

Accountability Report Card Summary 2018
Washington

Washington has an uneven state whistleblower law:

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

Washington has good coverage (23 of 33 possible points) with a poor degree of usability (14 out of 33) and relatively good remedies (26 out of 33), plus the one bonus point for requiring notice for employees.

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

page 2
page 6

Washington State Accountability Index Report card

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

State gov't whistleblower protection: Wash. Rev. Code Ann. § 42.40.010-110 (2012)

Local gov't whistleblower protection: Wash. Rev. Code Ann. § 42.41.010-902 (1992)

Unfair Labor Practices: Wash. Rev. Code Ann. § 49.60.210 and 250 (2012)

WA Industrial Health and Safety Act: Wash. Rev. Code Ann. § 49.17.010-075 (2012)

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

Do the statutes 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	5 points	5 points
6. Communication of scientific opinion or alteration of technical findings	5 points	5 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	0 points
9. Prohibition on “gag orders” to prevent employee disclosures	1 point	1 point ²
10. Whistleblower protection does not preclude collective bargaining or other rights	1 point	0 points
	<u>Maximum Score</u> <u>33 points</u>	<u>Awarded Score</u> <u>23 points</u>

¹ It is the policy of the legislature that employees should be encouraged to disclose, to the extent not expressly prohibited by law, improper governmental actions. Wash. Rev. Code Ann. § 42.40.010. “Improper governmental action” means any action by an employee undertaken in the performance of the employee's official duties which is (i) a gross waste of public funds or resources; (ii) in violation of federal or state law or rule; (iii) of substantial and specific danger to the public health or safety; (iv) gross mismanagement; or (v) prevents the dissemination of scientific opinion or alters technical findings without scientifically valid justification. Wash. Rev. Code Ann. § 42.40.020(6).

² An agency employee from using his/her authority to interfere with the right of an individual to disclose improper governmental action or identify administrative rules warranting review or provide information to the rules review committee. § 42.40.030(1)

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 only protect disclosures made to – 20 points or less

2. Any state executive or legislative body or person employed by such entities	4 points	2 points ³
3. Testimony in any official proceeding	4 points	4 points ⁴
4. Any state or federal law enforcement or investigative body or entity or its employees	3 points	3 point ⁵
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	0 points ⁶
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

³ For the purpose of construing the provisions concerning retaliatory and reprisal actions, “whistleblower” is defined to include an employee who in good faith identifies rules warranting review or provides information to the rules review committee, and an employee who is believed to have identified rules warranting review or provided information to the rules review committee but who, in fact, has not done so. § 42.40.020(8)(b). This committee is a bipartisan legislative committee. § 34.05.610.

⁴Wash. Rev. Code Ann. § 49.17.160(1)

⁵ In order to be investigated, an assertion of improper governmental action must be provided to the auditor or other public official within one year after the occurrence of the asserted improper governmental action. Wash. Rev. Code Ann. § 42.40.040(1)(a)

⁶ The state auditor, is empowered, but not required, to initiate an investigation. §42.40.040.

⁷ An action for relief not hereinbefore provided for, shall be commenced within two years after the cause of action shall have accrued. Wash. Rev. Code Ann. § 4.16.130. The three-year statute of limitations of RCW

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)	2 points ⁸
	<u>Maximum Score</u> 33 points	<u>Awarded Score</u> 14 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 ⁹
2. Opportunity for administrative challenge	4 points	4 points ¹⁰
3. Opportunities for court challenge	4 points	4 points ¹¹
4. Trial by jury	3 points	0 points
5. Burden shifting upon prima facie showing.	1 point	1 point ¹²
6. Make whole remedies (court costs, attorney fees, back pay; restoration of benefits, etc.)	3 points	3 points ¹³
7. Actual/compensatory damages	3 points	3 points
8. Interim relief, injunction or stay of personnel actions	3 points	3 points
9. Transfer preference for prevailing whistleblower or ban on blackballing	3 points	0 points

4.16.080(2) applies to actions under RCW 49.60. *Martini v. Boeing Co.*, 88 Wash. App. 442, 452 (Wash. Ct. App. 1997).

