



Freshfields Bruckhaus Deringer

Global investigations

What makes a good whistleblowing policy and why it is important



A robust internal system for employees to disclose wrongdoing without fear of reprisal shows that an employer takes its responsibilities seriously. It also helps to avoid the negative publicity that often accompanies a disclosure to an external organisation or the press.

This guide covers why you should have a good whistleblowing policy in place and what this policy should cover. Appendix one gives you an overview of the protections a whistleblower can enjoy in different jurisdictions. Many multinational organisations implement a global whistleblowing policy and may have a single international hotline for employees to report their concerns. But it is also important to comply with local rules protecting whistleblowers. Potential penalties can be severe.

This guide will help you understand the whistleblowing process and the importance of a strong, clear compliance policy. It also maps out what you can do to create an open culture in your company and avoid potentially embarrassing and expensive whistleblowing actions.

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What is whistleblowing?

‘Whistleblowing’ is when an employee raises a concern about malpractice or wrongdoing within an organisation. The person raising the concern is the ‘whistleblower’. Typically the concerns raised are high-profile ones for employers: health and safety, financial mismanagement or corruption, environmental matters or criminal activities.

What is a whistleblowing policy?

Whistleblowing policies should encourage employees to speak out if they have legitimate concerns about wrongdoing, as distinct from individual grievances. They should also establish an accessible procedure for doing so. The policy may be self-standing or part of a wider code of conduct. A good whistleblowing policy should:

- be simple and easy to understand;
- cover as much of the workforce as possible;
- clearly set out the standards of behaviour expected of employees;
- make clear what sorts of disclosures or malpractices are covered;
- make clear how and who to approach with any concerns (including contact details);
- let employees circumvent the person or part of the business to which the concern relates. Many organisations now have confidential whistleblowing hotlines to ensure employees feel confident and comfortable making disclosures;

- give an outline of the procedural steps involved in investigating any concerns and what steps may be taken should wrongdoing be established;
- make clear that employees who blow the whistle in good faith will not suffer any sort of detriment or be dismissed as a result; and
- warn that the victimisation of genuine whistleblowers, including malicious allegations and other abuses of the whistleblowing policy, are disciplinary offences.

Remember that rules differ between countries. For example, in France it may be necessary to register a whistleblowing policy with the Commission nationale de l’informatique et des libertés.

Whistleblowing hotlines

A whistleblowing hotline is a phone line dedicated to receiving whistleblowing disclosures from employees, on a global or more local basis. It can be an internal phone line staffed by a company's risk and compliance team, or can be run by an external provider. Once a disclosure is made through the hotline, it should trigger an agreed procedure to investigate the disclosure and determine what action is needed.

Originally a US phenomenon, whistleblowing hotlines have proved more problematic in Europe, particularly when reports are made anonymously. In France and Germany for example, there is a historical stigma towards anonymous reporting, and the antipathy it creates is one reason why it should be discouraged when possible. Another is that it can lead to abuse, such as malicious reports about fellow employees. Anonymous reports can also make it extremely difficult to investigate the issues that have been disclosed.

For hotlines that operate at a global level, certain jurisdictions' data protection and privacy restrictions can make anonymous reporting difficult. Finally, in some countries such as Germany, a whistleblowing hotline is seen as outside normal procedures for handling internal complaints.

Why is it important to have a robust whistleblowing regime?

To protect whistleblowers and companies from whistleblowing claims and the associated costs

In many jurisdictions, the right to blow the whistle on particular violations without suffering detriment is enshrined in law. Even in those jurisdictions that do not expressly protect whistleblowers, such as Germany, employment law tends to protect employees who blow the whistle on their employer.

In some areas, employees who blow the whistle or have been punished for blowing the whistle can be awarded significant compensation. In the US, for example, the Securities and Exchange Commission (SEC) can award between 10 and 30 per cent of any fine over \$1m to whistleblowers who disclose federal securities violations (these employees do not have to have even suffered detriment from their disclosure). In the UK, compensation is uncapped, although detriment must be shown.

