding	4 points	3 points ³
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	3 points

Does the state law –

8. Require an investigation by state auditor or other investigative entity of whistleblower disclosures	1 point	1 point
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)	0 points

² Disclosures to the Nebraska Public Counsel or elected state officials.

³ No action can be taken as a reprisal for providing information or testimony, pursuant to an investigation or hearing under the statute to the Public Counsel, an elected state official, a personnel board, or the direct or chief operating officer.

⁴ The Nebraska whistleblower statute does not contain a statute of limitations for state employee whistleblower complaints. We understand that Nebraska law provides that the statute of limitations on such claims is 4 years based on either the following provisions of the Nebraska Code, 25-206, 25-207, or 25-212. Apparently, no court has ruled on which one of these three statutes properly applies, though the result is the same in any event.

	<u>Maximum Score</u> 33 points	<u>Awarded Score</u> 14 points
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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 ⁵
2. Opportunity for administrative challenge	4 points	4 points
3. Opportunities for court challenge	4 points	4 points ⁶
4. Trial by jury	3 points	0 points ⁷
5. Burden shifting upon prima facie showing.	1 point	1 point ⁸
6.. Make whole remedies (court costs, attorney fees, back pay; restoration of benefits, etc.)	3 points	3 points –See Factor 3 above.
7. Actual/compensatory damages	3 points	3 points- Damages
8. Interim relief, injunction or stay of personnel actions	3 points	3 points- Preliminary relief
9. Transfer preference for prevailing whistleblower or ban on blackballing	3 points	0 points
10. Punitive damages or other fines	2 points	0 points

⁵ Any person who has authority to take or effect employee personnel actions shall not take a personnel action against an employee (1) because of the disclosure of information by the employee to the Public Counsel or a state elected official which the employee reasonably believes evidences wrongdoing; (2) as a reprisal for the submission of an allegation of wrongdoing or a violation of this provision of law to the Public Counsel or elected state official by such employee; or (3) as a reprisal for providing information or testimony, pursuant to an investigation or hearing under this Act to the Public Counsel, a elected state official, a personnel board, or the director or chief operating officer of an agency. The Public Counsel shall receive any allegation of a violation of this section., and investigate to determine whether there are grounds to believe that a violation has occurred or is about to occur.

⁶ An employee who is concerned about the State Personnel Board's or another personnel board's decision, who has been or is about to be injured by a prohibited personnel action, shall be entitled to maintain a cause of action pursuant to the Nebraska Administrative Procedure Act for damages, reinstatement, back pay, and such other relief, including preliminary relief, as the court considers appropriate. The personnel action shall be presumed to have been taken against such employee because the employee establishes that a personnel action was taken against him or her after he or she submitted an allegation of wrongdoing or provided information to the Public Counsel. Such presumption may be rebutted by appropriate evidence.

⁷ The statute does not mention trial by jury. We have not reviewed whether under other Nebraska statutes or its Constitution trial by jury would be available for certain issues in the law suit.

⁸ The personnel action shall be presumed to have been taken against such employee because the employee establishes that a personnel action was taken against him or her after he or she submitted an allegation of wrongdoing or provided information to the Public Counsel. Such presumption may be rebutted by appropriate evidence.

and penalties		
11. Personnel actions against managers found to have retaliated	3 points	0 points
	<u>Maximum Score</u> <u>33 points</u>	<u>Awarded Score</u> <u>22 points</u>

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

Factor	Maximum Score	Awarded Score
Posting	1 point	1 point

Totals

100 points

54 points

April 16, 2009

State Legislation Protecting State Employee Whistleblowers

State- Nebraska

Statute- State Government Effectiveness Act- R.R.S. Neb. § 81-2701 *et. seq.* (2005)

Provisions- The primary purpose of the State Government Effectiveness Act is to encourage public officials and employees to disclose information concerning possible violations of law and fiscal waste or mismanagement in state government to elected state officials or the Public Counsel and to prohibit reprisals for such disclosures by state employees. The Nebraska Legislature finds and declares that it is in the vital interest of the people of Nebraska that their government operates in accordance with the law and without fraud, waste, or mismanagement. If this interest is to be protected, public officials and employees must work in a climate where conscientious service is encouraged and disclosures of illegalities or improprieties may be made without reprisal or fear of reprisal.

A public employee may provide a written allegation of wrongdoing to the Public Counsel or an elected state official, which may conduct a preliminary investigation and determine whether reasonable ground exist to support the employee's allegation. "Wrongdoing" shall include any action by a state agency or employee which (a) is a violation of any law, (b) results in gross mismanagement or gross waste of funds, or (c) creates a substantial and specific danger to public health and safety. If the Public Counsel or the state official finds reason to believe that a reasonable ground exist to support the employee's allegation of wrongdoing, the Public Counsel may conduct a formal investigation. If the contents of the report indicate a wrongdoing exists or has occurred, the report shall become a matter of public record at the time it is transmitted to the director or chief operating officer of the agency, unless the Public Counsel determines its release would impede an ongoing investigation.

Any person who has authority to take or effect employee personnel actions shall not take personnel action against an employee (1) because of the disclosure of information by the employee to the Public Counsel or a state elected official which the employee reasonably believes evidences wrongdoing; (2) as a reprisal for the submission of an allegation of wrongdoing or a violation of this provision of law to the Public Counsel or elected state official by such employee; or (3) as a reprisal for providing information or testimony, pursuant to an investigation or hearing under this Act to the Public Counsel, a elected state official, a personnel board, or the direct or chief operating officer of an agency. The Public Counsel shall receive any allegation of a violation of this section., and investigate to determine whether there are grounds to believe that a violation has occurred or is about to occur.

If the Public Counsel finds that there are grounds to believe by a preponderance of the evidence that a violation has occurred, he or she shall transmit such finding in writing to the employee who raised the allegation and also to the Governor and, as appropriate, to the State Personnel Board, if the employee is employed by an agency subject to the state personnel system or the personnel appeals board of the employee's agency if the agency is not subject to the state personnel system. Any finding that is made and transmitted by the Public Counsel in this case shall include a finding regarding whether an alleged violation of the prohibitions against personnel actions and reprisals has occurred or will occur within 2 years after the employee engaged in an action for which he or she is protected from retaliation.

Upon receiving the Public Counsel's finding that a violation has occurred or is about to occur, the employee may petition the State Personnel Board or the personnel appeals board to hold a hearing to determine whether a violation of the prohibitions against personnel actions has occurred or is about to occur. If the finding transmitted to these bodies by the Public Counsel includes a finding that a violation has occurred or will occur within 2 years after the employee engaged in an action for which he or she is protected from retaliation, the Board or board, without further proceedings, may stay or reverse the personnel action until a hearing can be held. After determining that a violation has occurred, the Board or personnel appeals board shall have authority to grant back pay or other relief it deems appropriate, including reasonable attorney's fees.

An employee who is concerned about the Board's or board's decision, who has been or is about to be injured by a prohibited personnel action, shall be entitled to maintain a cause of action pursuant to the Administrative Procedure Act for damages, reinstatement, back pay, and such other relief, including preliminary relief, as the court considers appropriate. A prohibited personnel action shall be presumed to have been taken against such employee because the employee establishes that a personnel action was taken against him or her after he or she submitted an allegation of wrongdoing or provided information to the Public Counsel. Such presumption may be rebutted by appropriate evidence.

No employee shall intentionally misuse the State Government Effectiveness Act. The Public Counsel or elected state official may report to the state agency any employee found to have intentionally misused the Act. Such employee may be subject to such disciplinary action as is deemed appropriate by the director or chief operating agency of the employee's agency.