TECH 17/99

PUBLIC INTEREST DISCLOSURE ACT 1998

Guidance issued in December 1999 by the Business Law Committee of the Institute of Chartered Accountants in England and Wales, for Chartered Accountants working in practice or industry. This guidance is for assistance only and is not mandatory. Where additional information is required, reference should be made to the Act or to the Employment Rights Act 1996 (as amended) or legal advice should be sought.

Contents

Introduction

1 The Public Interest Disclosure Act 1998 was introduced to protect individuals making disclosures in the public interest and to allow such individuals to claim compensation for victimisation following such disclosure. It provides a framework for the identification of cases in which it is appropriate for employees to make disclosures internally, to an

appropriate regulator or otherwise externally to an alternative third party. The Act came fully into force on 2 July 1999.

2 The Act has effect by amending the Employment Rights Act 1996. It does not introduce any statutory offences or amend any other legislation but by providing protection under employment law for those making certain disclosures it clarifies the circumstances when such disclosures can be considered justifiable, in addition to any financial implications. The general climate for whistle-blowing is therefore likely to be altered, with the frequency and relevance of disclosures increasing as a direct consequence of the Act and in evolutionary terms as knowledge of its terms and consequent developments spread.

3 The Act does not have any direct effect on professional rules or guidance. Chartered Accountants and trainees in a position where they may or may not wish to disclose otherwise confidential information in the public interest should continue to follow the Guide to Professional Ethics and other professional guidance in considering the action they should take.

4 A working knowledge of the terms of the Act is important not only for those likely to be in a position where they may either disclose or receive confidential information but also to those managing or advising organisations where such disclosures may be made. Planning and the setting up of procedures and training will enable difficult circumstances or occurrences to be handled in a way which minimises the damage caused to the organisation. In addition, appropriate handling of whistle-blowing disclosures can form a useful element of risk control.

SUMMARY OF THE ACT

General

5 The Act applies to all "workers" with the exception of those in the police or armed forces or involved in national security. For the purposes of the Act, workers include agency and contract workers, trainees and self employed professionals in the National Health Service. People who ordinarily work outside Great Britain are not covered.

6 Where a worker is dismissed or otherwise disadvantaged as a consequence of their having made a "protected disclosure" they may claim unlimited compensation through an Industrial Tribunal. For information to qualify as a protected disclosure different standards of certainty and good faith apply to the worker, depending on the person to whom the disclosure is made. These are outlined below.

7 Confidentiality clauses in contracts of employment are considered null and void in relation to protected disclosures. The extent to which confidentiality clauses can be relied upon depends upon the conditions surrounding the definitions of protected disclosures and the adequacy of internal procedures.

Protected Disclosures

8 To qualify as a protected disclosure it must, in the reasonable belief of the worker, tend to show one or more of the following:

a) that a criminal offence has been committed or is likely to be committed;

b) that a person has failed or is likely to fail to comply with a legal obligation;

c) that a miscarriage of justice has occurred or is likely to occur;

d) that the health or safety of a person has been or is likely to be endangered;

e) that the environment is being or is likely to be endangered;

f) that information tending to show one of the above is being or is likely to be concealed.

For the purposes of the Act, such circumstances are called "relevant failures". Relevant failures may take place in the UK or overseas and the law applying may be that of the UK or any other jurisdiction. A legal obligation can include a contractual or other civil obligation as well as an obligation under criminal law. Some of the relevant failures are defined subjectively and interpretation is likely to develop over time.

9 A disclosure does not qualify as a protected disclosure if an offence is committed by making it (such as breach of the Official Secrets Act). Nor is disclosure of information in breach of legal professional privilege protected.

Disclosure to an Employer or Legal Adviser

10 Any disclosure, in one of the categories above, made in good faith, qualifies as a protected disclosure, with no further conditions attached if it is made:

a) to an employer;

b) to a third party in accordance with the employer's laid down procedures;

c) to a person other than the employer, in respect of the conduct of that person, or matters for which they are legally responsible;

d) to a legal adviser, in the course of obtaining legal advice; or

e) to a Government minister, where the employer is a Government appointed body.

