PETER A. ALLARD SCHOOL OF LAW
THE UNIVERSITY OF BRITISH COLUMBIA

Anti-Corruption Law Program
Briefing Note on Whistleblowing

CENTRE FOR
BUSINESS LAW

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About the Anti-Corruption Law Program

The Anti-Corruption Law Program (ACLP) is an ongoing series of public education events – including keynote public lectures, seminars, partial-day and full-day invited conferences, and colloquium format sessions – that are open to lawyers, business-people, law enforcement officials, government representatives and bureaucrats, students, and academics alike. These public education events are designed to provide a fertile setting for learning and informed discussion among participant panelists and registrants regarding the role the law may play in the global fight against corrupt business practices.

The ACLP is a collaborative effort founded by three organizations: the Centre for Business Law at the Peter A. Allard School of Law, UBC; Transparency International Canada; and the International Centre for Criminal Law Reform and Criminal Justice Policy. These stakeholders have combined forces to engage in collective action and bring anti-corruption experts together for this public education series. The ACLP has attracted support from a number of public and private organizations, including law firms, accounting/consulting firms, engineering firms, resource extraction companies, NGOs, government organizations, and interdisciplinary academic units at UBC, as well as other universities in Canada and abroad.

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The need for whistleblowing

Whistleblower protection is integral to fostering transparency, promoting integrity, and detecting misconduct. Past cases demonstrate that corruption, fraud, and wrongdoing, as well as health and safety violations, are much more likely to occur in organizations that are closed and secretive. In many cases, employees will be aware of the wrongdoing, but feel unable to say anything for fear of reprisal, concern about acting against the organization's culture, or lack of confidence that the matter will be taken seriously. The negative implications of this are far-reaching for both organizations and society as a whole.[1]

This brief material aims to present the reader with the main features of whistleblower regulations in Canada, the US, the EU and the UK.

Canada

The Canadian framework for whistleblowers' protection is represented by both federal and provincial laws and regulations.

1. Federal regulations

1.1. Public Servants Disclosure Protection Act

On the federal level, whistleblowing in Canada is covered mainly by the Public Servants Disclosure Protection Act (PSDPA), which came into effect on April 15th, 2007. The PSDPA established a procedure for disclosure of serious wrongdoings in the workplace for federal public sector employees, introduced protections from retaliation, and created agencies to guarantee the enforcement of these protections. In particular:

- The PSDPA requires all chief executive officers of the public sector to establish internal procedures to manage any disclosures of wrongdoing made by public servants of the agency or department for which they are responsible.
- The Act covers all employees in federal departments and agencies, most Crown corporations and the RCMP, as well as individuals outside the public sector when they provide information about wrongdoing in, or related to, the federal public sector. The Canadian Armed Forces, Security Intelligence Service and the Communications Security Establishment are excluded from the requirement to establish internal procedures.
- The law established the Office of the Public Sector Integrity Commissioner (Commissioner) and the Public Servants Disclosure Protection Tribunal (Tribunal) to help in protecting whistleblowers and those who participate in investigations from reprisal. If a public servant who made a protected disclosure faces retaliation in the form of demotion, termination of employment, any disciplinary or another measure that adversely impacts the employment or working conditions, or a threat of the aforementioned, she may file a complaint with the Commissioner. The complaint should be filed within 60 days of when

[1] OECD (2016), *Committing to Effective Whistleblower Protection*, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264252639-en

the whistleblower learnt about the retaliatory measure taken against her. The Commissioner might either dismiss a complaint or start an investigation into the complaint – if an investigation is initiated, the Commissioner might appoint a conciliator to try to settle the case, or refer the case to the Tribunal. The Tribunal, consisting of judges of the Federal Court or a superior court of a province, can grant remedies in favour of complainants and order disciplinary action against persons who take reprisals.

1.2. Section 425.1 of the Criminal Code

Established in 2004, Section 425.1 of the Criminal Code of Canada makes it a crime for an employee to threaten or take a disciplinary measure against, demote, terminate or otherwise adversely affect the employment of an employee in order to deter him or her from reporting information regarding an offence he or she believes has or is being committed by his or her employer to the relevant law enforcement authorities, or with the intent to retaliate for the disclosure made by an employee. The maximum punishment for such retaliation is up to five years of imprisonment. This provision is deemed almost to be the sole federal regulation regarding whistleblower protections in the private sector.[2]

1.3. Other Federal Protections

The Canada Labour Code also protects employees, but only with respect to whistleblowers who seek enforcement of, or are participating in proceedings or inquiries under, the Canada Labour Code. In addition, the Competition Act includes protections for those who report potential competition law violations to the Competition Bureau. The Competition Act provides that any person with reasonable grounds to believe that a person has committed (or intends to commit) an offence under the Competition Act may inform the Commissioner of Competition.[3]

1.4. Offshore Tax Informant Program

The Offshore Tax Informant Program (OTIP), inspired by the U.S. IRS Whistleblower Program, was introduced as a federal program in 2013. It offers financial rewards to individuals who provide information to the Canadian Revenue Agency (CRA) about major incidents of international tax non-compliance. To qualify for an award, the information provided must lead to the collection of at least CA$100,000. For a reward payment to be made, the information must result in the collection of more than $100,000 of additional federal tax (excluding penalties and interest), and all objection and appeal rights associated with the assessments must have expired. Awards range between 5% to 15% of the additional federal tax collected. The reward percentage is based on

[2] MICAH TOUB Canada needs to get serious about whistleblower protections. Here's why (2020), online: https://www.cpacanada.ca/en/news/pivot-magazine/2020-04-27-canada-protecting-whistleblowers

[3] https://www.labourandemploymentlaw.com/2014/11/state-of-whistleblowing-legislation-in-canada/

various factors, including quality of information reported, the relevance of information, cooperation of informant and Value of information to CRA.[4]

Between the launch of the OTIP to March 31st, 2020, the program received 808 submissions, identified 564 taxpayers for audit, and audited 180 taxpayers resulting in over CAD $62.2 million in additional federal taxes and penalties identified. Of these submissions, the OTIP entered into 48 contracts with whistleblowers, issuing over CAD $1 million for their disclosures by 2019.[5]

2. Provincial regulations

All Canadian provinces and two territories have enacted legislation respecting whistleblower protection.[6] These acts, typically called Public Interest Disclosure and Whistleblower Protection Acts, mainly contain provisions similar to the PSDPA, covering provincial-level public servants. Most of the provincial employment acts also contain provisions that make it an offence for an employer to take discriminatory action against an employee, but do not guarantee other protections. However, the onus of proving that the undertaken action is a retaliation stays with the employee, which complicates enforcement and makes the protective effect of these laws questionable. As an exception from that rule, Saskatchewan puts the burden on the employer to prove that any discriminatory action taken against the employee was taken for good and sufficient cause.[7]

In recent years, several developments in whistleblower protections have taken place in Ontario.

