A study by DLA Piper's Employment Group

WHISTLEBLOWING

An employer's guide to global compliance

DLA PIPER

CONTENTS

FOREWORD

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The high profile media attention which whistleblowing has attracted across the world in recent months has underlined its relevance to all organizations. Aside from stories about Edward Snowden and Bradley Manning, a glance at recent press reports reveals that reports made by whistleblowers of alleged wrongdoing have, for example, led to the Chinese authorities taking a close interest in multi-national businesses. On the other side of the Pacific, the US Securities and Exchange Commission has recently made its highest ever award of more than US$14 million to a whistleblower.

Every business and every public body risks inadequate systems or corruption leading to dangerous or criminal behavior. Where such risks arise, usually the first people to suspect will be those who work in, or with, the organization. Whistleblowers have consequently been instrumental in revealing serious corruption and fraud in organizations and preventing mistakes from leading to disasters. However, employers face a delicate balancing act in responding to the potential for whistleblowing in their organization.

Over 30 countries have now adopted some form of specific whistleblower protection, and countries including Denmark are proposing to introduce protection in the near future, but legal protection for whistleblowers varies significantly in its scope and effect. Regulated industries in certain sectors may face additional layers of legislation. In this report we have selected a representative sample of countries across the globe to highlight the variations in whistleblower protection and the challenges which this presents to global employers seeking to minimize the risks to their business. In **The Legislative Framework: Whistleblower protections across the globe** we provide a summary of the key legislative provisions regulating whistleblowing in the selected countries. In **Global differences: The cultural context** we examine the reasons for some of the key differences between the legal regimes. In **Whistleblowing hotlines** we explore the restrictions placed by many jurisdictions on the use of US-style corporate compliance hotlines. Finally, in **Implementing a global approach** we look at how the global differences give rise to challenges for multi-national employers in implementing effective whistleblowing policies and procedures and provide some checklists to assist employers in dealing with those challenges.

The key theme emerging from our report is that global employers need to take a global approach to manage whistleblowing effectively. Multi-national companies need to be aware of the sharp contrasts in culture between jurisdictions so that they can tailor their approach to whistleblowing to meet the demands of their global business. The cultural differences are often embedded in history meaning that imposing universal policies and procedures is unlikely to succeed in effective management of the issue. Investing in a bespoke approach will reap many rewards, not least enabling businesses to be aware of concerns at the earliest opportunity so that malpractices can be addressed in the most appropriate way. It will also help to ensure the workforce stays onside and works towards a common goal of building the business for the future.

A SUMMARY ACROSS FIVE CONTINENTS

WHISTLEBLOWER PROTECTION REGIMES

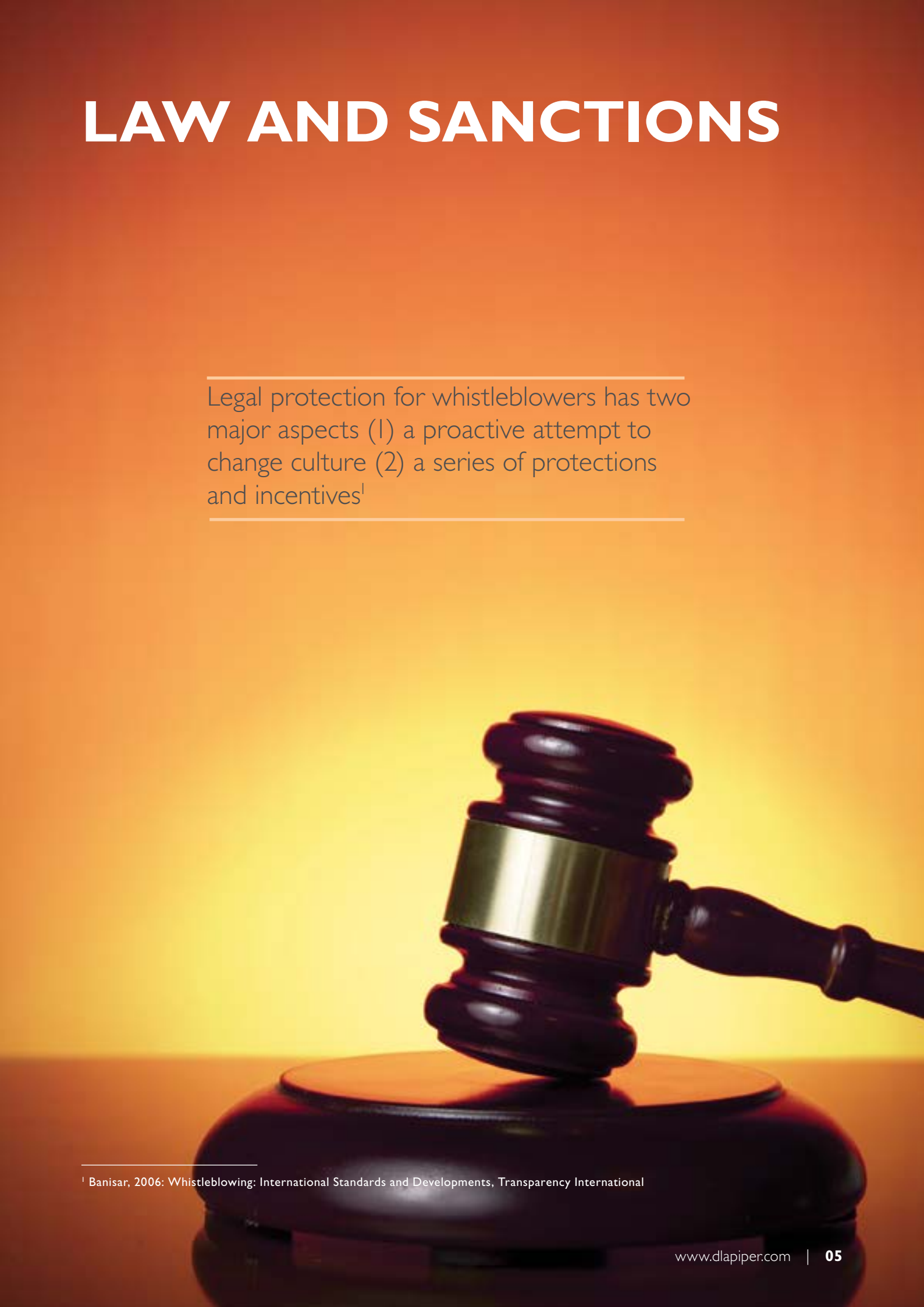
Little or no protection ★ Some protection through general laws ★★ Express protection ★★★

	US	UK	Germany	France	Netherlands*	Hong Kong	Japan	China	Australia*	South Africa
Overall protection rating	★★★	★★★	★★	★★	★★	★	★★★	★★★	★★	★★★
Express laws	✓	✓	X	X	X	X	✓	✓	✓	✓
General dismissal laws	X	✓	✓	✓	✓	✓	✓	✓	✓	✓
Protection against retaliation	✓	✓	✓	✓	X	✓	✓	✓	✓	✓
External reporting encouraged	✓	X	X	X	X	X	X	✓	✓	X
Internal reporting encouraged	✓	✓	✓	X	X	X	X	X	✓	✓
Consultation on whistleblowing procedures required	X	X	✓	✓	X	X	X	X	X	X
Board/ management investigation of disclosures required	✓	X	X	X	X	X	✓	X	X	X
Government/ regulatory incentives to disclose	✓	X	X	X	X	X	X	✓	X	X

* Jurisdictions where new whistleblowing laws have been proposed.

