

Accountability Report Card Summary 2022
California

California has one of the most complete state whistleblower laws:

- Scoring 78 out of a possible 100 points; and
- Ranking 2nd (to the District of Columbia) out of 51 states examined.

California has broad coverage (20 out of 33 possible points) with maximum usability (33 out of 33) and strong remedies (24 out of 33) plus the one bonus point awarded for employee notification of rights.

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California Accountability Index Report card

Rating on a 100 Point Scale

California Whistleblower Protection Act, Cal. Gov't Code § 8547 *et. seq.* (1993);

Whistleblower Protection Act, Cal. Gov't Code § 9149.20 *et. seq.* (1999);

Cal Gov. Code § 19683 (1986);

Occupational Health and Safety, Cal Lab. Code § 6310 (1973);

Cal Lab. Code § 1102.5 *et. seq.* (1984)

Reprisals; prohibition; justifications for disciplinary actions Cal. Gov. Code § 53298
(1986).

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
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 and/or environment	5 points	5 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 –

¹ California has several whistleblower statutes that involve violations of federal or state law, rules, or regulations. The Whistleblower Protection Act was intended to encourage state employees to disclose, to the extent not expressly prohibited by law, improper governmental activities. Cal Gov Code § 9149.21. "Improper governmental activity" means any activity by a governmental agency or by an employee that is undertaken in the performance of the employee's official duties, and that (1) is in violation of any state or federal law or regulation, including, but not limited to, corruption, malfeasance, bribery, theft of government property, fraudulent claims, fraud, coercion, conversion, malicious prosecution, misuse of government property, or willful omission to perform duty, or (2) is economically wasteful, or involves gross misconduct, incompetency, or inefficiency. Cal Gov Code § 9149.22(c). *See also* California Whistleblower Protection Act, Cal Gov Code § 8547.2(c), (e) (protecting any good faith communication that discloses or demonstrates an intention to disclose information that may evidence an improper government activity).

² The California Whistleblower Protection Act protects any good faith communication that discloses or demonstrates an intention to disclose, made for the purpose of remedying, any condition that may significantly threaten the health or safety of state employees or the public.

8. Employee may refuse to carry out illegal or improper orders	1 point	1 point ³
9. Prohibition on “gag orders” to prevent employee disclosures	1 point	1 point ⁴
10. Whistleblower protection does not preclude collective bargaining or other rights	1 point	1 point ⁵
	<u>Maximum Score</u> <u>33 points</u>	<u>Awarded Score</u> <u>20 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	24 points ^{6 7}

Or does the statute protect disclosures made to –

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

³ The California Whistleblower Protection Act requires that once the employer must show that the alleged action would have been taken even in the absence of the protected disclosure or refusal to comply with an illegal order. § 8547.8(e). The statute defines the term “illegal order” to mean any directive to violate or assist in violating any federal or state or regulation or any order to work or cause others to work in conditions outside their line of duty that would unreasonably threaten the health or safety of employees or the public. § 8547.2(b).

⁴ An employer may not enforce, adopt, and make any rule or policy preventing an employee from disclosing information to a government or law enforcement agency to a person with authority over the employee, or to another employee who has authority to investigate, discover, or correct the violation or noncompliance, or from providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry, if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation, regardless of whether disclosing the information is part of the employee’s job duties. Cal Lab Code § 1102.5(a). The California Whistleblower Protection Act and the Whistleblower Protection Act both contain legislative findings which highlight the intent of the Legislature to incentivize disclosures.

⁵ The California Whistleblower Protection Act provides that nothing in the Statute shall diminish the rights, privileges or remedies of any state whistleblower employee under any federal or state law or under any employment contract or collective bargaining agreement. § 8547.8(f).

⁶ The California Whistleblower Protection Act appears to allow disclosures to any person, although the State Auditor may conduct an investigation of improper government activities. Because the statute does not restrict disclosures to any particular persons or groups, we have awarded 24 points for Factor 1

⁷ Under California False Claims Act § 12653 (a)-(b)

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	1 point ⁸
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 ⁹
10. Allow qui tam or false claim actions for recovery of “bounty” in cases of fraud against the state	5 points	5 points ¹⁰
	<u>Maximum Score</u> 33 points	<u>Awarded Score</u> 33 points.

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 ¹¹
2. Opportunity for administrative challenge	4 points	4 points
3. Opportunities for court challenge	4 points	4 points
4. Trial by jury	3 points	0 points ¹²

⁸ The State Personnel Board shall initiate a hearing or investigation of a written complaint of reprisal or retaliation as prohibited by the California Whistleblower Protection Act within 10 working days of its submission. Cal Gov Code § 19683(a). *See also* Cal Gov Code § 8547.5(b).

⁹ The California Whistleblower Protection Statute states that the complaint filed with the board must be filed within 12 months of the most recent act of reprisal complained about. Cal Gov Code § 8547.8(a). Other California whistleblower statutes do not contain specific statutes of limitations.

