

(Approved by LRC Board on 13th May 2015)



Protected Disclosure (Whistleblowers) – Draft Code

Introduction

Section 42 of the Industrial Relations Act 1990 provides for the preparation of draft codes of practice by the Labour Relations Commission for submission to the Minister for Jobs Enterprise and Innovation. Codes of Practice are written guidelines, agreed in a consultative process, setting out guidance and best practice in regard to industrial relations practice and compliance.

The Commission has been requested by the Minister to prepare a Code of Practice on foot of the enactment of the Protected Disclosures Act 2014 both in order to assist in the practical implementation of the Act and give guidance on best principles to organisations and their workers.

Purpose

This Code is designed to

- help employers, workers and their representatives understand the law in regard to the disclosure of information relating to wrongdoing which comes to the attention of workers in the workplace and
- give guidance and set out best practice in regard to how to deal with the disclosure of such information in the workplace.

This Code underpins the principle that

- The disclosure of information relating to wrongdoing in the workplace is best dealt with in the first instance at workplace level. However there may be circumstances where this may not be appropriate.
- It is in the interests of employers, workers and their representatives to have in place clear and agreed procedures providing for “whistleblowing” in the workplace.

A sample policy is set out in an Appendix to the Code.

In preparing this Code of Practice, the Labour Relations Commission consulted with Ibec, ICTU and relevant Government Departments.

Protected Disclosures Act 2014

The Protected Disclosures Act 2014 was enacted on 15 July 2014. The purpose of the Act is to provide a statutory framework within which workers can raise concerns and disclose information regarding potential wrongdoing that has come to their attention in the course of their work in the knowledge that they can avail of significant employment and other protections if they are penalised by their employer or suffer any detriment for doing so. It is important to note that in order to enjoy the protections of the Act, disclosures must be made in accordance with the provisions set out in the Act.

The Act provides for a stepped disclosure process with the objective that disclosure should be, wherever possible, made at workplace level to the most appropriate person.

General

What is Whistleblowing in the Workplace?

Whistleblowing is the term used when a worker raises a concern about a relevant wrongdoing such as possible fraud, crime, danger or failure to comply with any legal obligation which came to the worker’s attention in connection with the worker’s employment. Relevant wrong doings are broadly defined in the Act and include the following:

- Commission of an offence – has happened, is happening, or is likely to happen
- Failure to comply with any legal obligation (other than one arising under the worker's contract of employment).
- Miscarriage of justice
- Health and safety of any individual
- Misuse of public money
- Gross mismanagement by public body
- Damage to the environment
- Destruction or concealment of information relating to any of the above.

It is important to note that a matter is not regarded as a relevant wrongdoing if it is a matter which it is the function of the worker or the worker's employer to detect, investigate or prosecute and does not consist of or involve an act or omission on the part of the employer.

What is meant by a protected disclosure?

The Act provides that if a disclosure is made by a worker in line with the channels set out in the legislation, a worker is protected from penalisation by the employer. Penalisation is defined in the Act and includes for example:

- Suspension/Layoff/Dismissal
- Demotion
- Transfer of duties, change of location, change in working hours, reduction in wages.
- Imposition of reprimand, discipline or other penalty
- Unfair treatment
- Discrimination
- Harassment, threat of reprisal.

It should be noted that there are several pieces of legislation, particularly in the financial and medical sectors, where reporting of certain matters is mandatory. The Act protects voluntary reporting and does not absolve any worker from a pre-existing mandatory reporting obligation. Likewise where additional protections apply these also remain in force.

Does motivation matter?

The motivation for making a disclosure is irrelevant as to whether or not it is a protected disclosure. What is required is that a worker has a reasonable belief as to wrongdoing and that this wrongdoing has come to the worker's attention in connection with his/her employment.

It is important to note that in situations where a worker makes a disclosure not in compliance with the Act, the protections under the Act will not be available to the worker. It is also important to note that deliberate false disclosure will not be protected and that a worker could leave him or herself open to disciplinary action in that regard.

Who is Covered?

The Act protects workers in all sectors of employment, both public and private, including:

- Employees
- Civil and Public Servants
- Members of an Garda Síochána and the Defence Forces
- Contractors and Consultants
- Agency Workers
- Trainees, temporary workers, interns, and those on work experience

How are protected disclosures made?

Whether a disclosure is protected or not will depend on the way in which the disclosure is made. The Act provides for a number of channels for those who wish to make a protected disclosure.

