McCann FitzGerald

Briefing
Wide Ranging Changes to Whistle-blowing Laws

INSTITUTE OF DIRECTORS IN IRELAND

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The Protected Disclosures (Amendment) Act 2022 was signed into law on 21 July 2022 and will commence on 1 January 2023. The Act, which transposes an EU Directive on whistle-blowing into Irish law, will further strengthen the protection of whistle-blowers under the Protected Disclosures Act 2014, and impose significant additional new obligations on employers and others who receive protected disclosures.

The 2014 Act, it will be recalled, provides protection against penalisation for workers who raise allegations of relevant wrongdoing within their organisation and indeed the Act expands upon and refines these concepts, giving non-exhaustive examples of what will amount to such penalisation. This factsheet outlines the key changes which will be most immediately of relevance to employers.

Scope

The new obligations will require all private sector organisations with 250 or more employees to establish formal procedures for the making of protected disclosures, although it will eventually apply (from 17 December 2023) to organisations with between 50 and 249 employees. Certain employers, including those in the public sector and certain financial services firms, regardless of size, must comply with the obligations contained in the Act.

The new protections will have broad application, covering current and former employees and contractors, job applicants, volunteers, board members, shareholders and members of administrative, management or supervisory bodies, including non-executive members. The Act clarifies that there is no obligation on employers to follow up on anonymous reports.

The Act provides that matters concerning 'interpersonal grievances exclusively affecting a reporting person' are not relevant wrongdoings which qualify for protection. This provision was not further expanded upon to limit protection to instances where the public interest is engaged despite the Supreme Court having

recently noted what it considered an anomaly where the 2014 Act could provide protection for purely personal grievances. Given that the scope for inventiveness here was curtailed by our obligations under EU law, it seems that workers whose personal grievances in some, if even tangential, way affect others within or outside the organisation, will qualify for protection under the terms of the Act notwithstanding this provision.

Relevant wrongdoing

Under the terms of the Act, information in respect of wrongdoing is relevant where it comes to the workers attention "in a work-related context" (and "irrespective of the nature" of the work-related activities concerned); penalisation must also arise "in a work-related context".

The Act also broadens the list of relevant wrongdoings which can be the subject of a protected disclosure to include breach of a broad range of EU measures and areas of competence listed in the Act. These include public procurement, financial services, prevention of money laundering, terrorist financing, product safety and compliance, transport safety, protection of the environment and humans, radiation protection and nuclear safety, food and feed safety and animal health and welfare, public health, consumer protection, protection of data privacy, security of network and information systems, together with acts and omissions which affect the financial interests of the Union or which relate to the internal market. Relevant wrongdoing will also include attempts to conceal or destroy information tending to show such relevant wrongdoing.

Reporting to employer

There will now be significant new obligations on employers. Internal reporting channels must be established and workers must be provided with accessible information on the making of disclosures both internally and externally. An impartial person (whether internal or external) must be designated to carry out an initial assessment of whether there is prima facie evidence of relevant wrongdoing, to communicate with the reporter (including to request further information and to acknowledge their report within seven days) and to 'diligently follow up' with them. 'Follow up' is defined to mean any action to assess accuracy of a report and to address relevant wrongdoing. Diligent follow-up requires the giving of feedback within a reasonable period and, in any case, within 3 months. 'Feedback' is defined to mean the provision to a reporting person of information on the action envisaged or taken as follow-up and on the reasons for same. Employees of public bodies may request feedback in respect of reports made before the enactment of the legislation where the relevant investigation has not yet concluded.

There is scope, following an initial assessment, for the designated person to decide that there is no prima facie evidence of relevant wrongdoing and to notify the reporter that the procedure is closed in writing, giving reasons. Otherwise 'appropriate action' must be taken to 'address' the relevant wrongdoing, in light of the nature and seriousness of the matter.

External reporting

Similar provisions apply to the making of disclosures to certain 'prescribed persons' (typically those bodies with regulatory functions). Notably, the deadline for the giving of feedback can, in such instances, be extended to 6 months "in duly justified cases due to the particular nature and complexity of the report".
The Act requires the communication of the final outcome of any investigation, unless to do so would run contrary to other legal obligations including in relation to confidentiality, data privacy and privilege. There is also scope within the Act for prescribed persons (and the newly created Protected Disclosures Commissioner) to close their procedure where the relevant wrongdoing is "clearly minor and does not require further follow-up" or fails to contain "meaningful new information about a relevant wrongdoing compared to a previous report". This language is not included in respect of internal reports.

A worker who is or was employed by a public body may make a report to a relevant Minister in limited circumstances subject to satisfying certain criteria. One basis on which a report can be made to a Minister is where a worker 'reasonably believes' there has been 'inadequate follow up' by an employer. The Minister as soon as practicable must transmit the report to the Protected Disclosures Commissioner, a new body within the office of the Ombudsman. The Commissioner enjoys extensive powers (including to enter premises, require production of documents and attendance of persons) and will, inter alia, receive and redirect reports made to prescribed persons and ministers.

As regards disclosure through other external channels (such as the media), there are more stringent standards in order for a worker to qualify for protection (including a reasonable belief in the substantial truth of the disclosure); however, the previous requirements that the making of the disclosure is reasonable and not for personal gain (as were contained in the 2014 Act) have been removed.

Changes to legal process

Employers should be aware of certain changes to how whistle-blowing matters will be addressed in the courts.

- Interim relief will be available before the Circuit Court in respect of all incidences of penalisation (typically within 21 days of its occurrence) and will not be confined to instances of dismissal.

- The burden of proof in penalisation or detriment proceedings will be on the employer to prove that the act or omission concerned was based on duly justified grounds unrelated to the making of any protected disclosure.
- Compensation for penalisation can be reduced by up to 25 per cent where the reporting person knowingly reported false information or where the investigation of the relevant wrongdoing was not the main motivation for making the disclosure.
- A person who suffers damage resulting from a report in which the reporting person knowingly reported false information, has a right of action in tort against the reporting person.
- Numerous new offences are contained within the Act including, significantly, hindering or attempting to hinder a worker in making a report; penalising or threatening penalisation (including to related persons or entities); bringing vexatious proceedings; breaching the duty of confidentiality to reporting persons; and failing to establish, maintain and operate internal reporting channels. Such offences, for which directors, managers, secretaries and other officers may also in certain instances be liable to be prosecuted, may attract significant fines of up to €250,000 and terms of imprisonment of up to two years.
- It will also be an offence for a worker to make a report containing any information that they know to be false.

Confidentiality

The Act contains protection for the confidentiality both of the reporting person and any person referred to in a protected disclosure, although, as before, the protection for confidentiality is not absolute. The obligation does not apply, for instance, where disclosure is a necessary and proportionate obligation in the context of conducting a fair investigation. The Act will typically require that a reporting person be informed before their identity is disclosed, unless, for instance, such information would jeopardise relevant investigations.

Concluding remarks

The Act will commence on 1 January 2023. Employers, in particular those in the compliance and human resources functions, should ensure that they have at least a working knowledge of the new requirements in the Act and the (sometimes criminal) consequences of breaching them. Appropriate training for managers should be arranged and the applicable policies of the employer should be updated accordingly. Those in the public sector should also have regard to the detailed Interim Guidance issued by the Minister for Public Expenditure and Reform in recent weeks.

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