



Protected Disclosures Act 2014 – Protection for Whistleblowers in Irish Law *

The Act became law on 15th July 2014.

This legislation in Ireland represents best practice in line with international standards.

The Act brings into operation new obligations for employers. All public sector bodies now have to put in place a whistleblowing policy in line with the Act. For those in the private sector who have policies in place they need to review these to make sure they are in line with the Act.

The new legislation which was originally intended only to apply to public servants now applies to all employees. The legislation refers to “worker”.

This is widely defined. It includes all employees, contractors, trainees, agency staff; members of An Garda Siochana and the Defence Forces and of course all Public Servants. It also includes importantly former employees and also those seeking employment.

What is protected?

The legislation refers to “protected disclosure”. This is stated to be “relevant information”. It must be information in the reasonable belief of the worker which tends to show one or more relevant wrongdoings and which came to the attention of the worker in connection with their employment.

What is a “relevant wrongdoing”

There is a very extensive list of what includes “relevant wrongdoings”. Some of the more common would be;

- A Commission of an offence;
- A miscarriage of justice;
- Noncompliance with a legal obligation;
- Health and safety threats;
- Misuse of public monies, mismanagement by a public official;
- Damage to the environment; and
- Concealment or destruction of information relating to any of the foregoing.



Is the motive for making a disclosure relevant?

The simple answer to this is “no”. There is no requirement that the disclosure is made in good faith. However, there is a provision where if it is shown the disclosure is made other than in good faith compensation payable under the Act may be reduced by up to 50% where the disclosure of the wrongdoing concerned was not the only or main reason for making the disclosure.

When does the Act apply from?

While the Act came into effect on the 15th July 2014 protected disclosures made before the Act came into effect may well be protected. The question is how far back can this go? As yet this has not been tested.

What are the steps in making a disclosure?

The Act encourages that the majority of disclosures will be made to the employer at first instance. The Act recognises that in certain circumstances this may be inappropriate or impossible.

The steps that are set out are;

1. Internal disclosure to an employer or other responsible person. Any worker may make a disclosure to their employer where the worker reasonably believes that the information shows or attempts to show wrongdoing. It also relates to a situation where the worker reasonably believes that the wrongdoing relates to the conduct of some person other than his or her employer or to something that some other person has legal responsibility. In such circumstances the disclosure can be made to that person;
2. Disclosure to a prescribed person. The Minister for Public Expenditure and Reform may produce a list of “prescribed persons”. This could be a Regulatory body;
3. Disclosure to a Minister. A worker employer in a public body may make a protected disclosure to the Department rather than to their employer;



4. Disclosure to a legal advisor. A disclosure made in the course of obtaining legal advice from a Barrister, Solicitor, Trade Union or other official of an excepted body is a protected disclosure; and
5. Disclosure to other persons and bodies.

There is provision for disclosure in other circumstances which would include disclosure potentially into the public domain such as the media. It must be noted that the standard for reporting is significantly higher. For this type of disclosure to be protected the worker must

- (a) Reasonably believe that the information disclosed is substantially true;
- (b) That the disclosure is not made for personal gain; and,
- (c) The making of the disclosure is in all the circumstances reasonable.

In addition, one of more of the following conditions must be met;

- At the time of making the disclosure the worker reasonably believes that he/she will be subject to penalisation and detriment by his/her employer if the disclosure is made to the employer;
- In the case where there is no prescribed person in relation to the relevant wrong doing the worker reasonably believes that this evidence will be destroyed, or concealed if a disclosure is made to the employer;
- The worker has previously made a disclosure of substantially the same nature to either the employer or a prescribed person and no action was taken, and
- The relevant wrong doing is of an exceptionally serious nature.

These are very high standards to be met. Any worker considering making disclosures other than for the first four set out above would be advised to obtain legal advice. The worker must be very careful of making disclosures into the public domain.



What happens where an employee makes a disclosure and what protections are there?

The Act provides workers who make protected disclosures with specific protections. These include;

1. Protection from dismissal for having made a protected disclosure. It should be noted that compensation for up to five years remuneration for Unfair Dismissal on the grounds of having made a protective disclosure can be awarded. Normally the level of compensation is up to two years remuneration. This shows how seriously the legislation provides protection for the employee.

Protection from penalisation

- Immunity for action for damages and a qualified privilege under defamation law;
- A right of action in tort where a whistleblower or a member. Their family experiences coercion, intimidation, harassment or discrimination at the hands of a third party;
- Protection of the workers identity. There are exceptions to this; and
- It is not a criminal offence to make a whistleblowing report which is a protected disclosure under the Act.

Protecting the workers identity

The Act includes measures to protect the identity of any workers so as to treat disclosures confidentially. Again, there are exceptions to this set out in the legislation.

What does this legislation mean for employees?

It means that employees are protected who make protected disclosures. It is not however an opportunity for employees to simply use the legislation to make unfounded allegation against their employer. The legislation is there for a purpose. It is there to protect the employees disclosing wrongdoing.



What should employers do?

Employers should put in place a Whistleblowing Policy

It may well be asked why an employer should do so. There is a simple reason. If there is internal procedure which allows for whistleblowing to take place it minimises the potential of an employee feeling that they must go outside the organisation.

Any policy should as a minimum;

1. Set out that the organisation takes malpractice seriously.
2. It should be set out very clearly that whistleblowing concerns are distinguished from and different from workers grievances
3. It should set out a procedure for making disclosures
4. A Policy should provide examples of the types of concerns which may be raised by any worker.
5. In setting out this list the employer should have regard to the provisions of the Act as regards setting out what relevant wrong doings are.
6. The employer should acknowledge that any worker has the option to raise concerns outside line management.
7. The policy should set out that there are different evidential burdens in the Act which the worker must reach in deciding to make a disclosure to the employer, relevant body or some external entity. It is useful to set these out.
8. Every policy should state that the employer will respect the identity and confidentiality of the whistleblower.
9. The policy should set out how concern should be properly raised outside the employer organisations.
10. Employers should ensure that the provisions of the policy are communicated.
11. Every employer should, monitor the effectiveness of the steps and make changes if required.

Of course employers will not like this new legislation. However it is better to plan properly than have a disclosure outside the organisation which otherwise could have been dealt with internally.



How will the Act operate in practice?

This is new legislation. There is the issue of international best practice. Saying this, we will have to wait and see how it operates in practice in Ireland. This will take some time.

For employees who believe wrongdoing has occurred, within their organisation this legislation provides significant protections. For employers it is important that they are aware of the Act and their obligations under the legislation.

This is an area of law where there will be significant developments in the coming years.

This note is not intended to be a full and details overview of the legislation. It is intended to give an overview only. Specific advice should always be obtained before acting or refraining from acting from anything set out in this note.

This note is intended simply to highlight the issues relevant to employers and employees.

*** In Contentious cases a Solicitor may not charge fees or other charges as a percentage of any award or settlement.**