

Accountability Report Card Summary 2009
New Hampshire

New Hampshire has an uneven state whistleblower law:

- Scoring 49 out of a possible 100 points;
- Ranking 30th out of 51 (50 states and the District of Columbia).

New Hampshire's statute has poor coverage (8 out of 33 possible points) with good usability (26 out of 33) and average remedies (14 out of 33), plus the one bonus point awarded for employee notification of rights. New Hampshire also has a statute that allows qui tam or false claim actions for recovery of "bounty" in cases of Medicaid fraud.

New Hampshire's' full Whistleblower Report Card
Narrative summary of New Hampshire law

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Coverage, Usability & Strength — Rating on a 100 Point Scale-
Whistleblowers’ Protection Act-(RSA § 275-E: 1 *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	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	0 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 ²
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
	<u>Maximum Score</u> <u>33 points</u>	<u>Awarded Score</u> <u>8 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

¹ The New Hampshire Whistleblowers’ Protection Act applies to both private and public sector employees.

² An employer shall not take any action affecting the employee’s employment because the employee refused to execute a directive that in fact violates any U.S. or New Hampshire law or rule.

Or does the statute only 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 ³

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)	0 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)	2 Points RSA § 161:61(b) <i>et .seq.</i> (2005)-Applies to Medicaid fraud only
	<u>Maximum Score</u> <u>33 points</u>	<u>Awarded Score</u> <u>26 points</u>

³ Statute only protects disclosures that were first brought to the attention of a person having supervisory authority with the employer and then employer was allowed a reasonable opportunity to correct the violation. Prior notice need not be given, if the employee had specific reason to believe that reporting the violation to the employer would not result in promptly remedying the violation.

⁴ We have not awarded any points for Factor 9 for the reasons explained in this footnote:

(i) The whistleblowers’ statute provides that an employee who alleges a violation of rights must make a reasonable effort to maintain or restore such rights through any grievance procedure or similar process available at the employee’s place of employment. The employee may then obtain a hearing with the commissioner of labor or a designee appointed by the commissioner. The time for filing a grievance or similar action under an agency grievance procedure or similar process will be found in such procedure or process available for a particular state agency. Consequently, it will be difficult to identify what the equivalent to the “statute of limitations” would be on a state-wide basis.

(ii) Also, identifying the period, in which a filing for a hearing with the commissioner of labor has to be made, is not the equivalent of a “statute of limitations” referred to in Factor 9 because the first complaint to be filed under the statute will be pursuant to the grievance procedure or similar process.

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 ⁶
3. Opportunities for court challenge	4 points	0 Points
4. Trial by jury	3 points	0 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
7. Actual/compensatory damages	3 points	0 Points
8. Interim relief, injunction or stay of personnel actions	3 points	3 Points ⁸
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> <u>33 points</u>	<u>Awarded Score</u> <u>14 Points</u>

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

Factor	Maximum Score	Awarded Score
Posting	1 point	1 Point – RSA§ 275-E:7(2005)

Total

Points 100

49 Points

⁵ Prohibits retaliatory actions affecting terms and conditions of employment for any whistleblower employee, whether in public or private sector.

⁶ All whistleblowers must first make a reasonable attempt to challenge retaliatory action through any grievance procedure or similar process at his place of employment. Subsequently, he may obtain a hearing from the Commissioner of Labor, or his/her designee. Decision of the Commissioner can be appealed to court.

⁷ Commission of Labor can order make whole remedies, if case warrants it.

⁸ The Commissioner can order appropriate injunctive relief.

April 16, 2009

State Legislation Protecting State Employee Whistleblowers

State- New Hampshire

Statutes- Whistleblowers' Protection Act- RSA § 275-E:1 *et. seq.* (2005) and State Employee Freedom of Expression- RSA § 98-E:1 *et. seq.*

Provisions-

The New Hampshire Whistleblowers' Protection Act applies to both private and public sector employees. No employer shall discharge, threaten, or otherwise discriminate against any employee regarding such employee's compensation, terms, conditions, location, or privileges of employment because: (1) the employee, in good faith, reports or causes to be reported, verbally or in writing, what the employee has reasonable cause to believe is a violation of any Federal or New Hampshire law or rule; or (2) the employee, in good faith, participates, verbally or in writing, in any investigation, hearing, or inquiry conducted by any government entity, including a court action, which concerns allegations that the employer has violated any Federal or New Hampshire law or rule. These protections shall only be available if the employee first brought the alleged violation to the attention of a person having supervisory authority with the employer, and then allowed the employer a reasonable opportunity to correct the violation. This prior notice to the employer requirement will not apply if the employee had specific reason to believe that reporting such violation to the employer would not result in promptly remedying the violation.

In addition, no employer shall discharge, threaten, or otherwise discriminate against any employee as described in the previous paragraph because the employee has refused to exercise a directive which in fact violates any Federal or New Hampshire law or rule. Any employee who alleges that he has been discriminated against as described previously, and who has first made a reasonable effort to maintain or restore his or her rights through any grievance procedure or similar process available at his place of employment, may obtain a hearing with the commissioner of labor or the commissioner's designee. Following such a hearing, the official shall render a judgment on such matter, and shall order, as the official deems appropriate, reinstatement of the employee, the payment of back pay, fringe benefits and seniority rights, any appropriate injunctive relief, or any combination of these remedies. This official's decision may be appealed to the courts. The whistleblowers' statute does not contain any statute of limitations for bringing the matter to the attention of the Commissioner of Labor. This statute shall not be interpreted to diminish or impair the rights of any person under any collective bargaining agreement or any common law rights.

The statute does not prescribe to whom the employee is to disclose a violation of Federal or New Hampshire law, other than disclosing it first to the employer. It does not say it

should be disclosed to any branch of government or its agencies, whether legislative, executive, or judicial. One factor that may account for this omission is that the statute applies to both private and public sector whistleblowers and is not explicitly aimed at public sector employees.

Every employer shall post notices as required by the Commissioner of Labor to keep its employees informed about their protections and obligations under the whistleblower statute.

The State Employee Freedom of Expression Act provides that a person employed as a public employee in any capacity shall have a full right to publicly discuss and give opinions as an individual on all matters concerning any government entity and its policies.