Drafting guidance: policy - whistleblowing

Reasons to have a whistleblowing policy

You are not required by law to have a whistleblowing policy, but good reasons to have one include:

1. Reducing the risk of someone making a disclosure about concerns they have related to certain wrongdoing at work, or blowing the whistle, to a person or body outside of the company;

2. Enabling you to remedy wrongdoing before serious damage is caused and to deal with the situation without publicity;

3. Someone who makes an external disclosure without having first disclosed the matter to you is less likely to be covered by whistleblowing protection where you operate a whistleblowing policy that contains an assurance that qualifying disclosures can be reported without fear of reprisals; and

4. Not having a whistleblowing policy may mean staff incorrectly believe that they have no alternative but to air the matter externally.

Consultation with staff

There is no requirement to agree the Policy with senior management, staff representatives or the recognised trade union, or even consult over it. However, the whistleblowing arrangements are more likely to be effective if staff and management have been involved in their development.

Publicise the Policy

You need to think about how best to ensure that all of those people covered by the Policy are aware of it. You might wish to include it in the staff handbook, put a copy on notice boards, discuss it during staff meetings or issue it to each individual.

An explanation of and training on the purpose and operation of the Policy may also be appropriate. You should ensure that your staff all understand the type of concerns they can raise under it, with whom they should raise such concerns and the fact that you will take them seriously.

Double check that anyone who makes a relevant disclosure is given a copy of the Policy.

Eligibility

The Policy should apply to all employees, and, if your workforce includes them, employees, officers, workers, apprentices, agency workers and interns. Genuinely self-employed contractors and volunteers are not protected under the whistleblowing statutory provisions. However, there is an option to include self-employed contractors and volunteers within the scope of the Policy if you use them, as you may wish to encourage all staff with concerns to raise them with you under a formal procedure, so you can investigate and deal with any concerns raised. (Note, however, that self-employed contractors and volunteers will not have statutory whistleblower protection.)

The rest of this drafting guidance refers to those who are covered by the Policy as 'staff' or 'staff members' - for ease and in line with the Policy's terminology.

Scope and relationship with grievance and/or anti-bullying and harassment policies

The Policy clearly states that it should be used to raise concerns about certain, specified categories of wrongdoing where the staff member believes that disclosure is in the public interest. The Policy includes an option to remove the requirement that the belief in the public interest must be 'reasonable'. (See **Types of wrongdoing covered in the Policy** for more explanation.)

The Policy is not normally the appropriate vehicle for resolving individual grievances. For individual grievances, staff should be encouraged to use other internal procedures, such as your grievance policy or anti-bullying and harassment policy. This is because it will not often be in the public interest to hear about an individual grievance, unless it has wider implications. If there is any uncertainty, the Policy provides for the individual to obtain advice from the relevant senior person about which type of policy is the most appropriate in the circumstances.

Types of wrongdoing covered in the Policy

The Policy sets out the types of wrongdoing set out in the whistleblowing legislation, and does not extend protection further (referred to as ‘wrongdoing’ in the rest of this guidance note, to be consistent with the terminology in the Policy).

For example, one of the categories of wrongdoing listed, a ‘failure to comply with any legal obligations’, will cover a breach of contract or of statutory duty. It will not, however, cover maladministration unless that, in itself, also involves a breach of legal obligations.

If, therefore, you would also like individuals to use the Policy to report concerns relating to general business malpractice, you should broaden the categories out to refer more generally to business malpractice. Equally, if you do not wish to restrict the Policy to “public interest” disclosures, you could extend it to cover disclosures that are not necessarily in the public interest. Note however that statutory whistleblowing protection only applies to the wrongdoing set out in the whistleblowing legislation.

Depending on the nature of your business, you might wish to highlight specific areas of concern, such as fraud or safety issues. You might also want to refer to (or if you don’t already have one) introduce a more comprehensive code of conduct or business ethics, which sets out the standards of conduct that you are aiming for (covering matters such as conflicts of interest, receipt of gifts, unlawful practices, bribery and improper payments).

