Whistleblowing Policies

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Whistleblowing Policies

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Position Pre-Act
Position Post-Act
**Relevant Wrongdoings**

- That an offence has been, is being or is likely to be committed
- That a person has failed, is failing or is likely to fail to comply with any legal obligation (other than one arising under the worker’s contract of employment)
- That a miscarriage of justice has occurred, is occurring or is likely to occur
- That the health or safety of any individual has been, is being or is likely to be endangered
- That the environment has been, is being or is likely to be damaged
- That an unlawful or otherwise improper use of funds or resources of a public body, or of other public money, has occurred, is occurring or is likely to occur
- That an act or omission by or on behalf of a public body is oppressive, discriminatory or grossly negligent or constitutes gross mismanagement
- That information tending to show any matter falling within any of the preceding bullet points has been, is being or is likely to be concealed or destroyed
# Stepped Disclosure Regime

<table>
<thead>
<tr>
<th>Stepped Disclosure</th>
<th>Evidential Thresholds</th>
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<tbody>
<tr>
<td>Disclosure to Employer</td>
<td>None</td>
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<tr>
<td>Disclosure to other Responsible Person</td>
<td>Reasonable belief – Contractor</td>
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<tr>
<td>Disclosure to Prescribed Person</td>
<td>Reasonable belief and substantially true</td>
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<tr>
<td>Disclosure to Minister</td>
<td>None – but worker must be employed by public body and the Minister must have responsibility for the matter disclosed</td>
</tr>
<tr>
<td>Disclosure to legal advisor</td>
<td>None – but disclosure must be made in the course of obtaining legal advice</td>
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| Disclosure in other cases (externally to other body or media) | • Reasonable belief  
• Substantially true  
• Not made for personal gain  
• Reasonable for worker to make the disclosure  
• Worker reasonably believes he may be penalised  
• Worker reasonably believes that evidence may be destroyed before disclosure is made to Prescribed Person  
• Where worker has previously made a disclosure of substantially the same information (and where the employer has not dealt with it) and the relevant wrong doing is exceptionally serious |
Penalisation

“Penalisation” means any act or omission that affects a worker to the worker’s detriment, and in particular includes:

- suspension, lay-off or dismissal
- demotion or loss of opportunity for promotion
- transfer of duties, change of location of place of work, reduction in wages or change in working hours
- the imposition or administering of any discipline, reprimand or other penalty (including financial penalty)
- unfair treatment
- coercion, intimidation or harassment
- discrimination, disadvantage or unfair treatment
- injury, damage or loss
- threat of reprisal
Penalisation
Whistleblowing Policy - Objectives

• Convey the importance the employer attaches to dealing with wrongdoing

• Encourage workers to raise concerns internally

• Remind workers of other policies (e.g. code of conduct) that is expected of them

• Ensure workers know who to approach with a concern

• Outline the procedures for investigating disclosures

• Make it clear that whistleblowers will not be victimised

• Provide access to further sources of advice and guidance on whistleblowing
Before introducing a whistleblowing policy – review other policies in place to ensure that required standards of conduct have been made clear to workers.
Whistleblowing Policy - Training

Managers and persons with responsibility for operating a whistleblowing policy should receive specialised training to help them to deal with issues arising out of investigation into disclosures.
**Whistleblowing Policy – Tips for an effective policy**

- Policy should result from consultation with staff, management and any recognised trade union
- The Policy should cover as much of the work force as possible
- It should encourage workers to raise concerns as soon as possible (reasonable suspicion is acceptable without the need for supporting evidence)
- Policy should facilitate workers in reporting their concerns to an individual outside of normal line management
- The policy should recognise that at times disclosures may need to be made externally
Whistleblowing Policy – Tips for an effective policy...Cont.

• The policy should encourage openness but also enable workers to raise concerns in confidence

• It should provide feedback to workers on the outcome of their disclosures

• It should make it clear that reprisals against workers who make disclosures will not be tolerated and may be treated as a disciplinary offence

• It should make it clear that the making of malicious false allegations may be a disciplinary offence
Whistleblowing Policy – Pitfalls to avoid

- Imposing a legal duty on workers to blow the whistle is unlikely to inspire confidence and may lead to practical difficulties
- Policies should not be unduly legalistic
- The policy should not be used for bullying or harassment complaints or other individual grievances
Whistleblowers and Data Protection

Jeanne Kelly, Partner Commercial

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Whistle-blowing: soon to be a national sport?
The Data Protection Angle

- Why is this controversial at all?
- Subject access rights (she said WHAT about me?!)
- Fairness in data collection (Data Protection Acts)
The Data Protection Angle

• Whistleblowing not new
• Sarbanes-Oxley Act (US) 2002
• Dodd-Frank Wall Street Reform and Consumer Protection Act 2010 (incentives!)
• Our experience: how does it become an Irish compliance issue?
Whistleblowing Hotlines

EU/US tension in approach

And: No EU passporting possible

Do you seek forgiveness, or ask permission?!

CNIL France 2005

McDonalds France + Exide Tech

2009 Dassaut Systemes

Germany? (Wal-Mart)

Sweden? (Key execs only)
Data Protection Issues

Article 29 Working Party: who are they and what solutions had they?

WP 117

- Whether w/b hotlines can co-exist with DP laws?
- Focus on financial issues/crimes
- Transfers abroad
- Fair processing
- Proportionality
- Consequences for the data subject
Data Protection Issues

WP 117

- Privacy by design
- Limits: who can use, who can be reported
- If no evidence, destroy data after 2 months
- If wrongdoing uncovered, keep data until end of resulting process
- Regulator clearance may be needed
- Secure processing transfer contracts
- Local filtration
Data Protection Issues

Irish Data Protection Commissioner Guidance (March 2006)

Focus on Issues not Individuals

- Consider the DP implications
- Data minimisation approach
- No encouragement of anonymous whistleblowing
- Tell your employees
- Anti-blowback measures
- Transfers abroad
The Protected Disclosures Bill and Data Protection

- Does it cut through the data privacy issues?
- Not a defence to a DP breach to say complied with the new Bill.
- What happens if whistle-blower identity is revealed? (Section 16)
Takeaways

- S.21 Public bodies must design schemes to deal.
- Those schemes must still be DP complaint.
- You may need to re-calibrate your existing DP documents
- If outsourcing, robust contracts needed.
- Approach in a “privacy by design” and “HR compliance by design” manner
Facilitated Session 1

(a) What workers are protected by the policy

(b) Whether workers should be consulted by designing a policy

(c) The wording which should be used to ensure that the policy does not have contractual status

(d) How the penalisation provisions in the 2014 Act will be expressed in the whistleblowing policy
Facilitated Session 2

(a) Who in their organisation should have responsibility for the whistleblowing policy

(b) How the subject matter of whistleblowing (protected disclosure) should be outlined in the policy

(c) How to ensure that workers use the organisations grievance procedure (and not the policy) for resolving their individual workplace issues
Facilitated Session 3

(a) How their policy should deal with confidential and anonymous disclosures

(b) How their organisation might investigate/deal with protected disclosure

(c) Whether the organisation will guide workers about how the worker can make a disclosure externally