LAW AND SANCTIONS

Legal protection for whistleblowers has two major aspects (1) a proactive attempt to change culture (2) a series of protections and incentives[1]



[1] Banisar, 2006: Whistleblowing: International Standards and Developments, Transparency International

STRIKING A BALANCE

The reporting of wrongdoing discovered in the workplace is a complex area in which there is a delicate balance to be struck between a variety of competing interests.

Whistleblowing has an important role to play in society as a means of reducing corruption and fraud and preventing mistakes leading to disasters. These were the triggers for legislation in, for example, the US and the UK. In the US, the main driver was a series of well-publicized instances of corporate misconduct whilst in the UK important catalysts included public inquiries into a series of corporate collapses and public disasters, including the collapse of the BCCI bank and the sinking of the Herald of Free Enterprise. A recent report by the European Environment Agency "Late Lessons from Early Warnings" highlights the vital role played by whistleblowing scientists who raised the alarm about potential harm to public health from emerging technologies.

However, balanced against this is the need for employers not to have business interests hampered by malicious or unfounded allegations or by the risk of confidential business information being disclosed unnecessarily to competitors, regulators or the press.

At an individual level, wrongdoing at work presents a serious dilemma to the employee who discovers it. Employees are often the first to find out, or suspect, that something is wrong, but any prospective whistleblower will, of course, pause to weigh the personal risks against the public interest in raising the alarm. Retaliation could ultimately result in the whistleblower losing their livelihood and there is often little to be gained personally from blowing the whistle.

A new law proposed in the Netherlands is in reaction to recognition of the harm which can be caused by inadequate protection for whistleblowers. Dutch whistleblowers have reported fraud and misconduct in a variety of workplaces including safety issues at nuclear power plants, misconduct at employment reintegration companies, fraud and price-fixing schemes in the construction industry and substandard grenades being supplied to the military, and have encountered damaging retaliation as a result. **Hélène Bogaard, from our Netherlands practice comments,**

> The retaliation that whistleblowers have suffered has caused individuals psychological problems and financial hardship due to dismissal and long-lasting legal proceedings against the government or companies. In a few cases whistleblowers have received financial compensation for the damage suffered. However, in most cases the social problem was tackled, while the whistleblowers were abandoned to their fate.

Individuals are more likely to speak out, however, if they can be confident that their report will be acted on, that they will be protected against retaliation and that their employer is serious about weeding out corruption and mismanagement.

Governments and organizations around the globe are increasingly accepting the crucial role of whistleblowing in uncovering and deterring secret or unaddressed wrongdoing and in increasing accountability and strengthening the fight against corruption and mismanagement. A number of jurisdictions are taking action to strengthen the legal protection for whistleblowers, including the Netherlands and the Republic of Ireland. The potential benefits for society at large are clear, but whistleblowing can also be a means of improving the internal organizational culture of operations in both the public and private sector.

However, different jurisdictions have taken different approaches to striking the balance between competing interests and, as a result, legal protection for whistleblowers varies widely around the world. Although many countries have now adopted some form of specific whistleblower protection, such protection varies considerably in scope and effect and there are significant

differences not only between, but also within, continents. In many countries, whistleblower protection is high up on the legal and political agenda; while in others there has yet to be any express approach. What is clear, however, is that, where legal protection exists, it has two major aspects (1) a proactive part which attempts to change the culture of organizations by making it acceptable to come forward, facilitating the disclosure of information on negative activities in the organization such as corrupt practices and mismanagement, and (2) a second aspect consisting of a series of protections and incentives for people to come forward without fear of being sanctioned for their disclosures.

Japan, China, the UK and the US have comprehensive protection whereas, for now, in Australia, for example, the existence of express federal laws protecting whistleblowers is limited. Similarly, in the UAE there is little express protection for whistleblowers. Whilst the UAE Labor Law provides that an employee will be deemed to have been arbitrarily dismissed if that employee's employment is terminated due to them having "submitted a serious complaint to the competent authorities", the protection is limited to an arbitrary dismissal claim which only attracts a maximum of three months' compensation. Further, it is unclear what sort of complaints would constitute a "serious complaint" and to whom such a complaint would need to be made. In addition, this particular "protection" has not been tested in the Labor courts. **Neil Crossley, from our UAE practice comments,**

> Overall, there is no free-standing statutory protection for whistleblowers in the UAE where there has been no dismissal. However, multinational companies operating in the region with links to the UK or the US are likely to have their own internal procedures arising out of overseas legislation and their own internal requirements to follow such procedures will help to prevent employers from simply ignoring grievances raised by employees.

In France, Germany, the Netherlands and Hong Kong there are, at present, no express whistleblowing laws and to gain protection in these jurisdictions a whistleblower has to rely on piecemeal rights found in, for example, employment, anti-corruption and criminal laws.

In Europe, the UK leads the way with extensive protection for whistleblowers. The UK whistleblowing legal regime is widely regarded as one of the most comprehensive in the world. Protection was first introduced in 1998 and reforms were introduced in 2013 to clarify the protection. Whistleblowing remains high on the UK Government's agenda with further proposals for reform being explored through a Call for Evidence throughout 2013. **Tom Kerr Williams, from our UK practice comments,**

> Although the UK legislative scheme is held up as providing good protection to whistleblowers, and has been adopted by several other countries, it was recently declared as 'not being fit for purpose' by the UK Government resulting in significant changes earlier this year, with further changes under consideration.

In contrast to the UK, in the other European countries considered in our report, express whistleblowing protection has yet to be introduced. France and Germany share common ground in their lack of specific whistleblowing legislation. A German bill on protection

of whistleblowers was rejected by Parliament. However, in both countries, laws which protect employees from dismissal without cause do offer whistleblowers some general protection. In France, protection is also derived from data protection laws.

Express legislative protection for whistleblowers has been proposed in the Netherlands; a legislative proposal was submitted in May 2012. **Hélène Bogaard, partner, Amsterdam comments,**

> Recent whistleblowers have suffered psychological and financial damage. This has led to a situation where people have become reluctant to disclose wrongdoing. This legislative proposal aims to improve the conditions for whistleblowing by allowing abuses to be investigated, while whistleblowers are better protected.

Although it may eventually come into being, movement towards a Europe wide approach to whistleblowing is extremely slow. In 2010, the Parliamentary Assembly of the Council of Europe passed a resolution on the protection of whistleblowers and in December 2012 a study on the feasibility of a European legal instrument on the protection of whistleblowers, which had been commissioned by the Council of Europe, was published. Work has now begun on a preliminary draft legal instrument but it is likely to be many years before this is passed into European law and then implemented within each member state.

