Workplace Whistleblowing Trend goes International: Ireland's Protected Disclosure Act 2014

Insights
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Fisher Phillips attorneys had the pleasure and privilege of presenting with Colleen Cleary, Esquire, a solicitor from Ireland, at an International Employers Forum event in Washington D.C. She kindly accepted our invitation to answer some of our questions about the practical application of the Protected Disclosures Act 2014 (the "Act") in Ireland over the past four years. The Act provides a statutory framework within which workers from all sectors may raise concerns about potential wrongdoing in the workplace ("whistleblowing") with the knowledge that there are legal protections upon which they may rely if they are penalized by their employer or suffer another form of detriment as a consequence of speaking out.

Colleen, welcome to our Cross Border Blog. We would love to have you tell us a little more about the changes brought about by the Act.

Q.: Why is whistleblowing culturally new in Ireland?

A.: **As a result of Ireland's political history, there would traditionally have been an ingrained unwillingness in Irish society to cooperate with authorities including when it comes to blowing the whistle on wrongdoers. That said, there had been a move towards encouraging whistleblowing in recent years by way of putting in place legal protections in certain sectors and situations prior. For example, the Health Act 2004, as amended, provides for the protection of employees and members of the public who disclose possible wrongdoing in the health sector. There are also protections contained within the Persons Reporting Child Abuse Act, 1998, which provides protection from victimisation and civil liability for people reporting the abuse of children. These had obviously been put in place for very particular reasons. The Act represents a big step forward in terms of broad encouragement to blow the whistle.**

Q.: Can you please explain to us a little more about the interim injunctive relief available to whistleblowers which may prevent an employer from implementing a decision to dismiss or to reverse the effect of a termination?

A.: **The Act allows an employee to apply for interim relief pending the hearing of unfair dismissal proceedings, by which he/she will continue to receive salary while awaiting the hearing, effectively equivalent to an injunction but, as the application is brought to the Circuit Court, without the costs risks of a High Court injunction.**

If the Court decides that the employee has substantial grounds grounding interim relief, then it can invite the employer to say whether it is willing:

- **to re-instate the employee to his/her role; or, if not**
- **to re-engage the employee in another position on terms and conditions not less favourable than those which would have been applicable to the employee had he/she not been dismissed.**

The employee can object to either option and, if the Court thinks the employee's objection is reasonable, it can order that the employee's employment be continued until the employee's unfair dismissal claim is heard, effectively placing the employee on garden leave.

Q.: Is an employee grievance a protected disclosure?

A.: **This will depend on the circumstances. A protected disclosure is a disclosure by a worker of 'relevant information' through one of the specified disclosure channels. Relevant information is information which the worker reasonably believes tends to show one or more 'relevant wrongdoings' and which came to his attention through his employment. The Act provides a wide definition of 'relevant wrongdoings' which includes:**

- **an offence that has been or is likely to be committed;**
- **a failure to comply with legal obligations (excluding under a contract of employment or contract for service);**
- **a miscarriage of justice has occurred/is occurring/is likely to occur**
- **health and safety of an individual has been, is being or is likely to be endangered;**
- **the environment has been, is being or is likely to be damaged;**
- **unlawful/improper use of funds by a public body;**
- **gross mismanagement/oppressive or discriminatory or negligent acts or omissions of a public body**

If an employee's grievance touches on any of the above, it will potentially be a protected disclosure. This is mostly likely to be in the "failure to comply with legal obligations" or health and safety fields. Until the Courts and/or tribunals have issued guidance on this, we encourage employers to take a conservative view if there is any question over it

Q.: Is an employee's motivation when they make a protected disclosure relevant and what impact might it have upon the outcome of any legal proceedings?

A.: **The minimum requirement for making a protected disclosure is that the employee reasonably believes the information to be substantially true. The employee's motivation is otherwise irrelevant in terms of whether it is a protected disclosure but will be taken into account in any award made where the employee is unfairly dismissed, i.e. the award may be reduced by up to 25%.**

Q,: How is a whistleblower's identity protected by the Act and what steps should employers take to ensure such protection?

A.: **A person to whom a protected disclosure is made is obliged under the Act to protect the identity of the discloser. Therefore, steps should be taken to the extent possible to protect it, including resting responsibility with senior management for the matter, availing of advice before any steps are taken that might reveal it, carefully delegating responsibility for any investigation and ensuring securing filing/storage of any materials.**

The whistle-blower is protected from "penalisation" and to the extent that revealing his/her identity could constitute penalization, he/she could avail of the Act's general protections (i.e. compensation of up to five years' gross remuneration OR an action in tort). It may not be possible in the circumstances to protect the whistleblower's identity (depending on the nature of the complaint) but, again, employers should take a very cautious approach in this regard, and seek specific advice. It is recommended that where action is to be taken following a protected disclosure, it is recommended that a process be put in place for consulting with the whistleblower and, where possible, for gaining his/her informed consent, prior to any action being taken that could identify them. This may include when disclosures are being referred by the employer to an external party.

Q.: Is there a protocol that employers should follow to ensure that employees can make protected disclosures without fear of reprisal?

A.: **Employers should have a policy in place, with clear procedures, and make sure that employees are familiar with both the policy (and the rationale underpinning it) and the procedures, including the circumstances where it might become necessary to disclose identity (e.g. for investigation of the wrongdoing/the prevention of a crime/public safety etc.).**

Q.: Are there any key differences between the provisions of this Act and those of whistleblowing legislation in the UK (the Public Interest Disclosure Act 1998 and the Enterprise and Regulatory Reform Act 2003)

A.: **The UK's public interest test stands out as a key difference, in that no such test applies pursuant to the Act. The Act's provision of an opportunity to seek interim relief, as set out above, also appears to be a key difference.**

Thank you very much, Colleen. From what you have told us, international employers with a presence in Ireland should ensure they implement clear policies and procedures to allow employees to make protected disclosures without fear of reprisal, train all employees in these policies and procedures, and make sure that senior management understands the company's obligations under the Act and the potential consequences of failure to meet them. As whistle-blowing becomes a protected act in more and more countries, it behooves international employers to keep pace with legislative changes and to ensure company policies are up to date and enforced.