The law protects whistleblowers only where both their belief in the wrongdoing and also their belief in the public interest are reasonable. Some employers may though wish to remove the optional word ‘reasonably’ in the Policy, in relation to the suspected wrongdoing and/or in relation to the public interest element (see also above). This is because there is a risk that requiring the beliefs to be ‘reasonable’ could deter some whistleblowers from raising concerns, thus removing a potential opportunity for the company to resolve the issue internally.

The Policy specifies that wrongdoing can originate from the employer and their staff, as well as from third parties. It gives (optional) examples of third parties such as its customers, clients, suppliers and service providers, but you can also add details of any specific types of third parties relevant to your business. The Policy includes third parties because, in some circumstances, the law protects whistleblowers who raise a concern about the wrongdoing of a third party. This means that if a member of staff raises a concern with you about third party wrongdoing (for example, one of your maintenance staff raises concerns about client breaches of health and safety requirements that they encountered when visiting a client site) it will be unlawful for your to subject them to a detriment or dismiss them (if they are an employee) as a result of them blowing the whistle.

To whom should the disclosure be made?

Internal disclosures

Individuals are protected if they make a disclosure internally to the company; internal disclosures also enable the company to investigate and deal with the concern. The appropriate recipient(s) of the information/disclosure within the company will depend upon your size and structure. We suggest that the Policy identify at least two senior members of management who can be approached in case the staff member's concern involves one of them. Some companies may wish to specify different senior managers for disclosure of different types of wrongdoing, for example, if the disclosure relates to a health and safety issue, disclosure could be to the member of management who has health and safety responsibilities.

In addition, you may choose to designate an independent person or organisation to receive disclosures. If so, the staff member is treated as making the disclosure to the company and is still protected. An example might include a disclosure to your company whistleblowing hotline or a member of management of a parent or group company.

External disclosures

The Policy encourages internal disclosure, whilst explaining to staff that in some limited circumstances, they are still protected if they make a disclosure externally.

The whistleblowing legislation protects staff who make a disclosure to certain prescribed bodies, e.g. the Health and Safety Executive and the Environment Agency, rather than to the company.

In relation to a disclosure about third party wrongdoing, a whistleblower can, if they choose, raise the issue externally by disclosing their concern directly to the 'responsible person' at the third party. The whistleblower is protected from detriment or dismissal by you (the company) if they disclose the information internally to you, or if they disclose it directly to the ‘responsible person’ at the third party. If disclosing to the responsible person at the third party, the whistleblower must reasonably believe the wrongdoing relates solely or mainly to the conduct of that responsible person, or relates to a matter which is the legal responsibility of that responsible person. The Policy expressly encourages staff to disclose concerns about third party wrongdoing internally first; this is to enable you to take steps to deal with the concern and ensure that you are aware of the situation.

The Policy also references the other more exceptional circumstances when an individual is protected if they disclose the information to a wider audience.

The Policy discourages other external disclosures and recommends that an individual seek advice from the whistleblowing charity, Protect, before disclosing to a person other than their employer or an appropriate regulator.

Although not mentioned in the Policy, note that whistleblowers are protected if they disclose information to a lawyer in the course of obtaining legal advice.

Dealing with allegations of wrongdoing

The Policy discourages anonymous disclosures, as it is typically more difficult to investigate them. The Policy does, however, reassure potential whistleblowers that you will try to keep their identity confidential as far as possible.

If, in practice, you do receive an anonymous disclosure, you should still take the matter seriously. If you do not, the staff member may still be protected if they subsequently make the same disclosure externally.

You should investigate a whistleblowing matter promptly, so as to ensure that relevant evidence is not destroyed before you have the chance to collect it, and that any delay does not create further grounds for complaint. Delay or inaction can appear suspicious to a worker who already suspects wrongdoing, and may lead them to consider wider disclosure.

You should meet with the whistleblower as soon as possible to discuss their concerns (unless the disclosure is anonymous).

It is important to keep notes of the allegations and information disclosed. Ideally, you should agree these with the staff member and ask them to sign a copy of the notes to evidence this.

You should also ensure that where possible you keep the staff member informed of the progress of the investigations and the outcome. This will assure them that their concerns are being taken seriously and may prevent them from making further disclosures externally.