The Asia Pacific region follows a similar pattern to Europe with some countries engaging fully with whistleblower protection, while other countries have yet to follow suit. Japan and China are at the forefront of whistleblower protection in the region with express legislative provisions outlawing detrimental treatment of workers who blow the whistle. Hong Kong, however, does not offer any statutory protection. According to **Pattie Walsh, from our Asia practice,**

> The Hong Kong market prides itself on anti-corruption and good governance in all respects so perhaps this will change in the future.

In Australia, protection is available, but only through a series of general laws. **Andrew Ball, from our Australia practice says,**

> Whilst the most recent legislative protection for whistleblowers under the Public Interest Disclosure Act 2013 provides a comprehensive protection regime, this applies to the Commonwealth public sector only. Those in the private sector are only afforded protection in a piecemeal fashion under a variety of different laws.

The US offers comprehensive protection of whistleblowers. Here, perhaps more than anywhere else in the world, there is a robust approach incorporating a positive attitude to reporting together with anonymity for those blowing the whistle. Employers are required to comprehensively investigate reported malpractices and the government may implement draconian sanctions against the wrongdoer. **Michael J. Sheehan, from our US practice comments,**

> The United States has a long history of protecting employees who report safety or health hazards from discrimination or retaliation. Whistleblower protections for employees in the financial sector began with the Corporate and Criminal Fraud Accountability Act 2002 (Sarbanes-Oxley) as part of the government's effort to prevent further corporate and accounting scandals like those at Enron and WorldCom, and similar whistleblower protections now are being included in most major US legislation, like the Wall Street Reform and Consumer Protection Act 2010 (Dodd-Frank) and the Affordable Care Act.

South Africa leads the way, by offering progressive and extensive protection for whistleblowers. However, internal disclosure of corporate misconduct must be made before protection for external disclosures may be claimed, except in limited circumstances. This is to afford the business an opportunity to correct corporate misconduct before external disclosures may follow. To the extent that a whistleblower's disclosure is not made internally first, or not based on a reasonable belief in the veracity of the disclosure, statutory protections will be forfeited. However, the benchmark to qualify for whistleblowing protection is set fairly low, to allow for protection even if the whistleblower may not have irrefutable proof of the truth of the disclosure.

In this section we set out below a round-up of the legislative framework of whistleblower protections across the world's major continents.

THE LEGISLATIVE FRAMEWORK: WHISTLEBLOWER PROTECTIONS ACROSS THE GLOBE

AUSTRALIA ★★

> Whistleblowing laws in Australia are piecemeal; they feature in various legislation and for distinct purposes.

Andrew Ball

LEGISLATIVE PROTECTION

In Australia, there is no single piece of legislation which prevents employers dismissing or taking other detrimental action against whistleblowers. However, whistleblowers do achieve a reasonable level of protection through a range of statutes which apply in different situations. The main provisions are found in:

- The **Corporations Act 2001** which includes provisions which protect company officers, employees and contractors who make good faith disclosures about breaches of corporations legislation
- **Occupational Health and Safety Acts** in each jurisdiction which prohibit retaliatory action against employees who raise issues or concerns about workplace safety
- The Commonwealth **Public Interest Disclosure Act 2013** which sets out procedures for making disclosures about wrongdoing and maladministration in the Commonwealth public sector and provides protection for people who make disclosures from reprisals in the workplace and against legal liability
- State and Territory legislation (variously called **Protected Disclosure Act, Public Interest Disclosure Act** or **Whistleblower Protection Act**) which sets out procedures for making protected disclosures about misconduct and maladministration affecting the State public sector and provides protection for persons who make such disclosures from reprisals in the workplace and against legal liability
- The **Fair Work Act 2009** (Cth) which protects employees from retaliation by employers if they have exercised a "workplace right" (including making a complaint or inquiry in relation to their employment) and the **Fair Work (Registered Organizations) Act 2009 (Cth)**, which protects union members, employees and officers from retaliation, civil and criminal liability, and defamation in relation to disclosures of breaches of either Act.

The Corporations Act is generally the most frequently used piece of legislation in relation to whistleblowing in the private sector.

PROTECTED WHISTLEBLOWERS

Under the Corporations Act, a person is protected as a whistleblower if they are:

- an officer of a company
- an employee of a company
- a person who has a contract for the supply of services or goods to a company
- an employee of a person who has a contract for the supply of services or goods to a company.

PROTECTED DISCLOSURES

The Corporations Act prohibits retaliation against a protected person connected to a company (including an employee) where they, acting in good faith, disclose information about a contravention of the corporations legislation by the company itself, or one of its officers or employees. The corporations legislation includes the Corporations Act, the Australian Securities and Investments Commission Act 2001, rules of court made by the Federal Court because of a provision of the Corporations Act and rules of court applied by State Supreme Courts when exercising jurisdiction conferred by the Corporations Act. The disclosure must be made to the Australian Securities and Investments Commission, the company's auditors or officers, or another such person authorised by the company to receive such disclosures.

Under the Corporations Act, if a person makes a disclosure that qualifies for protection:

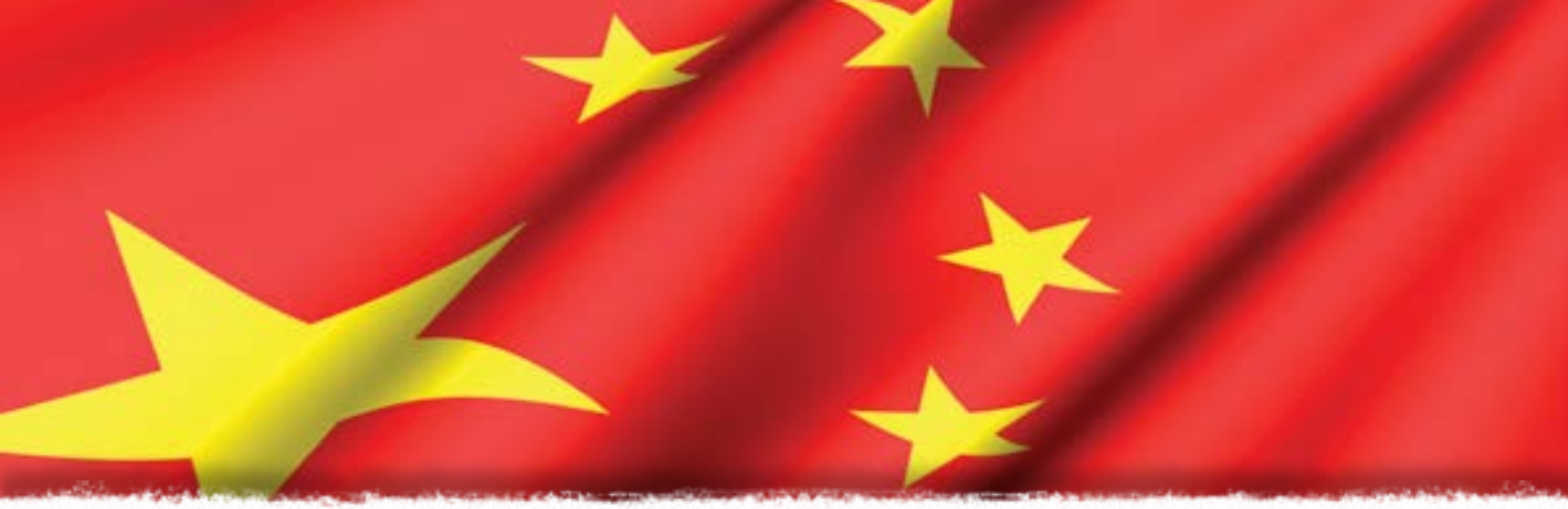
- the person is not subject to any civil or criminal liability for making the disclosure
- no contractual or other remedy may be enforced, and no contractual or other right may be exercised, against the person on the basis of the disclosure.

