

**Accountability Report Card Summary 2009**  
**New York**

New York has below average state whistleblower laws:

- Scoring only 43 out of a possible 100 points; and
- Ranking 40<sup>th</sup> out of 51 (50 states and the District of Columbia).

New York has a narrow statute (12 out of 33 possible points) with moderate usability (17 out of 33) and mediocre remedies (14 out of 33).

*New York's full Whistleblower Report Card*  
*Narrative summary of New York law*

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## New York Accountability Index Report card

Coverage, Usability & Strength — Rating on a 100 Point Scale

(1) Civil Service Law, Removal and Other Disciplinary Procedures- NY CLC Civ. S § 75-b (2006); (2) & (3) Labor Law, Retaliatory Action by Employers- NY CLS Labor § 740 and 741 (2006)

### 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 <sup>1</sup>
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
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>
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<sup>1</sup> New York has several statutes covering state employee whistleblowers. NY CLS Civ. S § 75-b (2) (a) (i) (2006) protects two kinds of public employee’s disclosure to a governmental body. The first is the disclosure of information concerning a violation of a law, rule, or regulation, which creates and presents a substantial and specific danger to the public health and safety. Secondly, the statute also protects a public employee’s disclosure of information to a government body, which the employee reasonably believes to be true and constitutes an “improper government action” This latter term refers to a public employer’s or employee’s action that is in violation of any federal, state or local law, rule or regulation. For a provision similar to the first disclosure above, see § 740 (2) (a) (2006), which applies to both public and private employees.

Another statute, § 741 (d) and (2)(a) (2006), covers health care employees, including state health care employees, who disclose improper quality of patient care, which concerns violations of law and regulations which present a significant danger to public health or safety or a significant threat to the health of a particular patient.

<sup>2</sup> One statute protects an employee’s refusal to carry out any activity, policy, or practice in violation of law, rule, or regulation. NY CLS Labor § 740 (2) (c) (2006). Another statute protects an employee’s refusal to participate in any activity, policy, or practice which the employee in good faith reasonably believes constitutes improper quality of patient care. § 741 (2)(b) (2006)

9. Prohibition on “gag orders” to prevent employee disclosures	1 point	0 point
10. Whistleblower protection does not preclude collective bargaining or other rights	1 point	0 points <sup>3</sup>
	<b><u>Maximum Score</u></b> <b><u>33 points</u></b>	<b><u>Awarded Score</u></b> <b><u>12 points</u></b>

**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	0 points

**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	2 points <sup>4</sup>
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	2 points <sup>5</sup>
7. Anyone as provided in paragraphs 2 thru 6 (above) without prior disclosure to another state official or supervisor	3 points	0 points <sup>6</sup>

Does the state law –

<sup>3</sup> Under § 740 (7) (2006), which applies to public and private whistleblower employees and also to health care employees 740 (4)(d), institution of a court action shall waive rights under any other contract, collective bargaining agreement, law, rule, rule or regulation or under the common law.

<sup>4</sup> § 740 (2)(b) (2006)- Employee provides information to, or testifies before, any public body conducting an investigation, hearing, or inquiry

<sup>5</sup> Two of the 3 statutes protect disclosures to a supervisor: §§ 740 (2)(a) and 741 (2)(a) (2006).

<sup>6</sup> § 75-b (2)(b) (2006) provides that prior to disclosure, a public employee shall have made a good faith effort to provide information to the appointing authority or his designee of the agency where he is employed and give such individual time to take appropriate action to correct the problem. However, such time shall not be provided if there is an imminent and serious danger to public health and safety.

The two other statutes require prior disclosure to a supervisor before an employee’s activities are protected. §§ 740 (3) and 741 (3) (2006)

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>7</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)	0 points
	<b><u>Maximum Score</u></b> <b><u>33 points</u></b>	<b><u>Awarded Score</u></b> <b><u>17 Points</u></b>

**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>8</sup>
2. Opportunity for administrative challenge	4 points	0 points <sup>9</sup>
3. Opportunities for court challenge	4 points	4 points
4. Trial by jury	3 points	0 points <sup>10</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 <sup>11</sup>

<sup>7</sup> The statute of limitations applicable to all 3 New York laws for bringing a court case is at least one year. Note: § 740 4 (d) (2006) provides a two-year statute of limitations for health care workers. Under § 75-b (2006), State employees who must follow a final and binding arbitration provision or are subject to a collectively negotiated agreement cannot bring a court case to contest retaliatory personnel actions. (3) (a) and (b).

Other state employees may bring such cases pursuant to § 75-b (3)(c) in accordance with § 740 (4)(a), which also applies to both public and private sector whistle-blowers, and has a one-year statute of limitations.

<sup>8</sup> All three statutes have prohibitions which concerns employment.

<sup>9</sup> Administrative challenges may be available under collective bargaining agreements, contracts, or state law, but these venues for challenging retaliatory action are not specifically mentioned or highlighted under the whistleblower laws.