A well-drafted whistleblowing policy should help to avoid expensive claims by picking up on disclosures at an early stage and dealing with them properly and appropriately. It also helps ensure that all employees – particularly managers – understand the rights of those who blow the whistle.

A well-prepared whistleblowing policy and a prompt response to disclosures may also limit the risk of notifications being made to regulators. In the UK, for example, the claim form for bringing an employment claim now includes a tick box asking whether the employee would like the relevant regulator to be informed of their claim. If the employee ticks this, the regulator is notified and the employer cannot control how information is passed to that regulator. Clearly, this could be costly and damaging.

To meet the expectations of regulators

Whistleblowing policies are required in various jurisdictions. In the US, the Sarbanes-Oxley Act demands that public companies have procedures for employees to submit concerns about accounting or auditing matters without fear of suffering reprisals. In other jurisdictions, such as the UK, there is no legal requirement for whistleblowing policies but regulators, such as the UK Financial Services Authority, expect to see such policies in any company that they regulate.

To comply with listing requirements

Listed companies' audit committees may have an interest in ensuring an effective whistleblowing policy is in place. For example, companies listed in the UK must state in

their annual report how they have applied the principles of the Financial Reporting Council's UK corporate governance code.

In the US, the NYSE listed company manual requires companies to adopt a code of conduct for all employees. Regardless of jurisdiction, these policies tend to be considered good practice. They indicate to outsiders that best practice is being followed.

To defend against the corporate offence of bribery

Robust whistleblowing policies bolster a company's argument that it has implemented adequate procedures to guard against bribery. This is a particular issue in the UK.

To set clear standards of behaviour for employees

Whistleblowing policies demonstrate that companies know the importance of being aware of any wrongdoing or malpractice and of putting it right.

To act as an early warning system and to encourage internal disclosure

Whistleblowing policies make it more likely that concerns will be raised internally. This reduces the risk of involvement by external regulators or the very real risk of bad press.

Although it is usually possible for a multinational company to take a global approach to whistleblowing, it is often necessary to support the main policy with separate, local processes. These can apply in particular jurisdictions and take account of local laws. It is also usually necessary – and advisable – to translate the entire policy into each country's native languages. This policy is often crucial: in a culture such as Japan's there is historical reluctance towards blowing the whistle. So a whistleblowing procedure is more likely to be successful if there is a carefully-drafted policy in the local language.

How to embed a whistleblowing culture into your company

A robust whistleblowing regime is now an integral part of governance best practice for all companies, regardless of their size or location. If you have not already done so, you should think about introducing a whistleblowing policy or code of conduct. But simply having a whistleblowing policy and hotline is not enough to create a culture in which employees are genuinely encouraged to make disclosures. So what can you do to embed an open culture and make sure your whistleblowing regime is effective?

Top-level commitment

The CEO and board should clearly support and sponsor any whistleblowing regime. Board members or other senior managers must be seen to respect the policy. If anyone discourages whistleblowing this will significantly undermine other efforts.

Senior accountability

A senior member of management must have overall responsibility for embedding the culture of internal disclosure throughout the company – particularly within management.

This person should also announce the policy to all employees, manage and review it, and feedback on it to the board. What's more, he or she must have enough resources to be able to do this well.

Communication and training

Employees must know the regime is in place and understand when and how to use it. Some businesses ensure this with regular emails, videos and presentations from the CEO, responsible manager or general counsel.

Comprehensive training must be compulsory for all, run regularly and records of employee attendance should be kept. It may be sensible to require employees to sign an annual declaration that they have read and understood the policy and received training. If there is a danger of training fatigue, make whistleblowing training part of the company's general compliance training and reserve more intensive training for employees with managerial responsibilities.