¹⁰ The False Claims Act, Cal Gov Code §§ 12650 through 12656.

¹¹ Statutes I and II prohibit retaliatory actions affecting employee’s terms and conditions of employment.

¹² Jury trial not specifically mentioned in any of the statutes, but as with the other Statutes, a right to trial by jury might be available under California law or the State’s Constitution.

5. Burden shifting upon prima facie showing.	1 point	1 point ¹³
6. Make whole remedies (court costs, attorney fees, back pay; restoration of benefits, etc.)	3 points	3 points ¹⁴
7. Actual/compensatory damages	3 points	3 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 ¹⁵
11. Personnel actions against managers found to have retaliated	3 points	3 points ¹⁶
	<u>Maximum Score</u> <u>33 points</u>	<u>Awarded Score</u> <u>24 points</u>

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

Factor	Maximum Score	Awarded Score
Posting	1 point	1 point ¹⁷

Total Points

100 Points

78 Points

¹³ Cal Gov Code § 8547.8(e).

¹⁴ If it is determined that improper activity has occurred, “the board may order any appropriate relief, including, but not limited to, reinstatement, back-pay, restoration of lost service credit, if appropriate, compensatory damages, and the expungement of any adverse records of the state employee or applicant for state employment who was the subject of the alleged acts of misconduct prohibited by Section 8547.3.” Cal Gov. Code § 19683(c); *see also* Cal Lab Code § 1102.5(j).

¹⁵ Punitive damages may be awarded by the court where the acts of the offending party are proven to be malicious. Cal Gov Code § 8547.8(c). Any person who intentionally engages in an acts of reprisal because a state employee made a protected disclosure is subject to a fine not to exceed \$10,000 and imprisonment in the county jail for a period not to exceed a year. Cal Gov Code § 8547.8(b). Under the California Labor Code, an employer who violates the prohibition against reprisal actions is guilty of a misdemeanor, punishable by imprisonment in the county jail not to exceed 1 year, a fine not to exceed \$1,000, or both. Cal Lab Code § 1103.

¹⁶ Cal Gov Code § 19683(d), (e).

¹⁷ Cal Gov Code § 8548.1 *et seq* (2011).

State Legislation Protecting State Employee Whistleblowers (updated July 2022)

State: California

Statutes: Whistleblower Protection Act, Cal. Gov't Code § 9149.20-23 (1993); Cal Gov. Code § 19683 (1992); California Whistleblower Protection Act, Cal. Gov't Code § 8547 (1993); Cal. Lab. Code §1102.5 (1984); Cal Lab. Code § 6310 (1973); liability of employer; remedies of employee Cal. Gov't Code § 12653 (2012); Reprisals; prohibition; justifications for disciplinary actions Cal. Gov't Code § 53298 (1986).

Provisions: California has several statutes protecting state public employees' whistleblower rights. Two statutes bear the title Whistleblower Protection Act and the two other statutes apply provisions of the California Labor Code to state public employees. The Whistleblower Protection Act provides that it is the intent of the legislature that state employees and other persons should disclose, to the extent not expressly prohibited by law, improper government activities. It prohibits a state employee, including individuals employed by the California State University and the University of California, to use the employee's official authority to intimidate, threaten, coerce, or command for the purpose of interfering with another employee's right to disclose to a legislative committee "improper government activities."

"Improper government activities" refers to an activity by a government agency or by an employee that is undertaken in the performance of the employee's official duties, whether or not that action is within the scope of his or her employment, and that (1) is in violation of any state or federal law or regulation, or (2) is economically wasteful, or involves gross misconduct, incompetence, or inefficiency. Any state employee who violates the prohibition on intimidating another employee may be liable in an action for civil damages, brought against him by the offended party.

In the California Whistleblower Protection Act, the state legislature stated its findings that state employees should be free to report waste, fraud, abuse of authority, violation of law, or threat to public health without fear of retribution and that public servants best serve the citizenry when they can be candid and honest without reservation in conducting the people's business. An employee may not directly or indirectly use his official authority to intimidate, threaten, or coerce another employee from reporting "improper government activity" or any condition that may significantly threaten the health or safety of employees or the public if disclosure was made for the purpose of remedying that condition. The definition of an "improper government activity" is the same as under the Whistleblower Protection Act. Protection under the Act is afforded to all current employees and former employees who met the statute's criteria during employment. Any

state employee who violates this prohibition may be liable in an action for civil damages brought against him by the offended party. Punitive damages may be awarded when the employee's actions are shown to be malicious. Under Cal. Gov't Code § 19683, the State Personnel Board must institute a hearing within 10 days of a complaint by an employee of prohibited retaliation under the Whistleblower Protection Act.

