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Target Audience
 All HSE Inspectors
 All Complaints Officers

PUBLIC INTEREST DISCLOSURE ACT 1998

This OC tells you about the Public Interest Disclosure Act 1998, which gives rights to workers who are victimised or dismissed for 'blowing the whistle' on their employers, for amongst other things health and safety concerns reported to HSE. HSE has no enforcement role under the Act.

INTRODUCTION

- 1 The Public Interest Disclosure Act 1998 came into force on 2 July 1999. It amends the Employment Rights Act (ERA) 1996 by introducing new rights of protection for workers not to suffer detriment or dismissal for raising concerns ('blowing the whistle') on their employers' fraudulent, criminal or dangerous activities.
- 2 The main amendments relating to health and safety widen the class of persons who have protection whilst making a disclosure and 'provide protection to workers raising health and safety concerns with the **enforcing authority**'.
- 3 The Act encourages resolution of problems within the workplace, before they are raised outside the workplace.
- 4 Protection relates to a 'qualifying disclosure' of information by a 'worker' about specified categories of wrongdoing or malpractice. A qualifying disclosure will only be a 'protected disclosure' for the purpose of victimisation and dismissal if it meets certain criteria relating to its content, and the recipient.

WHO DOES IT COVER?

- 5 The Act protects employees, regardless of age and length of employment. It also covers contractors, agency staff, homeworkers, all professionals in the National Health Service (NHS), trainees and work experience students.

6 It does not cover the genuinely self employed (other than professionals in the NHS, eg doctors, dentists, pharmacists), volunteers, the intelligence services, the armed forces or police officers. It does not apply to students in education.

WHAT IS A QUALIFYING DISCLOSURE?

7 A qualifying disclosure is defined as any disclosure of information about something that the worker 'reasonably believes' has occurred, is occurring or is likely to occur, relating to one or more of the following:

(1) a criminal offence;

(2) breach of any legal obligation (this could, in principle, include breach of a statutory requirement, contractual obligations, common law obligations, eg negligence, nuisance, defamation. In Government and public authorities, it could also include an official's reasonable belief that a decision of the authority could be overturned by judicial review);

(3) a miscarriage of justice;

(4) endangering the health and safety of any individual (includes risks to employees, contractors, visitors, customers, residents, patients, students, consumers, members of the public, etc);

(5) damage to the environment; and/or

(6) the cover up of any of the above matters.

8 There is scope for the information disclosed to overlap the 6 categories.

9 The information does not have to be accurate, but workers must be able to show that they acted in good faith and held a reasonable belief in all the circumstances that the information was accurate.

10 The worker must ordinarily work in Great Britain to invoke the Act, but the Act also applies to malpractice occurring outside the United Kingdom. For example, an employee working in Great Britain for a multi-national company who discovers and discloses to an appropriate person, a malpractice in another office of the company outside the UK, would be protected.

11 Any provisions in agreements, eg confidentiality clauses or agreements to refrain from instituting proceedings for breach of contract are void, in so far as they preclude the worker from making a 'protected disclosure'. The disclosure of information by a worker which in itself constitutes a crime, eg disclosure under the Official Secrets Act, is **not** a qualifying disclosure.

TO WHOM CAN THE CONCERN BE DISCLOSED?

12 The worker will only be protected if in 'good faith' they raise their concerns:

(1) **'to the employer or another responsible person':**

(a) disclosure made to an 'employer', is deemed to be a disclosure made to the employer directly, to someone senior to the worker who has been expressly or implicitly authorised as having management responsibility, or by the use of the employers' own internal whistleblowing procedures;

(b) concerns raised by agency or contractor workers to the host/principal employer are also protected. If the individual is victimised, they can only claim against their own employer, ie the agency/contractor;

(c) employees telling their trade union/safety representative, are not 'making a disclosure to the employer', unless the employer has specifically included raising concerns to safety representatives as part of their own internal whistleblowing procedures; and

(d) trade union/safety representatives acting upon information received will receive protection against detriment and dismissal by the ERA 1996;

(2) **'in the course of obtaining legal advice'**: the worker will be protected whilst gaining 'legal advice' - whether or not the advice is sought in good faith. The person giving the legal advice on the concern is not protected if they pass it on - unless they are acting on that individual's behalf. This is intended to ensure that workers are protected whilst telephoning help lines, etc;

(3) **'to a Minister of the Crown'**: disclosure to a Minister relates to workers employed by government departments, non-departmental public bodies, agencies, NHS trusts, utility regulators, etc who can disclose concerns direct to the relevant Minister for that department instead of their employer. The disclosure must be made in 'good faith'; and

(4) **'to prescribed persons (appointed by the Secretary of State)'**:

(a) the disclosure must be made in 'good faith' and the worker must reasonably believe the information to be substantially true;

(b) there is no requirement that the disclosure be reasonable; that the malpractice be serious; nor that the worker should have raised the matter internally first;

(c) Health and Safety Executive and local authority officers in their role as enforcers of health and safety law are prescribed persons;

(d) the police are not prescribed persons.