Regular review and audit

Regularly review any whistleblowing policies and prepare reports on the number and types of disclosures received in any given year. Asking the questions below will help your board to assess how the policy can be applied most effectively.

- Are disclosures widespread across the company or very limited?
- Are they concentrated in a particular business area or scattered across all areas?
- Are the numbers of disclosures going up or down?
- Do employees feel able to make disclosures?
- Are the types of issues being disclosed through the policy appropriate and sensible?
- How have disclosures been investigated and followed up?

You could also give employees updates on a more general level. This lets them see that people are making disclosures and that those disclosures are being encouraged and dealt with appropriately. Bring the information to life with anonymised examples of disclosures and how they were handled.

Proper investigation and action

It is essential that the whistleblowing policy is enforced. Any disclosure must be investigated promptly and properly. Take appropriate action at the right level. The policy will be seriously undermined if you do not. Conversely, seeing one or two individuals criticised for not keeping to the policy could have a really big positive impact. Keep the whistleblower in the loop as much as possible, even if it is just a telephone call once a week. You could use this to explain that the investigation is progressing but, because it is confidential, no further information can be given. That should be enough to reassure him or her that you are taking the disclosure seriously and there is no need to disclose it elsewhere – to the media or the relevant regulator, for example.

Feedback

Ask employees what they think of the whistleblowing policy and how effective they think it is. You could include questions such as the ones below in an employee satisfaction or feedback survey.

- Have you read the whistleblowing policy?
- Do you know who to contact if you wanted to make a disclosure?
- Do you feel you work in an open environment in which you are encouraged to speak up and you can safely voice any concerns without fear of reprisals?
- What would you change about how the policy operates?

Reward

Use rewards to encourage a strong compliance culture. You could link management bonuses to the results of the employee surveys, for example, and give higher rewards to the people who have created and encouraged an open culture.

You could also assess managers on whether their teams have attended training and feel as if they work in an open culture in which they are encouraged to make disclosures.

Giving the policy another name

Calling it a compliance or speak-up policy may help avoid the negative connotation that the ‘whistleblower’ label sometimes suffers in the press.

Compliance diary

Finally, make an effort to record all the steps you take in writing. For example, keeping a ‘compliance diary’ within the teams responsible for governance will make it much easier to prove you took adequate steps to promote compliance. This will be very helpful if there is a suspected breach of the law or regulations in the future.

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Appendix 1 – Whistleblowing: protections and rewards, by jurisdiction

Belgium

Is there specific legislation in place relating to whistleblowing?

Not in the private sector

But whistleblowing systems must comply with the Data Protection Act of 8 December 1992, with the Employment Agreement Act of 3 July 1978 and with the rules on information and consultation of the employee representatives.

In 2006, the Belgian Commission for the Protection of Privacy (CPP) enacted non-binding recommendations for implementing whistleblowing systems.

What protection does the legislation provide for whistleblowers?

What compensation for detriment or dismissal is available?

No statutory protection for private sector employees

A court might decide that the dismissal of the whistleblower is abusive and grant him or her indemnities.

So the dismissed whistleblower must show the link between the whistleblowing and the dismissal, as well as the specific damage.

Potential monetary reward for whistleblowing

Not applicable

Comments

If the whistleblowing results in a criminal trial, anonymous whistleblowing will oblige the court to make the balance between protecting the privacy of the whistleblower and the right to fair trial and privacy of the person against whom the whistle has been blown.

For instance this person should know the identity of the person who has blown the whistle.

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China (People's Republic of China)

Is there any specific legislation in place relating to whistleblowing?

No

But the banking, insurance and security regulators have issued various guidelines which require companies to put in place the internal whistleblowing system as part of their internal control, governance and compliance system.

Regulations of various authorities (including the tax authority and foreign exchange control authority) contain general provisions on implementation of the whistleblowing procedures, protection of the whistleblowers and the grant of monetary rewards for whistleblowing.

What protection does the legislation provide for whistleblowers?

What compensation for detriment or dismissal is available?

