Before the final whistle: how employers can stay onside with compliance hotlines

Dec 21 2011 Andrea Ward and Rose Parlane

Whistle-blowing and compliance hotlines have been in use for some time, but with the introduction of the UK Bribery Act 2010 and refinements in corporate governance under the Combined Code and the UK Corporate Governance Code, the systems in place for reporting concerns are increasingly coming under the spotlight.

Effective whistle-blowing procedures, designed to encourage employees to report internally, in confidence and without fear of reprisal, not only benefit employees but are also an important way for organisations to manage employee disclosures. Although there is no legal obligation to have a whistle-blowing policy most organisations understand the importance of an internal reporting system, to tackle serious complaints and to demonstrate to staff that concerns will be dealt with properly. Many have already introduced a whistle-blowing policy, or even (for some international businesses) a corporate hotline, managed by a third-party provider.

What some organisations may not appreciate, however, is that the failure to implement a proper whistle-blowing procedure could leave them exposed to criminal liability. For example, under the corporate liability provisions of the UK Bribery Act, the only defence to prosecution is to demonstrate the adoption of "adequate procedures" designed to prevent bribery, which would include having in place an internal reporting system and procedures to investigate and respond to reports which are made.

Protection for whistleblowers

In the UK, protection for whistleblowers was formally introduced under the Public Interest Disclosure Act 1998 (PIDA) with consequential amendments to the Employment Rights Act 1996 (ERA). As a result, it is: (a) automatically unfair to dismiss an employee if the reason, or principal reason, is that they have made a "protected disclosure" (as defined by the ERA); and (b) unlawful to subject any worker to a detriment on the ground that they have made a "protected disclosure". For a disclosure to be protected, the worker must have a reasonable belief that the information he is reporting tends to show that one of these six events has occurred, is occurring, or is likely to occur:

- criminal offence;
- breach of any legal obligation;
- miscarriage of justice;
- danger to health and safety;
- damage to the environment;
- deliberate concealment of the above.

The threshold for individuals is therefore fairly low; they do not have to prove any facts and provided they make the disclosure in good faith (and not out of malice, or for personal gain), they will be protected under the PIDA against any retribution. Contrary to the title of the Act, there is no requirement for the disclosure to be in the public interest.

Employees who are dismissed as a result of whistle-blowing also benefit from enhanced protection for automatic unfair dismissal under the ERA, as neither the one-year qualifying period of employment nor the statutory cap on compensation for unfair dismissal apply. This can result in substantial awards to individuals for future loss of earnings, injury to feelings and stigma damages, in cases where they may never find work in their industry or sector again. In one relatively recent case involving a protected disclosure, an Employment Tribunal awarded the chief executive of a hospital trust, who earned £148,000 a year, a total of £1,201,453, which included £569,158 for future loss of earnings until
retirement. Comparing these sums with the current limit on unfair dismissal compensation (of £68,400), it is not difficult to see why employers are concerned about whistle-blowing.

Incentivising whistleblowers

Regulators, hungry for information leading to new cases and prosecutions, are keen to encourage whistleblowers to make reports to them directly. On November 1, 2011 the UK Serious Fraud Office (SFO) launched its new confidential hotline called “SFO Confidential”. Whistleblowers are invited to come forward and speak with the SFO in confidence if they have concerns about fraud or corruption in their workplace.

Other regulators are also offering rewards to those who provide information leading to a prosecution. The UK Office of Fair Trading has the discretion to offer financial rewards for information that helps in the detection and investigation of cartels and which may lead to prosecution. In the United States, under the Dodd-Frank Act, the U.S. Securities and Exchange Commission (SEC) can make monetary awards to those who volunteer original information leading to successful Commission enforcement where the sanctions imposed are over $1 million, and in respect of various related successful actions. The bounties offered are between 10 percent and 30 percent of the monetary sanctions collected, resulting in multi-million dollar rewards.

If there is a problem within an organisation which firms want the opportunity to investigate, they should take advice and make an action plan in advance and, where possible, avoid subsequent exposure to the authorities, regulators, the media and competitors. While many disclosures are made internally to the employer, without raising confidentiality concerns, certain external disclosures (even to the media) may not breach express or implied contractual duties of confidentiality, exposing employers to greater risk of disclosures being made outside the organisation.

Devising a policy

Adopting a suitable policy is recommended and bodies such as the British Standards Institution (BSi) have issued good practice guidance on developing a policy. The BSi advises:

- consultation with the workforce, management and any trade unions;
- guidance on when to use the whistle-blowing policy (rather than the grievance procedure);
- encouraging workers to raise issues with their line manager, or another clearly identifiable person, as soon as possible;
- encouraging openness, but allowing matters to be raised confidentially, as far as possible;
- making it clear that reprisals against complainants will not be tolerated and will be treated under the employer's disciplinary procedure; and
- providing feedback to complainants and the workforce on the outcome of the disclosures (as appropriate).

Organisations should also ensure that any whistle-blowing procedure complies with relevant foreign regulatory requirements, such as the Sarbanes-Oxley Act of 2002 in the U.S (which requires mandatory hotlines for confidential and anonymous reporting of questionable accounting and auditing) and stricter data protection legislation in continental Europe. In the UK, there is a conflict between the data protection provisions of the PIDA (which protects the rights of the complainant) and the Data Protection Act 1998 (DPA) regarding anonymous reporting, as this affects individual data subjects whose personal data may be involved in any investigation. Following guidance from the EU Article 29 Working Party, organisations handling whistle-blowing reports should:

- structure hotlines to limit the number of individuals who are entitled to report allegations;
- allow disclosures to be made on a named, confidential, basis;
- have a dedicated team of complaint handlers;
- manage disclosures within the EU, as far as possible; and
• adopt appropriate technical and organisational measures to safeguard the data, particularly if third-party providers are involved and if data are to be transferred outside the EEA.

Firms should perhaps ask themselves this question: if faced with a concern, what do they think their employees would do? If they are not confident that they would report internally, now might be the time to revisit their whistle-blowing procedures.

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