

Accountability Report Card Summary 2009
Wisconsin

Wisconsin has a more evenly balanced state whistleblower law:

- Scoring 54 out of a possible 100;
- Ranking 17th out of 51 (50 states and the District of Columbia).

Wisconsin has above average coverage (21 of 33 possible points) with a below average degree of usability (12 out of 33) and fair remedies (21 out of 33).

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

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Wisconsin Accountability Index Report card

Coverage, Usability & Strength — Rating on a 100 Point Scale
 State Personnel-State Employee Relations-Employee Protection- Wis. Stat. §230.80
 (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 ¹
2. Gross mismanagement	3 points	3 points ²
3. Abuse of authority (including violations of agency policy)	3 points	3 points
4. Waste of public funds or resources	3 points	3 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	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 point ³
	<u>Maximum Score</u> <u>33 points</u>	<u>Awarded Score</u>

¹ A state employee may disclose that information to any other person, which he or she reasonably believes demonstrates (1) any violation of any state or federal statute, rule or regulation; or (2) mismanagement or abuse of authority in state government, a substantial waste of public funds or a danger to public health and safety.

² “Mismanagement” refers to a pattern of incompetent management actions which are wrongful, negligent, or arbitrary and capricious and which adversely affect the efficient accomplishment of an agency function. The term mismanagement" does not refer to the mere failure to act in accordance with a particular opinion regarding management techniques.

³ No collective bargaining agreement supersedes the rights of the state employee under the statute. However, nothing in the statute affects any right of an employee to pursue a grievance procedure under a collective bargaining agreement. If the division of equal rights determines that a grievance under such agreement involves the same parties and matters as the complaint filed with it shall order the arbitrator’s final award on the merits conclusive as to the rights of the parties to the complaint.

		21 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 protect disclosures made to –

2. Any state executive or legislative body or person employed by such entities	4 points	4 points ⁴
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	3 points ⁵
5. Any federal or non-state governmental entity	3 points	0 points
6. Co-workers or supervisors within the scope of duty	3 points	3 points
7. Anyone as provided in paragraphs 2 thru 6 (above) without prior disclosure to another state official or supervisor	3 points	1 point ⁶

Does the state law –

8. Require an investigation by state	1 point	0 points
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⁴ To obtain protection against retaliatory action under this statute before disclosing such information to any person, other than his or her attorney, collective bargaining representative, or legislator, the employee shall either (i) disclose the information to the employee's supervisor, or (ii) after asking the division of equal rights which governmental unit is appropriate to receive the information, disclose the information in writing only to the government unit that the division determines is appropriate.

“Government Unit” means any body in state government created or authorized to be created by the state constitution or any law, including the legislature, the office of the governor, and the courts.

⁵ No restrictions on disclosure prohibit an employee from disclosing information to an appropriate law enforcement agency, a state or federal district attorney in whose jurisdiction the crime is alleged to have occurred, a state or federal grand jury or judge and any such disclosure is protected against retaliatory actions

⁶ The statute allows disclosure to any person but requires that prior disclosure be made to the employee's supervisor or governmental unit. Also, certain other disclosures may be made without this prior requirement, e.g. a federal prosecutor.

auditor or other investigative entity of whistleblower disclosures		
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 ⁷
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>12 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 ⁸
2. Opportunity for administrative challenge	4 points	4 points ⁹
3. Opportunities for court challenge	4 points	4 points ¹⁰
4. Trial by jury	3 points	0 points ¹¹
5. Burden shifting upon prima facie showing.	1 point	1 point
6.. Make whole remedies (court costs, attorney fees, back pay; restoration of benefits, etc.)	3 points	3 points ¹²

⁷ An employee, who believes that a supervisor or appointing authority has initiated or administered or threatened to initiate or administer a retaliatory action against that employee in violation of the statute, may file a written complaint with the division of equal rights, specifying the nature of the retaliatory action, or threat thereof, and requesting relief, within 60 days after the retaliatory action allegedly occurred , or after the employee learned of the retaliatory action or its threat, whichever occurs last.

⁸ “Disciplinary action” means any action taken with respect to an employee, which has the effect, in whole or in part, of a penalty, which includes, but is not limited to, changes in the terms and conditions of employment, e.g., dismissal, demotion, transfer, suspension, reprimand, reassignment, or failure to increase base pay.

⁹ An employee, who believes that a supervisor or appointing authority has initiated or administered or threatened to initiate or administer a retaliatory action against that employee in violation of the statute, may file a written complaint with the division of equal rights, specifying the nature of the retaliatory action, or threat thereof, and requesting relief, within 60 days after the retaliatory action allegedly occurred , or after the employee learned of the retaliatory action or its threat, whichever occurs last.

¹⁰ An employee can commence a court action at any time... Upon commencement of such an action in a court of record, the division of equal rights has no jurisdiction to process the complaint, except to dismiss it.

¹¹ The statute does not mention a trial by jury. We did not review whether a jury trial is available under other Wisconsin statutes or the State’s Constitution.