Channels of Disclosure

The Act sets out a number of distinct disclosure channels for potential whistle blowers. It provides for a tiered or "stepped" disclosure regime with a number of avenues open to workers, internal and external to the workplace. The first tier in the disclosure regime is internal, namely disclosure to the employer or some other responsible person. However there may be circumstances where this may not always be appropriate. The channels are as follows:

1. Disclosure to an Employer

It is in the best interests of all concerned in the workplace - management, workers and their representatives - that disclosures about wrongdoing are managed internally.

The Act provides for direct disclosure to the employer and this Code recognises the strong value to this route. A worker may make a protected disclosure to his/her employer where he/she reasonably believes that information being disclosed shows or tends to show wrongdoing.

It is recommended, therefore, that all organisations should have an agreed whistleblowing policy in place to ensure that:

- Workers are assured of a safe and confidential avenue to make their disclosures;
- Employers are given the opportunity to address issues arising at the earliest possible opportunity or where the discloser is mistaken or unaware of all the facts surrounding the issues raised, and to take the opportunity to assure the worker that his/her concerns are unfounded;
- There is a clearly understood procedure governing the protected disclosure of information.

An effective policy helps workers understand how to make a disclosure and can make it easier for employers to find out when something goes wrong. It also makes it more likely that persons making disclosures will make disclosures “in house” and look to internal resolutions. The risk of not having a policy is that a worker will not feel protected and will be inclined to go an external route.

2. Disclosure to a Minister

A worker employed in a public body may make a protected disclosure to a Minister of the Government on whom any function relating to the public body is conferred rather than to their immediate employer. The evidential criteria for making a disclosure to the appropriate Minister is the same as that which

applies to a disclosure made internally to an employer i.e. the worker reasonably believes that the information being disclosed shows or tends to show wrongdoing.

3. Other Channels – Disclosure outside of the Workplace

While this Code places a strong emphasis on the value of addressing whistleblowing concerns within the workplace, there is no obligation on a worker to disclose to the employer in the first instance. There may be circumstances where it is appropriate for a worker to make a disclosure externally. These circumstances include the employer failing to act on the information being disclosed or the worker does not wish to avail of the internal channel route. This is provided for in the Act.

It should be noted that the evidential criteria for making an external disclosure is set at a higher level than that applying to internal disclosure. Disclosure to a prescribed person (e.g. Regulatory Bodies) will only be protected when the person making the disclosure believes that the information disclosed, and any allegation contained in it, is substantially true.

The Act sets out a number of external channels:

Prescribed Persons

The Act provides for the Minister to prescribe a list of “prescribed persons” (in effect Regulatory Bodies that have regulatory inspection and enforcement functions in their sector) whose roles and responsibilities are such as to be deemed appropriate to receive and investigate matters arising from disclosures relating to any of the wrongdoings in relation to which a disclosure may be made. Examples of such Bodies are the Central Bank, The Health and Safety Authority and NERA. A full list of relevant Statutory Bodies has been prescribed in Statutory Instrument No. 339 of 21st July 2014.

Legal Advisor

A disclosure made in the course of obtaining legal advice, including advice relating to the operation of the Act, from a barrister, solicitor or trade union official is protected.

Other Persons

There is also provision for disclosure in other circumstances i.e. disclosure potentially in the public domain, such as to the media. The evidential qualifying criteria are set at a higher level. In order for such a disclosure to be protected a worker must:

- Reasonably believe that the information disclosed and any allegation is substantially true;
- The disclosure is not made for personal gain;
- The making of the disclosure in public is in all the circumstances, reasonable.

In addition one or more of the following conditions must be met:

- At the time of making the disclosure the worker reasonably believes that he/she will be subjected to penalisation by the employer if they make the disclosure under the internal process or to a “Prescribed Person”,
- In a case where there is no appropriate prescribed person (Regulatory Body) in regard to the wrongdoing, the worker reasonably believes that evidence will be destroyed or concealed if the disclosure is made directly to the employer;
- No action was taken in regard to a previous disclosure of the same nature made by the worker;
- The relevant wrongdoing is of an exceptionally serious nature.

Support and Advice

When a worker seeks advice from a trade union, barrister or solicitor about the operation of the legislation, this discussion is also a “protected disclosure”. It is sufficient to be protected that the purpose of the discussion was that the worker was seeking advice about the operation of the legislation. Advice on the operation of the Act can be sought at any stage including in advance of making a protected disclosure and during the subsequent process in both internal and external channels.

What is the difference between a grievance and a protected disclosure?

A grievance is a matter specific to the worker i.e. that worker's employment position around his/her duties, terms and conditions of employment, working procedures or working conditions. A grievance should be processed under the organisation's Grievance Procedure.

A protected disclosure is where a worker has information about a relevant wrongdoing.