It may constitute a criminal offence for the civil servants to retaliate against or frame the whistleblowers. The employers may be imposed monetary fines for retaliating against the whistleblowers who report any employment related non-compliance. If an employee is dismissed for having reported the wrongdoing or violation of laws of his or her employer, the court may hold that the dismissal is illegal and the employee is entitled to reinstatement of employment or compensation, at the election of the employee.

An employee may be entitled to compensation for illegal dismissal. The amount of any such compensation is normally twice the severance pay that the employee would have been entitled to under a lawful dismissal. The severance pay is calculated on the basis of the employee's average monthly salary and the service year with the employer.

Potential monetary reward for whistleblowing

Regulations of various authorities contain general provisions on the grant of monetary rewards for whistleblowing. For example, the State of Administration of Work Safety and Ministry of Finance have jointly issued the *Awarding Measures on Whistleblowing Working Accidents* in 2005 (amended in 2012) to grant monetary awards (RMB1,000 to 30,000) to the whistleblowers who report serious work accidents.

Comments

Employees normally have various concerns over the potential consequences arising from their whistleblowing and may not be willing to do so.

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France

Is there specific legislation in place relating to whistleblowing?

No

But whistleblowing systems must comply with the Data Protection Act and recommendations made by the Data Protection Agency (CNIL).

The act and recommendations set out rules for creating a system and processing the information collected.

They also cover the general rules on informing and consulting with the employee representatives before implementation.

What protection does the legislation provide for whistleblowers?

What compensation for detriment or dismissal is available?

Dismissing an employee or subjecting him or her to discriminatory treatment because he/she has reported acts of corruption to the employer or the relevant authorities is prohibited (article L.1161-1, French labour code); dismissal in such circumstances would be void, so the employee could obtain reinstatement.

Where the report does not relate to acts of corruption, if the employee is dismissed simply for having reported a breach of applicable regulations through an existing whistleblowing procedure and did not act wrongly in doing so, then the dismissal will be held unfair and the employee is entitled to damages.

Potential monetary reward for whistleblowing

Not applicable

Comments

Whistleblowing systems are not frequently used by French employees.

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Germany

Is there specific legislation in place relating to whistleblowing?

No

Several legislative initiatives to introduce specific protection for whistleblowers against dismissal.

What protection does the legislation provide for whistleblowers?

What compensation for detriment or dismissal is available?

No statutory protection

Termination of whistleblowers may be null and void under general laws for protection against dismissal. In particular, if a labour court decides that the employee's constitutional right to express his or her views outweighs the employer's interest to keep certain deficiencies within the sphere of the company.

Potential monetary reward for whistleblowing

Not applicable

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Hong Kong

Is there specific legislation in place relating to whistleblowing?

No

The Stock Exchange of Hong Kong Limited has recently amended its Corporate Governance Code so as to include a provision that the audit committee of any Hong Kong-listed company should ensure that arrangements are in place by which the company's employees can raise concerns about possible improprieties in financial reporting, internal control and other such matters.

Any company listed on the Main Board of the Hong Kong Stock Exchange which fail to comply with this provision must explain its non-compliance in its annual report. In addition, the Code makes it a recommended best practice for the audit committee to establish a specific whistleblowing policy and system by which concerns can be raised in confidence by employees or by other parties who deal with the company, such as customers and suppliers.

What protection does the legislation provide for whistleblowers?

What compensation for detriment or dismissal is available?

It is a criminal offence for an employer to dismiss or discriminate against an employee because he or she has given or agreed to give evidence in proceedings, or information in a public inquiry, relating to (i) the enforcement of the Employment Ordinance or the Factories and Industrial Undertakings Ordinance; (ii) an employment-related accident; or (iii) a breach of duty in relation to the safety of persons at work. An employer found guilty of this offence is liable to pay a fine and compensation.

