CODE OF GOOD PRACTICE

ON WHISTLEBLOWING

2nd EDITION

OPEN DEMOCRACY ADVICE CENTRE

TRANSPARENCY IN ACTION

INTRODUCTION

Companies have identified whistleblowing as the most effective tool for detecting fraud. And whistleblowing can expose not only corruption, but also a slew of activities – such as environmental risk or discrimination – that can be harmful not only to the company itself, but to the public at large. Yet people may hesitate to disclose information, either because they are unaware of how they can, or because they are frightened of the consequences. A policy on whistleblowing within an organisation is a necessary first step both for assisting the whistleblower to disclose, but also embedding a culture of openness for everybody's benefit.

In South Africa, the Protected Disclosures Act 26 of 2000 (PDA) and the Prevention and Combating of Corrupt Activities 12 of 2004 are designed to encourage, and in certain circumstances to oblige, individuals to report corruption, and other crimes and malpractices. This Guideline seeks to assist employers and employees on how to make, facilitate, and manage disclosures in the South African context.

This Guideline has also been amended to include the Protected Disclosures Amendment Act of 2015.

Throughout this Guide, we will highlight suggestions on particular issues that might be of relevance in such a polic

PRIOR TO A DISCLOSURE

WHY CREATE THE RIGHT ENVIRONMENT FOR WHISTLEBLOWING?

The PDA is meant to encourage a workplace culture that facilitates the disclosure of information by employees relating to criminal and other irregular conduct in the workplace in a responsible manner. There are practical steps, which can be taken to promote a culture of openness in an organisation. This is necessary as, though the PDA provides protections, whistleblowers may nevertheless be scared to come forward. A safe environment means people will know how to disclose – but also increases the chances that the PDA won't even need to be called upon, as victimisation won't happen.

HOW DO WE CREATE THE RIGHT ENVIRONMENT FOR WHISTLEBLOWING?

Creating a considered and detailed whistleblowing policy is a first and necessary step for ensuring the right environment throughout an organisation and is a legal obligation in terms of the PDA. In constructing a policy, employers should consult employees and their trade union representatives to create a policy and establish procedures which will enable employees and management to raise concerns about wrongdoing. Employees and workers should be confident that their allegations will be taken seriously, that any wrongdoing that is unearthed will be dealt with, and that any persons involved whether directly or indirectly in covering up wrongdoing, will be called to account and, where appropriate, be required to reimburse the employer for undue benefits that they have received. It is important for employers to encourage employees to raise concerns that are honest even if they are mistaken. There is also a legal obligation on employers to take reasonable steps to ensure employees and workers know about the policy.

Outside of a policy, it is important that all levels of management and staff speak about whistleblowing in a language that acknowledges how useful, and vital, authentic dissent can be for an organisation. Whistleblowers need to be understood as compatriots, who actively contribute to an effective and innovative environment.

Perhaps most practically, employers, especially those in the public sector, must allocate sufficient and appropriate resources for the purpose of receiving protected disclosures.

WHAT SORTS OF THINGS SHOULD BE INCLUDED IN A WHISTLEBLOWING POLICY?

Any policy on how to make a disclosure should explicitly state that any employee, no matter how junior or senior, may disclose their concerns about what they perceive to be unacceptable conduct. The policy should give examples of practices that are appropriate to the industry sector or workplace, whether by fellow employees, contractors or members of the public. Such case studies are a great help to employees for understanding.

The policy must also be broadly advertised within an organisation and easily accessible.

The policy should explicitly state that anyone who makes a disclosure in good faith will be protected against any victimisation or reprisal by any colleague or manager and that any victimisation or attempt to discourage a person for making or wanting to make a disclosure is a disciplinary offence. At the same time malicious and unfounded allegations of wrongdoing will be considered an abuse of the policy on disclosures and will also be a disciplinary offence.
The policy should also set out how a disclosure should be made and to whom, e.g. by providing a template, which contains contact details of the person or agency that the employer has authorised to receive a disclosure.

WHO SHOULD BE INVOLVED IN WHISTLEBLOWING PROCEDURES?