- First, Ontario's Securities Commission (OSC) established a new whistleblower program in July 2016, giving additional incentives and protection to individuals who report a potential violation of Ontario securities law. The program offers a reward of up to $5 million for tips that lead to enforcement action. The reported wrongdoings include illegal insider trading, tipping, fraud, misleading corporate disclosure or financial statements and trading-related misconduct.[8] To qualify for the award, the disclosed information must lead to an administrative proceeding in which over CAD $1 million in total monetary sanctions is ordered or voluntary payments are made to the OSC. The OSC Policy 15-601 details requirements regarding both the quality of the submitted report and individual eligibility

[4] https://www.canada.ca/en/revenue-agency/programs/about-canada-revenue-agency-cra/compliance/report-offshore-tax-cheating-how-reward.html
[5] Canadian Whistleblower Reward Laws (2020), National Whistleblower Center, online at: https://www.whistleblowers.org/canada-whistleblower-reward-laws/
[6] Ontario (2006), Manitoba (2007), Nova Scotia (2010), Saskatchewan (2011), New Brunswick (2012), Alberta (2012), Newfoundland and Labrador (2014), Prince Edward Island (2015), Quebec (2016), British Columbia (2018).
[7] Saskatchewan Employment Act, SS 2013, c S-15.1, ss 2–8
[8] OSC Whistleblower Program, Ontario Securities Commission, online at https://www.osc.ca/en/enforcement/osc-whistleblower-program

of a whistleblower for the reward.[9] The OSC's Whistleblower Program has awarded more than $8.6 million to whistleblowers as of November 2020.[10]

- Second, in December 2017, Ontario instituted a civil cause of action for employees who experience reprisals from their employers for providing information or assisting in certain other ways in regulatory or criminal investigations or proceedings involving contraventions of securities or commodity futures laws. The new civil cause of action may entitle the employee to reinstatement or to payment of two times the amount of any remuneration they were denied. The demands for compensation for reprisal may be pursued before an arbitrator under a collective agreement, in a civil proceeding before the Superior Court of Justice, or pursuant to other avenues such as private arbitration, if available. The amendments add to existing provisions instituted in 2016 under Ontario's Securities Act and the Commodity Futures Act, which allow regulators to take action against employers who retaliate against whistleblowers, and which invalidate any term in an employment contract that prevents employees from whistleblowing.[11]

Securities regulators play a significant role in developing and enforcing whistleblower protections on the provincial level. Although the OSC implemented a progressive approach by introducing monetary incentives to whistleblowers, other provincial regulators have been less confident in linking financial rewards to whistleblowers to higher-quality reporting. Instead, they have focused on establishing more protections offered to whistleblowers. For example, Quebec AMF and Alberta Securities Commissions Whistleblower Programs focus on guaranteeing anonymity, confidentiality and a set of anti-reprisal measures, including immunity from civil prosecution, to those who report violations.[12] In October 2019, British Columbia introduced Bill 33, which provides for substantial amendments to the British Columbia Securities Act, including wide-ranging amendments targeted at strengthening the enforcement powers of the British Columbia Securities Commission and enhancing whistleblowers' protections from retaliation.[13] The Bill has not yet become law.[14]

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[9] Ontario Securities Commission Policy 15-601, https://www.osc.ca/sites/default/files/2021-02/pol_20181004_15-601_unofficial-consolidation.pdf

[10] OSC awards over half a million to three whistleblowers, Ontario Securities Commission, online at https://www.osc.ca/en/news-events/news/osc-awards-over-half-million-three-whistleblowers

[11] Jacob Wilson Ontario provides protection to "whistleblowers" against reprisals, online at https://www.securitieslitigation.blog/2018/02/ontario-provides-protection-to-whistleblowers-against-reprisals/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration

[12] https://lautorite.qc.ca/en/general-public/assistance-and-complaints/whistleblower-program ; https://www.albertasecurities.com/enforcement/office-of-the-whistleblower/questions-and-answers#:~:text=The%20Whistleblower%20program%20was%20created,and%20with%20heightened%20confidentiality%20protections.&text=The%20Office%20of%20the%20Whistleblower,Alberta%20Securities%20Commission%20(ASC).

[13] https://www.osler.com/en/blogs/risk/october-2019/amendments-to-british-columbia-s-securities-act-expand-enforcement-powers

[14] https://www.leg.bc.ca/parliamentary-business/legislation-debates-proceedings/41st-parliament/4th-session/bills/first-reading/gov33-1

3. Points of criticism

By and large, experts have criticized Canada's whistleblower protection system as insufficient and outdated.[15] Among the most important points of criticism:

- Lack of sufficient protection for public sector whistleblowers, either at a federal or provincial level. On the federal level, for the first 13 years of its existence until January 2020, out of 358 submitted complaints, the Office of the Public Sector Integrity Commissioner referred only eight whistleblowers to the Tribunal. Out of them, 3 cases stemmed from the same controversy and were settled. Only two cases were decided on merits, and in both instances, the Tribunal ruled against the whistleblower.[16] Additionally, whistleblowers often have to bear their own legal costs, while accused wrongdoers will typically have access to the financial and legal resources of the organization.[17] Recent surveys show that public servants do not trust the existing disclosure system under PSDPA.[18]
- Lack of coverage of the private sector. Experts indicate that the existing Section 425.1 of the Criminal Code and scarce sectoral protections are insufficient to impact private companies.[19] Yet under the PSDPA, the Public Sector Integrity Commissioner does not have a mandate to investigate or sanction the private sector.[20]
- The increasing regulations on the provincial level lack sufficient enforcement mechanisms and, in most cases, still leave the onus of proving retaliation with an employee, creating a burden for those seeking protection against reprisal.

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[15] For more details on that: What's Wrong with Canada's Federal Whistleblower Legislation, CENTRE FOR FREE EXPRESSION (2017), https://cfe.ryerson.ca/key-resources/cfe-publications/what%E2%80%99s-wrong-canada%E2%80%99s-federal-whistleblower-legislation (last visited May 22, 2021). Enhancing Whistleblower Protection, Transparency International Canada, https://open.canada.ca/en/idea/enhancing-whistleblower-protection; MICAH TOUB Canada needs to get serious about whistleblower protections. Here's why (2020), online: https://www.cpacanada.ca/en/news/pivot-magazine/2020-04-27-canada-protecting-whistleblowers

[16] Are whistleblowing laws working? A global study of whistleblower protection litigation, Government Accountability Project and International Bar Association Legal Policy and Research Unit, online at https://cfe.ryerson.ca/sites/default/files/Are%20Whistleblowing%20laws%20working%20REPORT_02March21.pdf

[17] Transparency International Canada: Report on Whistleblower Protections in Canada (2015), online at: http://static1.squarespace.com/static/5df7c3de2e4d3d3fce16c185/5df7c8833a774003e678b023/5df7c87b3a774003e678a939/1576519803459/TI-Canada_Whistleblower-Report_Final1.pdf?format=original, at 12.