<sup>10</sup> The three statutes are governed by the same remedy section, § 740 (5) and don’t specifically mention jury trials. In *Sc Aduto v Restaurant Associates Industries, Inc.*, 180 A.D. 2d 458; 579 N.Y.S. 2d 381 (1992 N.Y. App. Div.), the court held that there was no right to a jury trial because the statute provided that the court was only authorized to provide equitable relief and there was no authorization for compensatory damages.

7. Actual/compensatory damages	3 points	0 points
8. Interim relief, injunction or stay of personnel actions	3 points	3 points <sup>12</sup>
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
	<b><u>Maximum Score</u></b> <b>33 points</b>	<b><u>Awarded Score</u></b> <b>14 points</b>

**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

**Total Points**

**100 points**

**43 Points**

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<sup>11</sup> For all 3 whistleblower statutes, § 740 (4) and (5) provide authorization for court suits and the make whole relief that may be provided. Relief includes reinstatement to the same position, full fringe benefits and seniority rights; compensation for lost wages, remuneration, and benefits; payment of reasonable costs, disbursements and attorney's fees.

<sup>12</sup> For all 3 whistleblower statutes, § 740 (4) and (5) provide authorization for court suits and the make whole relief that may be provided. Relief includes reinstatement to the same position, full fringe benefits and seniority rights; compensation for lost wages, remuneration, and benefits; payment of reasonable costs, disbursements and attorney's fees.

**April 16, 2009**

**State Legislation Protecting State Employee Whistleblowers**

**State-** New York

**Statute-** (1) Civil Service Law, Removal and Other Disciplinary Procedures- NY CLC Civ S § 75-b (2006); (2) & (3) Labor Law, Retaliatory Action by Employers- NY CLS Labor § 740 and 741 (2006)

**Provisions-** New York State has several statutes that protect public employee whistleblowers from retaliatory actions. These statutes are respectively: (1) retaliatory actions by public employers; (2) retaliatory personnel action by employers, both private and public; and, (3) health care employers, including the State of New York, penalizing employees because of complaints of employer violations.

**I- Retaliatory action by public employers**

**A public employer, including the state of New York, shall not dismiss or take other disciplinary or other adverse personnel action against a public employee affecting the employee's employment because the employee discloses information to a governmental body: (i) regarding a violation of law, rule or regulation, which violation creates and presents a substantial and specific danger to the public health and safety; or (ii) which the employee reasonably believes to be true and reasonably believes constitutes an improper governmental action. "Improper governmental action" means any action by a public employer or employee, which is in violation of any federal, state, or local law, rule or regulation. Prior to disclosing information to a governmental body, an employee shall have made a good faith effort to provide the State agency appointing authority for personnel the information to be disclosed and a reasonable time to take appropriate action unless there is imminent and serious danger to public health and safety. "Personnel action" means an action affecting compensation, appointment, promotion, transfer, assignment, reassignment, reinstatement, or evaluation of performance.**

**The "governmental body" to which the employee discloses information refers to, among other persons or institutions: (i) an officer, employee, agency, department, division, bureau, board, commission, council, authority or other body of a public employer; (ii) an employee, member, committee, or commission of the legislative branch of government; (iii) a law enforcement agency or a member or an employee of such agency; or (iv) the judiciary or any of its employees.**

Where an employee is subject to dismissal or other disciplinary action under a final and binding arbitration provision, or other disciplinary procedure contained in a collectively negotiated agreement or any other provision of state law, and the employee reasonably believes dismissal or other disciplinary action would not have been taken, but for the

employee engaging in the protected conduct of disclosure of information, he or she may assert such a defense before the designated arbitrator or hearing officer. The merits of such defense shall be considered and determined as part of the arbitration award or hearing officer decision. If there is a finding that dismissal or other disciplinary action is based solely on the employer's retaliation for the employee's protected conduct, the arbitrator or hearing officer shall dismiss or recommend dismissal of the disciplinary proceeding and, if appropriate reinstate the employee with back pay, and in the case of an arbitration procedure, the arbitrator may take other appropriate action as is permitted in the collectively negotiated agreement.

In related circumstances, where an employee is subject to a collectively negotiated agreement which prevents an employer from taking adverse personnel actions and which contains a final and binding arbitration provision to resolve alleged violations of such provisions of the agreement and the employee reasonably believes that such personnel action would not have been taken but for the protected conduct the employee engaged in, the employee may assert a claim before the arbitrator. The arbitrator shall consider such claim and determine its merits. If a determination is made that such adverse personnel action is based on the employee's protected conduct, the arbitrator shall take such action to remedy the employer's violation as is permitted by the collectively negotiated agreement.

Where neither of the procedures discussed in the previous two paragraphs are available, the employee may commence an action in a court of competent jurisdiction under the same terms and conditions as set forth in article 20-C, § 740.(4) and (5) of the New York Labor Law, which applies to public and private sector whistleblowers. Nothing in this statute shall be deemed to diminish or impair the rights of a public employee or employer under any law, rule, regulation, or collectively negotiated agreement or to prohibit any personnel action which otherwise would have taken place regardless of any disclosure of information.