The answer depends on your organisational context, but the policy itself should set out to whom disclosures may be made. This could be a designated external service provider e.g. an auditor who may be different from the employer's regular auditor, or an internal person or office, e.g. a compliance officer or ombudsman. A best practice point to note here is that it is useful for the Human Resources Department to be fully engaged with the whistleblowing procedures. They are well placed not only to assist in the drafting and distribution of policy, but also to facilitate training and other important general awareness raising activities. They can also engage staff on whether there are any disclosures they would like to make during exit interviews: a time when employees often feel safest to reveal such information.

Any person authorised to receive disclosures must be sufficiently senior to have the confidence to investigate the allegations made from a disclosure without fear or favour. This may in a large government department require the establishment and support for an independent investigative unit staffed with people trained in investigative skills.

It is not necessary for an employee to make a disclosure to his/her line manager. If there is no whistleblowing policy in place, a disclosure can be made to any senior person who can remedy the wrongdoing.

PRIOR TO A DISCLOSURE

CAN WE CONTRACT OUT OF THE PDA?

In short, no. Section 2 makes it clear that any contract of employment or other agreement, which purports to exclude parts of the PDA, or even discourages an employee from making a protected disclosure, is void.

MAKING THE DISCLOSURE

WHAT CAN A DISCLOSURE BE ABOUT?

A disclosure can be about revealing information on the conduct of an employer, or another employee, which might include:

- a criminal offence e.g. theft;
- a failure to comply with a legal obligation
  e.g. meeting income tax or department of labour obligations;
- a miscarriage of justice e.g. lost dockets;
- endangering health and safety;
- damaging the environment; and
- unfair discrimination.

You can see that the range of issue you can disclose on are broader than just siphoning money. For instance, they might relate to the abuse of power e.g. favouritism in appointments of employees or contractors; abuse of privileged information to secure an advantage for oneself or others, e.g. splitting of purchases to avoid tender thresholds; indulging in or ignoring wasteful expenditure, e.g. abuse of overtime and travel claims; and conflicts of interest in the procurement of goods or services.

IS THERE A DIFFERENCE BETWEEN A GRIEVANCE AND A DISCLOSURE?

A grievance is about a problem that an individual has, such as problems with his/her pension, or leave calculations, or the behaviour of a colleague. In comparison, a disclosure is about reporting wrongdoing that is taking place at work. Many grievance procedures might confuse the whistleblowing protections. For instance, the grievance procedure may say that a grievance must be reported to one's manager. What if the wrongdoing is about the manager? The PDA allows an employee to bypass the chain of hierarchy when reporting wrongdoing, as you can report to the CEO or Financial Director, or anyone who is senior enough to remedy the wrongdoing.

WHAT ABOUT MAKING A DISCLOSURE CONFIDENTIALLY?

If individuals wish their identity to remain confidential, employers should take active steps to keep their identity confidential and may only reveal the identity of the individual with the permission of that person. This is necessary to maintain the trust of the whistleblower, and foster a culture of openness.

However, if a disclosure is made anonymously (note the difference between confidential and anonymous) it may be difficult to follow up on the disclosure for investigators. More importantly, it might be difficult to raise the protections of the PDA later if your disclosure was anonymous, as it will be difficult to ascertain whether or not you followed the correct procedures. The duty to inform the employee and worker of steps being to deal with disclosure obviously do not apply in the case of anonymous disclosures.

There are practical ways for keeping information about disclosures safe, and companies should align their security and data protection systems with their whistleblowing procedures as best practice.

WHO CAN MAKE A DISCLOSURE?

All employees in the public or private sector can make a disclosure. This now includes former employees and workers, whether permanent or employed under temporary employment services.

I WANT TO MAKE A DISCLOSURE, NOW WHAT?

There are five main routes you can take in making a disclosure so that the PDA will protect you. These are:

1. To a legal adviser (section 5);
2. Your employer (section 6);
3. To Cabinet or the Eexecutive Council (section 7);
4. To the Public Protector, Auditor General and others (section 8); or
5. As a "generally protected disclosure" (section 9).

