

THE FUTURE OF WORK: HR HOT TOPICS 2022

Welcome

Whistleblowing in a post COVID world

This webinar will begin at 10:00

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WHISTLEBLOWING IN A POST COVID WORLD

Meet our panel members

Connect with our panel members on LinkedIn by scanning the relevant QR code below.



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What we will cover

- ✓ The context – is it becoming a hotter topic in a post COVID world?
- ✓ What is a protected disclosure
- ✓ When a disclosure will be in the public interest
- ✓ Confidentiality considerations
- ✓ Potential claims and remedies
- ✓ Questions

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Whistleblowing – becoming a hotter topic?

- In 2020, Protect reported **3,845** whistleblowers who needed advice. This was an increase of **20%** in cases over the year
- The Covid-19 pandemic has probably accelerated an already increasing rate of protected disclosures – we have seen disclosures related to health and safety, compliance with Covid restrictions and the furlough scheme for example
- Matters such as the **#Metoo** movement, **BLM** and increased environmental awareness has already seen whistleblowing matters gain more attention
- This trend seems set to continue, with employees likely to feel more empowered and enabled to speak up when they see improper practices in the workplace
- ESG and EDI practices are becoming an increased focus for employees and consumers – they may now be more likely to report their employer for non-compliance with heightened reporting obligations

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Whistleblowing – becoming a hotter topic?

- Legal issues aside, “whistleblowing” is increasingly regarded as a potential hot topic and adverse PR issue for employers. Media examples in recent weeks:-
 - **“Whistleblower vet awarded £1.25m settlement and apology from DAERA”**
 - **“Cambridgeshire mayor under investigation after whistleblowing report”**
 - **“Manx medic unfairly dismissed over whistleblowing, tribunal finds”**
 - **“Government considers whistleblowing laws that could fine companies millions for attempted cover-ups”**

- However, whistleblowing is not always headline-grabbing!
- Disclosure can often be (and usually is) made on a more day-to-day level
- What will we see as the impact of the “new world” of hybrid world?



- Organisations will probably need to take a more proactive approach about how they manage whistleblowing incidents – especially as they look to be on the rise

What is a “protected disclosure”?

First must be a “qualifying disclosure”

- To engage the whistleblowing legislation the employee must make a ‘qualifying disclosure’
- Disclosure of information in relation to:
 - A criminal offence;
 - A breach of legal obligation;
 - A miscarriage of justice;
 - Danger to the health and safety of an individual;
 - Damage to the environment; or
 - The deliberate concealing of information in relation to any of the above

What makes a “protected” disclosure?

- In order to become ‘protected’, a qualifying disclosure needs to be made to a certain person – the most common situation is where the disclosure has been made to ‘the employer’
- Disclosure to someone more senior than the whistleblower (i.e. a line manager) is sufficient
- Disclosures to HR are also very likely to become protected, even if it is made to a junior HR advisor
- Employers should ensure that these individuals are able to identify a qualifying disclosure and, if necessary, direct it to the appropriate person
- In certain circumstances, disclosure can be made to a ‘responsible person’ (such as a client or customer) or a ‘prescribed person’ such as public bodies like HMRC and the FCA
- What might change as a result of the “post COVID” world?

What can they often look like in reality? Some real life examples that we have seen....



When will a disclosure be in the public interest?

The public interest test

- The person making the 'protected disclosure' must also reasonably believe that it is 'in the public interest'
- However, this is not defined in legislation and it can be difficult to differentiate between a 'private' grievance and information that the public would (or could) be interested in

Key questions to ask:

- How many people does it affect?
- How badly are those people affected?
- Is the wrongdoing deliberate or accidental?
- Who is the perpetrator of the wrongdoing and is it an especially significant or prominent organisation?

The public interest test

Example:

- Manipulation of employer accounts negatively affected employee's commission and 100 others
- The employee has a private interest, but this was also considered to be in the public interest due to the numbers impacted

Example:

- Nurse informs employer that a drug has been incorrectly administered to a patient
- It could be argued that this is a private matter between the nurse, hospital and patient
- However, there may still be a public interest because it is important that there is confidence in the system
- Post-COVID world – will we see any changes to “public interest”?



Why have a whistleblowing policy?

