

Accountability Report Card Summary 2009
Washington

Washington has a poorly balanced state whistleblower law:

- Scoring 51 out of a possible 100;
- Ranking 26th out of 51 (50 states and the District of Columbia).

Washington has uneven coverage (17 of 33 possible points) with a very poor degree of usability (6 out of 33) and relatively good remedies (28 out of 33).

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

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Washington State Accountability Index Report card

Coverage, Usability & Strength — Rating on a 100 Point Scale
(Rev Code Wash. § 42.40.010 *et. seq.* and § 9.60.210 and 250 (2006))

A Breadth of Coverage (33 points possible from 10 factors).

Do the statutes 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	3 points
5. Danger to health and/or public safety	5 points	3 points
6. Communication of scientific opinion or alteration of technical findings	5 points	5 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 ²
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</u> <u>Score</u>

¹ Local Government Whistleblowers have additional protection under § 42.41.010. According to the statute, every local government employee has the right to report inappropriate person or information concerning an alleged improper government action. Each agency must adopt procedures for dealing with such disclosures. Retaliatory action by local government official or employee against disclosing employee is unlawful and will be compensated by reinstatement and/or injunctive relief, as well as attorneys fees and costs. RCW § 42.41.010 *et seq.*

² § 42.40.010 (2006)-legislature encourages disclosure of improper government actions but falls short of an enforceable prohibition against “gag orders.” § 42.40.030 (1) (2006) prohibits an agency employee from using his/her authority to interfere with the right of an individual to disclose improper governmental action or identify administrative rules warranting review or provide information to the rules review committee.

Similarly, § 42.40.030 classifies preventing the dissemination of scientific opinions and technical data as improper governmental activity, but the statute does not explicitly prohibit imposition of such restraints.

		17 points
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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 only protect disclosures made to – 20 points or less

2. Any state executive or legislative body or person employed by such entities	4 points	2 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 point 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 ⁵
9. Have a statute of limitations of one year or longer for filing	3 points (2 points if 6 months or longer and 1	3 points ⁶

³ For the purpose of construing the provisions concerning retaliatory and reprisal actions, “whistleblower” is defined to include an **employee who in good faith identifies rules warranting review or provides information to the rules review committee, and an employee who is believed to have identified rules warranting review or provided information to the rules review committee but who, in fact, has not done so.** § 42.40.020 (8) (b) (2006) This committee is a bipartisan legislative committee. § 34.05.610 (2006).

⁴ The state auditor qualifies as an investigative body. Complaint can also be filed with Washington State Human Rights Commission as an unfair practice, which could lead to an ALJ decision with **appropriate remedies.**

§ 49.60.210 (2) and § 49.60.230 (1)(a)(2006).

⁵ Whistleblower makes good faith report to the state auditor, who is empowered, but not required, to initiate an investigation and/or refer to another state agency to investigate. §42.40.040 (2006).

complaints	point if 60 days or longer)	
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
	<u>Maximum Score</u> <u>33 points</u>	<u>Awarded Score</u> <u>6 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 ⁷
2. Opportunity for administrative challenge	4 points	4 points ⁸
3. Opportunities for court challenge	4 points	4 points ⁹
4. Trial by jury	3 points	2 points ¹⁰
5. Burden shifting upon prima facie showing.	1 point	1 point ¹¹
6. Make whole remedies (court costs,	3 points	3 points ¹²

⁶ Whistleblower subject to retaliatory action or workplace reprisal is presumed to establish a cause of action under civil rights law. § 42.40.050 (1) (2006). This may cover two kinds of actions. First, is a court action to enjoin further retaliation and/or recover actual damages and court costs. §49.60.030 (f) (2). § 42.40.050 (1) (2006). Statute of limitations for such suits is three years from act of discrimination. § 4.16.080 (2006) See Martin v. Boeing Co., 88 Wn. App. 442, 945 P. 2d 248 (1997), aff’d, 137 Wn. 2d 357, 971 P.2d 45 (1999). Second cause of action is the filing of an unfair practice complaint with Human Right Commission. § 49.60.210(2) (2006) The complaint must be filed within 60 days of retaliatory action. § 49.60.230 f)(2) (2006).

