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WHISTLEBLOWING

Why a whistleblowing programme is the best way of protecting corporations from a whistleblowing scandal

Whistleblowers have revealed some of the largest scandals and been the catalyst for some of the biggest government investigations and lawsuits in history. In some places, for example the United States there is a long history of incentivising whistleblowers by rewarding them with a share of any fines levied against businesses flowing from information supplied by the whistleblower.

Against this backdrop a common misconception is that whistleblowing should be discouraged. However, this is wrong. Businesses seeking to protect themselves from a whistleblowing scandal are recommended to ensure that they have in place their own internal whistleblowing program and actively encourage "speaking up".

The importance of a whistleblowing policy

Whistleblowers are frequently motivated by a desire that the truth be known or that suspicions of misconduct are investigated by someone and dealt with as appropriate. Whistleblowers are also afforded legal protections in different jurisdictions. Anecdotal evidence is that whistleblowers will often be satisfied if the investigation is impartially undertaken, and any problems are dealt with, by their employer. In contrast, a whistleblower report to the press, law enforcement, regulators etc. is often the last resort and frequently made after attempts to use internal channels have failed.

An effective internal whistleblowing process provides an internal channel for suspected problems and enables the company to get to the bottom of allegations and fix any problems, if necessary, without being under the spotlight of media or regulatory interest.

Protections for the whistleblower

Under UK employment law, whistle-blowers are protected from victimisation or discrimination by their employers under the Public Interest Disclosure Act 1998 (**'PIDA'**). PIDA provides protection for employees/workers who make a 'protected disclosure' report malpractices by their employers or third parties against detriment (Section 47B) or dismissal (Section 103A) by inserting legislative provisions into the Employment Rights Act 1996 (**'ERA'**). To attract protection, a whistleblower must have made a qualifying disclosure under section 43B(1) of ERA. For a disclosure to be 'protected', the worker must:

1. Make a disclosure of information.
2. Reasonably believe that the information tends to show that one or more of the following had occurred or was likely to occur:
 - a. a criminal offence;
 - b. breach of any legal obligation;
 - c. a miscarriage of justice;
 - d. danger to the health and safety of any individual;
 - e. damage to the environment; or
 - f. The deliberate concealment of information about any of the above.
3. Reasonably believe that the disclosure is "in the public interest"

If a whistleblower makes a protected disclosure, it will not be considered a breach of the duty of confidentiality between employee and employer. The same goes for any former employees; any non-disclosure provision in a settlement agreement will not apply if a protected disclosure is made. Whistleblowing is not, however, an exception to the general duty of legal professional privilege.

Unlike the US, there are no provisions in the UK regarding incentives or monetary rewards for whistleblowers from the authorities. However, if it transpires that an individual who blows the whistle has themselves also participated in the wrongdoing (such as taking bribes), they may be granted immunity from prosecution if they are willing to assist

the investigation.¹ The same leniency applies for those whistleblowers who are already convicted; a reduced sentence may be available to the whistleblower if they cooperate with the prosecuting authority.

Whistleblowing in the US

Whistleblowing has long been a feature of US law enforcement. The US Securities and Exchange Commission (**'SEC'**) has an Office of the Whistleblower which monitors for possible violations of federal securities laws. The main difference between the UK and US regimes is that whistleblowers in the US can be financially incentivised to report wrongdoing. Individuals that report 'high-quality original information' to the SEC which leads to successful enforcement action resulting in an order exceeding \$1,000,000, are eligible for a financial award between 10% and 30% of the total monies collected.

In Office of the Whistleblower's annual report for FY 2021², the SEC awarded \$564 million to 108 individuals. This is the largest sum to the greatest number of individuals in the history of the programme. Furthermore, the awards made in 2021 included the two largest awards to date: an award of \$114 million to an individual in October 2020, and a further award of \$114 million to two whistle-blowers in September 2021. Although it is a US whistleblowing scheme, reports can come in from anywhere; most non-US whistleblowers come from Canada, China, or the United Kingdom. The US Internal Revenue Service (**'IRS'**) has its own whistleblowing program. It has previously awarded in excess of \$100 million to a whistleblower who was himself jailed for his own involvement in the misconduct he blew the whistle on. His former employer was fined \$780 million for the misconduct.

Practical considerations

An effective whistleblowing policy and hotline in the local language is strongly recommended with corresponding training. A process for triaging reports is recommended ensuring that reports are handled appropriately. In most cases it is likely that whistleblowing reports can be dealt with internally using in-house resources. However, from time-to-time businesses may consider that this is inappropriate. For example, we have dealt with situations where allegations have been made against those who would normally undertake the investigations and where there is no other conflict free alternative within the business. It is strongly recommended that any investigation is conflict free to ensure that the investigation findings credibility is not dented.

At the end of the day investigations into whistleblower reports do not always substantiate the claims and we have been involved in examples where clients have determined that they wish to waive privilege over our investigation report to deploy in litigation as a defence to claims made by a whistleblower. Obviously, this is not a decision to be made lightly. In other cases, reports have led to the uncovering of misconduct and the remediation of problems by the business. Burying heads in the sand frequently ends in disaster. Far from inviting problems an effective whistleblowing program helps businesses fix problems and protects corporate reputations.

For more information, please contact the author(s) of this alert



ANNE-MARIE OTTAWAY

Partner, London

T +44 (0)20 7264 8054

E anne-marie.ottaway@hfw.com



BARRY VITOU

Partner, London

T +44 (0)20 7264 8050

E barry.vitou@hfw.com



CINDY LAING

Associate, London

T +44 (0)20 7264 8263

E cindy.laing@hfw.com

¹ Section 71 of the Serious Organised Crime and Police Act 2005.

² [2021 Annual Whistleblower Program Report to Congress \(sec.gov\)](#)

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