LIABILITY FOR RETALIATION BY CO-WORKERS

The Corporations Act makes victimisation of whistleblowers who report breaches of corporations legislation a crime, and provides criminal sanctions against an entity or individual who takes reprisal action against whistleblowers, including individuals.

SANCTIONS

Under the Corporations Act if an employee is victimised for making a disclosure, the entity or individual who contravenes the corporations legislation may face penalties and be ordered to pay compensation.



CHINA ★★★

> China has realized the important role whistleblower protection plays in the fight against corporate fraud and corruption.
>
> **Pattie Walsh**

LEGISLATIVE PROTECTION

In China, there is specific legislative protection for whistleblowers. This is contained in the Regulation on Labor Security Supervision (the Regulation) and Criminal Procedure Law of the PRC.

The Regulation provides that any organization or individual is entitled to report to the Labor Security Administrative Department (the Department) of the local labor bureau any act which breaches the laws, regulations and decrees. An employee who believes that his/her legal rights in connection with labor security are infringed by the employer has a right to file a complaint to the Department. The Department must keep this confidential for the whistleblower and even reward him/her where major evidence of a material breach proves to be authentic.

The Regulation provides protection from an employer retaliating against a whistleblowing employee. In cases of retaliation, the Department will require the employer to take rectification action but there are no fines or other administrative penalties. Further, pursuant to China labor laws, any dismissal must be based on legal grounds. Any termination of employment without legal grounds is considered illegal and the employer must compensate the employee and reinstate their employment.

Compared with the Regulation, which only addresses illegal acts in the work domain, the Criminal Procedure Law of the PRC encourages individuals to blow the whistle in relation to the fact of any crime or any suspected criminal to a public security bureau or a people's court. At the same time, to prevent false accusations, an official will notify the complainant or informant about the potential liability which exists where a false accusation is made.

In addition, the Basic Standard of Enterprise Internal Control applies to listed companies. This stipulates that an enterprise is required to establish whistleblowing and whistleblower protection mechanisms, set up a whistleblowing hotline and specify whistleblowing handling procedures, time limits and requirements.

PROTECTED WHISTLEBLOWERS

The Regulation encourages any individual or organization to report violations but is mainly aimed at protecting employees who work for an employer. The PRC Criminal Procedure Law entitles anyone or any unit to file a complaint about the fact of any crime or suspects of any nature, including workers, employees and ex-employees.

PROTECTED DISCLOSURES

The disclosures and/or actions which are protected under the Regulation and the PRC Criminal Procedure Law include:

- disclosure of an employer's violation of labor security related laws, regulations and rules
- disclosure of crimes or suspects to the public security authority, people's procuratorate or people's court.

LIABILITY FOR RETALIATION BY CO-WORKERS

A retaliator can be held personally liable for their actions if they have infringed the whistleblower's rights under civil law or criminal law, for example by causing bodily injury or defamation.

There are no mandatory requirements in China making the employer liable for retaliation by co-workers. It is at the employer's discretion to establish its own internal policy to manage this.

SANCTIONS

If an employer retaliates against a whistleblower, the labor security administration will order it to stop the detrimental action against the whistleblower. The employer may also potentially face a labor arbitration.

FRANCE ★★

> French authorities have until recently been quite hostile towards whistleblowing systems. Today, implementation of such systems is strictly monitored by the French Data Protection Authority and French Courts.

Bijan Eghbal

LEGISLATIVE PROTECTION

In France, whistleblowing is regulated to a very limited extent by the Labor Code. This states that an individual cannot be denied access to recruitment or training, or be dismissed or subjected to a discriminatory act for having disclosed either to their employer, or to the judicial or administrative authorities, corruption-related offences discovered in exercising their functions. Any such termination of contract or detrimental act is null and void.

Whistleblowing procedures are also regulated by the French Data Protection Act and further recommendations and decisions of the French Data Protection Authority (CNIL) namely:

- Guidelines adopted by the CNIL on 10 November 2005 on the implementation of whistleblowing procedures in compliance with the French Data Protection Act, relating to information technology, data filing systems and liberties (the Guidelines)
- Single Authorization of whistleblowing systems adopted by the CNIL on 8 December 2005 (the Single Authorization).

Whistleblowing procedures must be declared by the CNIL prior to implementation in France. The purpose of the Single Authorization is to set detailed rules regarding the scope and operation of such procedures. Whistleblowing procedures that strictly comply with all the provisions of the Single Authorization are declared to the CNIL through a self-certification from the employer that the system complies with all the provisions of the CNIL Single Authorization.

The Guidelines provide that a whistleblower cannot be subject to sanctions if they use in good faith an authorized whistleblowing procedure, even if the facts which they disclose are subsequently not borne out.

PROTECTED WHISTLEBLOWERS

The relevant provisions of the Labor Code apply to candidates for employment, trainees, employees and ex-employees.

PROTECTED DISCLOSURES

Whistleblowers are protected when they report, in good faith, a suspected infringement in the field of accounting, banking, financial audit, anti-corruption or anti-competitive behavior.

According to the CNIL Guidelines, the collection and handling of reports must be entrusted to a specifically designated section within the company, or a third-party provider, who must be specially trained and bound by a contractual obligation of confidentiality.

LIABILITY FOR RETALIATION BY CO-WORKERS

Employers have a duty to protect the health and safety of workers in the company, and in particular to protect them from harassment. If there is evidence of harassment at work, the employer can be held liable, even in the absence of any fault on its part, for a failure to comply with its health and safety obligations. If a co-worker puts pressure on, or harasses, a whistleblower, the employer must immediately take disciplinary action against the harasser. Harassment of this type can justify the dismissal of the harasser for serious misconduct (without notice or a termination payment). The harasser may also face criminal sanctions for the offence of "moral harassment". Offenders can now face up to two years' imprisonment and a €30,000 fine.

SANCTIONS

There is no specific sanction for breach of the protection provided by the French Labor Code. However, whistleblowers who have faced retaliation for their actions could claim constructive dismissal or apply to the court for "judicial resignation" of their employment contract. This would entitle them to termination indemnities as well as damages for unfair dismissal (equivalent to at least the last six months' salary for employees with at least two years' service with the company).

GERMANY ★★

> It is fair to say that whistleblowing hotlines and ombudsman systems are well established throughout German companies regardless of their size which shows the growing awareness of their central importance for discovering compliance violations.

Michael Magotsch

LEGISLATIVE PROTECTION

Germany does not have any specific legislation protecting whistleblowers from dismissal. A bill on the protection of whistleblowers has been rejected. Whistleblowers are, however, protected by general employment laws under the Dismissal Protection Act (Kündigungsschutzgesetz – KSchG).