MAKING THE DISCLOSURE

WHAT DO I NEED TO DO TO MAKE A DISCLOSURE TO A LEGAL ADVISER?

Disclosure to a legal practitioner is expressly privileged, and the legal practitioner may not disclose the information to a third party without permission. Approaching a legal adviser (such as an attorney) is a useful (but not compulsory) first step when trying to consider how best to raise your full concern.

WHAT DO I NEED TO DO TO MAKE A DISCLOSURE TO MY EMPLOYER?

You need to first consider your whistleblowing policy, if your company has one, and use that to guide how you disclose. Raising your concern internally is encouraged, but the PDA realised that circumstances might not always make it possible. Your disclosure must be made in good faith, and that you are in line with the procedures if the policy exists. The employer needs to be able to 'right' the impropriety.

WHAT DO I NEED TO DO TO MAKE A DISCLOSURE TO THE PUBLIC PROTECTOR, AUDITOR-GENERAL OR OTHERS?

You need to make your disclosure in good faith to either the Public Protector; Auditor-General; the South African Human Rights Commission; the Commission for Gender Equality; the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities; the Public Services Commission, or any other person or entity prescribed for the purposes of the section. However you should try and do so in line with their procedures and only if you think it would be within their ordinary course of operations (e.g. if you are a private sector employee, taking a complaint about your employer to the Public Protector won't make sense). You will not have to approach your employer first, if you chose this route, to still receive the PDA's protections. You must believe that your disclosure is substantially true.

WHAT DO I NEED TO DO TO MAKE A GENERALLY PROTECTED DISCLOSURE?

This route has the most requirements out of the five different routes. In this route, you can make your disclosure to anyone (including the press), and still receive the protections of the PDA, but only if:

- the disclosure is in good faith;
- you **reasonably believe** the information is **substantially true;**
- the disclosure is not being made for any personal reward or advantage unless a reward is payable by law;
- in all the circumstances of the case, it is reasonable to make the disclosure; **and**
- one or more of the following conditions also apply:
  - you have reason to believe you will be subjected to occupation detriment if you tried to disclose to your employer as under section 6;
  - that when the bodies prescribed in section 8 aren't relevant, you have reason to believe that it is likely the evidence relating to the impropriety will be destroyed or hidden if you make the disclosure to your employer;
  - you have made a disclosure previously of substantially the same information to your employer or the bodies described in section 8, but no action was taken within a reasonable period; or
  - the impropriety is of an **exceptionally serious** nature.

MAKING THE DISCLOSURE

You can see then that this is the most complicated why to disclose. When a decision-maker (such as the Labour Court or an arbitrator) is trying to consider whether the generally protected disclosure was made reasonably, they will consider various factors, including the identity of the person to whom disclosure was made; the seriousness of the impropriety complained of and whether it is or is likely to continue; whether the disclosure is in breach of a duty of confidentiality of the employer towards any other person; whether the information had been previously disclosed in a way that substantially complied with any prescribed or authorised procedure; the reaction and response of the employer to the disclosure; and the public interest.

WHICH IS THE BEST ROUTE?

It really just depends on your context. All routes receive the same protections.

DOES IT MATTER WHEN I MADE THE DISCLOSURE?

The Act took affect on 16 February 2001. However, you will be protected if you made the disclosure after February 2001, even if the disclosure is about something that happened before then.

AFTER THE DISCLOSURE

AS AN EMPLOYER, WHAT SHOULD BE OUR IMMEDIATE STEPS AFTER A DISCLOSURE HAS BEEN MADE TO US?

As mentioned earlier, if it has been requested, you should do everything you can to keep the identity of the whistleblower confidential. You should also follow up and investigate the complaint as soon as possible, or refer the complaint to someone best placed to investigate. Throughout this time, you must keep the whistleblower aware of what actions are being taken.
The PDA creates very specific rules about your obligations to inform the employee or worker of what steps are being taken in section 3B.

If serious wrongdoing is revealed, the employer should take appropriate measures, including criminal and civil proceedings to recover losses that have been incurred. This is not only for financial recovery reasons – the act of following up ensures other employees that their disclosures won't be made in vain. Particular efforts should be made to take direct action against anybody who may try and victimise the whistleblower at work.

