



Whistleblowing

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Whistleblowing is a hot topic that has hit the headlines in several European countries, especially in light of the recent financial crisis. This briefing summarises the key facts that employers in the United Kingdom need to know about whistleblowing and codes of conduct.

It aims to answer the following key questions:

- what is whistleblowing;
- what are codes of conduct;
- do employers need a whistleblowing policy or code of conduct; and
- why is it important for employers to know how to handle whistleblowing allegations?

What is whistleblowing?

‘Whistleblowing’ is the term used to describe the situation when an employee, or a group of employees, raises a concern about malpractice or wrongdoing within an organisation. The person raising the concern is known as a ‘whistleblower’. Concerns raised typically relate to health and safety, financial mismanagement or corruption, environmental matters or criminal activities that affect, or might affect, people other than just the whistleblower. In certain circumstances, employees have a legal obligation to report certain types of wrongdoing.

An employee who ‘blows the whistle’ will have protection under the relevant legislation as long as he has the ‘reasonable belief’ that malpractice has taken place, is taking place or is likely to take place. Importantly, the employee does not have to show that the facts (or alleged facts) are capable of amounting to malpractice, provided

he believes it has occurred and that belief is objectively reasonable. That is, it does not matter that the belief actually turns out to be inaccurate or that the conduct would not constitute malpractice.

What is a whistleblowing policy?

A whistleblowing policy encourages staff to speak out if they have legitimate concerns about wrongdoings, as distinct from individual grievances, and establishes an accessible procedure for doing so. The policy may form part of a wider code of conduct.

What is a code of conduct?

A code of conduct is a set of rules that makes reference to laws, rules, regulations and directives applying to a particular company. The code gives employees a comprehensive overview of their obligations both to the company and to their colleagues.

What are the advantages of a whistleblowing policy or code of conduct?

- They outline the applicable procedure for raising concerns and reassure staff that they will not be subject to reprisals if they raise concerns about a violation of internal rules, external laws or good practice.
- They act as an early warning system and make it more likely that concerns will be raised internally, thus reducing the risk of involvement by external regulators or adverse media publicity.

- They indicate to those outside the organisation, eg investors and customers, that good practice is being followed.
- Operating in some jurisdictions may require such a policy, eg in the US, where the Sarbanes-Oxley Act requires public companies to implement procedures by which employees can submit concerns relating to accounting or auditing matters without fear of suffering reprisals. Furthermore, the NYSE Listed Company Manual requires companies to adopt a code of conduct applying to all employees.

Why is it so important to know how to handle whistleblowing allegations?

- The very real risk of negative publicity if an allegation is made and not handled correctly.
- In the UK, employees who are dismissed or subjected to a detriment as a result of blowing the whistle may end up recouping substantial damages against their employer. If an employee has raised a prima facie case that blowing the whistle was the reason for the dismissal, the employer must then prove that the whistleblowing was *not* the reason for the dismissal to avoid the possibility of uncapped damages being awarded.

Are there any other issues to consider?

Listed companies

Companies that are admitted to listing by the UK Listing Authority and incorporated in the UK (including those whose shares are traded on the London Stock Exchange) are required to state in their Annual Report how they have applied the principles of the FRC's *Combined Code on Corporate Governance* (the June 2008 version of which applies to accounting periods beginning on or after 29 June 2008). Provision C.3.4 of the Combined Code provides that:

‘The audit committee should review arrangements by which staff of the company may, in confidence, raise concerns about possible improprieties in matters of financial reporting or other matters. The audit committee’s objective should be to ensure that arrangements are in place for the proportionate and independent investigation of such matters and for appropriate follow-up action.’

Accordingly, audit committees of listed companies may have an additional interest in ensuring that the company’s whistleblowing policies and procedures operate effectively.

Operations in multiple jurisdictions

Employers with operations in various jurisdictions often want to implement a uniform policy, particularly where the employer is based in a country where whistleblowing policies and a code of conduct are a legal requirement in some circumstances, eg the US.

However, implementation of such policies may run into trouble in other countries. For example, it may be necessary to obtain prior authorisation from a national body with responsibility for overseeing, eg data protection. Data protection issues, such as information being given anonymously or information being transferred to a third party, are often a significant concern, particularly in EU countries where data protection laws tend to be more robust than in many other countries.

Other practical points to note include possible requirements:

- to consult with and/or obtain approval from works councils;
- to provide training for staff on the contents of the policy or code; and
- to translate the policy or code into the local language(s).

So, should my organisation have a whistleblowing policy or code of conduct?

Yes. This is despite the fact that implementing a whistleblowing policy, as a stand alone policy or as part of a comprehensive code of conduct, is often a balancing act between the clear benefits to the organisation of having a policy and the practical means of implementation clashing with specific national requirements.

Maintaining this balance might seem tricky but it is important – and far from impossible. It is easier to think about introducing a whistleblowing policy or code of conduct before receiving expensive claims or unwanted publicity because implementation is likely to be less rushed and more considered. Many organisations already have whistleblowing policies or codes of conduct.

Such organisations may want to review their existing policies and satisfy themselves that they comply with national requirements, especially given the fact that several jurisdictions have recently witnessed significant developments in the legality of whistleblowing policies and codes of conduct.

However, a whistleblowing policy or code of conduct is not sufficient by itself. Employees must know that it is there and understand when and how to use it. Consequently, it is very important that employers develop a training package on the policy or code of conduct. This should be rolled out to existing employees and also to new staff when they join. Staff should also be kept informed of any changes to the policy or code.

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