The KSchG provides that employees may only be terminated 'for reason'. Those reasons comprise, in particular, conduct-related termination of the employment relationship and extraordinary terminations for good cause such as, for example, a serious breach of contract. Blowing the whistle internally in relation to a matter of legitimate concern would not generally be a valid reason for termination of employment. However, blowing the whistle externally, without trying to resolve the issue internally first, with the potential consequence of damaging the employer's reputation, may be a valid reason for termination. Such whistleblowing may be justified, however, if the employee is reporting a criminal offence committed by the employer. Whether there is a reason for termination in the specific case must be assessed on a case-by-case basis.

PROTECTED WHISTLEBLOWERS

All employees with at least six months' service, working in a business of more than 10 employees, are protected by the KSchG.

PROTECTED DISCLOSURES

In the absence of express whistleblower legislation, there are no specific provisions governing the nature of protected disclosures.

LIABILITY FOR RETALIATION BY CO-WORKERS

Vicarious liability will only arise if, for example the employee has acted as a proxy for the employer or has acted tortuously, and the employer is not able to exculpate himself by proving that he chose the employee carefully. Employees who deliberately harm a colleague

who has blown the whistle can be personally liable for their actions. Harm is caused when an employee intentionally or negligently unlawfully injures the life, body, health, freedom, property or another right of another person. In these circumstances the employee may be liable to pay compensation to the other party in respect of the damage arising from the harm.

SANCTIONS

In the event that an employer terminates a whistleblower's employment without valid reason, the employer must continue to employ the employee under the same conditions as before, or might in some cases be ordered to make a severance payment in order to end the employment.

HONG KONG ★

> There have been steps in the right direction, with, for example, Hong Kong Exchanges and Clearing stating that all listed companies should implement a whistleblowing policy to enable people to raise concerns of suspected malpractice. However, as a major business hub, Hong Kong lags behind other jurisdictions.
>
> **Pattie Walsh**

LEGISLATIVE PROTECTION

There is currently no statutory legislation offering protection for whistleblowers in Hong Kong.

PROTECTED WHISTLEBLOWERS

There are no protected categories of workers due to the absence of legislation governing whistleblowing.

PROTECTED DISCLOSURES

Although there is no legislation specifically protecting whistleblowers, an employee who gives evidence or information in any proceedings or inquiry in connection with the enforcement of labor legislation, industrial accidents or breach of work safety regulations is protected from dismissal under the Employment Ordinance.

Further, an employee who discloses confidential information may be exempt or protected against allegations of breaches of confidentiality in the following circumstances:

- if under common law it is in the public interest to do so;
- if the disclosure is made according to official directives, for example, a court order, or under the directive of a statutory inspector or the Independent Commission Against Corruption (ICAC)
- if the disclosure is made under a statute. For example:
  - disclosure of suspected money laundering or other crimes under the Organized and Serious Crimes Ordinance (OSCO), the Drug Trafficking (Recovery of Proceeds) Ordinance (DTROP), and the United Nations (Anti-Terrorism) Ordinance (UNATMO) is not to be treated as a breach of restrictions imposed by contract, enactment, rule of conduct or other provision

– disclosure of corruption and bribery conduct in both the public and private sector under the Prevention of Bribery Ordinance (POBO) and Banking Ordinance (BO).

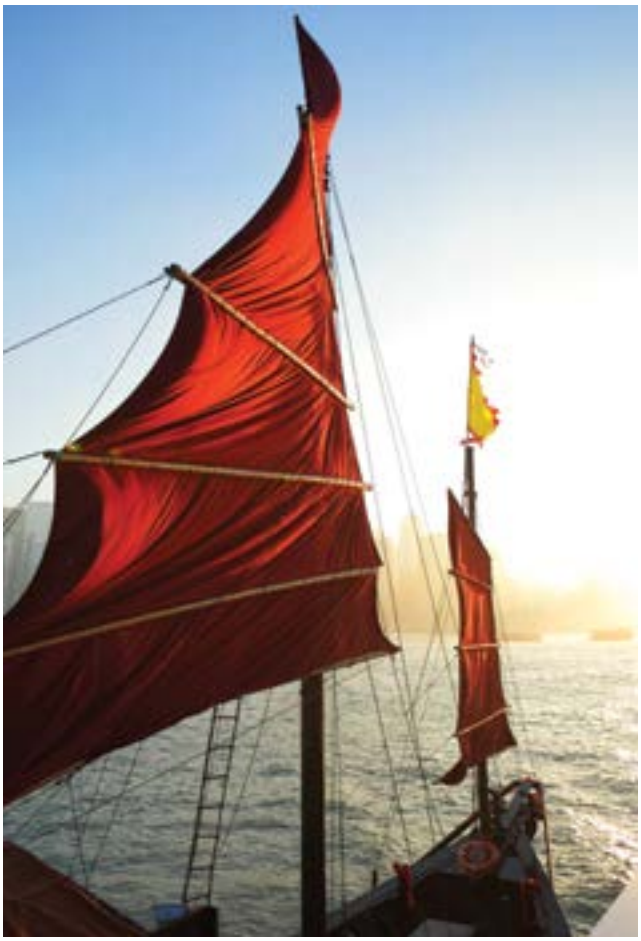
Under OSCO and DTROP, when an employee knows or has reasonable grounds to believe that any property constitutes "proceeds of an indictable offence" or drug trafficking, they are required to report this fact to a Hong Kong police officer or member of the Hong Kong Customs & Excise Department. In practice, the employee should report their knowledge or suspicion to the Joint Financial Intelligence Unit.

LIABILITY FOR RETALIATION BY CO-WORKERS

An employer has a general duty to provide a safe place of work for all employees. However, there are no specific regulations which make an employer liable for the actions of one employee towards another. An individual employee may be personally liable for any detrimental actions towards a co-worker under tort, criminal or anti-discrimination laws for example, However, there is no specific liability imposed on an individual in relation to retaliation against a whistleblower.

SANCTIONS

There are no sanctions specifically relating to detrimental treatment of whistleblowers.



JAPAN ★★★

> As the relationship between employers and employees continues to evolve based on practices put in place by global businesses, one increasingly sees employers in Japan providing hotlines for whistleblowers and instances where historically reticent employees are willing to use them to report claims of wrongdoing.
>
> **Lance Miller**

LEGISLATIVE PROTECTION

Japan has implemented specific legislation for the protection of whistleblowers in the workplace. The relevant legislation is the Whistleblower Protection Act (WPA).

PROTECTED WHISTLEBLOWERS

The WPA protects workers who are broadly defined as persons who are employed at an enterprise or office and receive wages without regard to the kind of occupation. Temporary and part-time workers are also protected as are certain government and public employees.

PROTECTED DISCLOSURES

The WPA protects workers who disclose 'reportable facts'. This term includes criminal acts under specific laws identified in the WPA. There is also a catch-all provision which encompasses any other laws provided for in a cabinet order as legislation concerning the protection of interests such as the protection of individuals' lives and bodies, the protection of consumer interests, the conservation of the environment, the protection of fair competition and the protection of citizen's lives, bodies, property and other interests. Whistleblowers must, however, make efforts not to damage the "justifiable interests of others and the public interest".

