

Accountability Report Card Summary 2009
Virginia

Unlike, the vast majority of other states, Virginia does not have a particular state statute that protects Commonwealth employees from retaliation in the terms or conditions of their employment because of reporting violations of law or wrongdoing. However, since January 1, 2003, private individuals may blow the whistle on fraud against the Commonwealth of Virginia and claim a reward.

- Scoring 16 out of a possible 100;
- Ranking 49th out of 51 (50 states and the District of Columbia).

Virginia has no coverage (4 of 33 possible points) with virtually no usability (7 out of 33) and no remedies for retaliation (5 out of 33).

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

page 2
page 5

Virginia Accountability Index Report card

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

Labor and Employment: Protection of Employees- Va. Code Ann. § 40.1-51.2

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	2 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	2 points ²
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>4 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 –

¹ Unlike, the vast majority of other states, Virginia does not have a particular state statute that protects Commonwealth employees from retaliation in the terms or conditions of their employment because of reporting violations of law or wrongdoing.

² Workplace health and safety reports are covered.

2. Any state executive or legislative body or person employed by such entities	4 points	0 points ³
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	1 points ⁴
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

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)	1 points
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 ⁵

³ VA has a third statute that gives local employees the right to express their opinions on matters of public concern to state or local elected officials. The employees cannot be subject to acts of retaliation because they have expressed such opinions. “Matter of public concern” means those matters of interest to the community as a whole, whether for social, political, or other reasons, and shall include discussions that disclose (i) evidence of corruption, impropriety, or other malfeasance on the part of government officials (ii) violations of law or (iii) incidence of fraud, abuse, or gross mismanagement. Va. Code Ann. § 15.2-1512.4.

⁴ Under the Occupational Safety and Health statute, complaints filed with the Labor Commissioner of Labor and Industry

⁵ Since January 1, 2003 private individuals may blow the whistle on fraud against the Commonwealth of Virginia and claim a reward. Under the “Virginia Fraud against Taxpayers Act”, which is modeled after the Federal False Claims Act, private individuals may sue companies or individuals who are defrauding the state and recover funds on the state’s behalf. Whistleblowers will be entitled to 15% to 25% of the amount recovered as a result of the “qui tam” lawsuits, if the state joins the case. If the state doesn’t join, the whistleblowers share would range from 25% to 30%.

April 16, 2009

State Legislation Protecting State Employee Whistleblowers

State- Virginia

Statute- Virginia Fraud against Taxpayers Act- Va. Code Ann. § 8.01-216.1 (2006) and Labor and Employment: Protection of Employees- Va. Code Ann. § 40.1-51.2

Provisions*

First Statute: Since January 1, 2003 private individuals may blow the whistle on fraud against the Commonwealth of Virginia and claim a reward. Under the “Virginia Fraud against Taxpayers Act”, which is modeled after the Federal False Claims Act, private individuals may sue companies or individuals who are defrauding the state and recover funds on the state’s behalf. Whistleblowers will be entitled to 15% to 25% of the amount recovered as a result of the “qui tam” lawsuits, if the state joins the case. If the state doesn’t join, the whistleblowers share would range from 25% to 30%.

Liabe companies or individuals would have to pay \$5,000 to \$10,000 for each false claim plus three times the state’s losses. The state law reduces the amount to two times the state’s damages if the liable person or company reports the false claims to the state within 30 days of learning of the fraud. The amount of time the lawsuit remains under seal (not publicly available) pursuant to Virginia law is longer than under the federal statute. The state law sets a seal period of 120 days while the government investigates the allegations. The federal statute allows 60 days, although in practice, the seal is routinely extended by the courts to give the government more time to complete its investigation.

If the Commonwealth of Virginia proceeds with the court action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. However, such party shall have the right to continue as a party to the action, subject to certain limitations. The Commonwealth may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified of the filing of a motion and the court has provided such person with an opportunity for a hearing. The state of Virginia may settle the action with the defendant, notwithstanding the objections of the person first bringing the action, if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under the circumstances.

The court may, in its discretion, impose limitations on the initiating party’s participation in the case upon a showing by the Commonwealth that unrestricted participation would interfere with, or unduly delay, the prosecution of the case, or would be repetitious, irrelevant or for purposes of harassment. The limitations the court may impose include: (i) restricting the number of witnesses the person may call; (ii) limiting the length of

testimony and cross-examination of witnesses; or (iii) otherwise restricting the person's participation in the litigation. The Commonwealth may elect to pursue its claim through any alternative remedy available to it, including any administrative proceeding to determine a civil money penalty. If such an alternative remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under the statute. If the State does not proceed with the action and the person who brought the action conducts the case, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails and the court finds that the claim was clearly frivolous or vexatious, or brought primarily for purposes of harassment.

Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his employer because he has opposed any fraudulent practice against the Commonwealth, or because he has initiated, testified, assisted or participated in any manner in any investigation, action, or hearing shall be entitled to all necessary relief to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had, but for the discrimination, 2X the amount of back pay, interest on back pay, and compensation for any special damages sustained as a result of such discrimination, including litigation costs and reasonable attorneys' fees.

A civil action may not be brought (i) more than 6 years after the date on which the violation is committed, or (ii) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the Commonwealth charged with responsibility to act, but in that event no more than 10 years after the date on which the violation has occurred.

In passing, please note that Virginia does have a "whistleblower type law" **protecting an employee of a business from discharge or discrimination because the employee has filed a safety or health complaint or has testified or otherwise acted to exercise rights under the safety and health provisions of Title 40.1, Chapter 3, and Article 5 of the Code of Virginia. Va. Code Ann. § 40.1-51.2.1 (2006).** An employee who believes he or she has been discharged or otherwise discriminated against by any person in violation of this prohibition, may, within 60 days after such violation occurs, file a complaint with the Virginia Commission of Labor and Industry. In the event a voluntary agreement to resolve the issue raised in the complaint is unsuccessful, the Commissioner shall bring a court action. Should the Commissioner refuse to issue a charge that discrimination against the employee had taken place, the employee may bring a court action.

Second Statute: This statute applies to both private and public employees. It states that no person shall discharge or in any way discriminate against an employee because the employee has filed a safety or health complaint or has testified or otherwise acted to exercise rights under the safety and health provisions of this title for themselves or others.

Any employee who believes that he or she has been discharged or otherwise discriminated against by any person in violation of § [40.1-51.2:1](#) may, within 60 days after such violation occurs, file a complaint with the Commissioner alleging such discharge or discrimination. The employee shall be prohibited from seeking relief under this section if he fails to file such complaint within the 60-day time period. Upon receipt of such complaint, the Commissioner shall cause such investigation to be made as he deems appropriate. If, upon such investigation, he determines that the provisions of § [40.1-51.2:1](#) have been violated, he shall attempt by conciliation to have the violation abated without economic loss to the employee. In the event a voluntary agreement cannot be obtained, the Commissioner shall bring an action in a circuit court having jurisdiction over the person charged with the violation. The court shall have jurisdiction, for cause shown, to restrain violations and order appropriate relief, including rehiring or reinstatement of the employee to his former position with back pay plus interest at a rate not to exceed eight percent per annum.

In addition, should the Commissioner, based on the results of his investigation of the complaint, refuse to issue a charge against the person that allegedly discriminated against the employee, the employee may bring action in a circuit court having jurisdiction over the person allegedly discriminating against the employee, for appropriate relief.

***The discussion in the first two paragraphs has been taken from materials prepared by Phillips & Cohen LLP and copyrighted 2001.**