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The Protected Disclosures Act 2014

The Protected Disclosures Act 2014 came into operation on 15 July 2014 and provides that workers in the public, private, and non-profit sectors who raise concerns / disclose information (make 'protected disclosures') will be protected.

The object of the legislation is to protect workers who make protected disclosures (whistleblowers) which in their reasonable belief show a 'relevant wrongdoing', from penalisation by their employer.

Who is a "worker" / who is covered?

The definition of a "worker" is broad and includes; Employees; Some Public Servants; Contractors or consultants (third parties); Agency workers in certain circumstances and Trainees, interns, temporary workers or those on work experience.

What is a 'Protected Disclosure?'

To qualify as a 'protected disclosure',

1. The disclosure must be in relation to a 'relevant wrongdoing'. A worker must reasonably believe the information disclosed tends to show one or more 'relevant wrongdoings'.

Wrongdoings include the following:

- A Criminal offence,
- Failure to comply with legal obligations, other than one arising under the worker's contract of employment,
- A Miscarriage of justice, Health or safety concerns,
- Damage to the environment,
- Unlawful/ improper use of public funds or resources,
- An act or omission, by or on behalf of a public body, which is oppressive, discriminatory or grossly negligent or constitutes gross mismanagement, or

- Destroying or concealment of relevant information.
(Absolute proof of wrongdoing is not necessary)
2. The wrongdoing must come to the workers attention in connection with their employment. A disclosure will not be protected if it relates to matters in someone's personal life outside and unconnected to the workplace.

Not all wrongdoing may carry the protection of the legislation. Examples where it may not could include breaches of internal controls, policies or procedures of the employer, where these do not come within the definitions above. In these cases, protection may be available under an employer's Whistleblowing Policy, but not under this legislation.

Protection Provided

The legislation provides the following protection for those who make Protected Disclosures;

1. Right of protection if unfairly dismissed.
2. Right of protection if you are otherwise penalised or threatened by your employer.
3. Right of protection against victimisation or other detriment caused by a third party.
5. Right to Civil Immunity.
6. Protection from prosecution for breach of

confidentiality.

7. Protection of the Identity of the Individual who makes the Disclosure. However, the requirement to protect the identity of the discloser does not apply if:

- The person to whom the protected disclosure was made or referred shows that he or she took all reasonable steps to avoid so disclosing any such information.
- The person to whom the protected disclosure was made or referred reasonably believes that the person by whom the protected disclosure was made does not object to the disclosure of any such information.
- The person to whom the protected disclosure was made or referred reasonably believes that disclosing any such information is necessary for the effective investigation of the relevant wrongdoing concerned with the prevention of risk or a criminal offence.

8. Interim Relief - An employee will have up to twenty-one days to make an application for interim relief before the Circuit Court. If the employer and the employee agree, the Court may order that the employee is reinstated to the position that he/ she was dismissed from or be re-engaged in another position on terms and conditions not less favourable than those which would have been applicable to the employee if he or she had not been dismissed.

9. The worker (or their trade union on their behalf) can make a complaint to a Rights Commissioner within 6 months which may be appealed to the Labour Court.

What is Penalisation

Penalisation includes actions such as; suspension, dismissal, demotion, and unfair treatment.

An employer may also be held vicariously liable if they cause or permit any other person to penalise or to threaten penalisation against an employee for having made a protected disclosure.

Forms of Redress

Workers will have a cause of action against someone who causes detriment to them, their spouse, sibling, parent or child, as a result of having made a protected disclosure.

“Detriment” includes; intimidation, harassment, discrimination, disadvantage, adverse treatment in relation to current or prospective employment etc. This action cannot be taken in conjunction with an application for unfair dismissal or penalisation under this Act.

The protections will not apply to false disclosures deliberately made and could result in legal action being taken against the perpetrator if this is the case. Where an issue arises in proceedings as to whether a disclosure is a protected disclosure or not, it will be presumed, until the contrary is proved, that it is protected.

