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EMPLOYMENT

Whistleblowing in South Africa – employers' obligations

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Whistleblowing is an important tool in identifying, preventing and eradicating criminal conduct, irregular activities, and other improprieties in both the public and private sectors. In the Judicial Commission of Inquiry into State Capture Report (Part 1), Chief Justice Raymond Zondo noted that whistle-blowers are amongst the most effective weapons against corruption. He remarked that: *"Recent events in South Africa … make it the highest priority that a bona fide whistle blower who reports wrongdoing should receive, as a matter of urgency, effective protection from retaliation."*

The Protected Disclosures Act 26 of 2000 ("PDA") makes provision for the protection of employees or workers (hereafter references to "employees" include "workers") who make protected disclosures (or "blow the whistle", as it were). It does this by, amongst other things, placing certain obligations on employers to ensure that employees who make protected disclosures are protected from any reprisals because of having done so. This article briefly highlights some of these obligations in terms of the PDA.

General Obligations for Employers

Section 6(2)(a) of the PDA provides that every employer must: authorise appropriate internal procedures for receiving and dealing with information about improprieties; and take reasonable steps to bring the internal procedures to the attention of every employee. Effectively, this provision compels employers to have a formal whistleblowing policy outlining the procedures that whistle-blowers must follow when making protected disclosures. Having formulated a policy, employers are required to inform their employees of the existence of the policy and its content (particularly the procedures for making protected disclosures).

Section 3 of the PDA prohibits employers from subjecting employees to any occupational detriment due to them having made a protected disclosure. The PDA lists numerous types of conduct that may constitute "occupational detriments". These include (but are not limited to): being subjected to any disciplinary action; being dismissed, suspended, demoted, harassed or intimidated; being denied a reference or being provided an adverse reference by their employer; and being otherwise adversely affected in respect of their employment, profession or office (including employment opportunities, work security, etc).

Where a protected disclosure is made internally – meaning by an employee to an employer – section 3B of the PDA imposes a duty on such employer to:

- decide whether or not to investigate the matter, or refer the disclosure to a person or body that will investigate or deal with it more appropriately; and
- acknowledge receipt of the disclosure in writing, and inform the employee of the decision to: investigate the matter (with time frames for completion of the investigation); not investigate the matter (with reasons); or refer the disclosure to another person or body.

The employer's decision and written acknowledgement of receipt of the disclosure must be communicated to the employee within 21 days of the protected disclosure being made.

Best Practices for Employers

The following are some recommended best practices to ensure employers' compliance with the PDA.

First, in line with the abovementioned obligation, employers must create a whistleblowing policy outlining internal procedures for receiving and dealing with disclosures. This policy may be a standalone policy, or it may be incorporated as a section in an existing policy (for example, a policy on ethics, or anti-fraud).

Secondly, employers may establish an ethics committee (or office), comprising of a group of individuals within its structures that is responsible for developing and updating whistleblowing policies and guidelines, and ensuring employees' awareness of the internal procedures.

Thirdly, the policy and its content must be shared with employees. Employees must either be provided with a copy of the policy, or it must be readily accessible to them.

Fourthly, as an additional means of bringing the policy to employees' attention, it may be useful to provide training to employees. This entails taking employees through the employer's whistleblowing policy and internal (and possibly external) disclosure procedures.

Fifthly, it is crucial that employers create an organisational ethos of trust with their employees. As part of this, employers must guarantee, respect and protect the confidentiality of employees who make disclosures. Similarly, if an employee elects to make a disclosure anonymously, that employee's anonymity must be safeguarded.

Final thoughts

Finally, it is important that employers seek legal advice regarding their general compliance with the PDA. Legal practitioners assist with the formulation and implementation of a whistleblowing policy within an employer's structures and provide better clarity on best practices that are tailor-made for the employer concerned. Importantly, legal practitioners can ensure an employer's compliance with whistleblowing laws in a more holistic sense, as the laws governing whistleblowing are not exclusive to the PDA. Several other laws relating to whistleblowing may be applicable to certain employers, based on their unique factual circumstances, as well as their particular industry, sector or profession.



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