An employee may be entitled to compensation for unlawful dismissal or discrimination under the aforementioned legislation. The amount of any such compensation is left to the discretion of the court or magistrate, having regard to the circumstances of the case.

Potential monetary reward for whistleblowing

Not applicable

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Italy

Is there specific legislation in place relating to whistleblowing?

No

What protection does the legislation provide for whistleblowers?

What compensation for detriment or dismissal is available?

No statutory protection

A dismissal of an employee who blows the whistle would be deemed discriminatory and consequently null and void, if it is proven to be retaliatory in nature.

Any act of detriment that turns out to have a retaliatory nature against the employee who blew the whistle would entitle the employee to file a claim for damages.

This claim is to be proven by the employee ie, no punitive damages exist under Italian law. Acts of detriment include threats, disciplinary action, loss of work or pay, damage to career prospects, or suspension.

Potential monetary reward for whistleblowing

Not applicable

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Japan

Is there specific legislation in place relating to whistleblowing?

Yes

The Whistleblower Protection Act (Act No.122 of June 18, 2004) (as amended by the Act No.128 of December 5, 2007).

What protection does the legislation provide for whistleblowers?

What compensation for detriment or dismissal is available?

An employee who has blown the whistle on alleged wrongdoing is protected against being dismissed or being subjected to any other detriment when the whistleblowing meets the requirements stipulated in the Whistleblower Protection Act.

The legislation says that (i) a whistleblower's dismissal by reason of whistleblowing shall be invalid and (ii) a detriment to a whistleblower by reason of whistleblowing is prohibited. 'Detriment' includes demotion, salary reduction, or other disadvantageous treatment.

If an employee has been subjected to a detriment or dismissed for having blown the whistle, the employee can demand compensation for damage caused by such detriment or dismissal against the company.

The compensation afforded to an employee for any detriment or dismissal can vary depending on the level of his or her salary. Generally awards granted by Japanese courts are relatively small.

The compensation for mental suffering payable to a whistleblower has ranged from ¥500,000 to ¥2m.

Potential monetary reward for whistleblowing

Not applicable

Comments

Since its enactment in 2004, there have not been many court precedents for protecting a whistleblower under the Whistleblower Protection Act.

One of the reasons for this is that the act stipulates strict requirements for whistleblowers to be protected under the act.

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The Netherlands

Is there specific legislation in place relating to whistleblowing?

No

Other than for public officials, there is no legislation in the Netherlands on protecting whistleblowers.

So the non-binding June 2003 statement published by the Stichting van de Arbeid (2003 STAR Statement), and the guidelines attached to it, forms the most important guide for whistleblowing. This sets out the procedural rules to be used when dealing with malpractices within Dutch companies.

Furthermore, the Dutch Corporate Governance Code (CGC) applicable to listed companies, which is based on the principle 'comply or explain', contains a best practices provision referring to whistleblowing.

Also, based on a decision of the Dutch Cabinet (Ministerraad), a central advice and reference committee for whistleblowers (Advies en Verwijspunt Klokkenuider) will be set up.

What protection does the legislation provide for whistleblowers?

What compensation for detriment or dismissal is available?

No statutory protection

The 2003 STAR Statement, the guidelines, and the Dutch CGC do not provide for specific protection and/or compensation for whistleblowers. They merely set out the procedural structure and rules that should be in place within a company.

The central committee for whistleblowers will not have any real powers, but will act as a source of support and advice for whistleblowers.

Potential monetary reward for whistleblowing

Not applicable

Comments

Although Dutch employees are in general highly protected, whistleblowers do not enjoy much protection, as there is no legislation protecting whistleblowers.

There is relatively little case law in this respect either. Most (published) cases involving whistleblowers did not end too well for the employees concerned.

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Russia

Is there specific legislation in place relating to whistleblowing?

No

What protection does the legislation provide for whistleblowers?

What compensation for detriment or dismissal is available?