¹² The division of equal rights may order, among other things: (a) reinstatement or restoration of the employee to his or her position with back pay; (b) transfer to an available position; (c) expungement of

7. Actual and/or compensatory damages	3 points	0 points
8. Interim relief, injunction or stay of personnel actions	3 points	0 points
9. Transfer preference for prevailing whistleblower or ban on blackballing	3 points	0 points
10. Punitive damages or other fines and penalties	2 points	2 points 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>21 points</u>

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

Factor	Maximum Score	Awarded Score
Posting	1 point	0 points

Totals

100 points

54 points

adverse materials: (d) payment of reasonable attorney's fees; or (e) suspension or termination of the employee who took retaliatory action.

¹³ The division of equal rights may also fine an employee who retaliates not less than \$10 or more than \$100 for each day he or she fails to comply with a division order.

¹⁴ The division of equal rights may recommend to the appointing authority of the person who retaliated that disciplinary or other action be taken, including, but not limited to, statement of violation in his/her personnel file, letter of reprimand, suspension or termination.

April 16, 2009

State Legislation Protecting State Employee Whistleblowers

State- Wisconsin

Statute- State Personnel-State Employee Relations-Employee Protection-
Wis. Stat. §230.80 (2006)

Provisions- A state government employee (except a person employed by the office of the governor, the courts, the legislature, or a person who is, or whose immediate supervisor is, assigned to an executive salary group or university senior executive salary group) with knowledge of information, the disclosure of which is not prohibited by state or federal statute, rule or regulation may disclose that information to any other person. "Information" means information gained by the employee, which he or she reasonably believes demonstrates (1) any violation of any state or federal statute, rule or regulation; or (2) mismanagement or abuse of authority in state government, a substantial waste of public funds or a danger to public health and safety. "Mismanagement" refers to a pattern of incompetent management actions which are wrongful, negligent, or arbitrary and capricious and which adversely affect the efficient accomplishment of an agency function. The term "mismanagement" does not refer to the mere failure to act in accordance with a particular opinion regarding management techniques.

However, to obtain protection against retaliatory action under this statute before disclosing such information to any person, other than his or her attorney, collective bargaining representative, or legislator, the employee shall either (i) disclose the information to the employee's supervisor, or (ii) after asking the Division of Equal Rights which governmental unit is appropriate to receive the information, disclose the information in writing only to the government unit that the Division determines is appropriate. "Government Unit" means any body in state government created or authorized to be created by the state constitution or any law, including the legislature, the office of the governor, and the courts. No restrictions on disclosure prohibit an employee from disclosing information to an appropriate law enforcement agency, a state or federal district attorney in whose jurisdiction the crime is alleged to have occurred, a state or federal grand jury or judge and any such disclosure is protected against retaliatory action.

No appointing authority, agent of an appointing authority, or supervisor may initiate or administer any retaliatory action against an employee. "Retaliatory action" means a disciplinary action taken because of any of the following: (a) the employee lawfully disclosed information or filed a complaint alleging that an appointing authority or supervisor has initiated or administered or threatened to initiate or administer a retaliatory act; (b) the employee testified or assisted or will testify or assist in any action or proceeding relating to the lawful disclosure of information by another employee; or (3) the appointing authority, agent of an

appointing authority, or supervisor believes the employee engaged in any activity described in (a) or (b). Nothing in the statute restricts the right of an employer to take appropriate disciplinary action against an employee who knowingly makes an untrue statement or discloses information the disclosure of which is expressly prohibited by state or federal law, rule or regulation.

“Disciplinary action” means any action taken with respect to an employee, which has the effect, in whole or in part, of a penalty, which includes, but is not limited to, changes in the terms and conditions of employment, e.g., dismissal, demotion, transfer, suspension, reprimand, reassignment, or failure to increase base pay. If a disciplinary action is taken within a certain time period (i) after the employee’s disclosure of information, which merits further investigation or (ii) after the employee’s supervisor or the employee’s appointing authority learns of the disclosure, which ever is later, it is presumed to be a retaliatory action. Such individuals may rebut this presumption by a preponderance of the evidence.

An employee, who believes that a supervisor or appointing authority has initiated or administered or threatened to initiate or administer a retaliatory action against that employee in violation of the statute, may file a written complaint with the Division of Equal Rights, specifying the nature of the retaliatory action, or threat thereof, and requesting relief, within 60 days after the retaliatory action allegedly occurred, or after the employee learned of the retaliatory action or its threat, whichever occurs last. After an investigation, the Division will hold a hearing if the case merits it and shall make written findings and orders. It may order, among other things,:
(a) reinstatement or restoration of the employee to his or her position with back pay;
(b) transfer to an available position; (c) expungement of adverse materials; (d) payment of reasonable attorney’s fees; or (e) suspension or termination of the employee who took retaliatory action. The Division may also fine such employee not less than \$10 or more than \$100 for each day he or she fails to comply with an order. The Division of Equal Rights may also enforce orders by a suit in equity.

The Division of Equal Rights may recommend to the appointing authority of the person who retaliated that disciplinary or other action be taken, including, but not limited to, a statement of violation in his/her personnel file, letter of reprimand, suspension or termination. An employee can also commence a court action at any time. Upon commencement of such an action in a court of record, the Division of Equal Rights has no jurisdiction to process the complaint, except to dismiss it.