If possible, staff should be given an idea of the steps to be taken in order to investigate their concerns and the likely timescale for completion of the investigation.

Some form of process should be provided for individuals to escalate their concerns to the most senior level within your organisation if they are not satisfied with way the matter has been handled.

The law does not provide a specific right for an individual to be accompanied by a colleague or trade union representative to meetings held to deal with whistleblowing disclosures. However, workers do have a statutory right to be accompanied to 'grievance hearings', and the way that grievance hearings are defined includes a hearing concerning the performance of a duty owed by the employer in relation to a worker. Therefore, depending on the nature of the wrongdoing being disclosed, there could be some meetings at which technically the right to be accompanied applies. For this reason and because staff who fear repercussions may feel more confident in making a disclosure if they are supported, we have therefore included in the Policy the right for the whistleblower to be accompanied.

Protection and support for whistleblowers

Whistleblowers are protected by law and have the right not to be subjected to a detriment or dismissal (if they are employees) for making protected disclosures.

Where the disciplinary policy applies, you should take disciplinary action against a staff member who is found to have subjected a whistleblower to a detriment or dismissal for using this Policy or deterred them from reporting genuine concerns. If your disciplinary policy does not apply to the alleged perpetrator, then the appropriate action will vary depending on the status of your relationship with them.

Note that in some circumstances staff who subject a colleague to a detriment or dismissal for using this Policy, or deter them from reporting a concern, may be personally liable. The Policy does not refer to the risk of personal liability, focussing instead on the standards it expects from its staff and the steps the employer will take to enforce these.

In some cases, you may want to instigate your disciplinary policy against a staff member who claims to be a whistleblower but has stepped outside of the legal rules for protection. For example, if a staff member raises concerns in the press without first raising the concern internally in accordance with the Policy in circumstances where this was unreasonable, they may not be protected by law and you may be able to discipline them for bringing the business into disrepute. The circumstances in which a staff member will lose whistleblower protection are complex and you should seek advice.

Note also that whilst whistleblowers do have to have genuine concerns (i.e. they must not make false allegations maliciously), they do not need to act in good faith to be protected. It would therefore be unlawful to discipline or dismiss a staff member who raised a concern over malpractice even if they had an ulterior motive in raising it – for example, if they wanted to harm the company rather remedy the wrongdoing.

Data Protection

Under data protection law, individuals have a right to receive 'fair processing information' about how you use their personal data. Most of the required information is likely to be contained in your general employee/staff privacy notice. However, given the nature of whistleblowing allegations, there may be some specific information that you have not covered in your general employee/staff privacy notice, and that you will therefore need to include in the Policy.

In addition, while staff should have access to a copy of your general employee/staff privacy notice, they may not actually look at it regularly in practice or pay particular attention to the information about whistleblowing data. It is recommend that you also include some fair processing information in the Policy to act as a 'just in time' privacy notice, i.e. where it is given to staff at the time they raise allegations of wrongdoing covered by the Policy, the fair processing information it contains is brought to their attention 'just in time'.

You will be able to cross-refer to your general employee/staff privacy notice where appropriate, e.g. for details of individual rights, who to contact to raise concerns or questions, etc.

Part of the fair processing information staff have the right to receive concerns the period for which their personal data will be retained or, if it is not possible to specify a particular retention period, details of the criteria on which retention and erasure decisions are based. Your general employee/staff privacy notice may include some information about the retention of whistleblowing data, but some employers may decide to provide more specific details in their whistleblowing policy. On the other hand, some employers may prefer to limit the retention information given to staff so that it is as broad/general as possible, and keep any more specific information in supporting process documents for HR. If you do include such information in the Policy, you must take care to ensure that you can actually comply with the retention periods you have specified. In order to comply with data protection law, you must do what you say you do, and be able to demonstrate this.

Status of the Policy

Rules and policies relating to whistleblowing can form part of contractual terms if, for example, they are set out in an employee's written contract or are incorporated into the contract by reference to the document where they can be found. We strongly recommend against making the Policy contractual.