No statutory protection

There is general protection from discrimination, which may be applied to an employee who blows the whistle on any wrongdoing by the employer or other employees. But this mechanism is quite vague.

Potential monetary reward for whistleblowing

Not applicable

Comments

Whistleblowing is not considered best practice in Russian companies.

Employees may be obliged to blow the whistle under the internal policies of the employer. But these obligations may not be legally enforced.

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Spain

Is there specific legislation in place relating to whistleblowing?

No

What protection does the legislation provide for whistleblowers?

What compensation for detriment or dismissal is available?

No statutory protection

Whistleblowers can be protected by the guarantee of indemnity, under which an employer can not use its organisational and disciplinary powers to punish its employees' legitimate exercise of fundamental rights (eg, complaining about his or her superior).

No specific compensation for detriment or dismissal is available. But if there is a case of breach of indemnity, the relevant action will be null and void.

Potential monetary reward for whistleblowing

Not applicable

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United Kingdom

Is there specific legislation in place relating to whistleblowing?

Yes

The Employment Rights Act 1996 (as amended by the Public Interest Disclosure Act 1998).

What protection does the legislation provide for whistleblowers?

What compensation for detriment or dismissal is available?

The legislation protects employees, and in some cases the wider category of workers as well, from detriment or dismissal (including being selected for redundancy) on the ground that they blew the whistle (provided certain conditions are fulfilled) on matters such as breach of any legal obligation, criminal wrongdoing or miscarriages of justice.

'Detriment' is not defined in the legislation. It might include threats, disciplinary action, loss of work or pay, damage to career prospects or suspension.

The compensation payable to any employee or worker who has been subjected to a detriment or dismissed for having blown the whistle is uncapped. Awards have ranged from £1,000 to £3.8m, with an average of around £110,000.

Potential monetary reward for whistleblowing

Not applicable

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United States

Is there specific legislation in place relating to whistleblowing?

Yes

Sarbanes-Oxley Act 2002 (principally section 806).

Dodd-Frank Wall Street Reform and Consumer Protection Act 2010 (sections 748 and 922).

SEC Whistleblower Statute (section 21F of the Securities Exchange Act of 1934).

SEC Whistleblower Rules (found in sections 240 and 249 of title 17 of the Code of Federal Regulations).

The US Commodity Futures Trading Commission (CFTC) Whistleblower Statute (section 26 of the Commodity Exchange Act).

CFTC Whistleblower Rules (found in section 165 of title 17 of the Code of Federal Regulations).

Other state and federal whistleblowing laws and implementing regulations for specific industries and health, safety, and environment matters.

What protection does the legislation provide for whistleblowers?

What compensation for detriment or dismissal is available?

Federal statutes and implementing regulations protect whistleblowers from any retaliatory action taken against them for reporting their reasonable belief of a possible violation of federal securities or commodities laws, rules or regulations.

Whistleblowers subjected to retaliation can be reinstated with the same seniority level. They can also receive back-pay with interest, special damages, attorneys' fees and other litigation costs.

Any violation of the SEC or CFTC whistleblower protections could constitute violations of US securities or commodities laws.

A SEC or CFTC investigation would follow and any offending company would be subject to the SEC or CFTC's enforcement remedies.

Potential monetary reward for whistleblowing

The SEC or CFTC will pay an award to whistleblowers who voluntarily give the SEC or CFTC original information about a violation of US securities or commodities laws that leads to a successful enforcement action.

An award is payable to whistleblowers if the SEC or CFTC recovers a monetary sanction over \$1m.

The SEC or CFTC must award all entitled whistleblowers at least 10 per cent and up to an aggregate of 30 per cent of the penalties collected in the enforcement action.

Comments

Whistleblowers' voluntary participation in reporting the possible violations through an internal corporate compliance programme before reporting to the SEC can be considered by the SEC in increasing the whistleblowers' award percentage.

This modification is intended to motivate whistleblowers to use internal corporate compliance processes. But it does not require them to do so.

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