⁸ Wash. Rev. Code Ann. § 74.66 *et seq.* (2016). Medicaid Fraud False Claims Act

⁹ Any whistleblower subject to workplace reprisal or retaliatory action in terms and conditions of employment after making a protected disclosure will be presumed to have established a cause of action. § 42.40.050(1)

¹⁰ Civil Rights Law provides administrative remedy through filing of complaint with Human Rights Commission.

¹¹ Any person considering himself or herself as injured by a civil rights violation shall have a civil action in court to enjoin further violations and/or recover actual damages. § 49.60.030(2).

¹² Retaliatory action or reprisal creates a presumption that whistleblower has established a cause of action. Agency can rebut by preponderance of the evidence that its actions justified for reasons unrelated to employee’s status as whistleblower. § 42.40.050(1), (2).

¹³ The remedies provided in civil rights law court case include injunction for further violations and/or actual damages, together with the cost of the suit, including reasonable attorneys’ fees, or any other remedy authorized by civil rights law or U.S. Civil Rights Act of 1964. The ALJ may also order make whole remedies.

State Legislation Protecting State Employee Whistleblowers (updated June 2018)

State- Washington

Statute- State gov't whistleblower protection: Wash. Rev. Code Ann. § 42.40.010-110 (2012); Local gov't whistleblower protection: Wash. Rev. Code Ann. § 42.41.010-902 (1992); Unfair Labor Practices: Wash. Rev. Code Ann. § 49.60.210 and 250 (2012); WA Industrial Health and Safety Act: Wash. Rev. Code Ann. § 49.17.010-075 (2012)

Provisions- The State Employee Whistleblower Protection Act states that it is the policy of the legislature that employees should be encouraged to disclose, to the extent not expressly prohibited by law, improper government actions, and it is the intent of the legislature to protect the rights of state employees making these disclosures. It is also the policy of the legislature that employees should be encouraged to identify rules warranting review or provide information to the rules review committee, and it is the intent of the legislature to protect the rights of these employees.

“Improper government action” means any action by an employee undertaken in the performance of the employee’s official duties, which is: (1) a gross waste of public funds or resources; (2) in violation of federal or state law or rule, if the violation is not merely technical or of a minimum nature; (3) of substantial and specific danger to the public health or safety; or (4) preventing the dissemination of scientific opinion or altering technical findings without valid scientific justification, and gross mismanagement. “Improper government action” does not include personnel actions, for which other remedies exist. “Gross waste of funds” means to spend or use funds or to allow funds to be used without valuable result in a manner grossly deviating from the standard of care or competence a reasonable person would observe in the same situation. “Substantial and specific danger” refers to a risk of serious injury, illness, peril, or loss, to which the exposure of the public is a gross deviation from the standard of care or competence which a reasonable person would observe in the same situation.

A whistleblower may make good faith reports alleging improper government action to the Washington State auditor. The term "whistleblower" also refers to: (a) an employee who in good faith provides information to the auditor in connection with an investigation and an employee who is believed to have reported improper governmental action to the auditor but who, in fact, has not reported such action or provided such information; or (b) an employee who in good faith identifies rules warranting review or provides information to the rules review committee, and an employee who is believed to have identified rules warranting review or provided information to the rules review committee but who, in fact, has not done so.

A state government employee shall not, directly or indirectly, use or attempt to use the employee’s official authority or influence for the purpose of intimidating, threatening, coercing, commanding, influencing, or attempting to do such things for the purpose of interfering with the right of an individual to disclose to the auditor or his or her representative information concerning improper government action, or to identify rules

warranting review or to provide information to the rules review committee. An employee must make a reasonable attempt to ascertain the correctness of the information furnished and may be subject to disciplinary actions, including, but not limited to, suspension or termination, for knowingly furnishing false information as determined by the employee's appointing authority.

Any person who is a whistleblower and who has been subjected to workplace reprisal or retaliatory action is presumed to have established a cause of action. It is unfair work practice for a state government agency, manager or supervisor to retaliate against a state employee whistleblower. The state employee also has a claim under civil rights law.

The employee has two ways to challenge the retaliation action. First, he can file a complaint with the Human Rights Commission and have it investigated. If a preliminary investigation discloses evidence of retaliation, the matter may be assigned to an administrative law judge to investigate more fully, including holding a hearing. The complaint must be filed within 2 years of the retaliatory action.

