Protected Disclosures – an overview of the proposed EU whistle-blower legislation

Speedread

In 2014 Ireland took the lead in whistle-blower protection with the introduction of its Protected Disclosures Act 2014 (the **Act**). This was tipped by many commentators at the time to be the strongest whistleblowing protection in Europe. The Act not only consolidated Ireland's previous piecemeal legislative approach it actively promoted a cultural shift towards encouraging employee whistle-blowers by offering significant protections.

Fast forward to 2019 and the European Parliament is following suit with its adoption of a new European Union Directive on the Protection of Persons Reporting on Breaches of Union law (the **Directive**). We explore below how this Directive will sit alongside Ireland's existing whistleblowing legislation and consider what key changes (if any) may be on the horizon for employers in Ireland?

What is the current legal position?

The Act defines a 'protected disclosure' as the disclosure by a 'worker' of 'relevant information' which tends to show a 'relevant wrongdoing' connected to the workplace. The Act defines relevant wrongdoing as:

- the commission or likely commission of an offence
- endangering of health and safety
- misuse of public money
- damage to the environment

The Act has teeth and employees who make a protected disclosure enjoy important protections from retaliation. Significantly, where an employee can connect the dots between their dismissal and making a protected disclosure, that employee can seek interim relief from the Circuit Court The court can order the employer to continue paying the dismissed employee's salary pending the hearing of the employee's unfair dismissal case before the Workplace Relations Commission (**WRC**). A hearing before the WRC can take several months. Further protections are bestowed on whistleblowing employees. This can include compensation awards by the WRC of up to five years' remuneration. This is significantly higher than the two year maximum provided for under Unfair Dismissals legislation.

The Act originally provided that the worker's motivation for making any protected disclosure is irrelevant. An amendment to the Act in 2018 protecting the disclosure of trade secrets diluted the level of protection afforded to whistle-blowers in specified circumstances. Where a whistle-blower wants to reveal a trade secret, as defined within the EU (Protection of Trade Secrets) Regulations 2018, they have a duty to demonstrate that doing so is in the public interest.

What's new in the Directive?

Ireland's whistle-blowing legislation ranks among the strongest level of whistle-blower protection in the EU. The majority of the key provisions of the Directive, for example stepped/tiered reporting and anti-retaliation, are already well established in Ireland and will need no introduction to Irish employers.

However, some notable changes proposed are:

- The Directive expands the ambit of relevant wrongdoings by encompassing breaches of EU law, money-laundering, corporate tax laws, food, product and transport safety, environmental protection, public procurement, data protection, consumer protection, nuclear safety and public health.
- It widens the definition of whistle-blower to encompass 'legal persons' as well as natural persons. The Directive provides for a very wide personal scope, covering the following workers: self-employed, company shareholders, non-executive directors, volunteers and unpaid trainees/interns.
- The Directive extends the requirement to have a whistle-blowing policy and procedure to certain private sector employers. The Act requires public sector employers to have a whistle-blowing policy in place, but not private sector employers. The Directive extends this requirement to:
    - all entities operating in financial services or vulnerable to money laundering
    - private entities with more than 50 employees
    - private entities with an annual turnover or balance sheet of €10m or more
- It also requires reporting channels to ensure the confidentiality of the whistle-blower's identity and to ensure that reports are followed up within three months. The Directive omits any of the exceptions provided for in relation to anonymity currently allowed by Ireland's Act.

What should you be doing?

The era of whistle-blowing is now well-established. Examples of whistle-blowing in operation are never far from the front pages of the media. Ranging from Mark Felt ("Watergate") to Edward Snowden, the concept of whistle-blowing is embedded in today's culture. One European Parliament rapporteur, Virginie Roziere (S&D, FR) commented:

"*Recent scandals such as LuxLeaks, Panama Papers and Football leaks have helped to shine a light on the great precariousness that whistle-blowers suffer today….Parliament has come together to send a strong signal that it has heard the concerns of its citizens and pushed for robust rules guaranteeing their safety and that of those persons who choose to speak out*".

With more scope than ever before to "blow the whistle" in a public manner via social media, the advantages of putting in place clear internal reporting structures are clear. As Ireland is already blazing the trail when it comes to whistle-blower protection, the introduction of this new EU Directive is unlikely to have the same impact in Ireland as it may in other EU member states. However, employers should get their houses in order by ensuring they have a robust whistleblowing policy in place that clearly identifies the correct internal channels to follow when making a protected disclosure.