WHAT AM I PROTECTED FROM?

The PDA says that, if you made a disclosure following one of the routes described above, you will be protected from "occupational detriment" for having made that disclosure, which is also commonly referred to as victimisation. This includes any adverse treatment to the whistleblower or associates of that person, including being disciplined or dismissed, harassed, demoted or denied promotion, subject to a civil claim for an alleged breach of confidentiality, being forced to transfer or denied a transfer, being denied any workplace benefit, being refused a reference or given an adverse employer's reference or threatened with any of these actions as a consequence of making a disclosure. Constructive dismissal would also constitute an occupational detriment.

Importantly, you might be found by a court to be excluded from other forms of civil and criminal liability if you make a protected disclosure about a criminal offence or substantial failure to comply with the law.

WHAT SHOULD I DO IF I AM BEING VICTIMISED?

If you believe you have been subject to an occupational detriment, you can try pursue a workplace grievance using any applicable grievance policy (you do not have to do this). If you are threatened with an occupational detriment, for example you get a notice of a potential disciplinary hearing, you can approach the Labour Court on an urgent basis to try to interdict the employer's conduct. The Labour Court may grant an interim order that the employer stop the occupational detriment.

All other forms of occupational detriment (outside of dismissal) are considered to be unfair labour practices in terms of the Labour Relations Act and may be referred to the Commission for Conciliation Mediation and Arbitration (CCMA) or relevant bargaining council within 90 days of the date of any other occupational detriment.

WHAT DO I DO IF I AM DISMISSED?

As we mentioned, dismissal is of course a kind of detriment. If you are dismissed, you may refer a dispute about the dismissal in terms of the Labour Relations Act to the CCMA or the particular bargaining council with jurisdiction over your sector within 30 days of the dismissal. If the dispute is not resolved after conciliation the complainant may, within 90 days of the failure of the conciliation process, refer a dispute about the dismissal to the Labour Court alleging that the dismissal is automatically unfair because it amounts to an occupational detriment.

If a person earns less than the threshold set by the Minister of Labour in terms of the Basic Conditions of Employment Act, you may choose to have the dispute determined by arbitration by the CCMA rather than by adjudication in the Labour Court.

The whistleblower should approach his or her trade union, a specialist advice office, the Legal Aid Board or the South African Society of Labour Law's pro bono service at the Labour Court in Johannesburg, Cape Town, Durban and Port Elizabeth for advice and support in initiating legal proceedings.

WHAT MUST THE CONNECTION BETWEEN THE DISCLOSURE AND THE VICTIMISATION BE (ALSO KNOWN AS THE 'NEXUS' ISSUE)?

If you have made a disclosure and have been victimised or received detriment at work, there should be a connection (nexus) between the disclosure and the victimisation. The PDA notes though that you shouldn't be subjected to detriment even partly on account of having made a disclosure. You do not need to show that the employer (or workplace) said expressly that they were victimising you because of the disclosure, but only some connection need be established. The whistleblower does not need to show that the disclosure was the only reason for the occupational detriment, but that it was tainted by bad faith. You might for example show inconsistent treatment when compared to other individuals and which appears to be unjustified in all the circumstances. If you can show this nexus, it is then presumed that the detriment you suffered was unfair.

WHAT ARE THE REMEDIES AVAILABLE?

Victimisation of people who make protected disclosures is a serious violation of their rights. The Labour Court may order an employer to protect the job security of an employee who has been dismissed by ordering the employer to reinstate or re-employ the victim retrospective to the date of the dismissal, or to transfer the employee if they request it. If the whistleblower does not wish to be reinstated, the employer may be ordered to pay just and equitable compensation for the financial loss the person suffered, including compensation for the harm caused to the dignity of the person, and to order the employer to pay some or all of the employee's legal costs in initiating proceedings in the Labour Court. An employer may also be ordered to pay just and equitable compensation to the employee or worker on account of the occupational detriment, actual damages, or to take steps to remedy the detriment.

AFTER THE DISCLOSURE

WHAT IF SOMEONE MADE A DISCLOSURE IN BAD FAITH?