⁷ See Note 5: § 42.40.050 (1) (2006) provides that any whistleblower subject to workplace reprisal or retaliatory action in terms and conditions of employment presumed to have established a cause of action for remedies provided under § 49.60(2006) (civil rights law).

⁸ Civil Rights Law provides administrative remedy through filing of complaint with Human Rights Commission. See B. (9). It is unsettled whether administrative appeal could be taken for retaliatory action or workplace reprisal under state personnel law or a collective bargaining agreement. No provision providing for this possibility contained in whistleblower law.

⁹ § 49.60.030(2) (2006) provides that any person considering himself or herself as injured by a civil rights violation shall have a civil action in a court of competent jurisdiction to enjoin further violations and/or recover actual damages.

¹⁰The remedies provided in civil rights law court case include injunction for further violations and/or actual damages, together with the cost of the suit, including reasonable attorneys’ fees. Whistleblower law does not provide for trial by jury. However, Washington general laws on the use of a jury do not allow jury trials when the court case is primarily one in equity, e.g. injunctive relief. Jury trials are available for matters at law, such as a suit for actual damages sustained.

¹¹ Retaliatory action or reprisal creates a presumption that whistleblower has established a cause of action. Agency can rebut by preponderance of the evidence that its actions justified for reasons unrelated to employee’s status as whistleblower. § 42.40.050 (1)and (2) (2006).

attorney fees, back pay; restoration of benefits, etc.)		
7. Actual/compensatory damages	3 points	3 points
8. Interim relief, injunction or stay of personnel actions	3 points	3 points – Civil rights law provides for injunctive relief.
9. Transfer preference for prevailing whistleblower or ban on blackballing	3 points	0 points
10. Punitive damages or other fines and penalties	2 points	1 point ¹³
11. Personnel actions against managers found to have retaliated	3 points	3 points ¹⁴
	<u>Maximum Score</u> <u>33 points</u>	<u>Awarded Score</u> <u>28 points</u>

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

Factor	Maximum Score	Awarded Score
Posting	1 point	0 Points

Total Score

Maximum Score 100

Awarded 51

¹² Civil rights law provides for court injunctions against future violations and/or actual damages sustained by the whistleblower, together with costs of suit, including reasonable attorneys' fees, or any other remedy authorized by the Wash. civil rights law or U.S., Civil Rights Act of 1964, as amended. Also. ALJ may order make whole remedies.

¹³ ALJ may impose upon a retaliator a civil penalty of up to \$3,000 and shall require that a letter of reprimand be placed in retaliator's file. § 49.60.250 (6) (2006).

¹⁴ Personnel actions against employee who engaged in workplace reprisal or retaliatory actions not prohibited. § 42.40.050 (3) (2006)

April 16, 2009

State Legislation Protecting State Employee Whistleblowers

State- Washington

Statute- State Employee Whistleblower Protection- Rev. Code Wash (ARCW)-
§ § 42.40.010 *et. seq* (2005), Discrimination-Human Rights Commission
§ 49.60.210 (2) (2006)

Provisions-

The State Employee Whistleblower Protection Act sets forth the legislature's policy in passing the statute. "It is the policy of the legislature that employees should be encouraged to disclose, to the extent not expressly prohibited by law, improper government actions, and it is the intent of the legislature to protect the rights of state employees making these disclosures. It is also the policy of the legislature that employees should be encouraged to identify rules warranting review or provide information to the rules review committee, and it is the intent of the legislature to protect the rights of these employees."

