

HOW DO YOU RESPOND TO A WHISTLEBLOWER?

If you are informed by an employee of your company or a contractor that your company has breached a law, how do you respond? If you inappropriately terminate the employee and do not report the alleged breach, you could be penalised and the employee compensated.

The law

Queensland has had a Whistleblowers Protection Act dealing with unlawful, negligent or improper conduct affecting the state's public sector since 1994.

The Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004 ("CLERP 9") incorporates four basic provisions in Part 9.4AAA of the Corporations Act: protection for qualifying whistleblowers, a prohibition against victimization of whistleblowers, the right to compensation by whistleblowers and the obligation by company directors and officers and auditors to keep the details of the whistleblower confidential.

In particular, CLERP 9 protects individuals who report suspected breaches of the Corporations Act to ASIC provided they have reasonable grounds to suspect a breach and they make the disclosure to ASIC "in good faith".

When the whistleblower has identified themselves to ASIC, it will be an offence for a person to threaten, or engage in, conduct which causes detriment to a whistleblower or third person (such as the whistleblower's family).

Because of these changes, it is important that a company has policies and procedures to respond to disclosures by whistleblowers. If it does not, it risks contravening the Corporations Act.

Pre-requisites for whistleblower protection

- A whistleblower may only be an officer or employee of the company or a contractor (or an employee of the contractor) who supplies goods or services to the company.
- The whistleblower regime only covers disclosures about a possible breach of the Corporations Act or the Australian Securities and Investments Commission Act 2001. The company itself, or one of its officers or employees, must have committed the breach.
- If a whistleblower wants to disclose danger to public health or safety or the environment which does not amount to a contravention of the Corporations Act, then they must seek protection under the State Act.
- The whistleblower rules only protect the whistleblower if they make the disclosure to:
 - * ASIC;
 - * the company's auditors;

- * a director, secretary or senior manager of the company; or
- * a person appointed by the company for that purpose.

The rules do not cover disclosures to shareholders, creditors or the general public via the media.

If a disclosure satisfies all of the above criteria, then the whistleblower is protected from:

- * any legal liability arising from the disclosure; and
- * any retribution or victimisation that may result.

The company cannot terminate an employee's services on the grounds that, by making the disclosure, he or she has breached confidentiality provisions.

Developing a whistleblower policy

To manage the risk of non-compliance, a company should develop and implement a whistleblower policy. This should complement other corporate compliance programs such as fraud and corruption control.

AS 8004-2003 Australian Standard "Whistleblower Protection Programs for Entities" gives guidelines for such policies. It is based on the Victorian Whistleblowers Protection Act.

The Standard prescribes that "the policy should clearly provide for the mechanisms by which whistleblower complaints can be made (for example an internal or external "Whistleblower Hotline") and a statement that all reports will be kept confidential and secure."

The Standard also deals with:

- The appointment of a designated Whistleblower Investigations Officer;
- Reporting mechanisms;
- Immunity from disciplinary action.

Conclusion

Whilst a whistleblower can help identify legal offences within your organization, you need to have policies and train your staff on what happens if someone wants to be a whistleblower or if they receive a whistleblower's report.

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