WIDER DISCLOSURE

13 In addition to the persons to whom a disclosure can be made (para 12), in certain circumstances the worker can make a 'wider disclosure'. This would include disclosures made to the police, the media, MPs and non-prescribed regulatory bodies.

14 The disclosure will only be protected if:

- (1) it is made in 'good faith';
- (2) it is reasonably believed to be substantially true;
- (3) it is not made for personal gain;
- (4) it is reasonable for the disclosure to be made;

and also

- (5) the worker reasonably believes that they will be subject to a detriment, if a disclosure is made to the employer or a prescribed person; or
- (6) there is no prescribed person and the worker believes the evidence will be concealed or destroyed if he makes a disclosure to his employer; or
- (7) the worker has previously made a disclosure of substantially the same information to the employer or the prescribed person already. (NB to be 'protected', the tribunal will take into account whether the worker followed the employer's internal whistleblowing procedures and also any response the worker received from the employer and/or the prescribed person).

15 In determining whether it is reasonable for the worker to make the disclosure regard shall be had to:

- (1) the identity of the person to whom disclosure is made;
- (2) the seriousness of the relevant failure;
- (3) whether the relevant failure is continuing or likely to occur in the future; and
- (4) whether the disclosure is made in breach of a duty of confidentiality owed by the employer to any other person.

Further, depending on the circumstances, regard shall also be had to any action which the employer or person to whom the previous disclosure was made had taken or might reasonably be expected to have taken as a result of the previous disclosure; and whether in making the disclosure to the employer the worker complied with any procedure whose use by him was authorised by the employer.

WHAT IS VICTIMISATION?

16 Victimisation is, if an individual suffers a detriment or dismissal for making a 'protected disclosure', ie one meeting the criteria relating to content **and** recipient.

17 Examples of detriment include disciplinary action, demotion, failure to provide training, failure to provide promotion, withholding a pay rise, selection for redundancy or early termination of a fixed contract.

18 Employees can make a claim for unfair dismissal under the existing (ERA) legislation.

IMPLICATIONS FOR HSE

19 HSE has no arbitrating or enforcing role in relation to the Act; this is explicitly the responsibility of employment tribunals.

20 Most complaints from individuals received by HSE will be protected disclosures. Complaint handling procedures already take into account the need to protect complainants by offering anonymity.

21 If an individual claims to a tribunal for victimisation by his employer after raising a concern, the tribunal will amongst other matters, take into account the response received by the individual in terms of feedback on their concerns. It is therefore important to take complainants' details so that they can be told of the outcome of any investigation.

ADVICE FOR INDIVIDUALS AND EMPLOYERS

Advice to individuals

22 Individuals should be advised to raise their health and safety concerns with the employer or an appropriate manager first. They can also raise their concerns with their safety representative.

23 If the individual has done this and there has been no satisfactory response, or they feel they would be victimised for raising the matter internally, they should be advised to report the concern to HSE.

24 Individuals can be advised that they may be legally protected from victimisation when reporting complaints to HSE. This could be used to persuade individuals to leave their name and contact details, to help in obtaining further information from, and providing feedback to, the complainant.

25 If someone believes they have been victimised, they can bring a claim to an employment tribunal for compensation. In some circumstances, a worker claiming to have been unfairly dismissed may (within 7 days) seek an interim order so that employment continues or is deemed to continue, until the full hearing of the tribunal.

Advice to employers

26 Employers should ensure they have procedures in place that allows workers to raise concerns internally.

27 An existing company procedure, eg near miss reporting, hazard spotting, complaints procedures, may suffice, or be able to be adapted to allow for reporting.

28 Internal procedures should be simple to use, readily accessible and encourage workers to raise concerns internally as a first step.

FURTHER INFORMATION

29 HSE staff should refer people to free DTI guidance: URN 99/511 *Guide to the Public Interest Disclosure Act 1998* (FOD file 109) which may be obtained by calling 0870 1502 500 or via the DTI website

30 Public Concern at Work is an independent charity that provides free advice and assistance to concerned individuals. They can also provide guidance to employers about setting up effective internal whistleblowing systems.

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