Any disclosure you make to your employer, to a member of Cabinet, to the section 8 bodies or as a generally protected disclosure, must be made in good faith to count as a disclosure that is protected by the PDA. An employee who intentionally discloses false information may be guilty of an offense.

Also, the fact that a person has made a disclosure does not give that person immunity from fair managerial authority or criminal prosecution if the person making the disclosure has also been involved in the wrongdoing.

OUTSIDE OF THE PDA

WHAT IS THE CONNECTION BETWEEN LRA AND PDA?

As you saw above, the LRA states that an unfair labour practice and automatically unfair dismissal includes acts in contravention of the PDA.

Further, sometimes people who have made a disclosure of information and later been dismissed are at risk of being discriminated against when they seek employment elsewhere. The PDA only protects employees or past employees of a particular employer, and does not extend to people who are work seekers. However, the LRA provides that no one may discriminate against a person who has disclosed information that he or she was lawfully (i.e. in terms of the PDA) entitled or required to give to another person. You would then need to refer to the LRA procedures and follow those.

ARE THE ANY OTHER PROCEDURES FOR MAKING A DISCLOSURE?

There are a number of ways you might want to disclose information of wrongdoing within the workplace. While the PDA requires you follow its procedures if you wish to later enact its protections, you might instead want to make use of internal or external whistleblowing hotlines, or using mechanisms within the Department of Labour.

The Companies Act has its own form protected disclosure procedure, which is some ways broader than the PDA because they expand on the types of information release that warrant protection. It expands on the lists of persons to whom a whistleblower can make a disclosure (including, for instance, a Board Member of the company concerned or the Companies and Intellectual property Commission). It also extends the means for protection far beyond those labour protections in the PDA through section 159(4), and provides that whistleblowers who make a protected disclosure are “immune from any civil, criminal or administrative liability for that disclosure.

The downside of course is that would only apply to those making disclosures within the types of company that are covered by the Act (and would exclude, for instance, public sector disclosures). If the information relates to a criminal case of corruption, disclosure may be made to the South African Police Service (SAPS), to the Directorate for Priority Crime Investigation (The Hawks) or to Crime Stop. If the matter relates to a police official, disclosure may be made to the Independent Police Investigations Directorate (IPID).

WHAT OTHER ACTS ARE OF RELEVANCE IN THE AREA WHISTLEBLOWING?

This Guideline should be read in conjunction with the Code of Good Practice: Dismissal which forms Schedule 8 to the Labour Relations Act 66 of 1995, Chapter II of the Employment Equity Act of 1998, the Financial Intelligence Centre Act 3 of 2000, the Promotion of Access to Information Act 2 of 2000, the Promotion of Administrative Justice Act 3 of 2000, the Prevention and Combating of Corrupt Activities Act 12 of 2004, the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA) and section 159 of the Companies Act 71 of 2008.

WHEN AM I UNDER A LEGAL DUTY TO MAKE A DISCLOSURE?

While the PDA does not oblige anybody to reveal wrongdoing, there are some other laws and regulations that create a duty to disclose certain types of information. For instance, if the information relates to corruption or other crimes and involves more than R100 000, people in *positions of authority* in the public and private sector must report the information to the Hawks if it relates to organised crime, or to the Public Protector if it relates to at least one member of the public sector.

Employees employed in terms of the Public Service Act 1994 in national and provincial departments and agencies, SAPS, the SA National Defence Force, the National Intelligence Agency and the South African Secret Service are obliged in

terms of the Code of Conduct for the Public Service to report fraud, corruption, nepotism, maladministration and other conduct which is prejudicial to the national interest. If they are aware of the wrongdoing, but choose to ignore it, which is in itself a criminal offence.

These are just some examples of the most relevant obligations, but you should always be aware of your sector-specific legal obligations – and a good employer should ensure its employees are all well versed in these requirements.

For additional information and assistance you can contact the Open Democracy Advice Centre:

Email: helpline@odac.org.za
Whistleblower Helpline: 0800 52 53 52 (toll-free)
Website: www.odac.org.za

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