

Accountability Report Card Summary 2009
West Virginia

West Virginia has a relatively balanced state whistleblower law:

- Scoring 59 out of a possible 100;
- Ranking 9th out of 51 (50 states and the District of Columbia).

West Virginia has limited coverage (17 of 33 possible points) with an average degree of usability (19 out of 33) and fair remedies (22 out of 33) plus the one bonus point awarded for employee notification of rights.

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

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West Virginia Accountability Index Report card

Coverage, Usability & Strength — Rating on a 100 Point Scale
 Public Employees- Whistle-blower Law- W. Va. Code § 6C-1-1 (2006)
 Labor: Occupational Health and Safety- W.Va. Code § 21-3A-13

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	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 ²
5. Danger to health and/or public safety and/or environment	5 points	2 points ³
6. Communication of scientific opinion or alteration of technical findings	5 points	0 points
7. Breaches of professional ethical canons	5 points	5 points ⁴

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 ⁵
	<u>Maximum Score</u>	<u>Awarded</u>

¹ The statute defines a “whistle-blower” as a person who witnesses or has evidence of wrongdoing or waste while employed with a public body and who makes a good faith report of, or testifies to, the wrongdoing or waste, verbally or in writing, to one of the employee’s superiors, to an agent of the employer, or to an appropriate authority. “Wrongdoing” means a violation which is not of a merely technical or minimal nature of a federal or state statute or regulation, or of a code of conduct or ethics designed to protect the interest of the public or the employer.

² “Waste” means an employer or employee’s conduct or omissions which result in substantial abuse, misuse, destruction or loss of funds or resources belonging to or derived from federal or state sources.

³ Disclosures of occupational health and safety violations are covered.

⁴ “Wrongdoing” means a violation which is not of a merely technical or minimal nature of . . . a code of conduct or ethics designed to protect the interest of the public or the employer.

⁵ The statute shall not impair the rights of any person under a collective bargaining or other labor management agreement.

	<u>33 points</u>	<u>Score</u> <u>17 points</u>
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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 ⁶ -
3. Testimony in any official proceeding	4 points	4 points ⁷
4. Any state or federal law enforcement or investigative body or entity or its employees	3points	3 points ⁸
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 ⁹
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	1 point	0 points
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⁶ **An employee is protected from discrimination or retaliation if he or she makes a good faith report to his or her employer. Also, the definition of whistleblower has the report made a little differently. The statute defines a “whistle-blower” as a person who makes a good faith report of, or testifies to, the wrongdoing or waste, verbally or in writing, to one of the employee’s superiors, to an agent of the employer, or to an appropriate authority.**

⁷ See definition of whistleblower in Factor 2 above. Also, No employer may discharge, threaten, or otherwise discriminate or retaliate against an employee by changing the terms and conditions of employment because the employee . . . is requested or subpoenaed by an appropriate authority to participate in an investigation, hearing or inquiry held by an appropriate authority or in a court action.

⁸ **An “appropriate authority” refers to a federal or state government body, agency or organization having jurisdiction over criminal law enforcement, regulatory violations, professional conduct or ethics or waste; or a member, officer, agent, representative or supervisory employee of such an entity.**

⁹ **To one of the employee’s superiors, to an agent of the employer, or to an appropriate authority.**

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)	2 points ¹⁰
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>19 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	0 points ¹¹
3. Opportunities for court challenge	4 points	4 points ¹²
4. Trial by jury	3 points	0 points ¹³
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 ¹⁴
7. Actual and/or compensatory damages	3 points	3 points ¹⁵ .
8. Interim relief, injunction or stay of personnel actions	3 points	3 points ¹⁶

¹⁰ **A person who alleges that he was discriminated or retaliated against may bring a civil action for appropriate injunctive relief or damages, or both, within 180 days after the occurrence of such conduct.**

¹¹ No administrative remedies are provided. However the statute provides that it does not impair the rights of any person under a collective bargaining or other labor management agreement. Such remedies might be available to an employee who was discriminated or retaliated against.

¹² **A person who alleges that he was discriminated or retaliated against may bring a civil action for appropriate injunctive relief or damages, or both.**

¹³ The statute does not provide for trial by jury. However, we did not review whether trial by jury is available for certain issues under other West Virginia statutes or the State’s Constitution.

¹⁴ In rendering judgment for the complainant, a court shall order, as appropriate, reinstatement of the employee, payment of back wages, full reinstatement of fringe benefits and seniority rights, actual damages or any combination of these remedies. Also, the court may award the complainant, as appropriate, all or a portion of the costs of the litigation, including reasonable attorney and witness fees. Occupational statute mentions whole remedies.