It is important that a worker understands the distinction between a protected disclosure and a grievance. The organisation's Whistleblowing Policy (see below) should make this distinction clear.

Examples of a grievance

- Complaint around selection criteria for a promotional post;
- Complaint around allocation of overtime.

Example of a whistleblowing disclosure

- In a hazardous work situation information regarding a failure to provide or wear protective clothing and adhere to health and safety guidelines;
- Information about the improper use of funds, bribery and fraud.

Confidentiality

All reasonable steps must be taken to protect the identity of the person making the disclosure and to ensure the disclosures are treated in confidence. The exceptions to this are (a) where the worker making the disclosure has made it clear that he/she has no objection to his/her identity being disclosed and (b) the identity of the person making the disclosure is critical to an investigation of the matter raised. An example of this might be where the worker making the disclosure is called as a witness in the context of an investigation.

Can a disclosure be made anonymously?

Yes, a disclosure may be made anonymously. It should be noted that a disclosure made anonymously may potentially, of itself, present a barrier to the effective internal investigation of the matter reported on.

Focus should be on the reported wrongdoing and not on the person making the disclosure.

Can a disclosure made before the commencement of the Act be protected?

Yes, a disclosure made before the Act coming into force (14 July 2014) may still be a protected disclosure provided that penalisation or negative consequences for making the disclosure are suffered by the worker subsequent to the enactment of the Act.

What about disclosure in regard to wrongdoings occurring outside the State?

A disclosure made outside the State may qualify for protection. It is immaterial whether a relevant wrongdoing occurred or occurs in the State or elsewhere.

Workplace Whistleblowing Policy

It is mandatory for all public bodies, and highly recommended for all employments, to have in place an agreed Whistleblowing Policy setting out an accessible procedure for making protected disclosures and underpinning a culture of encouraging workers to speak out if they have genuine concerns.

As best practice, a policy should be developed and put in place on foot of agreement with all stakeholders in the organisation i.e. management, workers and their representatives. In general terms it should be simple and easy to understand, and set out a clear “roadmap” for dealing with protected disclosures.

While this Code of Practice does not propose to be prescriptive in regard to what a policy should look like as this is a matter for the stakeholders, the following elements are given as guidance in regard to matters which should be addressed in a policy:

Overview

- The policy should make clear that the organisation is committed to a culture which encourages workers to make disclosures internally in a responsible and effective manner when they discover information which they believe shows wrongdoing. Essentially the policy should underpin that the organisational culture is such that workers will feel comfortable and confident about reporting wrongdoing;
- The policy should make clear that the organisation will not tolerate the penalisation of a worker who discloses information in line with the policy;
- The policy should make clear that the organisation is committed to addressing concerns raised in an effective and timely manner.

Scope of the Policy

The policy should specify to whom it applies. The Act defines workers to include employees, Civil and Public Servants, Members of An Garda Síochána and the Defence Forces, Contractors and Consultants, Agency Workers, Trainees, temporary workers, interns and those on work experience.

Types of concerns that can be raised as a protected disclosure

The policy should give guidance on the types of wrongdoing that may be reported e.g. financial irregularity, or suspected criminal offences.

Concerns that may not form the basis for a protected disclosure

Matters for which appropriate procedures exist, for example, Grievance Procedures in regard to a worker's or employee's own contract of employment.

It is important that the distinction between procedures governing whistleblowing and other procedures, such as a Grievance Procedure, is made clear in the policy.

Raising a disclosure

Factors to be considered in prescribing a reporting structure for a protected disclosure include:

- To whom a disclosure should be made e.g. to an immediate manager in the first instance but with a clear option of bypassing the line management structure or disclosing to a higher level if appropriate. In larger organisations, consideration should be given to nominating a designated officer or officers, appropriately authorised, to act as a complaint recipient.
- The size of the organisation: Arrangements for a large organisation will differ from those of a small organisation.
- A concern can be raised verbally or in writing. Workers can be allowed to disclose verbally in the first instance, to be followed with a written communication if necessary. In the case of verbal disclosures, it is recommended that a written record is kept of the disclosure with due regard to confidentiality obligations.

Responses to Protected Disclosures

In the case of a concern expressed verbally, the person to whom the disclosure is expressed should listen carefully and give full attention to the person. In the case of a written disclosure, the matter should be acknowledged as quickly as possible.

The first matter that needs attention is assessing whether or not the concern raised should be treated as a protected disclosure or is more appropriate to another procedure, for example, Grievance or Dignity in the Workplace procedure. In the event that the employer does not consider the matter to be a protected disclosure, the Act provides for alternative channels of disclosure.

