

Accountability Report Card Summary 2022
Montana

Montana has an uneven state whistleblower law:

- Scoring 59 out of a possible 100 points;
- Ranking 20th out of 51 (50 states and the District of Columbia).

Montana's statute has very limited coverage (12 out of 33 possible points) with a high degree of usability (32 out of 33) and average remedies (15 out of 33).

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

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

Wrongful Discharge from Employment Act, Mont. Code Ann. § 39-2-901 to -915 (2021);

Montana False Claims Act, Mont. Code Ann. § 17-8-401 to -411 (2021);

Montana Occupational Safety and Health Act – Retaliation Prohibited, Mont. Code Ann. § 50-71-123 (2009).

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	3 points ¹
2. Gross mismanagement	3 points	0 points
3. Abuse of authority (including violations of agency policy)	3 points	3 points ²
4. Waste of public funds or resources	3 points	0 points
5. Danger to health and/or public safety and/or environment	5 points	5 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
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	0 point ⁴
	<u>Maximum Score</u> <u>33 points</u>	<u>Awarded Score</u> <u>12 points</u>

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

Do the laws protect disclosures made to –

¹ Employee may disclose violation of “public policy in effect at the time of discharge concerning the public health, safety, or welfare established by constitutional provision, statute, or administrative rule.” § 39-2-903(7).

² The statute protects a public employee who contacts the department with a complaint of a violation of a standard in the workplace. MCA 50-71-123

³ A discharge from employment is wrongful if it was in retaliation for the employee’s refusal to violate public policy or for reporting a violation of public policy. Mont. Code Anno. § 39-2-904.

⁴ This statute also does not apply to an employee covered by a collective bargaining agreement or a written contract of employment for a specific term. Mont. Code Anno., § 39-2-912.

Factor	Maximum Points	Awarded Points
1. Any person or organization, including public media	24 points	24 points ⁵

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
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 ⁶

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 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)	5 points ⁸
	<u>Maximum Score</u> 33 points	<u>Awarded Score</u> 32 points

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

Does the statute provide for –

Factor	Maximum Points	Awarded Points
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⁵ The statute does not specify to whom the employee should report a violation of public policy affecting the public health, safety, or welfare.

⁶ The statute does not provide that the employee’s reporting of a violation of public policy must be to any organization, person, or entity mentioned in Factors 2-6 above.

⁷ A court action can be filed within 1 year from the date of discharge. However, the employer must first exhaust the employer’s written internal administrative procedures. If these procedures are not completed within 90 days from the date the employee initiates them, the employee may file a cause of action and the internal procedures are considered exhausted. Mont. Code Anno., § 39-2-911

⁸ Mont. Code Anno., § 17-8-410(1).

1. Prohibition on retaliatory actions affecting a state employee's terms and conditions of employment	4 points	2 points ⁹
2. Opportunity for administrative challenge	4 points	4 points ¹⁰
3. Opportunities for court challenge	4 points	4 points
4. Trial by jury	3 points	0 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
7. Actual/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 ¹¹
11. Personnel actions against managers found to have retaliated	3 points	0 points
	<u>Maximum Score</u> <u>33 points</u>	<u>Awarded Score</u> <u>16 points</u>

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

Factor	Maximum Score	Awarded Score
Posting	1 point	0 points ¹²

Totals **100 points** **59 points**

⁹ Eligible retaliatory action limited to discharge. "Discharge" includes a constructive discharge (voluntary termination of employment by an employee because of an intolerable situation) and any other termination of employment, including resignation, elimination of the job, layoff for lack of work, failure to recall or rehire, and any other cutback in the number of employees for a legitimate business reason. Mont. Code Anno., § 39-2-903(2). A public sector employer may not retaliate against a public sector employee. MCA 50-71-123 (2011). After amendments in 2021, discharge is wrongful only if the employer materially violated an express provision of its own personnel policy, and only if the violation deprived the employee of "a fair and reasonable opportunity to remain in a position of employment with the employer." Employers have "the broadest discretion" when discharging managerial employees, and are able to make use of an expansive definition of "good cause" for dismissals.

