HERBERT SMITH FREEHILLS

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GLOBAL GUIDE TO WHISTLEBLOWING

LEGAL GUIDE
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WHISTLEBLOWING LAWS, CULTURE AND POLICIES:

A GLOBAL GUIDE FOR PRIVATE SECTOR EMPLOYERS

Snitch, rat, nark, sneak, leak, grass, squealer, weasel. Stay schtum, hold the blue wall, keep mum, button it, take the oath of omertà. Deep Throat, Ellberg, Serpico, Silkwood, Bukovsky, Manning, Snowden.

Whether it's in the playground, the workplace or the upper echelons of government, to the teacher, the boss or the chief of police, we can all acknowledge some degree of ambivalence about the idea of being under a duty to report on other people's misconduct. Just because we can admire the self-regulatory honesty of sports such as golf doesn't mean we can't also enjoy acts of simulation and skull-duggery on, say, the football pitch. From our seat in the stands, when we are neither doer nor done-to, it is all too-tempting to remain uninvolved as a bystander than take sides as a witness.

So whenever we admire those who have risked their own careers (and sometimes lives) to expose corrupt and illegal acts perpetrated by their government, military, employer or associates, we may also shrink from asking ourselves what we might do in similar circumstances. For some of us, it may also stir up painful associations with our country's past in times of war, foreign occupation or dictatorship. While appreciating the courage required from individuals who 'speak up', we may also find in their actions troubling connotations of the self-righteous, self-serving, covert informant. Whatever our leanings, the truth of the matter is probably that whistleblowing is never a straightforward business.

This is principally because the boundaries between right and wrong, between public and personal interest, between public hero and corporate traitor, are rarely clear cut. It is easy to condemn employees who steal confidential information or damage their employer's business but it is much harder to delineate the public interest boundary where such wrongs start to become righteous.

The whistleblower protection regimes in the 40 countries outlined in our guide all attempt to mark out those boundaries. They do so in different ways and to different degrees because the contexts in which they operate are everywhere different. This includes:

- the (perceived) need for specific legislation: greater in those countries where general employment law permits dismissal at will or provides limited remedies for unfair dismissal; and perhaps smaller where dismissal is permitted only for a narrow range of reasons.
- the approach to legislation – either principles-based, involving enactment of a single law applying to all sectors and situations, or applications-based, involving enactment of a series of laws applying only to specific types of wrongdoing and specific sectors.
- the differing objectives of the legislation – from incentivising employees to report corporate corruption on the one hand to discouraging external reporting to the media or police before internal reporting has been pursued on the other.
- the impact of complementary legislative regimes, such as anti-corruption and corporate ethics laws, data protection regulations and constitutional protections for individual freedoms and human rights.

Of course the law is but one of the influences determining whether employees will choose to speak up. Protection in theory may not amount to much at all in practice where local judges retain a broad discretion to decide where the balance of justice lies, and where remedies are limited or slow to obtain. The same is true where powerful trade unions hold sway and can, in effect, render corporate policy toothless.

Most of all, the safety of speaking up requires employees to make an assessment of their company's culture and values – not what it says in the brochure but what actually goes on in practice. To some or other degree, every business has to make progress, meet deadlines and reach agreements, and the cost of doing so is the occasional grubby compromise, fudged principle and cut corner. In the same way, every employee has to get on with his colleagues, and the price of doing so is to give and take, suppress disapproving thoughts, grit teeth and turn blind eyes. Yet neither we nor our employers can be bystanders for everything; we must be able to recognise what crosses a line.

So the true positioning of corporate boundaries, at local level, is what will determine, as much as any law or policy edict, what comes to be seen as acceptable business practice and, therefore, how safe it may feel for employees to draw attention to practices that are not.

The upshot of this is that multi-national businesses wishing to adopt a 'one-size-fits-all' approach for all jurisdictions are best advised to think again. A bespoke local approach is needed because the differences from country to country extend not just to the scope, intent and context of the legal frameworks but also to the way they are followed in practice. It is relatively easy to see a global common ground for whistleblowing on malfeasances such as major financial fraud, test-rigging, market-rigging, environmental damage and health & safety violations but a consistent position becomes much more difficult to find as the infractions become more minor.

In other ways, too, a one-size-fits-all approach will not fit all. Any policy, code or procedure, anywhere in the world, will only work if it is trusted by those who are expected to use it. Whistleblowers fearing reprisals may distrust 'guarantees' of confidentiality, making the option to report anonymously essential. Indeed,

systems for anonymous reporting must be permitted by some companies, such as those subject to the US Sarbanes-Oxley Act. Yet in parts of Europe, this option has been viewed as detrimental to co-workers, allowing false or malicious allegations to be made with impunity and making proper investigation difficult. As a result, data protection laws place limits on the scope and type of reporting systems permitted and, in some cases require prior approval by national authorities. Companies operating within the EU, or with employees based there and accessing anonymous hotlines overseas, will need detailed local advice to tailor their systems and follow the proper processes.

All of this makes the ambition of this guide – to provide a readily comparable summary of the legal framework for employee whistleblower protection and employer policies in each of 40 countries and with a level of detail that does justice to the complexity and difference of each country's legal system – a daunting task. Each section could be double or half the length that it is, but we have tried to strike a balance and included contact details for every country so that you can always come back for more. Of course, we will be delighted if you do, and to hear any suggestions you have for improving it so that we can hold them in mind when it's time for the second edition.

It goes without saying that this guide is not a substitute for legal advice nor is it a tome that must be read from start to finish. It is a resource for you to dip into at any point, and we very much hope it has the information that you need.

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