[18] What's Wrong with Canada's Federal Whistleblower Legislation, CENTRE FOR FREE EXPRESSION (2017), https://cfe.ryerson.ca/key-resources/cfe-publications/what%E2%80%99s-wrong-canada%E2%80%99s-federal-whistleblower-legislation (last visited May 22, 2021)

[19] Enhancing Whistleblower Protection, Transparency International Canada, https://open.canada.ca/en/idea/enhancing-whistleblower-protection; MICAH TOUB Canada needs to get serious about whistleblower protections. Here's why (2020), online: https://www.cpacanada.ca/en/news/pivot-magazine/2020-04-27-canada-protecting-whistleblowers

[20] Transparency International Canada: Report on Whistleblower Protections in Canada (2015), online at: http://static1.squarespace.com/static/5df7c3de2e4d3d3fce16c185/5df7c8833a774003e678b023/5df7c87b3a774003e678a939/1576519803459/TI-Canada_Whistleblower-Report_Final1.pdf?format=original, at 13.

United States

The US was the first country to enact a whistleblower protection law. Since then, the federal government has created a comprehensive system of whistleblower protections, enacting over 60 sectoral and specialized laws.[21] A single comprehensive whistleblower protection act has not been enacted due to constitutional limitations at play, as well as the 'at will' principles of US employment law that give employers the power to terminate employees without good cause.[22]

The history of whistleblower protections laws in the US can be traced back to the False Claims Act (FCA) of 1863, 31 U.S.C. §§ 3729, et seq. Also known as "Lincoln's Law", the FCA was enacted during the Civil War to counter widespread fraud by contractors supplying the military.[23] Whistleblower statutes exist both on the federal and state level in abundance. For the sake of brevity, we will focus on the most general features of the federal whistleblower protection system in the US and on whistleblower incentives programs.

1. Federal regulations

1.1. False Claims Act

The FCA prohibits any person from presenting a "false or fraudulent claim for payment or approval" to the United States. The overarching purpose of the FCA is to prevent the wrongful acquisition or retention of government funds. The FCA authorizes the federal government to seek reimbursement for false or fraudulent claims for payment, to punish wrongdoers through civil and criminal penalties, and to deter the future submission of false or fraudulent claims. The federal government has two primary means of enforcing the FCA. First, the U.S. Attorney General may file a civil action on behalf of the federal government. Second, individual citizens – referred to as "relators" – may file suit on behalf of the government and assist the government in recovering funds that have been falsely obtained. Such a suit is called a qui tam action.[24]

In addition to providing a mechanism for individuals to sue on behalf of the government, the FCA also prohibits retaliation against whistleblowers. In 1986, Congress passed the False Claims Amendments Act, which introduced employment protections for whistleblowers, including reinstatement with seniority status, special damages, and double back pay. Since 2009, Congress has twice amended the anti-retaliation provision of the FCA to broaden its scope. The Fraud

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[21] Are whistleblowing laws working? A global study of whistleblower protection litigation, Government Accountability Project and International Bar Association Legal Policy and Research Unit, online at https://cfe.ryerson.ca/sites/default/files/Are%20Whistleblowing%20laws%20working%20REPORT_02March21.pdf at 38.

[22] Transparency International Canada: Report on Whistleblower Protections in Canada (2015), online at: http://static1.squarespace.com/static/5df7c3de2e4d3d3fce16c185/5df7c8833a774003e678b023/5df7c87b3a774003e678a939/1576519803459/TI-Canada_Whistleblower-Report_Final1.pdf?format=original, at 13.

[23] A Guide To The Federal False Claims Act, online at https://www.whistleblowerllc.com/resources/whistleblower-laws/the-federal-false-claims-act/#:~:text=It%20allows%20whistleblowers%20to%20sue,Act%20(FCA)%2C%2031%20U.S.C.

[24] Lisa J. Banks, Jason C. Schwartz Whistleblower Law: A Practitioner's Guide, online at https://plus.lexis.com/api/permalink/89fb1d68-4693-46a0-8bee-6afbeb49489d/?context=1530671

Enforcement and Recovery Act of 2009 (FERA) amended the FCA anti-retaliation provision to protect employees, contractors, and agents from being:

> "discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter."[25]

However, federal employees may not bring FCA retaliation actions against the federal government, and the FCA contains no waiver of sovereign immunity.

The FERA amendments broadened protections for whistleblowers who take actions within their companies to stop fraud and related misconduct. The FERA amendments also ensure that individuals who report misconduct internally to a supervisor or corporate compliance department, or who refuse to participate in misconduct that could lead to false claims, are protected regardless of whether they ultimately file a qui tam suit – thereby encouraging employees to take action against apparent misconduct. A year after the passage of FERA, the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) further broadened the scope of anti-retaliation protections under the FCA by prohibiting retaliation against colleagues and family members of an FCA whistleblower.[26]

In order to prove that an employer retaliated against an employee, an employee must demonstrate that: (1) He engaged in protected activity; (2) The employer knew of the protected activity; (3) He was discriminated against because of his protected activity. However, courts commonly apply a burden-shifting framework (called the McDonnell-Douglas standard) to those FCA retaliation cases where there is no direct evidence of retaliation. Under this framework, once the plaintiff establishes the elements of a prima facie case, the employer bears the burden of offering a legitimate, non-discriminatory reason for the employee's termination. It is then the employee's burden to refute that reason by demonstrating pretext – by showing the employer's proffered reason was not the true reason for the termination or other disciplinary action.[27]

1.2. Whistleblower Protection Act of 1989

In 1978, in response to the Watergate Scandal, Congress passed the Civil Service Reform Act (CSRA), which protects whistleblowing in federal agencies. In order to expand on CSRA provisions and to provide additional protections to federal employees in the executive branch who report illegal or improper government activities, a decade later Congress passed the Whistleblower Protection Act of 1989 (WPA). The WPA strengthened the role of the Office of Special Counsel (OSC, an independent arm of the Merit Systems Protection Board (MSPB)) to investigate allegations of retaliation in response to whistleblowing. With the WPA, Congress transformed the

[25] Ibid.
[26] Ibid.
[27] Ibid.

OSC into an independent executive agency with enhanced power to provide redress to employees who experience reprisal for disclosing government wrongdoing.