Disclosure to a Prescribed Person

11 A disclosure may also be made in good faith to the appropriate regulator or Government body and qualify as a protected disclosure if the following additional conditions are met:

a) the disclosure is made to one of the bodies prescribed and in respect of their laid down functions;

b) in the reasonable belief of the worker the information disclosed and any allegation contained in it are substantially true.

A list of the prescribed persons is included in the appendix to this technical release.

Other Disclosures

12 A disclosure may be made to any other appropriate person, in good faith and where the worker believes that the information and any allegations are substantially true, if the following additional conditions have been met:

a) the disclosure is not made for reasons of personal gain; and

b) the disclosure is reasonable in all the circumstances.

13 In addition, the worker must either:

a) reasonably believe that he will be victimised if he makes an internal report or to the prescribed regulator; or

b) reasonably believe that the evidence will be hidden if he reports internally or to the regulator; or

c) he has already reported to one or both of them.

14 In assessing whether a disclosure is reasonable in all the circumstances, the following will be taken into account:

a) the person to whom the disclosure is made;

b) the seriousness of the relevant failure;

c) whether the failure is continuing or will recur;

d) whether the disclosure results in a breach of duty owed by the employer to any other person;

e) whether any action has resulted from the previous disclosure to the employer or regulator; and

f) whether the previous internal disclosure was made in accordance with the employer's laid down procedures.

15 Where the relevant failure is of an exceptionally serious nature, the worker does not need to have made a previous internal report or to fear victimisation or concealment before reporting to an appropriate third party other than a prescribed regulator.

IMPLICATIONS FOR EMPLOYERS

Organisational policy for Whistle-blowing

16 The coming into force of the Act may increase the incidence of whistle-blowing within organisations and increase the dangers to such organisations if they are not handled appropriately. The advantages of setting up formal procedures to encourage and control whistle-blowing are that:

a) internal disclosures can be encouraged, as part of the normal risk control mechanisms of the organisation;

b) inappropriate external disclosures can be avoided by providing an alternative internal route for workers experiencing significant concerns;

c) oppression of whistle-blowers, with consequent damage to their own morale and that of their colleagues, can be minimised; and

d) compensation costs can be avoided.

17 In designing a system of whistle-blowing policies organisations must take a number of factors into account to enable employees to use the system with confidence and to discourage the misuse of the system. A number of these factors are considered below.

High Level Commitment

18 If a high level of commitment to an effective system for whistle-blowing is not shown, confidence will not be achieved lower down the hierarchy and employees may either stifle their own or other people's concerns or disclose them in an uncontrolled manner outside the organisation.

Publicity and Training

19 All employees should be informed on how to make a disclosure, the nature of the concerns that are suitable for disclosure and the distinctions from the organisation's grievance procedures. Many employees will respond better if they are also given access to a confidential source of advice where they can discuss their concerns and the action that they should take.

Alternative Disclosure Routes

20 In most organisations, the first recourse for the disclosure of concerns would be to the line manager. An alternative recipient for disclosures will also need to be identified, however, for those cases where the concerns involve the line manager, or where employees are reluctant to disclose their concerns to their manager for any other reason.

21 A policy position on whether the source of disclosures is to be kept confidential should be taken, and this communicated to employees. Whistle-blowing disclosures could be routed through an external third party, such as a charity, with the name of the whistle-blower withheld as a standard procedure to ensure confidentiality. Alternatively an internal but separate department, such as Internal Audit could be used and employees assured that their identity will not be relayed to their line manager. However, in many cases the identity of the whistle-blower will be apparent or can be narrowed down to a fairly small group, during the course of follow up action. If it is clear to employees that victimisation of a whistle-blower is a disciplinary offence, this should provide reassurance to them that it is safe to use the organisation's whistle-blowing procedures where this is appropriate. However, unrealistic assurances that the identity of the whistle-blower will not be made apparent to a line manager should not be given.

Follow Up

22 A system should be in place to ensure that significant whistle- blowing disclosures are recorded and appropriate follow up action taken.

Feedback

23 If employees are not provided with appropriate feedback and given the confidence that appropriate action has been taken in respect of their concerns, they may be justified in making an external disclosure.

