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# Briefing

## **Employers Beware:**

### New Whistle-Blowing Rules on the Horizon



INSTITUTE OF DIRECTORS  
IN IRELAND

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In recent weeks, a general scheme for an amendment to the Protected Disclosures Act 2014 (the “**Act**”) has been published. The proposed Protected Disclosures (Amendment) Bill 2021 (the “**Bill**”) is intended to implement into Irish law the Directive on the protection of persons who report breaches of Union law (the “**Directive**”). While the scope of the Directive is limited to disclosures relating to certain areas within the scope of EU law, the proposed content of the Bill extends well beyond this.

Although the Act was already noted, on its introduction, to be wide-ranging in its strength and scope, the proposed Bill will introduce significant changes to the protected disclosures landscape. This briefing outlines some of the headline additional requirements which employers should be expecting when the Bill eventually becomes law later this year.

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#### **“Relevant wrongdoing”**

The nature of wrongdoings which can be disclosed under the Act are proposed to extend to breaches of certain EU laws, including in the areas of public procurement, the single market, financial services, product safety, transport safety, environmental protection, food safety, animal welfare, animal and public health, consumer protection, privacy and the protection of personal data. The Bill also confirms that “*interpersonal grievances*” relating to “*conflicts between the reporting person and another worker*” fall outside the scope of the Act where they can be channelled to other procedures such as grievance procedures.

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## Scope of protection

The scope of the Act is currently limited to information which comes to the attention of a worker *‘in connection with the worker’s employment’*. The scheme of the Bill proposes to extend the protections of the Act to shareholders, members of the administrative, management or supervisory body of an undertaking, including non-executive members, volunteers or unpaid trainees, suppliers, and those who acquire information during a recruitment or other pre-contractual process.

Interestingly, employers who receive anonymous disclosures will not be obliged to accept and follow up on such disclosures, albeit a person who makes an anonymous disclosure whose identity subsequently becomes known will enjoy the protections under the Act.

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## Private employers

Whereas the Act currently provides that the adoption of workplace channels and procedures regarding protected disclosures is mandatory only for public bodies, it is proposed to extend this requirement in the Bill to all private companies with over 249 employees, and to further extend this to private companies with over 50 employees from 17 December 2023. The Minister may also by order require entities with less than fifty employees to comply following a risk assessment taking into account the entity’s activities and the ensuing level of risk.

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## Enhanced employer obligations

Under the proposed Bill, employers and prescribed persons will be subject to more prescriptive obligations regarding the processing of protected disclosures. Some of the more significant changes include the requirement to acknowledge receipt of disclosures within 7 days in most instances and the need for an *“impartial person”* to *“diligently follow up”* on disclosures. The Directive, meanwhile, indicates that whistle-blowers should *“as far as legally possible and in the most comprehensive way possible”* be informed of the follow-up to their report, and so this is likely to be an onerous obligation. However, the proposed Bill clarifies that the obligation to diligently follow up may not apply where the recipient considers it is *“clearly minor”* or where no *“meaningful new information about a relevant wrongdoing compared to a past report”* has been provided.

Other changes include the need to provide feedback to the worker on the actions taken or proposed within 3 or 6 months, and the requirement to communicate *“the final outcome of investigations”* to the discloser.

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## Other changes

A dedicated, independent Protected Disclosures Office is proposed to be established within the Office of the Ombudsman to, inter alia, receive disclosures made to prescribed persons and to support Ministers who receive disclosures.

Among the other changes is the proposal that interim relief can be obtained before the Circuit Court in all cases where a worker alleges they have been penalised under the Act and not only cases involving dismissal. A further change is that the conditions by which workers can raise protected disclosures publicly are also proposed to change. The general scheme of the Bill also envisages measures to ensure that whistle-blowers have access to support, including free, independent information on their rights and the procedures and remedies available, as required by the Directive.

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## Concluding remarks

It is notable that the Minister for Public Expenditure & Reform, when publishing the proposals, indicated an intention to reverse the burden of proof in cases of penalisation under the Act, such that it would be presumed that alleged acts of penalisation occurred because the worker made a protected disclosure, unless the employer can prove otherwise. Provision has not been made for this in the general scheme of the Bill, but it could represent a challenging development for employers if workers were not first required to establish a *prima facie* case of penalisation, as is envisaged by the Directive.

It is also interesting to note that the Act in its current form provides that a worker will only benefit from the protection of the Act insofar as their disclosure relates to the broadly-defined concept of a 'trade secret' if they can show that they acted in '*the general public interest*'; otherwise the disclosure of such information amounts to a criminal offence, regardless of the truth of the disclosure. The general scheme of the Bill does not refer to the potentially significantly lower burden of proof provided for in the Directive, which provides for protection where the whistle-blower had '*reasonable grounds*' to believe the reporting or public disclosure was necessary to reveal a breach of the Directive.

For the moment, the general scheme of the legislation provides only a broad outline of the proposals and employers will await with interest the publication of detailed legislation, which is required to be enacted before 17 December 2021. Certain detailed rules on whistle-blower protection in specific areas such as financial services, prevention of money laundering and terrorist financing, are not proposed to be disturbed by the Bill. It is clear however that the proposals will further strengthen the already significant protections enjoyed by whistle-blowers in Ireland and employers should ensure that they are prepared for such changes when they eventually take effect.

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## Action Required

Employers throughout the private and public sectors ought to develop effective policies on protected disclosures, if they have not already done so, and update those policies once the proposed new law is in place.

*Further information is available from*



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