

Accountability Report Card Summary 2009
Texas

Texas has a poor state whistleblower law:

- Scoring 41 out of a possible 100;
- Ranking 42nd out of 51 (50 states and the District of Columbia).

Texas has poor coverage (7 of 33 possible points) with a poor degree of usability (10 out of 33) and average remedies (24 out of 33). The statute provides for qui tam suits and a “bounty” for false claims for the Medicaid program.

Texas’ full Whistleblower Report Card
Narrative summary of Texas law

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Texas Accountability Index Report card

Coverage, Usability & Strength — Rating on a 100 Point Scale
Texas Government Code § 554.001 *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
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	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	1 points
	<u>Maximum Score</u> <u>33 points</u>	<u>Awarded Score</u> <u>7 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

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	4 points	0 points

proceeding		
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	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 ¹
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)	1 point-generally 90 days to file suit.
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. The statute involves Medicaid false claims. Tex. Gov. Code § 32.039 <i>et. seq.</i> (2005)
	<u>Maximum Score</u> <u>33 points</u>	<u>Awarded Score</u> <u>10 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. Opportunity for administrative challenge	4 points	4 points
3. Opportunities for court challenge	4 points	4 points
4. Trial by jury	3 points	0 points ²

¹ § 554.010 If a state entity \$10,000 or more to the whistleblower, the state Attorney General shall provide information to the state auditor’s office, who may investigate the state governmental entity to determine any changes necessary to correct the problems that gave rise to the whistleblower’s suit.

² Whistleblower statute does not provide for trial by jury. We did not determine whether jury trial would be available under other Texas statutes or the state Constitution.

April 16, 2009

State Legislation Protecting State Employee Whistleblowers

State- Texas

Statute- Protections for Reporting Violations of Law- Tex. Gov't. Code § 554.001 *et seq.* (2005)

Provisions- The Texas whistleblower statute applies to state and local government employees. This description of the statute will only concern state employees. A state governmental entity may not suspend or terminate the employment of, or take any other adverse personnel action against, a state employee who in good faith reports a violation of law by the employing state governmental entity or another public employee to an appropriate law enforcement authority. A report is made to an appropriate law enforcement authority, if the authority is part of a state government or of the federal government, that the employee believes is authorized to (i) regulate under or enforce the law alleged to be violated in the report; or (ii) investigate or prosecute a violation of criminal law. **This provision leaves the state or federal legislature, its members, bodies, and its employees out of the definition of appropriate law enforcement authority.**

The “law” that is violated is a state or federal statute or a rule adopted under a statute or ordinance, **but it creates some ambiguity because it makes no mention of whether the rule is a state or federal rule.** “Personnel action” means an action that affects a state employee’s compensation, promotion, demotion, transfer, work assignment, or performance evaluation. A “state employee” means an employee or appointed officer, other than an independent contractor, who is paid to perform services for a state governmental entity. These entities include agencies in the executive branch of state government, created under the Texas constitution or Texas statute, including an institution of higher education; the legislature or a legislative agency; or the Texas Supreme Court, the Texas Court of Criminal Appeals, a court of appeals, a state judiciary agency, or the State Bar of Texas. **Thus, the violations of law that can be reported concern entities from all three branches of Texas state government: the executive, legislative, and judiciary.**

A public employee, whose employment is suspended or terminated or who is subject to an adverse personnel action, is entitled to sue for injunctive relief, actual damages, court costs, and reasonable attorney fees and sovereign immunity is waived in such situations.. In addition to such relief, a state employee whose employment is suspended or terminated in violation of this statute is entitled to: (1) reinstatement to the employee’s former position or an equivalent position; (2) compensation for wages lost during the suspension or termination; (3) reinstatement of fringe benefits and seniority rights lost because of the suspension or termination. The employee may recover compensatory damages for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life and other nonpecuniary losses in an amount that does not exceed the

amounts set forth in the statute that are based on the number of employees the state governmental entity has. For example, the compensatory damages may not exceed \$100,000 for an entity which has more than 100 employees and fewer than 201 employees in each of 20 or more calendar weeks in the calendar year in which the suit is filed or in the preceding year. For certain agencies, the amount awarded could be as much as \$250,000.

A public employee who sues has the burden of proof. However, if the suspension, termination, or other adverse personnel action, occurs not later than 90 days after the employee reports a violation of law, the action taken is presumed, subject to rebuttal, to be because the employee made the report. It is an affirmative defense to a suit that the employing state governmental entity would have taken the action against the employee based on information, observation, or evidence that are not related to the report the employee made.

A public employee must sue not later than the 90th day after the date on which the alleged violation of law occurred or was discovered by the employee through reasonable diligence. However, the matter gets more complicated. Before suing, a state employee must initiate action under the grievance or appeal procedures of the employing state governmental entity not later than the 90th day referred to earlier in this paragraph. The time used by the employee under these administrative procedures is excluded from the time within which the employee must sue. If a final decision in the administrative procedure is not rendered before the 61st day after the procedures were initiated, the employee may elect to choose what alternative provided by the statute to follow, an administrative remedy or court action. If the employee chooses to exhaust administrative procedures, he may still sue not later than the 30th day after these procedures are exhausted.

A supervisor who takes retaliatory action against the employee is liable for a civil penalty not to exceed \$15,000, which is the limit of his or her personal liability. Such a penalty shall be paid by the supervisor out of his/her own funds and should not be paid by the employer agency. Texas has a false claims act applicable to Medicaid fraud. An individual may start a suit to recover the amounts the government lost and can share, in certain cases, in any recovery. *Tex. Gov. Code § 32.039 et. seq. (2005).*