In 2012 Congress passed the Whistleblower Protection Enhancement Act (WPEA) to amend the WPA in a number of ways, including:

- Clarifying the scope of protected disclosures. WPEA explicitly protected whistleblowers who make a disclosure: (1) to the person who participated in the wrongdoing disclosed; (2) regarding information that has already been disclosed; (3) irrespective of their motive for disclosing; (4) while off-duty, and (5) irrespective of how much time has passed since the events described in the disclosure.
- Promoting scientific integrity. The WPEA extended whistleblower protections to government scientists who challenge censorship or make disclosures related to the integrity of the scientific process.
- Increasing available remedies. The WPEA authorized the MSPB to award a prevailing employee compensatory damages.
- Bolstering the ability of the OSC to deter retaliation. Congress reduced the burden on the OSC to show retaliation before intervening in a case before the MSPB, replacing the judicially created "but for" causation standard with a "significant motivating factor" standard.
- Expanding the individual right of action and judicial review. The WPEA made several whistleblower-friendly procedural changes to the WPA by expanding the individual right of action, authorizing review of MSPB decisions in any federal court of appeals that would otherwise have jurisdiction, and ensuring due process rights at MSPB hearings.[28]

The WPA empowered an aggrieved employee with four ways to pursue relief: (1) A direct appeal to the MSPB of an agency's retaliatory action; (2) An action through the OSC (3) An individual right of action, or (4) A grievance proceeding pursuant to a collective bargaining agreement between the agency and union. Analysis of a WPA retaliation claim takes place within a burden-shifting framework. First, an aggrieved employee must establish a prima facie case by demonstrating (1) that he made a protected disclosure or engaged in protected activity as defined by the statute, and (2) that his disclosure or protected activity was a contributing factor to the adverse personnel action. If the employee establishes a prima facie case, then the burden of persuasion shifts to the agency to show by "clear and convincing evidence" that it would have taken the same personnel action in the absence of such disclosure. Corrective action may involve various remedies, including reinstatement, back pay and related benefits, medical costs, travel expenses, reasonable and foreseeable consequential damages, compensatory damages, and reimbursement for attorneys' fees and costs. The OSC or MSPB may also impose disciplinary actions against an employee who commits a prohibited personnel practice, including disciplinary action and/or a civil penalty up to $1,000.[29]

[28] Ibid.
[29] Ibid.

1.3. Sarbanes-Oxley Act of 2002

In the wake of high-profile corporate accounting scandals involving Enron and WorldCom, the U.S. Congress passed the Sarbanes-Oxley Act of 2002 (SOX). The law introduced federal regulation of disclosure and whistleblowing in the private sector. The SOX requires certain officers of publicly traded companies to make certifications related to the accuracy of the company's financial statements, and authorizes penalties for material misstatements or omissions. The law applies to all domestic public companies and non-public companies with publicly traded debt securities. Some sections of Sarbanes-Oxley apply to non-publicly traded companies that do business with publicly traded companies. Both corporate liability and individual liability exist under the law, and it is enforced administratively, civilly, and criminally.[30]

SOX also includes anti-retaliation protections for whistleblowers. Under Section 806, a covered employer may not terminate or otherwise discriminate against an employee for providing information that the employee reasonably believes constitutes a violation of federal laws relating to one of six enumerated categories: (1) mail fraud, (2) wire fraud, (3) bank fraud, (4) securities/commodities fraud, (5) "any rule or regulation of the U.S. Securities and Exchange Commission" (SEC), or (6) "any provision of federal law relating to fraud against shareholders."[31] Section 1107 of SOX makes it a crime for a person to knowingly retaliate against a whistleblower for disclosing truthful information to a law enforcement officer regarding an alleged federal offence. Whistleblower reprisal claims must be filed with the U.S. Department of Labor within 180 days of the employer's retaliation.

1.4. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) is the latest in a series of significant financial reforms. It was passed after the financial crisis of 2008 and was designed to provide greater oversight of the financial industry and protection for financial consumers. In recognition that whistleblowers play a vital role in detecting and preventing fraud, Dodd-Frank:

- Enacted a series of whistleblower incentive and protection programs that encourage whistleblowers to help police the financial markets and protect them from retaliation for these efforts. Dodd-Frank closed previous legislative loopholes and strengthened SOX and the FCA. The text of the amendments can be found here.
- Created the Securities and Exchange Commission and the Commodity Futures Trading Commission whistleblower incentive programs. Both programs reward individuals who provide information to the government relating to violations of federal securities or

[30] Sarbanes-Oxley Act, https://www.justia.com/employment/retaliation/sarbanes-oxley-act/#:~:text=Among%20other%20things%2C%20Sarbanes%2DOxley,related%20to%20fraud%20against%20shareholders.

[31] Lisa J. Banks, Jason C. Schwartz Whistleblower Law: A Practitioner's Guide, online at https://plus.lexis.com/api/permalink/89fb1d68-4693-46a0-8bee-6afbeb49489d/?context=1530671

commodities exchange laws by giving whistleblowers a share of the money the government recovers.

- Created a specific whistleblower protection program for those who work in the financial industry to encourage them to come forward with information related to fraudulent conduct in the sale and marketing of consumer financial products or services.

These provisions build on existing financial whistleblower programs and create new programs intended to complement the robust regulatory changes ushered in under Dodd-Frank.[32]

Dodd-Frank provided additional, in comparison to the SOX, advantages in bringing whistleblower retaliation claims under it:

- Broader coverage: While SOX whistleblower protections cover the employees of public companies and their contractors, Dodd-Frank prohibitions against retaliation apply to any employer.
- Longer statute of limitations: While claims under the SOX should be brought within 180 days after the act of reprisal, claims under Dodd-Frank Act can be brought within three years after the date when the facts material to the right of action became known or reasonably should have been known to the whistleblower.
- Exhaustion of administrative remedies: While the SOX mandates the employee file with the Department of Labor first, the Dodd-Frank Act allows to bring a lawsuit directly in federal court.
- Financial remedies: The SOX authorizes ordinary back pay, whereas Dodd-Frank permits awarding the double of lost wages.[33]

In *Digital Realty Trust, Inc. v. Somers*, the U.S. Supreme Court held that the Dodd-Frank whistleblower protections apply only where the whistleblower disclosed potential securities law violations to the SEC, effectively curtailing the protections for internal whistleblowing, including disclosures made to a corporate ethics or compliance program, unless the whistleblower also disclosed to the SEC.[34]

2. Whistleblower rewards programs

Whistleblowers in the US not only receive protection from retaliation but can get a monetary reward as an incentive offered by the government to individuals for exposing certain wrongdoings. Federal laws require the government to reward whistleblowers with a percentage of the money that it recovers as a result of their tip. Whistleblowers may receive up to 30% of the total monetary recovery as a reward. In the United States, there are four main whistleblower reward programs:

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[32] Ibid.