A worker must make the disclosure to the employer, an administrative body or a third party. If the worker makes the disclosure to the employer, the worker is protected if they believed they were reporting a reportable fact. If the worker makes the disclosure to an administrative body the worker is protected if they had reasonable grounds to believe they were reporting a reportable fact.

If the employee makes the disclosure to a third party the worker is protected if they had reasonable grounds to believe they were reporting a reportable fact and:

- the worker has reasonable grounds to believe that they will be dismissed or subject to other disadvantageous action if they make their disclosure to the employer or administrative body
- the worker has reasonable grounds to believe that evidence supporting the reportable fact might be concealed, counterfeited, or altered if they report it to the employer

- the worker was requested by the employer, without any justifiable reason, not to report the reportable fact to the employer or administrative body
- the worker does not receive notice from the employer regarding the commencement of an investigation into the reportable fact within 20 days from the day they made the report in writing or the employer does not investigate without any justifiable reason or
- the worker has a justifiable reason to believe that some damage to the life or body of an individual has been caused or is about to be caused.

No incentives to encourage whistleblowing internally or externally are provided by the WPA.

LIABILITY FOR RETALIATION BY CO-WORKERS

In terms of retaliation by co-workers, the whistleblower's remedy lies in bringing an action in tort against any colleague who has bullied or harassed them. The employer could be liable for "power harassment" or retaliation undertaken by another employee or director.

SANCTIONS

The WPA provides that a termination or detrimental employment action based on protected whistleblowing is a nullity. However, employers are not subject to criminal liability or fines under the WPA.

NETHERLANDS ★★

Whistleblowing is currently a hot topic in the Netherlands, with a legislative proposal to be adopted by the House of Representatives. Once adopted, a Whistleblowers' Centre will be established, which will investigate misconduct and provide support for the whistleblower.

Hélène Bogaard

LEGISLATIVE PROTECTION

A legislative proposal regarding the protection of whistleblowers was submitted on 14 May 2012. Once the proposal is adopted, the Dutch Civil Code (DCC) will be amended to the effect that a whistleblower cannot be dismissed or subject to detriment by the employer, provided the disclosure is made properly and bona fide. For the time being, however, Dutch law has no legal provisions protecting whistleblowers, although some regulations have certain requirements concerning whistleblowing policies. For companies with a separate whistleblowing policy, the "Statement on dealing with suspicions of misconduct in companies" (Statement) and the example procedure published by the Foundation of Labor (*Stichting van de Arbeid,* "STAR") are the most important regulations. The Statement lists the basic components of a whistleblowing procedure. In respect of civil servants in the public sector, the Act on Civil Servants provides how to deal with suspicions of abuse and malpractice.

PROTECTED WHISTLEBLOWERS

If enacted, the new law will apply to employees and ex-employees from both the public and the private sector.

PROTECTED DISCLOSURES

According to the legislative proposal and case law, disclosures are protected if the suspicions are based on reasonable grounds, the public interest is seriously at risk and disclosures are handled with due care. Regarding handling with due care, a distinction can be drawn between formal (procedural) due care (internal disclosure first) and material (substantive) due care (there is an abuse with serious risk to the public interest). Whistleblowing is defined as the disclosure to the community by an employee without the employer's permission of a specific, immediate or threatened abuse which occurs in the company where the employee works and which conflicts with the public interest. According to case law, disclosure must be made internally to a supervisor or any other competent official within

the organization. Disclosures can be made public if internal disclosure is pointless, if it cannot reasonably be required, or if it is contrary to the public interest. The new law will create a new organization, called the Whistleblowers' Centre, which will fall under the office of the National Ombudsman and will be empowered to investigate cases. As soon as an employee is officially recognized as a whistleblower, they will be protected from dismissal.

LIABILITY FOR RETALIATION BY CO-WORKERS

The employer is obliged to make efforts to prevent employees harassing other employees and can be liable for damages where there is bullying and intimidation.

SANCTIONS

There are no specific sanctions mentioned in the legislative proposal. Under current Dutch law, the termination of an employment contract is voidable if there are any termination prohibitions (e.g. during illness or pregnancy) or if no dismissal permit is obtained from the Employee Insurance Agency. The cantonal court can also refuse the request for termination of the employment agreement or award higher severance pay. If the court finds that the dismissal is manifestly unreasonable the employer can be ordered to pay compensation for damages.

SOUTH AFRICA ★★★

South Africa, having come out of an era of darkness, has joined the international community in promoting openness and accountability.

Aadil Patel

LEGISLATIVE PROTECTION

The whistleblowing framework in South Africa has developed over time and includes constitutional provisions, the Protected Disclosures Act 2000 (PDA), the Labor Relations Act (LRA), the Companies Act 2008 (CA) and a body of case law. South Africa has specific legislative protection for whistleblowers in the workplace, similar to the legislation in place in the UK. Employees who disclose information in a prescribed manner regarding criminal, unlawful or irregular conduct in the workplace are protected from any form of occupational detriment (such as victimization/ retaliation) under the PDA. **Aadil Patel, Head of Employment Law at DLA Cliffe Dekker Hofmeyr in Johannesburg comments,**

South African whistleblowing laws have been captured eloquently by an eminent Labor Court judge who stated, "Internationally, there is growing recognition that whistleblowers need protection. Whistleblowing is healthy for organizations. Managers no longer have a monopolistic control over information. They have to be alert to their actions being monitored and reported on to shareholders and the public. Everyone is alive to their loyalty to the organization. As a safe alternative to silence, whistleblowing deters abuse. Whistleblowing is neither self-serving nor socially reprehensible.

PROTECTED WHISTLEBLOWERS

Protection under the PDA and LRA is limited to paid employees only, excluding independent contractors and volunteers. The CA however extends whistleblowing protection to (amongst others) suppliers of goods or services to the company, which may then include all types of personal services, irrespective of the classification as employee or independent contractor.

PROTECTED DISCLOSURES

Whether or not a disclosure is protected depends on the subject matter of the disclosure, the nature of the information disclosed, the disclosure procedure followed and the person or agency to whom the disclosure is made. Only disclosures which relate to specific categories of information are covered by the legislation.

A disclosure is defined by the PDA as any disclosure of information regarding any conduct of an employer or employee of the employer made by an employee who has reason to believe that the information concerned shows or tends to show that one of following categories of wrongdoing has occurred, is occurring, or is likely to occur:

- A criminal offence
- Failure to comply with any legal obligation
- Miscarriage of justice
- Danger to the health and safety of any individual
- Damage to the environment
- Unfair discrimination in terms of the Promotion of Equality and Prevention of Unfair Discriminations Act 2000
- The deliberate concealing of information about any of the above.

Disclosures under the PDA are protected if they are made to the following list of recipients:

- A legal adviser, in the course of obtaining legal advice
- An employer substantially in accordance with any prescribed procedure
- A member of Cabinet or of the Executive Council of a province about an individual, body or organ of state appointed by or falling in the area of responsibility of that member
- The Public Protector, the Auditor-General or a person or body prescribed by regulation.