Disciplinary Offences

24 An examination of the organisation's disciplinary code would also be advisable, to ensure that it contributes to the success of the whistle-blowing policy and is not at variance with the current state of the law. In particular:

a) it should be clear that disclosures made in good faith and in accordance with the whistle-blowing policy are not a disciplinary offence;

b) however, it might be useful to confirm that any disclosure made of matters which are known to be untrue or are otherwise made in bad faith will be considered a serious matter; and

c) any oppression of whistle-blowers reporting in good faith will also be taken very seriously.

External Auditors and Accountants acting in an Advisory Capacity

25 The Act and the related secondary legislation take no account of the particular position of the auditors of commercial organisations. However, it would be helpful if in formulating their policy on disclosure of information such organisations were to confirm to workers that it is a part of their duties to provide the external auditors with all the information and explanations that they require and to give them full, open and truthful answers to questions. It would also be helpful if it were also made clear to employees that it will not be considered a disciplinary offence if they disclose to auditors matters of significant financial concern.

26 This policy should also apply to disclosures of relevant matters to external professional advisers. For example, disclosures to tax advisers on matters concerning information of interest to the Inland Revenue should not be considered a disciplinary offence.

27 For disclosures to both auditors and other professional advisers, it is suggested that the standard of belief applicable to internal disclosures should apply. That is, the worker only need to be in a possession of information tending to that a relevant failure has occurred and need not be required to believe the information to be true before making such a disclosure (that is to have conclusive evidence of the failure). In addition, it is suggested that the following conditions apply to uninvited disclosures to the auditors:

- The worker must either:

  a) reasonably believe that he will be victimised if he makes an internal report; or

  b) reasonably believe that the evidence will be hidden if he reports internally; or

  c) have already reported internally.

- The relevant failure is significant in terms of the financial statements, the control environment or risk profile of the organisation.

Other Sources of Information

28 The charity Public Concern at Work advised on the drafting of the Act and can give advice and assistance to organisations and individuals in a number of areas. They have available a Whistle-blowing Policy Pack which, besides providing guidance on the formulation of an organisational policy, gives access to an advisory help line on a subscription basis.

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Appendix

Prescribed Persons under the Public Interest Disclosure Act 1998

This list of prescribed persons is as laid down in the Public Interest Disclosure (Prescribed Persons) Order 1999, reference SI 1999 No. 1549. Where necessary, a very brief description of the matters for which they are prescribed is also given, to clarify the functions involved.

Financial Services Regulators

The Financial Services Authority
Investment Management Regulatory Authority
Securities and Futures Association
Personal Investment Authority
Building Societies Commission
Friendly Societies Commission
Stock Exchange
Treasury (for insurance companies)
DTI (for insider dealing)
Occupational Pensions Regulatory Authority

Taxation Authorities

Customs and Excise
Inland Revenue

Serious Crime and Miscarriages of Justice

Serious Fraud Office
Lord Advocate of Scotland (for serious fraud)
DTI (for serious corporate offences or insider dealing)
Criminal Cases Review Commission
Scottish Criminal Cases Review Commission

Local Authorities and Other Bodies

Audit Commission
Accounts Commissions for Scotland
Auditors appointed by either of these bodies
National Audit Office
Auditor General for Wales

Utilities

Director General of Electricity Supply
Director General of Gas Supply

Director General of Telecommunications
Director General of Water Services
Rail Regulator

Charities and Other Organisations

Charity Commissioners for England and Wales
Lord Advocate of Scotland
Certification Officer (for Trade Unions and Employers Organisations)
DTI (for companies)
Chief Registrar of Friendly Societies (for credit unions, clubs, housing associations and similar organisations)
Assistant Registrar of Friendly Societies for Scotland

Health and Safety and the Environment

Civil Aviation Authority
Environment Agency
Scottish Environment Protection Agency
Health and Safety Executive
Local Authorities (with responsibility for enforcement of consumer or health and safety legislation)
DTI (for consumer safety)

Other

Director General of Fair Trading
Data Protection Registrar

Any body taking over the functions of these bodies, by virtue of any legislative provision, will also be a prescribed person.