Where the matter is being treated as a protected disclosure, further communication with the discloser may be appropriate to clarify or seek further information. It may be possible that the matter can be addressed to the satisfaction of the discloser at this point on foot of a discussion and clarification.

A further examination or an investigation may be appropriate. Any examination or investigation should be conducted using objective and fair

principles with regard to the principles of natural justice. It is important that the outcome or conclusion of any such examination or investigation is communicated to the worker making the disclosure. In certain circumstances, a referral to the appropriate external enforcement agency or An Garda Síochána may be appropriate.

Communication/Feedback

It is important that the worker making the disclosure has a sense that the complaint is being taken seriously and that action is being taken, not least with a view to ensuring that the concerns raised are dealt with internally. The organisation should ensure that as much feedback as possible is given having regard to sensitivities around, for example, confidentiality. Information in regard to timelines for responses/actions should be communicated to the discloser.

Confidentiality

It is important that a worker making a disclosure should be assured that every effort will be made to maintain confidentiality. It is advisable to point out that there may be circumstances where confidentiality cannot be maintained, for example in the context of an investigation. It is important to note however that all reasonable steps must be taken to maintain confidentiality.

Representation/Supports

When a worker seeks advice from a trade union official, solicitor or barrister, this discussion is treated as a protected disclosure including at early stages in contemplation of making a protected disclosure or seeking information on the operation of the legislation. The trade union official, solicitor or barrister is bound by a general duty of confidentiality. In regard to confidentiality, it is important that there should be an awareness of respecting sensitive company information, which, while unrelated to the disclosure, may be disclosed in the course of a consultation or investigation process.

Any worker making a protected disclosure or any worker against whom an allegation has been made must have their constitutional right to natural justice and fair procedures upheld in accordance with all relevant employment legislation. In this regard, appropriate representation, if requested, should be accommodated.

Internal Redress

The organisation should make it clear that any penalisation of a worker making a protected disclosure will not be tolerated and that the organisation's

disciplinary procedure will be invoked against any worker or manager who engages in penalisation or threatened penalisation of a worker making a disclosure.

Alternative Channel for Public Servants

The policy should recognise that where a worker is employed by a public body, there may be circumstances where a concern can be disclosed to the appropriate Minister.

External Disclosure

The policy should recognise that, while the organisation is committed to addressing concerns in house to the greatest extent possible, there may be circumstances where a concern can be disclosed externally to a Prescribed Person or a person other than a Prescribed Person.

The policy should give guidance on accessing the relevant external channels.

The worker making the disclosure should ensure that the disclosure is limited to information relevant to the wrongdoing and does not unnecessarily disclose confidential company or confidential commercial information unrelated to the wrongdoing.

Awareness

To be effective, a Whistleblowing Policy should ensure that workers are aware of and, critically, trust the arrangements put in place. The policy should be widely promoted throughout the organisation to maximise awareness. This is important to underpin a culture of open and safe disclosure. There is value in relevant staff with specific responsibilities (for example designated officers and senior managers) being trained in the operation of the policy and on how to handle concerns.

Review

It is recommended that the policy be reviewed periodically to assess its effectiveness.

What are the Protections for a Worker making a disclosure?

The Act provides for a number of protections.

Employees, as defined in the Protected Disclosures Act, have access to the State's dispute resolution machinery as follows:

- **Protection from Penalisation**

If an employee feels that the employer has penalised him/her for making a protected disclosure, the employee may refer the matter to an Adjudicator. Generally speaking such action by the employer would encompass any action which could be interpreted as penalisation by the employer against the employee for having made a protected disclosure.

An Adjudicator will hear the case and issue a decision. A decision could declare that the complaint was not well founded, or if declared well founded, require the employer to take a specified course of action, including payment of compensation. The decision of an Adjudicator may be appealed to the Labour Court.

- **Protection from Dismissal**

The Act provides that an employee who is penalised by dismissal following the making of a protected disclosure may claim that he/she has been unfairly dismissed. There are extensive protections set out in the Unfair Dismissals Acts for protection against unfair dismissals. In addition (a) there is no minimum service requirement to avail of the Unfair Dismissal Acts arising from making a protected disclosure and (b) compensation for unfair dismissal on grounds of making a protected disclosure can be up to a maximum of 5 years remuneration.

Furthermore, where an employee is dismissed on foot of having made a protected disclosure, protection in the form of "interim relief" on application to the Circuit Court is available to prevent an unfair dismissal proceeding in advance of an outcome being determined.

The following protections are available to all workers making a protected disclosure:

- Right of take action through the Civil Courts;
- Immunity from Civil Liability where a worker making a disclosure suffers detriment;
- Making a protected disclosure does not constitute a criminal offence.
- Right of confidentiality.

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