## **II- Retaliatory personnel action by employers, both public and private**

**Any public or private sector employer shall not take any retaliatory personnel action against an employee because such employee does any of the following: (i) discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer that is in violation of law, rule or regulation which creates and presents a substantial and specific danger to the public health and safety; (ii) provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any such violation or a law, rule or regulation by such employer; or (iii) objects to, or refuses to participate in any such activity, policy or practice in violation of a law, rule or regulation. The protection against retaliatory personnel action provided in (i) pertaining to disclosure to a public body shall not apply unless the employee has brought the activity, policy or practice in violation of law, rule or regulation to the attention of a supervisor of an employer and has afforded the employer a reasonable opportunity to correct such activity, policy or practice.**

**The term “public body” includes the federal or state legislature or any member or employee thereof; any federal or state judiciary, or any member or employee thereof, or any grand or petit jury; any federal or state regulatory, administrative, or public agency or authority, or instrumentality thereof; or any federal or state law enforcement agency, prosecutorial office, or police or peace officer. “Retaliatory personnel action” means the discharge, suspension or demotion of any employee, or other adverse employment action taken against the employee in the terms and conditions of employment. “Law, rule or regulation” includes any federal or state statute or ordinance or any rule or regulation promulgated pursuant to any federal or state statute or ordinance.**

An employee who has been the subject of a retaliatory personnel action in violation of this provision may bring a civil action for relief within one year after the alleged retaliatory action. The court may order the following relief: an injunction to restrain the continued violation of this provision; the reinstatement of the employee to his form position or an equivalent position; the reinstatement of full fringe benefits and seniority rights; compensation for lost wages, benefits and other remuneration; and the payment by the employer of reasonable costs, disbursements, and attorney’s fees. A court, in its discretion, may also order that reasonable attorneys’ fees and court costs and disbursements be awarded to an employer if the court determines that an action brought by an employee under this provision was without basis in law or fact. The institution of an action in accordance with this provision shall be deemed a waiver of the rights and remedies available under any other contract, collective bargaining agreement, law, rule or regulation or under the common law.

### **III- Health care employers penalizing employees because of complaints of employer violations**

**No employer shall take retaliatory against an employee because the employee does any of the following: (i) discloses or threatens to disclose to a supervisor, or to a public body an activity, policy or practice of the employer which the employee, in good faith, reasonable believes constitutes improper quality of patient care; or (ii) objects to, or refuses to participate in an activity, policy or practice of the employer that the employee, in good faith, reasonably believes constitutes improper quality of patient care. This protection shall not apply unless the employee has brought the improper quality of patient care to the attention of a supervisor and has afforded the employer a reasonable opportunity to correct such activity, policy or practice. However, this requirement shall not apply to a situation in (i) above, wherein the improper patient care described presents an imminent threat to public health or safety or to the health of a specific patient and the employee reasonably believes in good faith that reporting to a supervisor would not result in corrective action. The term “retaliatory action” means the discharge, suspension, demotion, penalization or discrimination against an employee, or other adverse employment action taken against an employee in the terms and conditions of employment.**

**Under the statute, the term “employer” includes the state of New York which provides health care services in a facility licensed pursuant to article 28 or 36 of the public health law; provides health care services within a primary or secondary public school or public university setting; or operates and provides health care services under the mental hygiene law. “Improper quality of patient care” means with respect to patient care, any practice, procedure, action or failure to act of an employer which violates any law, rule, regulation or declaratory ruling adopted by law, where such violation relates to matters which may present a substantial and specific danger to public health or safety or a significant threat to the health of a specific patient. The term “public body” means a federal or state legislature or any member or employee thereof; a federal or state court, or any member or employee thereof, or any grand or petit jury; any federal or state regulatory, administrative or public agency or authority, law enforcement agency, prosecutorial office or police or peace officer; any federal or state department of the executive branch of government; or any division, board, committee, or commission of the previously referred to public bodies.**

A health care employee who has been the subject of a retaliatory action by a health care employer in violation of the statute may bring a civil action for relief, as set forth in II above, within two years after the alleged retaliatory action had taken place. Also, the court in its discretion, based upon a finding that the employer acted in bad faith in the retaliatory action may assess the employer a civil penalty of an amount not in excess of \$10,000, to be paid to the improving quality of patient care fund.

The three statutes are governed by a provision in one of them, which specifies the relief a court may provide § 740 (5) and they don’t specifically provide for jury trials. In *Scaduto v Restaurant Associates Industries, Inc.*, 180 A.D. 2d 458; 579 N.Y.S. 2d 381 (1992 N.Y.App. Div.), the court held that there was no right to a jury trial because this provision provided that the court was principally authorized to provide relief that was equitable in nature and there was no separate statutory authorization for state employees to obtain compensatory damages, which would entitle them to a jury trial on this issue.