¹⁰ If the employer has written internal rules, these must be exhausted before bringing a court action.

¹¹ Punitive damages, in the case of an employer's actual fraud or actual malice in the discharge of an employee. Mont. Code Anno., § 39-2-905(2).

¹² Notice of agency internal procedure is required, but not of the main statute provisions.

State Legislation Protecting State Employee Whistleblowers (updated March 2021)

State- Montana

Statute- Wrongful Discharge from Employment Act, Mont. Code Ann. § 39-2-901 to -915 (2010); Montana False Claims Act, Mont. Code Ann. § 17-8-401 to -411 (2010). Montana Occupational Safety and Health Act – Retaliation Prohibited, Mont. Code Ann. § 50-71-123 (2011).

Provisions- This statute applies to the discharge of private and public sector employees. A discharge from employment is wrongful if, among other things, it was in retaliation for the employee’s refusal to violate public policy or for reporting a violation of public policy. “Public policy” means a policy in effect at the time of discharge concerning the public health, safety, or welfare established by constitutional provision, statute, or administrative rule. Discharge includes a constructive discharge (voluntary termination of employment by an employee because of an intolerable situation) and any other termination of employment, including resignation, elimination of the job, layoff for lack of work, failure to recall or rehire, and any other cutback in the number of employees for a legitimate business reason.

The statute does not apply to a discharge that is subject to any other state or federal statute that provides a procedure or remedy for contesting the dispute. These situations prohibit discharge for filing complaints, charges, or claims with administrative bodies or that prohibit unlawful discrimination based on race, national origin, age, disability, creed, religion, political belief, color, marital status, and other similar grounds. This statute also does not apply to an employee covered by a collective bargaining agreement or a written contract of employment for a specific term.

If an employer maintains written internal procedures under which an employee may appeal a discharge within the organizational structure of the employer, the employee must first exhaust these procedures before filing a civil action. Administrative remedies may be considered exhausted when the procedure has not been completed within 90 days. A civil action must be filed within 1 year after the date of discharge. If an employer had committed a wrongful discharge, the employee may be awarded lost wages and fringe benefits for a period of not to exceed 4 years from the date of discharge. The employee may recover punitive damages otherwise allowed by law if it is established by clear and convincing evidence that the employer engaged in actual fraud or actual malice if the discharge was for the employee’s refusal to violate public policy or reporting a violation of it. Unless otherwise provided, damages for wrongful discharge shall not include pain and suffering, emotional distress, compensatory damages, compensatory damages, or any other form of damages. No claim for discharge may arise from tort or express or implied contract.

If the employer maintains written internal procedures under which an employee may appeal a discharge within the organizational structure of the employer, the employer shall within 7 days of the date of the discharge notify the discharged employee of the existence of such procedures and shall supply the discharged employee with a copy of them. A party may make a written offer to arbitrate a dispute that otherwise could be adjudicated

under the statute. If a valid offer to arbitrate is made and accepted, arbitration is the exclusive remedy for the wrongful discharge dispute. Consequently, there is no right to bring or continue a law suit brought under the statute. The arbitrator's award is final and binding, subject to review of the arbitrator's decision under the provisions of the Uniform Arbitration Act. Under the Montana False Claims Act, if a government attorney proceeds with an action brought by a whistleblower, the person must receive at least 15% but not more than 25% of the proceeds recovered and collected in the action or in settlement of the claim, depending on the extent to which the person substantially contributed to the prosecution of the action. Mont. Code Ann., § 17-8-410.

Under Mont. Code Ann. 50-71-123, a public sector employer may not retaliate against a public sector employee who:(1) contacts the department with a complaint of a violation of a standard in the workplace;(2) cooperates with the department in the performance of an inspection or an investigation; or (3) testifies or cooperates with the department in any case arising out of: (a) an inspection; (b) an investigation; (c) a citation; (d) a temporary stop-work order; or (e) a civil action seeking injunctive relief.