



## Public Interest Disclosure Guidance Note



When you are running a business the last thing you want or indeed can afford, is to carry an employee who is not doing his job. It affects morale within the company, and can have an adverse effect on clients, and business performance. Correct management of people from the outset can pay dividends later.

### Protecting the Whistleblowers

The Public Interest Disclosure Act 1998 came into force on 02 July 1999 and inserted new sections into the Employment Rights Act to protect whistleblowers. By whistleblowers we mean workers who have raised concerns about misconduct or malpractice at work, or perhaps have even reported an illegal act. Public enquiries into disasters that have happened in recent years (such as the Clapham rail crash) have revealed that there is a need for workers to be protected from suffering a detriment at work and the risk of unfair dismissal. This protection is required if they are to be encouraged to disclose legitimate concerns, such as safety risks, which may prevent crimes or accidents.

### The main issues

Workers who may have previously remained silent for fear of losing their jobs or damaging their continued employment are now able, in certain circumstances, to disclose information and “blow the whistle”. This article summarises the main issues surrounding the law, and highlights the need for employers to consider whether a whistle-blowing policy should be introduced into their organisation.

A worker is protected in law if he or she discloses information that falls into one of six categories (known as “qualifying disclosures” - see below) and the information is disclosed in a manner that is permitted in the Act.

### What is a “worker”?

Section 230(A) of the ERA has extended the definition of “worker”. It now includes all employees, agency workers and contractors, trainees and NHS professionals. It does not include the genuinely self-employed, volunteers, police officers, those ordinarily working outside Great Britain, those in the armed forces or in the security and intelligence services.

### What is a “qualifying disclosure”?

Section 43B (1) defines a “qualifying disclosure” as a disclosure which, “in the reasonable belief of the worker” making it, concerns:

- a criminal offence;
- a breach of a legal obligation;
- a miscarriage of justice;
- the endangerment of an individual's health or safety;
- damage to the environment; or
- any of the above issues being deliberately concealed.

It is not necessary for any of the above to actually occur; it is enough that the worker has a reasonable belief that it is likely to occur. The disclosure is not limited to an act which occurs in the UK. For example, if a worker in England discloses information about a criminal act in another country, the disclosure will still qualify for protection. The disclosure is not protected, however, if the worker commits an offence by disclosing it – if, for example, by revealing some information an employee breaches the Official Secrets Act 1989.

In case law, **Parkins v Sodexho Ltd** [2002] IRLR 109, the EAT held that a *qualifying disclosure* included 'any breach of information which, in the reasonable belief of the worker making the disclosure, tends to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject' including obligations arising out of the contract of employment. Mr Parkins complained that there was a lack of adequate supervision on site, which breached his contract of employment; this complaint was held to be a qualifying disclosure.

### **To whom should the disclosure be made?**

- The disclosure should normally be made to the employer or the person who has legal responsibility for the issue.
- A qualifying disclosure is also protected if it is made to a legal advisor.
- If the worker works for an employer appointed under any enactment by a Minister of the Crown, then a disclosure to a Minister will be protected.
- Disclosure may also be to a person prescribed by The Public Interest Disclosure (Prescribed Persons) Order 1999, referred to in the Act as a "prescribed person". There are 38 prescribed persons in this Order which includes the Audit Commission for England and Wales (Accounts Commission for Scotland), Commissioners of the Inland Revenue, the Data Protection Registrar, Commissioners of Customs and Excise, the Environment Agency, and the Health and Safety Executive. Only disclosures relevant to these persons' areas of authority will be regarded as qualifying disclosures. Please call the helpline if you require the full list of prescribed persons.

### **Can a disclosure be made to anyone else?**

A worker will be able to make a qualifying disclosure to another party (i.e. an outside body or even the newspapers) in any of the following circumstances, and still be protected:

- if the worker reasonably believes that he will be subjected to a detriment by his employer if he makes a disclosure directly to his employer;
- if there is no "prescribed person" to whom the disclosure can be made, and the worker reasonably believes that evidence relating to the failure will be concealed or destroyed if he does make a disclosure to his employer;
- the worker has already substantially disclosed the same information first to his employer or a "prescribed person".

