

## Whistleblowing

The Whistleblowing Directive sets new EU-wide minimum standards for protecting whistle-blowers and requires Member States to establish comprehensive whistle-blower protection frameworks.

We have set out below the current situation in Ireland, Germany and the UK (who of course are not implementing the Whistleblowing Directive).

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### Ireland

The original **Irish Protected Disclosures Act 2014** was enacted on **15 July 2014**. The **Irish Protected Disclosures (Amendment) Act 2022** (“the Act”) was signed into law in **July 2022** and represents a very substantial development in Irish law related to whistleblowing and imposes significant new obligations on employers.

The updated legislation includes a number of key enhancements to existing whistleblowing protections and measures, such as:

- Widening the scope of individuals who are afforded protection beyond employees to include volunteers, interns, job applicants, suppliers, shareholders and non-executive directors;
- Reversing the burden of proof. Where a worker alleges penalisation, the new legislation shifts the burden to the employer to prove that the employer’s actions were based on duly justified grounds and not because the worker made a protected disclosure. Where an employer is found to have penalised a worker for having raised a protected disclosure, the Workplace Relations Commission can award compensation of up to five year’s remuneration;
- Requiring that employers with between 50 and 249 employees establish internal channels and procedures for the making of protected disclosures on or before **17 December 2023**;
- Requiring that employers with 250 plus employees have established internal channels and procedures for the making of protected disclosures by **1 January 2023**;
- Interpersonal grievances: a new exclusionary provision endeavours to exclude personal grievances from the scope of the legislation being matters exclusively affecting a reporting person. However, legal advice should be sought before making a decision as, due to the fact that there is no public interest requirement, there may be individual grievances that would not come within this exclusion (e.g., complaints about an individual worker’s health and safety).

A stepped disclosure regime is envisaged which sees the first disclosure being made to one’s employer. The Act provides for the establishment of the Office of the Protected Disclosures Commissioner.

The Act creates a range of criminal offences and penalties. They cover scenarios such as hindering the making of a protected disclosure or penalising a worker for making a protected disclosure. Depending on the particular offence, there are a range of heavy potential fines of anything up to €250,000. A conviction of a body corporate can even result in potential imprisonment for an offending director, manager, secretary or other officer for up to 12 months upon summary conviction or up to 2 years upon indictment.

Employers in Ireland need to ensure they have appropriate whistleblowing procedures in place. Any existing whistleblowing procedures should be reviewed against the detailed provisions of the Act particularly the timelines for response which include the requirement to acknowledge receipt of a protected disclosure within **7 days** of receipt and to appoint a designated impartial person to follow up diligently on all reports received and provide feedback to the reporting person within **3 months** of acknowledgment of receipt.

Employers with 250 employees or more, who do not have a local whistleblowing procedure in place, should take immediate steps to put one in place, and employers who have between 50-249 employees should prepare to do likewise by December 2023. While it might not be legally required, it is recommended that employers with less than 50 employees also have a local whistleblowing procedure in place in order to ensure any whistleblowing complaints are dealt with appropriately.

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## Germany

The German Whistleblower Protection Act was passed by the federal parliament on 16 December 2022. However, the legislation was blocked by the Bundesrat (the legislative body that represents the federal states of Germany) in February of this year on the basis that it unduly burdens small and medium-sized enterprises by going beyond the scope of the Whistleblowing Directive. The matter now goes to a mediation committee and the date for finalised legislation remains unclear.

Up until now there has been no legislation relating specifically to whistle-blower protection in Germany. The rights and duties of employees in this respect have been determined by the general rules and obligations applicable to the employer-employee relationship.

The new legislation aims at creating legal clarity for whistle-blowers about when they are protected when reporting violations and requires companies with 50 and more employees to set up internal reporting systems. Worthy of mention is the fact that the legislation provides for:

- anonymous reporting and
- in addition to the internal reporting systems which companies are required to set up, there is provision for a central external reporting system at the Federal Office of Justice, responsible for both the public section and the private sector. There is no recognition at the minute of any mandatory priority of internal over external reporting. In principle, employees are thus free to turn directly to an external reporting system.

There is a prohibition on reprisals against whistle-blowers with a reversal of the burden of proof in favour of the whistle-blower. Certain companies in the financial services sector (e.g. credit institutions) are obliged to set up internal whistleblowing systems regardless of their number of employees.

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## United Kingdom

In the UK, the Public Interest Disclosure Act 1998 ("PIDA") protects whistle-blowers and given that that Act has been in place for some 25 years now, the UK was considered to be at the forefront of whistle-blower protection. Dismissal of employees will be automatically unfair if the reason, or principal reason, for their dismissal is that they have made a "protected disclosure". Workers (a wider category of individuals than employees) are protected against being subjected to any detriment on the grounds that they have made a protected disclosure. PIDA generally encourages disclosures to be made internally to the employer and further conditions apply to disclosures to third parties.

There are two matters of note in relation to the current whistleblowing regime in the UK. Firstly, the Protection of Whistleblowing Bill, a private member's bill introduced by Baroness Kramer, seeks to repeal the current legislation and follow suit with other countries that have already introduced penalties for employers who fail to comply with the whistle-blower obligations.

Secondly and potentially more far-reaching, in a policy paper published on Monday 27 March, the Department for Business and Trade announced a review into the current UK whistleblowing framework with the aim of developing and improving the existing regime and reviewing whether the objectives of PIDA are being met. The three central topics for review are as follows:

- Who is covered by whistleblowing protections;
- The availability of information and guidance for whistleblowing purposes and
- How employers and prescribed persons respond to whistleblowing disclosures, including best practice.

The review is expected to conclude in Autumn 2023 and may very well result in additional legislation in the UK.

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