[33] Jason Zuckerman, Matthew Stock Dodd-Frank SEC Whistleblower Protection Post-Digital Realty (2020), online at: https://www.natlawreview.com/article/dodd-frank-sec-whistleblower-protection-post-digital-realty

[34] Dig. Realty Tr., Inc. v. Somers - 138 S. Ct. 767 (2018), online at https://www.supremecourt.gov/opinions/17pdf/16-1276_b0nd.pdf

- SEC Whistleblower Reward Program: whistleblower rewards for reporting violations of the federal securities laws.
- CFTC Whistleblower Reward Program: whistleblower rewards for reporting violations of the Commodity Exchange Act.
- IRS Whistleblower Reward Program: whistleblower rewards for reporting tax fraud or underpayments.
- False Claims Act / Qui Tam Lawsuits: whistleblower rewards for reporting fraud against the government.[35]

Whistleblower rewards programs also exist on the state and local levels.

2.1. SEC Whistleblower Program

It is worth mentioning that for more than twenty years prior to Dodd-Frank, the SEC maintained an incentive program designed to reward whistleblowers who provided information regarding unlawful insider trading. This program was largely unsuccessful, as few people were aware of its existence, resulting in a dearth of fruitful SEC tips and SEC payouts. Congress attempted to resuscitate the incentive program with Dodd-Frank by expanding the type of information the SEC accepts under the program and increasing the amount of money awarded to whistleblowers.[36]

Established according to the Dodd-Frank, the SEC Whistleblower Program is based on three main cornerstones: (1) anonymous reporting, (2) effective protections from retaliation and (3) substantial monetary incentives to informants.[37] Under the revamped SEC whistleblower program, an individual who voluntarily provides original information to the SEC relating to possible violations of federal securities laws and which leads to a successful SEC enforcement action resulting in over $1 million in monetary sanctions is eligible to receive an award of between 10-30% of the amount collected.[38] Since the first award in 2012, the SEC has issued approximately $838 million to 156 individuals. All payments are made out of an investor protection fund established by Congress that is financed entirely through monetary sanctions paid to the SEC by

[35] Walter Pavlo The Controversial History Of Whistleblowers And Those Who Are Speaking Out, online at: https://www.forbes.com/sites/walterpavlo/2020/10/21/the-controversial-history-of-whistleblowers-and-those-who-are-speaking-out/?sh=6886083c6e55

[36] Lisa J. Banks, Jason C. Schwartz Whistleblower Law: A Practitioner's Guide, online at https://plus.lexis.com/api/permalink/89fb1d68-4693-46a0-8bee-6afbeb49489d/?context=1530671

[37] Reporting Without Regrets: The SEC Whistleblower Handbook, Labaton Sucharow, online at: https://www.americanbar.org/content/dam/aba/events/labor_law/2020/section-conference/materials/reporting-without-regrets.pdf

[38] Lisa J. Banks, Jason C. Schwartz Whistleblower Law: A Practitioner's Guide, online at https://plus.lexis.com/api/permalink/89fb1d68-4693-46a0-8bee-6afbeb49489d/?context=1530671

securities law violators.[39] More than one-fifth of award recipients were foreign nationals or resided outside of the US when they submitted tips to the SEC.[40]

In order to qualify for the SEC Whistleblower Reward several criteria should be met:

(1) Whistleblower provides the information to the SEC.
(2) He provides information voluntarily. This means that tips are provided "before a request, inquiry, or demand" for such information: (i) by the SEC; (ii) by the Public Company Accounting Oversight Board or any self-regulatory organization in connection with an investigation, inspection or examination; or (iii) in connection with an investigation by Congress, the Federal Government, or a state attorney general or securities regulatory authority.
(3) The provided information is original, which means that it is derived from independent knowledge or independent analysis, not from any public source or already known to the SEC.
(4) The provided information leads to successful enforcement action.
(5) The monetary sanctions must exceed $1 million in a single judicial or administrative action.[41]

For more information on SEC Whistleblower Program, eligibility for Award and Procedures for Filing a SEC Whistleblower Submission please follow this link and read this material prepared by Labaton Sucharow LLP.

2.2. CFTC Whistleblower Program

Also established by the Dodd-Frank, the Commodity Futures Trading Commission (CFTC) Whistleblower Program offers the same protections and awards as its SEC counterpart to individuals who voluntarily provide original information regarding commodities law violations. The CFTC is an independent agency with regulatory authority over futures trading in all commodities. The eligibility criteria and award amounts match precisely those offered by the SEC.[42] Since issuing its first award in 2014, the CFTC has awarded approximately $123 million to whistleblowers. The CFTC issues awards related not only to the agency's enforcement actions but also in connection with actions brought by other domestic or foreign regulators if certain conditions are met.[43]

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[39] SEC Awards $22 Million to Two Whistleblowers (2021), https://www.sec.gov/news/press-release/2021-81#:~:text=Whistleblowers%20may%20be%20eligible%20for,monetary%20sanctions%20exceed%20%241%20million.
[40] Reporting Without Regrets: The SEC Whistleblower Handbook, Labaton Sucharow, online at: https://www.americanbar.org/content/dam/aba/events/labor_law/2020/section-conference/materials/reporting-without-regrets.pdf
[41] Ibid.
[42] Lisa J. Banks, Jason C. Schwartz Whistleblower Law: A Practitioner's Guide, online at https://plus.lexis.com/api/permalink/89fb1d68-4693-46a0-8bee-6afbeb49489d/?context=1530671
[43] CFTC Awards Approximately $3 Million to Whistleblower (2021), https://www.cftc.gov/PressRoom/PressReleases/8383-

More information on the CFTC Whistleblower Program is available here.

2.3. Notes on the Effectiveness of Whistleblower Rewards

The matter of offering awards to whistleblowers remains contested. Critics of monetary incentives frequently underscore that these programs motivate employees to file meritless allegations with regulators that waste resources of regulators and accused firms[44] and that they incentivize employees to bypass internal procedures and share information directly with regulators.[45]

The view of monetary rewards as a valuable tool to encourage reporting misconduct has become dominant. An increasing number of research papers and notes have been published to support the effectiveness of monetary incentives in the last few years.[46] The National Whistleblower Center argues that monetary rewards are an effective tool to incentivize people to provide high-quality tips which result in successful prosecutions.[47] The most recent study by researchers from Harvard Business School shows financial incentives do not make whistleblowers less likely to first report internally, and that greater incentives increase the number of lawsuits filed with the regulator, the regulator's investigation length, and the percentage of intervened and settled lawsuits. They

21#:~:text=Washington%2C%20D.C.%20%E2%80%94%20The%20Commodity%20Futures,bring%20a%20successful%20enforcement%20action

[44] Bok S., 1980. Whistleblowing and professional responsibility. New York Education Quarterly 11, 2–10; Gobert, J., and Punch, M., 2000. Whistleblowers, the public interest, and the public interest disclosure act 1998. The Modern Law Review 63, 25–54

