World Whistleblowers Day: five practical steps employers can take to support whistleblowers

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World Whistleblowers Day (23 June 2021) looked at how best to support the mental wellbeing of whistleblowers. What can employers do to empower staff to speak up about malpractice and protect whistleblowers from reprisals? We round up five actions that employers can take to support whistleblowers within their business.

1. **Encourage the reporting of malpractice**

Legal protection for whistleblowers is not as far reaching as many employers believe. Only "workers" and "employees" are covered, meaning that some groups such as job applicants, interns and self-employed contractors are unprotected. Furthermore, protection is only available where the disclosure concerns one of the specified types of malpractice listed in the legislation. While it is down to the Government to close these gaps and extend legal protection, employers have an important role to play in encouraging everyone to report all forms of malpractice, regardless of the legal position.

Some sectors have already been leading the way. In September 2016, the financial services sector introduced its own whistleblowing rules which extend to all whistleblowers, not just those protected by law. Under the rules, a "whistleblower" is defined as someone who discloses a "reportable concern", which, in turn, means "any concern" about the activities of the firm.

A company statement that all reports of wrongdoing will be reviewed and, where appropriate, investigated, and that all whistleblowers will be protected by the company, should provide reassurance to those considering blowing the whistle and ensure that wrongdoing comes to light.

2. **Establish whistleblowing arrangements and communicate them to staff**

Outside of certain sectors, there is currently no requirement for employers to establish whistleblowing reporting channels and communicate these to the workforce through a whistleblowing policy. Firms regulated by the FCA or PRA are obliged to implement internal arrangements which, among other things, require the firm to:

- respect the confidentiality of whistleblowers and permit anonymous disclosures;
- permit disclosures to be made through a range of communication methods;
- ensure the effective assessment and escalation of concerns within the firm and to the regulator;
- providing appropriate feedback to whistleblowers; and
- prepare and maintain written whistleblowing procedures that are readily available to staff.

After two years in place, a review of this framework found that the rules helped firms to implement effective whistleblowing arrangements and manage disclosures fairly and consistently, while also protecting whistleblowers from reprisals.

Lessons can be learnt from this: a clear approach communicated to staff is the best way for employers to manage whistleblowing disclosures consistently and support the whistleblower. Indeed, the Government's guidance on whistleblowing also recommends that employers adopt whistleblowing policies, noting that: "By having clear policies and procedures for dealing with whistleblowing, an organisation demonstrates that it welcomes information being brought to the attention of management." The guidance includes a helpful checklist of what such policies should include.

From 17 December 2021, the EU Directive on Whistleblowing will require employers with 50 or more employees based in EU member states to have internal whistleblowing procedures which offer

a range of reporting mechanisms. The UK Government has not indicated whether legislation will be brought in to align with the new Directive, but this is an area to watch.

3. **Appoint a whistleblowers' champion**

Allocating overall responsibility for internal whistleblowing arrangements to a senior person is a sensible step for employers. Not only does it show senior "buy in" to the arrangements, it provides staff with an identifiable point of contact with whom to raise concerns in appropriate cases.

Firms in the financial services sector are obliged to appoint a non-executive director into this role – dubbed the "whistleblowers' champion". The whistleblowers' champion oversees the integrity, independence and effectiveness of the firm's whistleblowing arrangements. Further, the whistleblowers' champion must have access to resources, including independent legal advice and training, to enable her/him to carry out that role, although s/he is not expected to have a day-to-day operational role handling disclosures.

4. **Train staff about whistleblowing**

There is evidence that the percentage of whistleblowers with under two years' service has dropped in recent years, with the figure falling from 44% in 2015 to 39% in 2018. This downward trend could suggest that firms are not doing enough to empower new joiners to voice concerns. One way to improve this would be through targeted training.

Yet there is no general requirement for employers to train staff about whistleblowing (although the Government guidance does recommend that such training is delivered). Although it is not yet clear whether the UK will align, the EU Directive on Whistleblowing will require employers to whom it applies to provide whistleblowing training to staff.

There have been calls for mandatory training to educate staff

about whistleblowing, similar to the requirements in the financial services sector. The FCA and PRA rules already require tailored training to be delivered to:

- all UK-based employees;
- managers of UK-based employees (wherever they are based); and
- all employees who are responsible for operating the internal arrangements (wherever they are based); and
- the "whistleblowers' champion".

All employers would benefit from providing this kind of tailored training to staff. It will help junior staff understand how to raise concerns and ensure that managers and HR teams know when an issue could amount to both a personal grievance and a wider whistleblowing concern. This is particularly important given that there is evidence that employees are increasingly likely to view discrimination and harassment as a whistleblowing issue.

Importantly, training will also help employers defend claims that they are vicariously liable for acts of victimisation by co-workers. Employers may have a defence to such claims where they can demonstrate they have taken "reasonable steps" to prevent such treatment. Such steps will include things like having a well-communicated policy and delivering training to staff. However, as was made clear in a recent case, for employers to be able to rely on this defence, such training needs to be "thoughtful and forcefully presented", rather than "brief and superficial".

5. **Proactively protect whistleblowers from victimisation**

Victimisation is still a major problem for whistleblowers. Protect's Silence in the City 2 Report revealed that 35% of whistleblowers reported having been victimised by managers or co-workers. The All-Party Parliamentary Group for Whistleblowing also reported that more whistleblowers are

going off sick than ever before (39% in 2018, up from 24% in 2015).

There are steps employers can take to combat victimisation. Indeed, some financial services firms have adopted particularly good practices in this area, such as monitoring employment records for 12 to 18 months after a concern had been investigated to check whether the whistleblower had been victimised.

Employers should devise a strategy addressing how they will protect whistleblowers from victimisation. This could cover "front end" steps such as well-publicised procedures and firm-wide training, to "back end" steps such as having regular follow-ups with the whistleblower for a period after they have blown the whistle and disciplining perpetrators of victimisation. As well as tackling victimisation head on, this strategy should have the added benefit of helping the employer establish the reasonable steps defence in a vicarious liability claim.

If you would like to discuss how BDBF can help your business implement an effective whistleblowing strategy please contact Amanda Steadman (amandasteadman@bdbf.co.uk) or your usual BDBF contact.

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