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Potential consequences

- The amount of potential compensation available for successful claims for whistleblowing under the **Public Interest Disclosure Act 1998** is not limited
- Some of the costliest Tribunal judgments involve a whistleblowing element
- PR issues attaining more prominence

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Why have a whistleblowing policy in place?

Is it a legal requirement?

- That will depend on the nature of the organisation. For example, the UK Corporate Governance Code requires UK listed companies to have written whistleblowing arrangements in place, or to otherwise explain why they do not

Many employers will fall outside of the scope of legal requirement, but a policy can:

- Assist employees with making whistleblowing complaints in a correct and compliant way
- Enable employers to handle them effectively in response
- Prevent complaint from becoming a crisis (i.e. a risk management issue)
- Provide clear guidance to managers
- Send a clear message that any detrimental action taken against whistle-blowers will not be tolerated and is against the law

What should the policy include?

- An effective whistleblowing policy does not need to be overly long. It is important that it is **clear and easily accessible** by all members of staff
- The main elements of the policy are likely to cover:
 - a) an overview of whistleblowing in simple, jargon-free language
 - a) how to raise a whistleblowing concern – directing the individual to a specific person, form or helpline
 - a) explaining the next steps including any initial meetings, investigation and whether the outcome will be shared or not
 - b) explaining that any concerns will be treated confidentially (and anonymously where possible)
 - c) what to do if the individual is not happy with the process or outcome
 - d) outlining the protection and support available for whistle-blowers
 - e) outlining the individual's right to make a report externally (for example, to a regulator) if necessary

A step towards a better culture

- Putting a policy in place will not automatically create a better culture, but it is a step in the right direction, particularly when implemented with the **appropriate training and ongoing education**
- Whilst whistleblowing complaints have become more prominent in the employment tribunal as a result of the pandemic, **employers should not shy away from encouraging whistleblowing in the workplace**
- It has become ever more important to have **clear processes** in place to be able to deal with complaints properly and to **protect the rights** of those concerned employees, whether COVID related or not



Confidentiality considerations

Confidentiality

- Individuals will want to feel that their complaint has been dealt with confidentially, sensitively and without adverse consequences
- A separate confidential hotline or a way of ensuring that the complaint can be made anonymously may provide reassurance

Contractual confidentiality

- Direction of travel = employers less able to gag employees
- Any contract clause which tries to prevent or discourage a person from making a protected disclosure is **null and void**
- The contract (or settlement agreement) must allow for protected disclosures or any other disclosure allowed by law

Confidentiality at the tribunal stage

- Allegations will be brought out in public at the final hearing under the principle of **open justice**
- Employers might win a tribunal claim but lose in the court of public opinion
- The tribunal can also notify regulators of alleged misconduct which may spark further investigation
- Demonstrates the need for proper whistleblowing policies and a **culture of openness** and transparency

Potential claims and remedies

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Potential claims

Two types of protection for employees who have made a protected disclosure:

1) Protection from detriment

- No requirement for 2 years' service
- An employee or worker can bring a claim if they have suffered detriment as a result of making a protected disclosure
- Causative link is required
- The claim can be brought against the individual who caused the detriment and against the employer.
- Detriment must show disadvantage
 - i.e. failure to promote, denial of training, bullying or harassment

2) Automatic Unfair Dismissal

- Available to employees only - if the reason/principal reason for dismissal was because they have made a protected disclosure
- No requirement for 2 years' service unlike ordinary unfair dismissal
- Higher bar to show causal link
- Employees can also claim constructive dismissal was automatically unfair

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Interim relief

- Interim relief might be available if an employee acts quickly
- Applications must be made within **7 days** of termination of employment
- Both parties will attend a hearing and relief may be granted where the Tribunal believes the employee is likely to succeed
- Employer may be asked to **re-instate** or **re-engage** the employee
- If this isn't possible the employer will need to pay the employee as if they were employed until the matter is concluded

Potential remedy

No upper limit on the amount of compensation that can be awarded

Detriment claims

- Assessed on a similar basis to discrimination and may include an award for injury to feelings
- Vento guidelines currently range from £900 to £49,300

Automatic Unfair Dismissal claims

- Awarded by calculating the basic award (similar to calculation for statutory redundancy)
- Plus a compensatory award determined by loss of earnings, future losses and potential stigma
- Uplifts for breach of the ACAS Code of Practice

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