

**Accountability Report Card Summary 2018**  
**Massachusetts**

Massachusetts has a relatively good state whistleblower law:

- Scoring 64 out of a possible 100 points; and
- Ranking 15<sup>th</sup> out of 51 (50 states and the District of Columbia).

Massachusetts's statute has incomplete coverage (13 out of 33 possible points) with a very good degree of usability (26 out of 33) and very good remedies (24 out of 33) plus the one bonus point awarded for employee notification of rights.

*Massachusetts's full Whistleblower Report Card*                      *page 2*  
*Narrative summary of Massachusetts's law*                              *page 6*

**Massachusetts Accountability Index Report card**

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

Labor and Industries, Misc. Provisions- Mass. Ann. Laws ch.149, §§ 5, 185 (2012);

False Claims Act, Mass. Ann. Laws ch.12, § 5A-5K (2012).

Hazardous Substances Disclosure by Employers- Mass. Ann. Laws ch.111F, § 13 (2012).

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

Does the statute cover disclosures of –

<b>Factor</b>	<b>Maximum Points</b>	<b>Awarded Points</b>
1. Violation of state or federal law, rules or regulations	6 points	6 points <sup>1</sup>
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 the 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	1 point <sup>2</sup>
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 <sup>3</sup>
	<b><u>Maximum Score</u></b> <b><u>33 points</u></b>	<b><u>Awarded Score</u></b> <b><u>13 Points</u></b>

<sup>1</sup> The statute protects disclosures regarding violations of the law, and risks to public health and safety. ALM GL ch. 149, § 185(b).

<sup>2</sup> ALM GL ch. 149, § 185(b)(3).

<sup>3</sup> Once whistleblower brings a court action, all these rights are waived. ALM GL ch. 149, § 185(f).

**B. Usability: Scope of Protection (33 points possible from 10 factors)**

Do the laws protect disclosures made to –

<b>Factor</b>	<b>Maximum Points</b>	<b>Awarded Points</b>
1. Any person or organization, including public media	24 points	0 points

**Or** does the statute only protect disclosures made to –

2. Any state executive or legislative body or person employed by such entities	4 points	4 points <sup>4</sup>
3. Testimony in any official proceeding	4 points	4 points <sup>5</sup>
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	3 points
6. Co-workers or supervisors within the scope of duty	3 points	3 points <sup>6</sup>
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	1 points <sup>7</sup>
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<sup>4</sup> "Public body" refers to "(A) the United States Congress, any state legislature, including the general court, or any popularly elected local government body, or any member or employee thereof; (B) any federal, state or local judiciary, or any member or employee thereof, or any grand or petit jury; (C) any federal, state or local regulatory, administrative or public agency or authority, or instrumentality thereof; (D) any federal, state or local law enforcement agency, prosecutorial office, or police or peace officer; or (E) any division, board, bureau, office, committee or commission of any of the public bodies described in the above paragraphs of this subsection." ALM GL ch. 149, § 185(a)(3).

<sup>5</sup> ALM GL ch. 149, § 185(b)(2).

<sup>6</sup> An employee must first disclose the information to a supervisor, unless specific exceptions apply. ALM GL ch. 149, § 185(c).

<sup>7</sup> The attorney general "shall receive all complaints concerning conditions existing in any industry carried on in the commonwealth, or concerning alleged violations of any laws enforced under his direction, and shall thereupon make or direct all needful and appropriate investigations and prosecutions. ALM GL ch. 149, § 5

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)	3 points <sup>8</sup>
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 <sup>9</sup>
	<b><u>Maximum Score</u></b> <b><u>33 points</u></b>	<b><u>Awarded Score</u></b> <b><u>26 Points</u></b>

**C. Strength: Remedies against retaliation (33 points possible from 11 factors)**

Does the statute provide for –

<b>Factor</b>	<b>Maximum Points</b>	<b>Awarded Points</b>
1. Prohibition on retaliatory actions affecting a state employee’s terms and conditions of employment	4 points	4 points <sup>10</sup>
2. Opportunity for administrative challenge	4 points	4 points <sup>11</sup>
3. Opportunities for court challenge	4 points	4 points <sup>12</sup>
4. Trial by jury	3 points	3 points
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 <sup>13</sup>
7. Actual/compensatory damages	3 points	3 points
8. Interim relief, injunction or stay of personnel actions	3 points	3 points

<sup>8</sup> Two-year statute of limitations to bring court action. ALM GL ch. 149, § 185(d).

<sup>9</sup> ALM GL ch.12 § 5F.

<sup>10</sup> ALM GL ch. 149, § 185(a)(5).

<sup>11</sup> Not specifically mentioned, but the reference to collective bargaining rights being maintained unless a civil action is brought leads to the conclusion that there must be a opportunity for administrative challenge under the statute, which would maintain the employees collective bargaining rights.

<sup>12</sup> Any employee or former employee aggrieved of a violation of this section may, within two years, institute a civil action in the superior court. Any party to said action shall be entitled to claim a jury trial. ALM GL ch. 149, § 185(d).

<sup>13</sup> Any remedy available in a tort action is available to prevailing plaintiffs. “The court may: (1) issue temporary restraining orders or preliminary or permanent injunctions to restrain continued violation of this section; (2) reinstate the employee to the same position held before the retaliatory action, or to an equivalent position; (3) reinstate full fringe benefits and seniority rights to the employee; (4) compensate the employee for three times the lost wages, benefits and other remuneration, and interest thereon; and (5) order payment by the employer of reasonable costs, and attorneys' fees.” ALM GL ch. 149, § 185(d).



