

Accountability Report Card Summary 2022
Delaware

Delaware has a relatively strong state whistleblower law:

- Scoring 60 out of a possible 100 points; and
- Ranking 20th out of 51 (50 states and the District of Columbia).

Delaware has moderate coverage (14 out of 33 possible points) with a very high degree of usability (28 out of 33) and middling remedies (17 out of 33), plus the one bonus point for posting or employee notice requirements

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Delaware Accountability Index Report card

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

Protection of public employees - Del. Code Ann. tit. 29, § 5115 (1983);

Delaware Whistleblowers' Protection Act- Del. Code Ann. tit. 19, § 1701-1708 (2004)

Delaware False Claims and Reporting Act, Del. Code Ann. tit. 6, § 1201-1211 (2000)

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	3 points ³
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 ⁴
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>33 points</u>	<u>Awarded Score</u> <u>14 points</u>

¹ Delaware has two whistleblower protection statutes. The first applies to full-time or part-time employees of the State. The second applies to all public and private employers including the state government. Under the first statute, no public employee shall be discharged, threatened, or otherwise discriminated against with respect to the terms or conditions of employment because the employee reported, in a written or oral communication, to an elected official, a violation or suspected violation of law or regulation under the laws of the United States or of Delaware, unless the employee knows that the report is false.

² Protects an employee who reports or is about to report an act or omission to protect any person from fraud, deceit, or misappropriation of public or private funds or assets under the control of the employer. 19 Del. C. § 1702(6)(b).

³ Employee reports or is about to report an act or omission to protect health, safety or environmental hazards on the employer’s premises or elsewhere. 19 Del. C. § 1702(6)(a).

⁴ An employer cannot discriminate against an employee who “refuses to commit or assist in the commission of a violation, as defined in this chapter.” 19 Del. C. § 1703(3).

⁵ 19 Del. C. § 1705.

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	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
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 of whistleblower disclosures	1 point	0 points
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 ⁸
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 ⁹
	<u>Maximum Score</u> <u>33 points</u>	<u>Awarded Score</u> <u>28 points</u>

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

⁶ The Delaware Whistleblowers’ Protection Act defines “public body” very broadly. 19 Del. C. § 1702(4).

⁷ Employer cannot discriminate against an employee because they participate in an investigation, hearing, or inquiry associated with a suspected violation. 19 Del. C. § 1703(2).

⁸ “A person who alleges a violation of this chapter may bring a civil action for appropriate declaratory relief, or actual damages, or both within 3 years after the occurrence of the alleged violation of this chapter.” 19 Del. C. § 1704(a).

⁹ Delaware False Claims and Reporting Act, 6 Del. C. § 1205 (2011).

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 ¹⁰
2. Opportunity for administrative challenge	4 points	0 points
3. Opportunities for court challenge	4 points	4 points
4. Trial by jury	3 points	0 points ¹¹
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 ¹²
7. Actual/compensatory damages	3 points	3 points ¹³
8. Interim relief, injunction or stay of personnel actions	3 points	3 points ¹⁴
9. Transfer preference for prevailing whistleblower or ban on blackballing	3 points	0 points
10. Punitive damages or other fines and penalties	3 points	0 points
11. Personnel actions against managers found to have retaliated	2 points	0 points
	<u>Maximum Score</u> 33 points	<u>Awarded Score</u> 17 points

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

Factor	Maximum Score	Awarded Score
Posting	1 point	1 point ¹⁵

Total points

100 points

60 points

State Legislation Protecting State Employee Whistleblowers (updated July 2022)

State: Delaware

¹⁰ The Delaware Whistleblowers' Protection Act, 19 Del. C. §1703. *See also* 29 Del. C. § 5115.

¹¹ Statutes do not explicitly provide for jury trial.

¹² The court may award back pay, reinstatement of fringe benefits and seniority rights, and all or a portion of the costs of litigation, including attorneys fees. 19 Del. C. § 1704(d).

¹³ 19 Del. C. § 1704 and 29 Del. C. § 5115 both provide for actual damages.