¹⁵ Actual damages. See footnote 13 immediately above

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 ¹⁷
11. Personnel actions against managers found to have retaliated	3 points	3 points ¹⁸
	<u>Maximum Score</u> <u>33 points</u>	<u>Awarded Score</u> <u>22 points</u>

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

Factor	Maximum Score	Awarded Score
Posting	1 point	1 point

Totals

100 points

59 points

¹⁶ **A person who alleges that he was discriminated or retaliated against may bring a civil action for appropriate injunctive relief or damages, or both.**

¹⁷ **A person, who, is an employer or under color of an employer's authority, violates this statute, is liable for a civil fine of not more than \$500.**

¹⁸ **If the court specifically finds that such a person, while in employment of the state, committed a violation with the intent to discourage the disclosure of information, the court may order such person's suspension from public service for not more than 6 months.**

April 16, 2009

State Legislation Protecting State Employee Whistleblowers

State- West Virginia

Statute- Public Employees- Whistle-blower Law- W. Va. Code § 6C-1-1 (2006) and Labor: Occupational Health and Safety- W.Va. Code § 21-3A-13

Provisions-

The first statute defines a “whistle-blower” as a person who witnesses or has evidence of wrongdoing or waste while employed with a public body and who makes a good faith report of, or testifies to, the wrongdoing or waste, verbally or in writing, to one of the employee’s superiors, to an agent of the employer, or to an appropriate authority. “Wrongdoing” means a violation which is not of a merely technical or minimal nature of a federal or state statute or regulation, or of a code of conduct or ethics designed to protect the interest of the public or the employer. “Waste” means an employer or employee’s conduct or omissions which result in substantial abuse, misuse, destruction or loss of funds or resources belonging to or derived from federal or state sources.

“Public body” refers to (1) a department, division, officer, employee, commission, council, authority or other instrumentality of the state of West Virginia; or (2) any other body which is created by state authority or which is funded by 35% or more by or through state authority, or a member or employee of that body. An “appropriate authority” refers to a federal or state government body, agency or organization having jurisdiction over criminal law enforcement, regulatory violations, professional conduct or ethics or waste; or a member, officer, agent, representative or supervisory employee of such an entity. A “good faith report” means a report of conduct defined in the statute as wrongdoing or waste which is made without malice or consideration of personal benefit and which the person making the report has reasonable cause to believe is true.

No employer may discharge, threaten, or otherwise discriminate or retaliate against an employee by changing the terms and conditions of employment because the employee (i) acting on his or her own volition, or a person acting on behalf or direction of such employee, makes a good faith report or is about to report, verbally or in writing, to the employer or appropriate authority an instance of wrongdoing or waste; (ii) is requested or subpoenaed by an appropriate authority to participate in an investigation, hearing or inquiry held by an appropriate authority or in a court action. A person who alleges that he was discriminated or retaliated against may bring a civil action for appropriate injunctive relief or damages, or both, within 180 days after the occurrence of such conduct. The employee must show by the preponderance of the evidence that, prior to the alleged reprisal, that the employee, or a person acting on his or her behalf or under the direction of the employee, had

reported or was about to report in good faith, verbally or in writing, an instance of wrongdoing or waste to the employer or an appropriate authority. It shall be a defense to such civil action if the defendant proves by a preponderance of the evidence that the action complained of occurred for separate and legitimate reasons, which are not merely pretexts.

In rendering judgment for the complainant, a court shall order, as appropriate, reinstatement of the employee, payment of back wages, full reinstatement of fringe benefits and seniority rights, actual damages or any combination of these remedies. Also, the court may award the complainant, as appropriate, all or a portion of the costs of the litigation, including reasonable attorney and witness fees.

A person, who, is an employer or under color of an employer's authority, violates this statute, is liable for a civil fine of not more than \$500. If the court specifically finds that such a person, while in employment of the state, committed a violation with the intent to discourage the disclosure of information, the court may order such person's suspension from public service for not more than 6 months. The statute shall not be construed to require an employer to compensate an employee for participation in an investigation, hearing, or inquiry held by appropriate authority or impair the rights of any person under a collective bargaining or other labor management agreement.

The second statute provides that no employer may discharge or discriminate in any manner against any employee because the employee files a complaint, institutes a proceeding, or testifies. It applies to "public employee(s) of the state, or any state agency." § 21-3A-2. An employee who feels he has been discriminated against in this manner may file a complaint within 30 days. Relief includes reinstatement and back pay.