Disclosure to any other person is only protected if it is made in good faith, founded on information the whistleblower believes to be substantially true, it is not made for personal financial gain and the employee has reason to believe that he or she would be subjected to an occupational detriment and evidence would be concealed or destroyed if disclosure was made to the employer. The good faith requirement does not apply to disclosure made to a legal adviser in order to obtain legal advice.

Disclosure of information will be protected under the CA if made in good faith to the prescribed bodies, which include the regulatory bodies established in terms of the CA, as well as internal company structures such as the board of directors, plus legal representatives, and to the extent that the person making the disclosure reasonably believed at the time of disclosure that the information showed or tended to show that a company, director or prescribed officer acting in that capacity had – (1) contravened the CA; (2) failed or was failing to comply with any statutory obligation to which the company was subject; (3) engaged in conduct that had endangered or was likely to endanger the health or safety of any individual, or had harmed or was likely to harm the environment; (4) unfairly discriminated, or condoned unfair discrimination against any person; or (5) contravened any other legislation.

LIABILITY FOR RETALIATION BY CO-WORKERS

Employees are protected against occupational detriment committed either by the employer or by another employee of the organization. The employer will attract liability for the actions of co-workers if it fails to protect the employee from an occupational detriment in consequence of a protected disclosure.

SANCTIONS

Dismissal of a whistleblower is categorized as automatically unfair and may attract the maximum punitive sanction allowed against the employer under the LRA. In addition, the CA provides that the whistleblower (which may include an employee) is entitled to compensation from "another person" (which in turn may include either the company or an individual acting in the capacity of director or prescribed officer of the company) for any damages suffered pursuant to a protected disclosure as understood in the CA, to the extent that the person from whom damages are claimed – (1) engaged in conduct with the intent to cause detriment, and causes such detriment to the claimant; or (2) threatens any detriment to the claimant, with the intent to cause the claimant to fear that the threat will be carried out (or is reckless as to causing such fear). In the latter case, it is irrelevant whether the claimant actually feared that the threat would be carried out.

UK ★★★

> Whistleblowing is currently riding high on the political agenda with recent reforms to the law and further review underway.
>
> **Alan Chalmers**

LEGISLATIVE PROTECTION

The UK has specific legislative protection for whistleblowers in the workplace. This is provided through the Employment Rights Act 1996 (ERA) (which has incorporated the Public Interest Disclosure Act 1998). The ERA has recently been amended by the Enterprise and Regulatory Reform Act 2013. Further reforms are currently the subject of consultation.

As the law stands, it is unlawful for an employer to subject a worker to a detriment because they have made a protected disclosure.

PROTECTED WHISTLEBLOWERS

Protected workers include agency workers, freelance workers, seconded workers, homeworkers, contractors working in the NHS and trainees, as well as employees and former employees.

PROTECTED DISCLOSURES

Only disclosures which relate to specific categories of information are covered by the legislation. The information disclosed must, in the reasonable belief of the worker, be made in the public interest and tend to show that one of following categories of wrongdoing has occurred, is occurring, or is likely to occur:

- A criminal offence
- Breach of any legal obligation (which can include an obligation contained in a contract of employment)
- Miscarriage of justice
- Danger to the health and safety of any individual
- Damage to the environment
- The deliberate concealing of information about any of the above.

The legislation encourages internal disclosure to an employer or other responsible person as the primary method of whistleblowing. Disclosure to an employer, or to another person who the employee reasonably believes is responsible for the alleged wrongdoing (such as a supplier), will usually be protected without more. This also applies to disclosures made by a process authorized by the employer, such as a confidential whistleblowing hotline.

External disclosures are protected in more limited circumstances. Disclosures to prescribed persons will be protected provided the worker believes the information is substantially true and concerns a matter within that person's area of responsibility. Prescribed persons are a list of persons approved by the UK Government to whom workers can make disclosures which includes

the tax authorities, the Health and Safety Executive, the Office of Fair Trading and other regulatory bodies.

Wider disclosure to a third party such as the police or the media is only protected if the worker believes the information is substantially true and the disclosure is not made for personal gain. Unless the matter is "exceptionally serious", the worker must have already disclosed it to the employer or a prescribed person, or believe that, if they do, evidence would be destroyed or they would suffer reprisals.

Wider disclosure must also be reasonable, in light of such factors as:

- The identity of the person to whom disclosure is made
- The seriousness of the default
- Whether the default is continuing or is likely to occur in the future
- Whether the disclosure was made in breach of a duty of confidentiality owed by the employer to a third party
- If previous disclosure has been made to the employer or a prescribed person, whether any action was taken or might reasonably have been taken as a result of the previous disclosure
- If previous disclosure has been made to the employer, whether the worker has complied with any whistleblowing procedure operated by the employer
- Any relevant circumstances of the whistleblower.

A worker does not have to prove that the facts or allegations disclosed are true, or that they are capable in law of amounting to one of the categories of wrongdoing listed in the legislation.

LIABILITY FOR RETALIATION BY CO-WORKERS

Express vicarious liability for a worker who subjects a whistleblower to a detriment has been in force since June 2013 and the employer has a defense if it took all reasonable steps to prevent the detrimental treatment. Individual employees can be personally liable for any detrimental actions towards a co-worker.

SANCTIONS

Dismissal of an employee on the grounds they have made a protected disclosure is automatically unfair. The employee does not have to have any period of qualifying service in order to bring a claim and compensation is potentially unlimited. Interim relief is available in certain circumstances where the employee is 'likely' to succeed with their claim. A successful interim relief action may result in the tribunal ordering that the employee's contract of employment continues until the final determination of the complaint.

AVOIDING CRIMINAL LIABILITY

UK criminal legislation also highlights the importance of whistleblowing provisions. The Bribery Act 2010, which came into force in July 2011, contains a new strict liability corporate offence that applies where an organization fails to prevent bribery by a person "associated" with it, including employees, agents, subcontractors (section 7). The organization has a defence if it can show that it had in place "adequate procedures" designed to prevent bribery. Guidance from the Ministry of Justice stresses that this would include having effective whistleblowing procedures that encourage the reporting of bribery.

US ★★★

> The concept of employee whistleblower protections has a long history in the United States, and those protections and incentives for whistleblowing will continue to expand.
>
> **Michael J. Sheehan**

LEGISLATIVE PROTECTION

There are many United States federal statutes that prohibit employers in the private sector from retaliating against whistleblowers, many of which are sector or industry specific. For example, the Occupational Safety and Health Act 1970 protects those who have reported or complained about workplace safety and health issues, the Corporate and Criminal Fraud Accountability Act 2002 (Sarbanes-Oxley), as expanded by the Wall Street Reform and Consumer Protection Act 2010 (Dodd-Frank), protects securities law related whistleblowers, and the Affordable Care Act protects those blowing the whistle on issues related to healthcare reform. Most of these laws are enforced/administered by the Department of Labor (DOL) or the Occupational Safety and Health Agency (OSHA).

There are also federal statutes of general application that protect those who report fraud on the government or complain about violations of federal anti-discrimination laws, federal statutes that specifically apply to protect public sector employees and subcontractors, and statutes and common law protections at the state level.