¹⁴ 29 Del. C. § 5115 provides for appropriate injunctive relief.

¹⁵ “An employer shall post notices and use other appropriate means to keep the employer's employees informed of their protections and obligations under this chapter.” 19 Del. C. § 1707

Statute: Protection of public employees reporting suspected violation of law—Del. Code Ann. tit. 29, § 5115 (1983); Delaware Whistleblowers’ Protection Act—Del. Code Ann. tit. 19, § 1701-1708 (2004); Delaware False Claims and Reporting Act, Del. Code Ann. tit. 6, § 1201-1211 (2000).

Provisions: Delaware has two whistleblower protection statutes. Under the “Protection of public employees reporting suspected violation of law,” no public employee shall be discharged, threatened, or otherwise discriminated against with respect to the terms or conditions of employment because the employee reported, in a written or oral communication to an elected official, a violation or suspected violation of law or regulation under the laws of the United States or of Delaware, unless the employee knows that the report is false. The term “elected official” refers to the Auditor of Accounts, a state official elected by popular vote and employees of his office and does not include members of the legislature of Delaware. An employee who alleges a violation of the statute may bring a civil action for appropriate injunctive relief, actual damages, or both, within 90 days after the occurrence of the violation.

The Delaware Whistleblowers’ Protection Act applies to both public and private employers. It provides protection for legitimate, good faith whistleblower activities. The statute provides that an employer shall not discharge, threaten or otherwise discriminate against an employee regarding the employee’s terms and conditions of employment because (1) the employee or a person acting on his behalf, reports, or is about to report, to a public body, verbally or in writing, a violation which the employee knows or reasonable believes has occurred or is about to occur, unless the employee knows, or has reason to know, that the report is false; (2) an employee participates or is requested by a public body to participate in an investigation, hearing, or inquiry by that public body, or a court action in connection with a violation; (3) an employee refuses to commit or assist in the commission of a violation; or (4) the employee verbally or in writing reports to the employer or to the employee’s supervisor a violation, which the employee knows or reasonably believes, has occurred or is about to incur, unless the employee knows or has reason to know that the report is false.

The term “public body” includes an agency, department, division, bureau, board, commission, authority or other body in the executive branch of state government or an employee of such entities. It also includes a legislator or employee of the legislative branch of state government, and any federal agency or employee of that agency. The term “violation” means an act or omission by an employer, or an agent thereof, that is (1) materially inconsistent with, or a serious deviation from, standards implemented pursuant to a law, rule, or regulation promulgated under the laws of Delaware or the United States, to protect employees or other persons from health, safety, or environmental hazards while on the employer’s premises, or elsewhere; or (2) materially inconsistent with, or a serious deviation from, financial management or accounting standards implemented pursuant to a rule or regulation promulgated by the employer or under the laws of Delaware or the United States, to protect any person, from fraud, deceit, or misappropriation of public or private funds or assets under the control of the employer.

A person who alleges a violation of the whistleblowers’ law may bring a civil action for appropriate declaratory relief, actual damages, or both within 3 years after the occurrence

of the violation. The burden of proof lies with the employee to show that the primary basis for the discharge, threats, or discrimination alleged to be in violation of this chapter, was that the employee made a protected disclosure. In its judgment, a court shall order, as it considers appropriate, reinstatement of the employee, back wages, reinstatement of fringe benefits, actual damages, expungement of records, or any combination of these remedies. The court may also order, if it considers appropriate, the payment of all or part of the costs of litigation, including attorney's fees.

The Whistleblowers' Protection statute does not diminish or impair the rights of a person under any collective bargaining agreement. An employer must post notices and use other appropriate means to keep the employer's employees informed of their protections and obligations.

The Delaware False Claims and Reporting Act states that if the Department of Justice proceeds with an action brought by a party under the Act, such party shall, subject to the second sentence of this subsection, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the party bringing the action) relating to allegations or transactions in a criminal, civil or administrative hearing, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information. Any such party shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees and costs shall be awarded against the defendant.