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- a managers guide

Protected Disclosures Act 2000

A guide for employers and managers

A-Z of Employing

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OVERVIEW

- 1 Employees who expose serious wrongdoing in the manner prescribed by the Protected Disclosures Act 2000 are protected by that Act against retaliatory action.
- 2 The Act protects whistleblowing in both the public and private sectors, but it imposes greater demands on the public sector.
- 3 Private sector organisations are not required to have an internal whistleblowing policy; however it is recommended that employers consider devising one to suit their organisation size and structure.
- 4 An employee, who experiences retaliatory action because of the disclosure of serious wrongdoing in the organisation, may have a personal grievance pursuant to the Employment Relations Act 2000 or, a complaint of unlawful discrimination under the Human Rights Act 1993.

INTRODUCTION

The Protected Disclosures Act 2000 is sometimes referred to as the “whistleblowers” Act. It was enacted to promote the disclosure of information that the public has an interest in seeing disclosed, including serious wrongdoing, and to protect those employees who make those disclosures.

DEFINITIONS

These definitions are provided in section 3 of the Act.

Employee

The definition of “employee” under this Act is wider than the definition under the Employment Relations Act 2000 and in relation to an organisation includes:

- ▶ A former employee;
- ▶ A homeworker within the meaning of section 5 of the Employment Relations Act 2000;
- ▶ A person seconded to the organisation;
- ▶ An individual who is engaged or contracted under a contract for services to do work for the organisation;
- ▶ A person concerned in the management of the organisation;
- ▶ In relation to the New Zealand Defence Force, a member of the Armed Forces.

Only disclosures made in accordance with the Act are protected; unlawful disclosures of either official or personal information that occur outside this Act are addressed by either the Official Information Act 1982 or the Privacy Act 1993.

Serious wrongdoing

The Act covers both public and private sectors but the two sectors are treated differently by the Act; only public sector organisations are required to establish, and have in operation, internal procedures for receiving and dealing with reports of serious wrongdoing.

Under this Act, serious wrong doing includes, whether the wrongdoing occurs before or after the commencement of this Act:

- ▶ An unlawful, corrupt, or irregular use of funds or resources of a public sector organisation; or
- ▶ An act, omission, or course of conduct that constitutes a serious risk to public health or public safety or the environment; or
- ▶ An act, omission, or course of conduct that constitutes a serious risk to the maintenance of law, including the prevention, investigation, and detection of offences and the right to a fair trial; or
- ▶ An act, omission, or course of conduct that constitutes an offence; or
- ▶ An act, omission, or course of conduct by a public official that is oppressive, improperly discriminatory, or grossly negligent, or that constitutes gross mismanagement.

If you are a private sector employer you should consider devising and adopting an internal procedure for receiving and dealing with disclosures of serious wrongdoing. Not only does such a procedure provide your employees with some certainty in the event of discovering serious wrongdoing, but also it advertises to your employees at the outset of their employment your views about serious wrongdoing.

Organisation

Means a body of persons, whether corporate or unincorporate, and whether in the public sector or in the private sector; and includes a body of persons comprising 1 employer and 1 or more employees.

Appropriate authority

Without limiting the meaning of that term,

- ▶ Includes:
 - the Commissioner of Police;
 - the Controller and Auditor-General;
 - the Director of the Serious Fraud Office;
 - the Inspector-General of Intelligence and Security;
 - an Ombudsman;
 - the Parliamentary Commissioner for the Environment;
 - the Police Complaints Authority;
 - the Solicitor-General;
 - the State Services Commissioner;
 - the Health and Disability Commissioner; and
- ▶ Includes the head of every public sector organisation, whether or not mentioned above; and
- ▶ Includes a private sector body which comprises members of a particular profession or calling and which has power to discipline its members; but

- ▶ Does not include:
 - a Minister of the Crown; or
 - a member of Parliament.

APPLICATION

Not every disclosure by an employee can be a protected disclosure. To gain the protection of this Act, not only must the information be of the kind prescribed by the Act (in section 6) but additionally the employee must follow the Act's procedural steps for disclosure.

6 Disclosures to which Act applies

- (1) *An employee of an organisation may disclose information in the manner provided by this Act if*
- (a) *the information is about serious wrongdoing in or by that organisation; and*
 - (b) *the employee believes on reasonable grounds that the information is true or likely to be true; and*
 - (c) *the employee wishes to disclose the information so that the serious wrongdoing can be investigated; and*
 - (d) *the employee wishes the disclosure to be protected.*
- (2) *Any disclosure made in accordance with subsection (1) is a protected disclosure of information for the purposes of this Act.*

PROCEDURE

The Act prescribes a 4-tiered approach to disclosure of serious wrongdoing in an organisation:

- ▶ The employee must make the disclosure in accordance with the internal procedure where one exists. **If** one doesn't, or the employee believes on reasonable grounds that the person to whom the disclosure should be made is implicated, either directly or indirectly, **then**:
- ▶ The employee may make the disclosure to the head or deputy head of the organisation. **If** the employee believes on reasonable grounds that this person (the head or deputy head of the organisation) either is, or may be involved, **OR** either is related to a person who is or may be involved, **OR** it is a matter of urgency, **OR** there has been no action on the matter and 20 days have passed since the date of the first disclosure, **then**:
- ▶ The employee may make the disclosure to the appropriate authority. If the employee has followed the correct procedure on the same matter and believes on reasonable grounds that no action has been taken by the appropriate authority and continues to believe that the information is true or likely to be true, **then**:
- ▶ The employee may make the disclosure to a Minister of the Crown or Ombudsman (public sector only).

The final tier only applies to public sector organisations. If an employee believes on reasonable grounds that the head of a private sector organisation which they are working for is involved in serious wrongdoing and they need advice as to the correct procedure to follow, they can seek that advice from an Ombudsman.

PROTECTION

An employee who makes a disclosure of serious wrongdoing in accordance with the Act is protected by the Act against:

- ▶ Unjustifiable dismissal and disadvantage by the employer's unjustifiable action. If the employee is an employee within the meaning of section 6 of the Employment Relations Act 2000 they may have a personal grievance under section 103 of that Act; and
- ▶ Victimization within the meaning of section 66 of the Human Rights Act 1993 (which is a form of unlawful discrimination); and
- ▶ Civil and criminal proceedings; and
- ▶ Disclosure of their own identity (subject to exceptions).

CONCLUSION

Disclosing serious wrongdoing is a difficult and stressful task and your internal procedure for receiving and handling disclosures of this nature may want to address that.

Appointing an appropriate person to provide support to your employees in the event that serious wrongdoing is disclosed by them may be a proactive way of encouraging your employees to disclose wrongdoing. It is certainly one step you can take to reassure your employees that if they disclose serious wrongdoing they will have their employer's support and that any problems that arise out of the whistleblowing for them will be addressed in a timely and sensitive fashion.

Remember:

- ▶ Always call AdviceLine to check you have the latest guide (refer to the publication date below).
- ▶ Never hesitate to ask AdviceLine for help in interpreting and applying this guide to your fact situation.
- ▶ Use our AdviceLine employment advisors as a sounding board to test your views.
- ▶ Get one of our consultants to draft an agreement template that's tailor-made for your business.
- ▶ Visit our website www.emadvice.co.nz regularly.
- ▶ Attend our member briefings (held every 4 months) to keep up to date with all changes.
- ▶ Send your staff to EMA Learning courses and conferences designed for those who manage employees.

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