A state employee may also file a written complaint with his or her supervisor, manager, or the appointing power alleging actual or attempted acts of reprisal. Any person who intentionally engages in acts of reprisal is subject to a fine not to exceed \$10,000 and imprisonment for a period not to exceed one year. The State Auditor investigates and reports on improper government activities. The California Whistleblower Protection Act also provides protection from reprisals for employees of the University of California system and the California State University system.

The State Auditor shall create the means for the submission of allegations of improper governmental activity both by transmission via mail or other carrier to a specified mailing address and electronic submission through an Internet Web site portal. The State Auditor may request that a person submitting an allegation provide his or her name and contact information and provide the names and contact information for any persons who could help to substantiate the claim. However, the State Auditor shall not require any person submitting an allegation to provide his or her name or contact information and shall clearly state on the agency Internet Web site that this information is not required in order to submit an allegation.

Upon receiving specific information that any employee or state agency has engaged in an improper governmental activity, the State Auditor may conduct an investigation of the matter. The identity of the person providing the information that initiated the investigation, or of any person providing information in confidence to further an investigation, shall not be disclosed without the express permission of the person providing the information except that the State Auditor may make the disclosure to a law enforcement agency that is conducting a criminal investigation.

The provisions of the California Labor Code concerning an employee's right to disclose information to government or law enforcement agencies also applies to State employees. An employer, or a person acting on behalf of the employer, shall not adopt or enforce any rule, regulation, or policy preventing an employee from making such a disclosure where the employee has reasonable cause to believe that the information discloses a violation of a state or federal statute, or a violation or noncompliance with a state or federal rule or regulation. An employer, or a person acting on behalf of the employer, also shall not retaliate against such an employee in such a circumstance and also if the employee refuses to participate in an activity that would result in a violation of a state or federal statute, or a violation or noncompliance with a state or federal rule or regulation.

Under this statute the Office of Attorney General is to maintain a whistleblower hotline to receive calls concerning violations of federal or state statutes, rules, or regulations. An employer who violates the statute is guilty of a misdemeanor and if an individual, is

subject to a fine not to exceed \$1,000 or up to a year in jail, or both. If the employer is a corporation, the punishment is a fine not to exceed \$5,000.

Under Cal Lab. Code § 6310 (2022), disclosures of occupational health and safety violations are protected, as well as refusals to perform work which would lead to the violation of any occupational safety or health standard or any safety order. Retaliation for such disclosures is prohibited.

Under Cal.Gov.Code § 53298, No local agency officer, manager, or supervisor shall take a reprisal action against any employee or applicant for employment who files a complaint pursuant to § 53297.

This article is not intended to prevent a local agency from taking, directing others to take, recommending, or approving any personnel action with respect to any employee or applicant for employment if the local agency reasonably believes that the action or inaction is justified on the basis of separate evidence which shows any of the following:

- (1) The employee's complaint has disclosed information that he or she knows to be false or has disclosed information without regard for the truth or falsity thereof.
 - (2) The employee's complaint has disclosed information from records which are closed to public inspection pursuant to law.
 - (3) The employee's complaint has disclosed information which is confidential under any other provision of law.
 - (4) The employee was the subject of an ongoing or existing disciplinary action prior to the disclosure of information with the local agency.
 - (5) The employee has violated any other provision of the local personnel rules and regulations, has failed to perform assigned duties, or has committed any other act unrelated to the disclosure that would otherwise be subject to personnel action.
- (c) It is not a violation of this article for an officer, manager, or supervisor to take disciplinary action against an employee if that officer, manager, or supervisor had no prior knowledge that a complaint had been filed by that employee

Under Cal. Gov't Code § 12653,

- (a) No employer shall make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency or from acting in furtherance of a false claims action, including investigating, initiating, testifying, or assisting in an action filed or to be filed under Section 12652.
- (b) No employer shall discharge, demote, suspend, threaten, harass, deny promotion to, or in any other manner discriminate against, an employee in the terms and conditions of employment because of lawful acts done by the employee on behalf of the employee or others in disclosing information to a government or law enforcement agency or in furthering a false claims action, including investigation for, initiation of, testimony for, or assistance in, an action filed or to be filed under Section 12652.
- (c) An employer who violates subdivision (b) shall be liable for all relief necessary to make the employee whole, including reinstatement with the same seniority status that the employee would have had but for the discrimination, two times the amount of back pay, interest on the back pay, compensation for any special damage sustained as a result of the discrimination, and, where appropriate, punitive damages. In addition, the defendant shall

be required to pay litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate superior court of the state for the relief provided in this subdivision.

(d) An employee who is discharged, demoted, suspended, harassed, denied promotion, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of participation in conduct which directly or indirectly resulted in a false claim being submitted to the state or a political subdivision shall be entitled to the remedies under subdivision (c) if, and only if, both of the following occur:

(1) The employee voluntarily disclosed information to a government or law enforcement agency or acted in furtherance of a false claims action, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed.

(2) The employee had been harassed, threatened with termination or demotion, or otherwise coerced by the employer or its management into engaging in the fraudulent activity in the first place.