[45] Miceli, M., and Near, J. 1992. Blowing the whistle: The organizational and legal implications for companies and employees. New York, NY: Lexington Books.; Dave Ebersole, Blowing the Whistle on the Dodd-Frank Whistleblower Provisions, 6 ENTREPRENEURIAL BUS. L.J. 123, 132 (2011); U.S. Chamber Warns New SEC Whistleblower Rule Will Undermine Corporate Compliance Programs, PRESS RELEASES, U.S. CHAMBER OF COMM. (May 25, 2011), http://www.uschamber.com/press/releases/2011/may/us-chamber-warns-new-sec-whistleblower-rule-will-undermine-corporate-complia

[46] See Theo; Spagnolo, Giancarlo (2018) : Myths and Numbers on Whistleblower Rewards, SITE Working Paper, No. 44, Stockholm School of Economics, Stockholm Institute of Transition Economics (SITE), Stockholm, available at http://hdl.handle.net/10419/204755 ; Jason Zuckerman and Matt Stock One Billion Reasons Why The SEC Whistleblower-Reward Program Is Effective, online at https://www.forbes.com/sites/realspin/2017/07/18/one-billion-reasons-why-the-sec-whistleblower-reward-program-is-effective/?sh=79f243bb3009 ; Iwasaki, Masaki, Effects of External Whistleblower Rewards on Internal Reporting (May 26, 2018). Harvard John M. Olin Fellow's Discussion Paper Series No. 76, Available at SSRN: https://ssrn.com/abstract=3188465 or http://dx.doi.org/10.2139/ssrn.3188465 ; Justin Blount and Spencer Markel, The End of the Internal Compliance World as We Know It, or An Enhancement of the Effectiveness of Securities Law Enforcement? Bounty Hunting Under the Dodd-Frank Act's Whistleblower Provision, 17 Fordham J. Corp. & Fin. L. 1023 (2012). Available at: https://ir.lawnet.fordham.edu/jcfl/vol17/iss4/4

[47] The Importance of Rewards, National Whistleblower Center, https://www.whistleblowers.org/the-importance-of-rewards/#:~:text=Data%20shows%20that%20incentivizing%20whistleblowers,increased%20number%20of%20false%20reports.

concluded that the FCA cash-for-information program helps expose corporate misconduct and helps compensate whistleblowers for their income loss.[48]

European Union

In the EU, whistleblower protection laws are mostly falling within the competence of the member states. As a result, they vary significantly in their existence and quality. Lack of comprehensive EU-wide regulation on whistleblowers has long presented an obstacle to levelling the playing field between European countries.[49] In 2019 the European Parliament[50] and the Council of the EU[51] attempted to solve this problem by passing the EU Directive 2019/1937 on the protection of persons who report breaches of Union law.[52]

1. The Directive (EU) 2019/1937 on the protection of persons who report breaches of Union law

The Directive recognized the essential role that whistleblowers play as a source of information on fraud and corruption and in safeguarding the welfare of society. It also acknowledged the need to establish confidential and secure reporting channels and ensuring that whistleblowers are protected effectively against retaliation.[53] Accordingly, the Directive sets up common minimum standards for protecting persons reporting breaches of EU law. The core provisions of the Directive can be boiled down to the following points.

1.1. Material scope. Under this Directive, whistleblowers will be protected from retaliation for reporting violations of the EU law within the following areas: (1) public procurement; (2) financial services, products and markets, and prevention of money laundering and terrorist financing; (3) product safety and compliance; (4) transport safety; (5) protection of the environment; (6) radiation protection and nuclear safety; (7) food and feed safety, animal health and welfare; (8) public health; (9) consumer protection; (10) protection of privacy and personal

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[48] Dey, Aiyesha and Heese, Jonas and Perez Cavazos, Gerardo, Cash-for-Information Whistleblower Programs: Effects on Whistleblowing and Consequences for Whistleblowers (April 30, 2021). Available at SSRN: https://ssrn.com/abstract=3837308 or http://dx.doi.org/10.2139/ssrn.3837308

[49] Mark Worth, Whistleblowing in Europe: Legal protections for whistleblowers in the EU (2013), online at: https://images.transparencycdn.org/images/2013_WhistleblowingInEurope_EN.pdf ; Mapping the EU on legal whistleblower protection assessment before the implementation of the EU Whistleblowing Directive (2019), Transparency International Nederland, online at: https://www.transparency.nl/wp-content/uploads/2019/04/Mapping-the-EU-on-Whistleblower-Protection-TI-NL.pdf

[50] European Parliament adopted the Directive on April 16, 2019.

[51] The Council of the European Union passed the Directive on October 7, 2019.

[52] DIRECTIVE (EU) 2019/1937 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 23 October 2019 on the protection of persons who report breaches of Union law (2019), Official Journal L 305, 26 November, pp. 17-56.

[53] Ibid at 17.

data, and security of network and information systems; (11) breaches affecting the financial interests of the Union and (12) breaches relating to the internal market, including breaches of Union competition and State aid rules, as well as breaches relating to the internal market in relation to acts which breach the rules of corporate tax or to arrangements the purpose of which is to obtain a tax advantage that defeats the object or purpose of the applicable corporate tax law.[54] Breaches of law are defined as acts or omissions that are either unlawful or defeat the object or the purpose of the rules.[55]

Due to the limited competences of the EU, the Directive does not protect whistleblowers reporting breaches of EU law in other areas or breaches of national law.[56] UNODC Report suggested that limiting the scope of protected areas of disclosure has an adverse effect on whistleblowing: if people are not sure that the misconduct they want to report fits the criteria, they will remain silent, whereas authorities and the public will remain ignorant of wrongdoing.[57] It remains unclear whether member states will extend protections under national laws or merely follow the minimal standard.

1.2. Personal scope. The Directive covers both the public and private sectors. Whistleblower protections apply to a broad scope of individuals, including (1) persons with the status of a worker, including civil servants; (2) self-employed persons; (3) shareholders or associates and persons who are members of a body of an undertaking; (4) persons working under the supervision and direction of contractors, subcontractors and suppliers; (5) job applicants; (6) former employees; (7) volunteers and trainees, whether or not they are paid; (8) supporters of a whistleblower (colleagues and relatives).[58] In granting protection, it does not in any way take into account the whistleblowers' motive for reporting.

1.3. Reporting standard – reasonable belief. Reporting persons are eligible to protection under the Directive if they (a) had reasonable grounds to believe that the information on breaches reported was true at the time of reporting and that such information fell within the scope of this Directive, and (b) reported either internally or externally or made a public disclosure following the rules set forth in the Directive.[59] The standard of reasonable belief is relaxed and creates a strong tool to level the playing field between whistleblowers and their employers.