Secondly, the employee can bring a civil action in a court of competent jurisdiction to enjoin further violations, or to recover the actual damages sustained by the employee, or both, together with the cost of suit, including reasonably attorneys' fees, or any other appropriate remedy authorized by the discrimination statute. Under the whistleblower statute, "reprisal or retaliatory action" means, but is not limited, to any of the following: denial of adequate staff to perform duties, refusal to assign meaningful work, demotion, reduction in pay, denial of promotion, suspension, dismissal, issuing or attempting to enforce a non-disclosure agreement and any action inconsistent with prior action taken towards the employee or compared to action towards other employees. Washington Human Rights Commission Staff have advised that employees usually file a complaint with the Commission and if the Commission investigation indicates that the employer or its staff may have engaged in an unfair practice, to bring a court action before the Commission had issued a final decision. The statute of limitations for such suits is three years from the act of discrimination.

A whistleblower is allowed to disclose information otherwise prohibited by law if necessary to substantiate the whistleblower claim. Notice of the rights under the statute must be provided to new employees, and must be posted and distributed annually to all employees.

Under Wash. Rev. Code Ann. § 49.60, It is an unfair practice for any employer, employment agency, labor union, or other person to discharge, expel, or otherwise discriminate against any person because he or she has opposed any practices forbidden by this chapter, or because he or she has filed a charge, testified, or assisted in any proceeding under this chapter.

Secondly, it is an unfair practice for a government agency or government manager or supervisor to retaliate against a whistleblower as defined in chapter 42.40 RCW.

Moreover, it is an unfair practice for any employer, employment agency, labor union, government agency, government manager, or government supervisor to discharge, expel, discriminate, or otherwise retaliate against an individual assisting with an office of fraud and accountability investigation under Wash. Rev. Code Ann. § 74.04.012, unless the individual has willfully disregarded the truth in providing information to the office.

Under Wash. Rev. Code Ann. § 49.17.160, no person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or herself or others of any right afforded by this chapter.

Secondly, any employee who believes that he or she has been discharged or otherwise discriminated against by any person in violation of this section may, within thirty days after such violation occurs, file a complaint with the director alleging such discrimination. Upon receipt of such complaint, the director shall cause such investigation to be made as he or she deems appropriate. If upon such investigation, the director determines that the provisions of this section have been violated, he or [or] she shall bring an action in the superior court of the county wherein the violation is alleged to have occurred against the person or persons who is alleged to have violated the provisions of this section. If the director determines that the provisions of this section have not been violated, the employee may institute the action on his or her own behalf within thirty days of such determination. In any such action the superior court shall have jurisdiction, for cause shown, to restrain violations of subsection (1) of this section and order all appropriate relief including rehiring or reinstatement of the employee to his or her former position with back pay.

Moreover, within ninety days of the receipt of the complaint filed under this section, the director shall notify the complainant of his or her determination under subsection (2) of this section.

Under the Medicaid Fraud False Claims Act, a person may bring a civil action for a violation of Wash. Rev. Code Ann. § 74.66.020 for the person and for the government entity. The action may be known as a qui tam action and the person bringing the action as a qui tam relator. The action must be brought in the name of the government entity. The action may be dismissed only if the court, and the attorney general give written consent to the dismissal and their reason for consenting.

“Claim” means any request or demand made for a Medicaid payment under Wash. Rev. Code Ann. § 74.09, whether under a contract or otherwise, for money or property and whether or not a government entity has title to the money or property, that: (i) Is presented to an officer, employee, or agent of a government entity; or (ii) Is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the government entity's behalf or to advance a government entity program or interest, and the government entity: (A) Provides or has provided any portion of the money or property

requested or demanded; or (B) Will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(b) A "claim" does not include requests or demands for money or property that the government entity has paid to an individual as compensation for employment or as an income subsidy with no restrictions on that individual's use of the money or property.

Any employee, contractor, or agent is entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent, is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent, or associated others in furtherance of an action under this chapter or other efforts to stop one or more violations of this chapter. Relief under subsection (1) of this section must include reinstatement with the same seniority status that employee, contractor, or agent would have had but for the discrimination, two times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees, and any and all relief available under Wash. Rev. Code Ann. § 49.60.030(2). An action under this subsection may be brought in the appropriate superior court of the state of Washington for the relief provided in this subsection. A civil action under this section may not be brought more than three years after the date when the retaliation occurred.