"Improper government action" means any action by an employee undertaken in the performance of the employee's official duties, which is: (1) a gross waste of public funds or resources; (2) in violation of federal or state law or rule, if the violation is not merely technical or of a minimum nature; (3) of substantial and specific danger to the public health or safety; or (4) preventing the dissemination of scientific opinion or altering technical findings without valid scientific justification, and gross mismanagement. "Improper government action" does not include personnel actions, for which other remedies exist, including but not limited to, employee grievances, complaints, appointments, personnel actions, alleged labor agreement violations, or claims of discriminatory treatment. "Gross waste of funds" means to spend or use funds or to allow funds to be used without valuable result in a manner grossly deviating from the standard of care or competence a reasonable person would observe in the same situation. "Substantial and specific danger" refers to a risk of serious injury, illness, peril, or loss, to which the exposure of the public is a gross deviation from the standard of care or competence which a reasonable person would observe in the same situation.

"Whistleblower" means an employee who in good faith reports alleged improper government action to the Washington State auditor. For purposes of the provisions of this chapter and chapter 49.60 RCW relating to reprisals and retaliatory action, the term "whistleblower" also means: (a) an employee who in good faith provides information to the auditor in connection with an investigation under [RCW 42.40.040](#) and an employee who is believed to have reported asserted improper governmental action to the auditor or to have provided information to the auditor in connection with an investigation under [RCW 42.40.040](#) but who, in fact, has not

reported such action or provided such information; or (b) an employee who in good faith identifies rules warranting review or provides information to the rules review committee, and an employee who is believed to have identified rules warranting review or provided information to the rules review committee but who, in fact, has not done so.

A state government employee shall not, directly or indirectly, use or attempt to use the employee's official authority or influence for the purpose of intimidating, threatening, coercing, commanding, influencing, or attempting to do such things for the purpose of interfering with the right of an individual (i) to disclose to the auditor or his or her representative information concerning improper government action; or (ii) to identify rules warranting review or to provide information to the rules review committee. "Use of official authority or influence" includes taking, directing others to take, recommending, processing, approving any personnel action or any adverse or disciplinary action, or determining any material changes in pay, provision of training or benefits, and tolerance of a hostile work environment. An employee must make a reasonable attempt to ascertain the correctness of the information furnished and may be subject to disciplinary actions, including, but not limited to, suspension or termination, for knowingly furnishing false information as determined by the employee's appointing authority.

Any person who is a whistleblower and who has been subjected to workplace reprisal or retaliatory action is presumed to have established a cause of action for the remedies set out in chapter 49.60 RCW concerning discriminatory actions. Under this legislation, it is an unfair practice for a state government agency, manager or supervisor to retaliate against a state employee whistleblower.

The employee has two ways to challenge the retaliation action. First, he can file a complaint with the Human Rights Commission and have it investigated. If a preliminary investigation discloses evidence of retaliation, the matter may be assigned to an administrative law judge to investigate more fully, including holding a hearing. The complaint must be filed within 2 years of the retaliatory action. § 49.60.210(2) (2006)

Secondly, the employee can bring a civil action in a court of competent jurisdiction to enjoin further violations, or to recover the actual damages sustained by the employee, or both, together with the cost of suit, including reasonably attorneys' fees, or any other appropriate remedy authorized by the discrimination statute. § 49.60.030 (2) (2006). Under the whistleblower statute, "reprisal or retaliatory action" means, but is not limited, to any of the following: denial of adequate staff to perform duties, refusal to assign meaningful work, demotion, reduction in pay, denial of promotion, suspension, dismissal, issuing or attempting to enforce a non-disclosure agreement and any action inconsistent with prior action taken towards the employee or compared to action towards other employees. Washington Human Rights Commission Staff have advised that employees usually file a complaint with the Commission and if the Commission investigation indicates that the employer or its staff may have engaged in an unfair practice, to bring a court action before the Commission had issued a final decision. The statute of limitations for such suits is three years from the act of discrimination. § 4.16.080(2006).

See *Martin v. Boeing Co.*, 88 Wn. App. 442, 945 P.2d 248(1997), aff'd 137 Wn. 2d 357, 971 P.2d 45 (1999).

A whistleblower is allowed to disclose information otherwise prohibited by law if necessary to substantiate the whistleblower claim. Moreover, the identity of a whistleblower, and anyone who provides information for the investigation in good faith, is protected under § 42.40.040.