1.4. Reporting channels. The Directive provides three channels for reporting: (1) internal (within the organization); (2) external (to the law enforcement agency); (3) public disclosure (to the public). It also allows the whistleblower to choose the most appropriate reporting

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[54] Ibid Art. 1.
[55] Ibid Art 5(1).
[56] Building on the EU Directive for whistleblower protection: analysis and recommendations (2019). Transparency International, online at: https://transparency.eu/wp-content/uploads/2020/11/2019_EU_whistleblowing_EN.pdf at 4.
[57] Resource Guide on Good Practice in the Protection of Reporting Persons (2015), United Nations Office on Drugs and Crime (UNODC), online at: https://www.unodc.org/documents/corruption/Publications/2015/15-04741_Person_Guide_eBook.pdf at 22.
[58] *Supra 52* Art 4.
[59] Ibid Art. 6(1).

channel, depending on the case's individual circumstances. No mandatory procedural sequence of disclosure exists, with the acknowledgement, however, that:

> "47. For the effective detection and prevention of breaches of Union law, it is vital that the relevant information reaches swiftly those closest to the source of the problem, most able to investigate and with powers to remedy it, where possible. As a principle, therefore, reporting persons should be encouraged to first use internal reporting channels and report to their employer, if such channels are available to them and can reasonably be expected to work. That is the case, in particular, where reporting persons believe that the breach can be effectively addressed within the relevant organisation, and that there is no risk of retaliation. As a consequence, legal entities in the private and public sector should establish appropriate internal procedures for receiving and following up on reports. Such encouragement also concerns cases where such channels were established without it being required by Union or national law. This principle should help foster a culture of good communication and corporate social responsibility in organisations, whereby reporting persons are considered to significantly contribute to self-correction and excellence within the organisation".[60]

Member States are to encourage whistleblowers to use internal reporting channels first; the whistleblower may report internally or externally to competent authorities; and as a last resort, whistleblowers may make a public disclosure, including directly to the media.

1.4.1. ***Internal channels***. All public sector entities and private sector companies with more than 50 employees must establish internal whistleblowing channels. For the companies with 250 and more employees, the deadline for establishing these channels is December 17th, 2021; for legal entities with between 50 and 249 employees, internal whistleblowing channels should be established by no later than December 17th, 2023. Private sector companies with fewer than 50 workers are not mandated to establish internal channels by the Directive; however, the Directive encourages member states to consider introducing such requirements in their national law. The 50-employees threshold also does not apply to industries where existing EU laws already require internal channels to be established, like in the financial sector. For public sector entities, member states may exempt municipalities with fewer than 10 000 inhabitants or fewer than 50 workers from the obligation to establish internal schemes.

Requirements for internal reporting procedures:

- Reporting channels may be operated internally by a person or department designated for that purpose or provided externally by a third party;
- Reporting schemes shall enable reporting in writing or orally, or both. Oral reporting shall be possible by telephone or through other voice messaging systems and, upon request by the reporting person, by means of a physical meeting within a reasonable timeframe.
- The procedures shall include: (a) channels for receiving the reports which preserve the confidentiality of the whistleblower's identity and prevent unauthorized access; (b) confirmation of receipt of the report to the reporting person within seven days;

[60] Ibid Rec. 47.

(c) the designation of an impartial person or department competent for following-up on the reports; (d) diligent follow-up by the designated person; (e) diligent follow-up, where provided for in national law, as regards anonymous reporting; (f) a reasonable timeframe to provide feedback within three months; (g) provision of clear and easily accessible information regarding the procedures for external reporting.[61]

1.4.2. ***External channels.*** Member States are required to designate and adequately equip the authorities competent to receive, give feedback and follow up on reports. The procedures for external reporting must include similar points to the internal procedures and ways to transmit in due time the information contained in the report to competent institutions, bodies, offices or agencies of the EU, as appropriate, for further investigation, where provided for under EU or national law on top.[62]
(2) Whistleblowers may make a report to the law enforcement agency or competent authority ("external reporting") following an internal reporting or directly without prior internal reporting.
(3) If the law enforcement agency or competent authority does also not take sufficient measures, the whistleblower may turn to the public("public disclosures").

1.4.3. ***Public disclosure.*** An individual who makes a public disclosure may qualify for protection under this Directive if any of the following conditions is met:
(a) the person first reported internally and externally, or directly externally, but no appropriate action was taken in response; or
(b) the person has reasonable grounds to believe that:
(i) the breach may constitute an imminent or manifest danger to the public interest, such as where there is an emergency situation or a risk of irreversible damage; or
(ii) in the case of external reporting, there is a risk of retaliation or there is a low prospect of the breach being effectively addressed, due to the particular circumstances of the case, such as those where evidence may be concealed or destroyed or where an authority may be in collusion with the perpetrator of the breach or involved in the breach.[63]

1.5. Protective measures. The Directive establishes the duty for member states to outlaw any type of whistleblower retaliation, including:

- suspension, lay-off, dismissal,
- demotion or withholding of promotion,
- transfer of duties, change of location of the place of work, reduction in wages, change in working hours,
- withholding of training,

[61] Ibid Art. 9.
[62] Ibid Art. 11.
[63] Ibid Art. 15.

- a negative performance assessment or employment reference,
- imposition or administering of any disciplinary measure, reprimand or other penalties, including a financial,
- coercion, intimidation, harassment or ostracism,
- discrimination, disadvantageous or unfair treatment,
- failure to convert a temporary employment contract into a permanent one, where the worker had legitimate expectations that he or she would be offered permanent employment,
- failure to renew, or early termination of, a temporary employment contract,
- harm, including to the person's reputation, particularly in social media, or financial loss, including loss of business and loss of income;
- blacklisting on the basis of a sector or industry-wide informal or formal agreement, which may entail that the person will not, in the future, find employment in the sector or industry;
- early termination or cancellation of a contract for goods or services;
- cancellation of a license or permit;
- psychiatric or medical referrals.[64]

Member states are required to introduce (a) measures of support to whistleblowers, including information, advice and assistance from competent authorities, and legal aid; (b) protections against retaliation, including the presumption of reprisal in proceedings relating to a detriment suffered by the reporting person, and shifting the burden of proving otherwise to the employer; and (c) penalties for natural or legal persons who hinder reporting, retaliate against whistleblowers, or breach the duty of the confidentiality.[65]

1.6. Final remarks. It is not yet clear how successful the Directive will be in encouraging whistleblowing and granting protection to those who report. The transpositions in the member states are still ongoing, and the approach to implementation that they will choose. To track the progress that the member states have made in implementing the Directive, click here.

2. Regulations in the member states

European countries thus far have considerably differing national frameworks on whistleblower protections. For a detailed overview of the up-to-date provisions on whistleblower protections in individual member states, please visit here and here. For the Transparency International Report on Whistleblowing in Europe as of 2019, follow this link.

The UK

[64] Ibid Art. 19.
[65] Ibid Art. 20-23.