A disclosure made before the date of the Act may still be a protected disclosure provided that penalisation, detriment or negative consequences for making the disclosure have already been suffered by the worker. It is also immaterial whether a wrongdoing occurs in Ireland, the disclosure will still qualify for protection.

In a case for unfair dismissal, compensation of up to a maximum of five years remuneration may be awarded. This may be reduced by up to 25 per cent if the investigation of the relevant wrongdoing was not the sole or main motivation for making the disclosure.

Representation

An employee may be represented by his/her union or work colleague at any meetings held in connection with the concerns raised.

Disclosure Procedure

An internal whistleblowing policy should only have to be used where there is a suspicion of wrongdoing which cannot be effectively addressed through ordinary reporting procedures (such as a grievance procedure). This may not happen where the suspected wrongdoing involves or affects third parties such as suppliers or customers, or the reporting line manager of the worker reporting is implicated in the wrongdoing.

This Act encourages internal reporting to the employer in the first instance and although it is anticipated that this will be availed of most frequently should this be deemed inappropriate, ineffective or impossible by the worker a stepped approach should be provided:

Option 1- Disclosure to an employer/other person procedures;-

Making a Protected Disclosure of Information to an Authorised Person:

- The employee should set out the details in writing on a Protected Disclosures of Information Form and submit to his /her manager or selected authorised person.
- Following receipt of the disclosure, the manager /Authorised Person will make initial enquiries to determine whether or not the subject matter of the disclosure comes within the scope of the Act and, if so, what form the investigation should take.
- If the subject matter falls within the scope of specific policies or procedures within the organisation an investigation will be carried out in accordance with the

appropriate policy/procedure and the employee should be advised accordingly.

- The Manager/authorised person must ensure that the identity of the worker is protected when reporting at the preliminary stage. Anonymous complaints should not be entertained. The whistleblower should be made aware that if the matter goes to a formal investigation, his/her identity will probably have to be disclosed, to ensure that the subject of the complaint has fair procedures;
- Provide that any retaliatory action, or any abusive or false allegations, could involve exposure to disciplinary proceedings.

Where there appears to be substance to the allegation, the matter should be sent onward for appropriate internal action or investigation and/or refer the matter to an appropriate external agency.

The worker should be kept apprised of the progress and outcome at all times.

Option 2- Disclosure to a nominated Third Party

A worker is regarded as having made a protected disclosure if he or she does so to a nominated third party. This outsourcing alternative provides employers with a mechanism to make it easier for workers to raise concerns, and provides independent guidance, intermediation, feedback and case management by third party professionals.

Once Bona Fide disclosures are made there is virtually no hurdle to be met in a worker availing of these two options above.

Option 3 - Disclosure to a Prescribed Person or Body

Alternatively, a protected disclosure may be made to a person or body prescribed by the Minister for Public Expenditure and Reform.

The hurdle for an Option 3 disclosure is higher. A worker must have a reasonable belief that their disclosure is relevant to that regulator and, secondly, he or she must have a reasonable belief that their allegation is substantially true.

Option 4 - Disclosure to a legal adviser

Disclosure can be made by any worker to a legal adviser if it is made by the worker in the course of obtaining legal advice from a barrister, solicitor or trade union official.

Again, the hurdle to be met in Option 4 disclosures is low. The worker must merely have a reasonable belief that information disclosed tends to show relevant wrongdoing.

Option 5 - Disclosure to 'other persons' A disclosure to a person other than those already mentioned, such as to the press, can

be made by a private sector or public body worker **but** a significantly higher hurdle applies.

Option 6- Disclosure to a 'sponsoring' Minister

This alternative applies to public bodies only, where an employee makes the disclosure to a minister responsible for their area.

Recommendations

It is recommended that employers implement a policy and procedure governing 'Protected Disclosures' within the workplace and that all employees are made aware of and have access to it.

This update is provided by the MSS HR Support Service.

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