### **The worker will need to:**

- make the disclosure in good faith;
- reasonably believe that the information and any allegations are substantially true;
- ensure that the disclosure is not made for personal gain.

In determining whether the worker has acted reasonably, a court or tribunal would take into account the identity of the person to whom the disclosure is made (e.g. trade union official, reporter), the seriousness of the failure (i.e. the degree of danger posed by the health and safety risk), and whether the worker has already raised concerns with the employer or any other regulatory body. Therefore, the worker is encouraged to always act reasonably, and to make any disclosure to their employer wherever possible.

### **Disclosing an exceptionally serious failure**

There is a special provision for cases when a failure is discovered which is of an "exceptionally serious nature". This is not defined, but is presumably intended to protect a whistleblower who has discovered a serious risk, such as a hazard which presents an imminent risk of danger to individuals or the wider community. Similar criteria will need to be met for the disclosure to qualify: it should be made in good faith; the worker should reasonably believe that the information and any allegations are substantially true and the disclosure is not for personal gain.

### **What protection do workers have when making a "qualifying disclosure"?**

Workers are protected from any detrimental action taken as a result of their disclosure. Dismissal will be treated as automatically unfair if it is as a result of the disclosure. The usual qualifying length of service for unfair dismissal claims (which is one year) does not apply, and the amount of compensation awarded is unlimited.

### **Could I include a clause in workers' contracts to deny them of the rights the Act?**

No, this could not be enforced. Confidentiality clauses are also unenforceable if they are used to try to stop a worker making a “qualifying disclosure”.

### **What protection does the employer have from workers who make malicious allegations?**

The Act makes it quite clear that disclosures must be made in good faith in order to be protected. Any acts of a malicious nature can be addressed through your firm’s disciplinary and dismissal procedure.

### **The need to have a disclosure procedure in your organisation**

The legislation is drafted to encourage workers to discuss their concerns with their employer in the first instance. There is, however, the possibility for a worker to make a legitimate complaint to a third party such as a professional body or the press, if the worker believes that he would suffer a detriment on raising the issue with his employer. Employers of large organisations should consider adding a policy to the staff handbook to enable workers to raise concerns or complaints internally, preferably to a senior manager who is not the employee’s line manager. This may prevent serious malpractice and also may avoid unnecessary publicity. It is suggested that a whistleblowing policy should contain:

- a clear statement that malpractice is taken seriously in the organisation and an indication of the sorts of matters regarded as malpractice;
- a statement respecting the confidentiality of staff raising concerns if they wish, and the opportunity to raise concerns outside of the line management structure;
- penalties for making false and malicious accusations which will be handled by the disciplinary and dismissal procedure; and
- an indication of the way in which concerns may be raised outside the organisation if necessary (such as reporting matters to the Health & Safety Executive).

### **Surely this is what our grievance procedure is for?**

- A grievance procedure outlines the action a worker can take when they have a complaint about their own working arrangements.
- It does not necessarily address other matters outside of the worker’s immediate scope.
- In large organisations the first stage of a grievance procedure is normally to raise the matter with the immediate line manager. This may be inappropriate for matters of a more serious nature, which fall within the scope of the Act.
- For large organisations a separate disclosure policy is advisable.

### **We’re only a small firm. Does any of this affect us?**

Yes. All employers, regardless of the number of employees they have are affected by the whistle-blowing legislation. The small employer should, be aware of this fact so that if an employee were to approach the management about an issue of malpractice, the matter will be treated seriously and sensitively. The employer needs to be aware that employees making such disclosures will be protected against detrimental treatment and unfair dismissal under the Public Interest Disclosure Act.

**This datasheet is an outline of the position at the time of writing. No part of this datasheet should be copied or transmitted to any third party or non-association member. Advice on any specific problem is always available from the BAseline advisors on 0844 5618133.**