1. Public Interest Disclosure Act of 1998

In the UK, whistleblower law stands in the form of a dedicated, uniform statute – The Public Interest Disclosure Act of 1998 (PIDA).[66] Employees who make "protected disclosures" under the PIDA can claim unfair dismissal if their contracts are terminated due to the disclosures. Additionally, they are protected from other detriments, such as a refusal to offer promotion, facilities or training opportunities. Workers who are not employees (for example, independent contractors and workers supplied through an agency) cannot make an unfair dismissal claim, but can claim that they have experienced detrimental treatment.[67] The UK has hundreds of cases each year brought under the PIDA.[68]

1.1. Material Scope: Qualified disclosures. The PIDA sweeps broadly in defining the disclosures that fall under protections. Any disclosure which, in the reasonable belief of the whistleblower, tends to show one or more of the following criteria, is being protected:

- that a criminal offence has been committed, is being committed or is likely to be committed,
- that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
- that a miscarriage of justice has occurred, is occurring or is likely to occur,
- that the health or safety of any individual has been, is being or is likely to be endangered,
- that the environment has been, is being or is likely to be damaged, or
- that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.[69]

It does not matter whether the wrongdoing occurred within or outside the UK, or whether non-UK law applies to it.

1.2. Personal scope. Whistleblower protections under the PIDA cover all public and private sector current and former employees, agency workers, trainees, contractors, suppliers and temporary employees. The PIDA does not simply use the definitions of "worker" and "employee" set forth by the Employment Rights Act, but sets up substantive criteria for falling within the scope of protection.[70]

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[66] Public Interest Disclosure Act 1998, c. 23. Available at: https://www.legislation.gov.uk/ukpga/1998/23/contents (Accessed: 21 May 2021).

[67] Erika Collins and Marjorie Culver, Rights and protections for whistleblowers (2006), online at: https://uk.practicallaw.thomsonreuters.com/2-203-2258?transitionType=Default&contextData=(sc.Default)&firstPage=true

[68] Are whistleblowing laws working? A global study of whistleblower protection litigation, Government Accountability Project and International Bar Association Legal Policy and Research Unit, online at https://cfe.ryerson.ca/sites/default/files/Are%20Whistleblowing%20laws%20working%20REPORT_02March21.pdf at 57.

[69] *Supra 66* Sec. 43B.

[70] Ibid Sec. 43K.

1.3. Disclosure addressee. In order to qualify for protection under the PIDA, disclosures need to be made in good faith to appropriate parties: (a) an employer or other responsible person (internal reporting), (b) a legal adviser, (c) a Minister of the Crown, or (d) a prescribed person.[71] Prescribed persons[72] are regulators and other bodies to whom a worker can make a protected disclosure instead of, or in addition to, their employer. The Prescribed Persons Regulations of 2017 imposed a new duty on all prescribed persons to produce an annual report on whistleblowing disclosures made to them by workers.[73]

In all other cases, a reporting qualifies under the PIDA protection if it meets the following criteria: (a) the worker makes the disclosure in good faith, (b) he reasonably believes that the information disclosed and any allegation contained in it are substantially true, (c) he does not make the disclosure for purposes of personal gain, (d) in all the circumstances of the case, it is reasonable for him to make the disclosure. Additionally, at least one of the conditions is present: (i) the worker reasonably believes that he will be subjected to a detriment by his employer if he uses internal reporting; (ii) he reasonably believes that it is likely that evidence relating to the wrongdoing will be concealed or destroyed if he makes a disclosure to his employer, or (iii) the worker has previously made a disclosure of substantially the same information to his employer or the prescribed person.[74]

The PIDA does not require an employer to enact a special procedure for handling whistleblowing complaints.

1.4. Protective measures and remedies. The PIDA declares the right of an employee who made a qualified disclosure not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done in reprisal. It is automatically unfair to dismiss an employee if the reason (or the principal reason) for the dismissal is that the employee made a protected disclosure or to select a whistleblower for dismissal in a redundancy situation.[75]

Remedies available to whistleblowers include interim relief (if an employee claims that their dismissal is automatically unfair) and compensatory award (including reinstating the whistleblower). Failure to comply with the reinstatement court order may result in a higher additional award of between 26 and 52 weeks' pay.[76]

There is, however, no reversal of the burden of proof from the whistleblower to the employer.[77]

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[71] Ibid Sec. 43C-43F.
[72] Whistleblowing: list of prescribed people and bodies (2020), online at: https://www.gov.uk/government/publications/blowing-the-whistle-list-of-prescribed-people-and-bodies--2
[73] Whistleblowing in the UK (2018), online at: https://www.simmons-simmons.com/en/publications/ck0d9iyqgmncs0b59s7dtwxr0/24-whistleblowing-in-the-uk
[74] *Supra 66* Sec. 43G.
[75] *Supra 73.*
[76] Ibid.
[77] *Supra 68* at 59.

2. The United Kingdom Accountability and Whistleblowing Instrument of 2015

In 2015 the Financial Conduct Authority (FCA), the UK regulator for financial services firms and financial markets, established Accountability and Whistleblowing Instrument.[78] The Instrument went into effect in 2016, introducing a robust regime of whistleblower protections in the financial sector. According to this regulation, covered firms must establish, implement and maintain appropriate and effective arrangements for disclosing reportable concerns by whistleblowers. Internal reporting schemes need to be able to handle confidential disclosures made through a range of communication methods. Arrangements should ensure the effective assessment and escalation of reportable and guarantee that "no person under the control of the firm engages in victimization of that whistleblower."[79]

Further, the Instrument requires firms to set up internal reports on the effectiveness of whistleblowing system and reports to the FCA about each case the firm contested but lost before an employment tribunal where the claimant successfully based all or part of their claim on either detriment suffered as a result of making a protected disclosure or being unfairly dismissed.[80] Firms are also obligated to develop training programs on whistleblowing for the management, UK-based employees, and employees responsible for operating the firm's whistleblowing arrangements.[81]

Moreover, firms are obligated to appoint a "whistleblowers' champion," who bears responsibility for "ensuring and overseeing the integrity, independence and effectiveness of the firm's policies and procedures on whistleblowing ... including those policies and procedures intended to protect whistleblowers from being victimized because they have disclosed reportable concerns." To enable whistleblowers' champions to perform effectively, firms must provide them with the requisite authority, independence, access to resources, and sufficient information to execute their duties.[82]

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[78] Accountability and Whistleblowing Instrument 2015, FCA, online at: https://www.handbook.fca.org.uk/instrument/2015/FCA_2015_46.pdf

[79] Ibid at 7.

[80] Ibid at 8.

[81] Ibid at 9.

[82] Lynne Bernabei & Kristen Sinisi, U.K. - Whistleblower Protections in the UK (2018), American Bar Association, online at: https://www.americanbar.org/groups/labor_law/publications/ilelc_newsletters/issue-june-2018/uk-whistleblower-protections/