## **State Legislation Protecting State Employee Whistleblowers (updated June 2018)**

### **State-** Massachusetts

**Statute-** Labor and Industries, Misc. Provisions- Mass. Ann. Laws ch.149, §§ 5, 185 (2012); False Claims Act, Mass. Ann. Laws ch.12, § 5A-5K (2012); Hazardous Substances Disclosure by Employers- Mass. Ann. Laws ch.111F, § 13 (2012).

**Provisions-** The Commonwealth of Massachusetts and its agencies shall not take any retaliatory action against an employee of governmental entities because the employee does any of the following: (1) discloses or threatens to disclose to a supervisor or to a public body an activity, policy, or practice that the employee reasonably believes is in violation of a law, or which the employee reasonably believes poses a risk to public health, safety, or the environment; (2) provides information or testifies before a public body conducting an investigation; (3) objects to, or refuses to participate in, activities which they reasonable believe are in violation of the law or put the public at risk. “Retaliatory action” refers to any adverse action taken with respect to an employee’s terms and conditions of employment. A “public body” refers to any federal or state legislature, judiciary, regulatory, administrative or public agency or authority, law enforcement agency or prosecutorial office, or any division, bureau, office, or committee of any of the previously described public bodies. It also includes any member or public employee of the U.S. Congress or the State of Massachusetts legislature, or of the federal or state judiciary.

This protection does not apply unless the employee has brought the matter to the attention of a supervisor of the employee by written notice and has afforded the employer a reasonable a reasonable opportunity to correct the matter in question. This notice to the employer is not required if the employee (i) is reasonably certain that the matter is known to one or more of the supervisors of the employer and the situation is emergency in nature, (ii) reasonably fears physical harm as a result of the disclosure provided, or (iii) makes a disclosure to a public body which is part of the federal or state judiciary or a law enforcement agency for the purpose of providing evidence of what the employee reasonably believes to be a crime.

An employee aggrieved by a violation of the statute may within two years bring a civil action with a right to a jury trial. All remedies available in common law tort actions shall be available to a prevailing plaintiff. The court may also issue preliminary and permanent injunctions, reinstate the employee to the same or equivalent position and to full benefits and seniority rights, provide three times lost wages, and order the employer to pay reasonable costs, and attorneys’ fees. Nothing in the statute shall be deemed to diminish the employee’s rights or remedies under any federal or state law or regulation, under any collective bargaining agreement or employment contract. However the commencement of a private action by the employee shall be deemed a waiver by the employee of the rights and remedies available to him under any contract, collective bargaining agreement, state law, rule or regulation, or under the common law.

An employer must conspicuously display notices reasonably designed to inform its employees of their protection and obligations under this section, and use other appropriate means to keep its employees so informed. Each notice posted pursuant to this subsection shall include the name of the person or persons the employer has designated to receive written notifications. Upon receipt of a disclosure brought forward by a whistleblower, the Attorney General must investigate the allegation.

Massachusetts has a False Claims Act, which allows a person to bring an action alleging that individuals, companies, or contractors had defrauded the State or any of its units, entities, or other bodies. The person may share a percentage of any recovery that may be obtained.

Under Section 13 of the Hazardous Substance Disclosure by Employers Act, No person shall discharge or cause to be discharged or otherwise discipline or in any manner discriminate against any employee for the reason that such person has exercised any right, made any claim or filed any complaint or suit or has instituted, or caused to be instituted, any proceeding under this chapter, or has testified, or is about to testify in any proceeding in his own behalf or on behalf of others; nor shall any pay, seniority or other benefits be lost by or denied to any such employee who has exercised any right provided by this chapter.

An employee who believes that he has been discharged, disciplined or in any other manner discriminated against by his employer for reason or reasons of exercising rights under this chapter may, within one hundred and eighty days of such violation or within one hundred and eighty days after obtaining knowledge that a violation did occur, file a verified complaint with the commissioner of DOL. A copy of the verified complaint shall also be sent by certified mail, return receipt requested, by the employee or his attorney to the employer at the time of filing with the commissioner of DOL. The employer, if he so chooses, may file with the commissioner of DOL an answer to the verified complaint, but must do so within twenty days of the receipt of the verified complaint from the employee or his attorney.

Upon receipt of a verified complaint and an answer, if one is so filed within the time period set forth in this section, the commissioner of DOL shall undertake an investigation of the alleged violation. If after a preliminary investigation, the commissioner determines that there is insufficient cause to believe a violation occurred, he shall so notify the complainant and employer within ten days of such determination. The employee or his attorney may, within ten days of such notice, request in writing with a copy to the employer an adjudicatory hearing pursuant to the provisions of chapter thirty A of the General Laws.

If after a preliminary investigation, the commissioner of DOL determines that there is cause to believe a violation occurred, he or she shall so notify the complainant and employer within ten days, and shall conduct an adjudicatory hearing pursuant to chapter thirty A of the General Laws. If after such a hearing, the commissioner determines that the employer did violate the provisions of this chapter, he may take such remedial action

as is appropriate, including the issuance of a cease or desist order or the ordering of any other affirmative steps to correct the violation and prevent its recurrence.

Any time an employee exercises the rights specified in subsection (d) of section eleven of this chapter, and files a complaint pursuant to this section and section three of this chapter, the commissioner of DOL shall hold an adjudicatory hearing to resolve said complaint within ten days.

Any person aggrieved by the determination of the commissioner may appeal such determination in the Superior court for the county in which the employer's workplace is located. Such determination shall be reviewed in accordance with the standards for review provided in section fourteen of chapter thirty A.