

A whistle-stop tour of Irish whistleblowing legislation

The Disclosures Tribunal has brought whistleblowing into sharp focus. Muireann Reedy looks at some key whistleblowing legislation, the difference between voluntary and mandatory reporting and why it is advisable for all employers to have whistleblowing policies in place.

The 2014 Act

The Protected Disclosures Act 2014 (the 2014 Act) aims to protect 'workers' from reprisal where they voluntarily disclose information relating to wrongdoing in the workplace, which comes to their attention. The term 'worker' is defined broadly and includes employees, contractors, the self-employed, agency workers and people on work experience. To qualify for protection the disclosure must meet certain criteria depending on to whom the information is disclosed. The worker must also reasonably believe that the disclosure tends to show one or more relevant wrongdoings as set out in the 2014 Act. These include that a criminal offence has been committed, that a person has failed to comply with any legal obligation or that an improper use of funds or resources of a public body has occurred, among other matters.

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The 2014 Act provides for a stepped disclosure regime where, depending on the category of person to whom the disclosure is made, different criteria must be met for the disclosure to be protected. The people to whom disclosures can be made are broadly split into three categories: the worker's employer, disclosures to a 'prescribed person' (certain regulatory bodies such as the Central Bank of Ireland (the Central Bank) have been designated as 'prescribed persons' for disclosures relating to specific matters) and disclosures 'in other cases' i.e. to other third parties, including potentially the media. Although there is no



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requirement for a worker to make a disclosure to his/her employer first, the 2014 Act is clearly designed to incentivise this as, when making a disclosure to an employer, less requirements need to be met for such a disclosure to qualify for protection.

Protections

The 2014 Act requires the recipient of the disclosure to protect the whistleblower's identity in so far as possible, but there are certain exceptions to this obligation. No civil proceedings - except for a defamation case - may be taken against a person for having made a protected disclosure, although in defamation cases a protected disclosure may attract the defence of qualified privilege. The whistleblower also has immunity from criminal liability for any offence prohibiting or restricting the disclosure of information, if at the time of making the disclosure he/she reasonably believed that it was a protected disclosure under the 2014 Act.

A worker who is an employee is also protected from penalisation or dismissal by his/her employer for making a protected disclosure and can be awarded up to five years remuneration

for any such penalisation or dismissal. However if the investigation of the relevant wrongdoing was not the sole or main motivation for making the disclosure, the amount of compensation awarded for a dismissal may be reduced by up to 25%.

Mandatory reporting

While the 2014 Act does not require individuals to blow the whistle, it provides protection for those who decide to do so. Some sectoral legislation, however, compels individuals to blow the whistle in certain scenarios, two examples of which are considered below.

Individuals who perform pre-approval controlled functions (PCFs) are required to inform the Central Bank of specific matters set out in the Central Bank (Supervision and Enforcement) Act 2013 (the 2013 Act) as soon as practicable, if they believe this will be of material assistance to the Central Bank. This includes that an offence under financial services legislation may have been committed or that any provision of financial services legislation may have been contravened.

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The Criminal Justice Act 2011 (the 2011 Act) also requires individuals to provide information about a 'relevant offence' to the Gardaí if they believe it might be of material assistance to the Gardaí. The relevant offences mostly relate to company law offences, specified offences of financial services legislation and theft and fraud offences. The requirement to make mandatory disclosures under both of the above

Acts does not apply where the person has a 'reasonable excuse' not to make the disclosure. The 2013 Act confirms that a person will have a 'reasonable excuse' for not making a disclosure if to do so might incriminate him/her or if the information has already been disclosed by another person. The 2011 Act gives no examples of what a reasonable excuse might be.

Both of the above Acts provide differing levels of protections to individuals who make mandatory disclosures.

Is a whistleblowing policy required?

All public bodies are required to have whistleblowing procedures in place to deal with disclosures under the 2014 Act by workers who are employed by them and to provide details of these procedures to their workers. Some companies operating in the financial services industry are also required by law to have procedures in place for employees to report suspected breaches of particular legislation (e.g. the Irish legislation which transposes MiFID II requires certain firms to have specific internal procedures in place for

employees to report potential breaches of that legislation or of the MiFIR Regulation).

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While there is no general obligation on other employers to have whistleblowing policies in place it is recommended that such policies are implemented, as it may incentivise staff to communicate any concerns internally rather than informing an external party of them.

This would enable the employer to investigate and rectify the matter before it potentially goes public, damaging the company's reputation and potentially

leading to loss of business.

Conclusion

The 2014 Act has overhauled the protections available to whistleblowers in Ireland. However it is not the only Act which covers whistleblowing and individuals should be aware that in some cases they may be required to make mandatory reports.

The high profile nature of recent whistleblowing allegations which have been aired at the Disclosures Tribunal and reportedly made to the ODCE in respect of Independent News and Media, should serve as a timely reminder to employers to put whistleblowing policies in place.

Finally, it is worthwhile noting that the Securities and Exchange Commission in the United States can pay substantial awards to whistleblowers if certain conditions are met. There is no provision under Irish law allowing whistleblowers to be paid.

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