As a general matter, employees may not be fired or subject to any other unfavorable job action (disciplined, transferred, denied a raise or benefits, hours reduced, demoted, suspended, etc) because they have exercised any right afforded to them under one of the laws that protect whistleblowers.

PROTECTED WHISTLEBLOWERS

All of the statutes with whistleblower provisions protect employees of companies covered by the applicable statute, and some statutes also cover employees of contractors and subcontractors who work for the covered company. For example, Sarbanes-Oxley protects employees of certain publicly traded companies and companies with certain reporting requirements with the Securities and Exchange Commission (SEC), as well as their contractors, subcontractors, and agents.

PROTECTED DISCLOSURES

Protected activities typically include initiating a proceeding under, or for the enforcement of, any of the statutes with whistleblower protections, or causing such a proceeding to

be initiated; testifying in any such proceeding; assisting or participating in any such proceeding or in any other action to carry out the purposes of those statutes; complaining about a violation. By way of example, Sarbanes-Oxley protects covered employees who report alleged violations of the federal mail, wire, bank, or securities fraud statutes, any rule or regulation of the SEC, or any other provision of federal law relating to fraud against shareholders.

Any employee who believes they have been discriminated or retaliated against in violation of the statutes administered by OSHA must file a complaint with OSHA within the statutorily defined time period (that complaint is itself protected activity). If OSHA has not issued a final decision within a statutorily defined time period, and there is no showing that there has been delay due to the bad faith of the employee, the employee may file an action in federal court. If OSHA does issue a final decision, the matter may be appealed to a federal appellate court.

Most of the statutes administered by OSHA specifically protect an employee's complaints to not only the applicable federal agency but also to the employee's employer, and it is the DOL's position that employees who express concerns internally to their employers are protected under all of the statutes administered by OSHA. For example, Sarbanes-Oxley expressly allows, although it does not require, complaints to the SEC. Unlike claims under Sarbanes-Oxley, however, the Dodd-Frank Act excludes protection against retaliation for internal reporting (i.e., an employee must report potential securities law violations to the SEC to be entitled to whistleblower protections). Under all of those laws, except for Dodd-Frank Act which creates a private right of action in federal district court for an individual who alleges discharge or other discrimination in violation of its prohibition against retaliation, complaints of discrimination or retaliation for engaging in whistleblowing are to be reported to OSHA.

LIABILITY FOR RETALIATION BY CO-WORKERS

An employer has vicarious liability for retaliation by a co-worker. An individual employee may be personally liable under Sarbanes-Oxley if they are both materially involved with the retaliation effort and in a position to modify the terms and conditions of employment of the whistleblower.

SANCTIONS

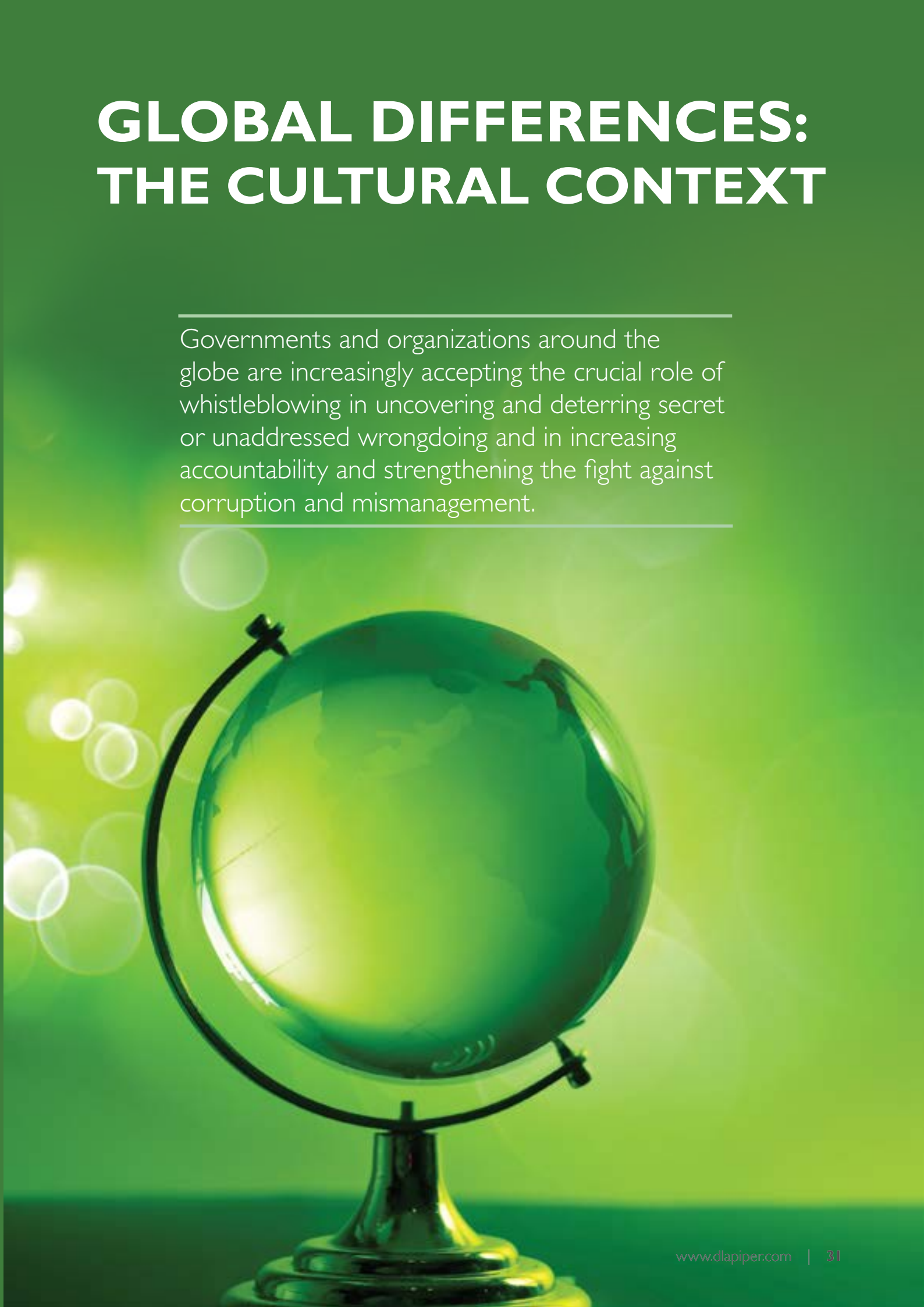
Upon receipt of a timely complaint, OSHA notifies the employer, and if conciliation fails, conducts an investigation. Complaints without merit will be dismissed. Where OSHA finds a complaint has merit it will either be referred to the DOL Office of Solicitor for legal action or OSHA will issue a determination letter requiring the employer to pay back wages, reinstate the employee, reimburse the employee for attorney's fees and litigation costs, and other steps to provide necessary relief. Some statutes allow for additional damages, such as Dodd-Frank, which provides for increased back pay awards and a percentage of the money recouped by the government for the reporting (see below).

Employers may challenge OSHA's determinations by requesting a hearing before an Administrative Law Judge, whose decisions are subject to review by DOL's Administrative Review Board, and can then ultimately be challenged in the federal courts.

Under Sarbanes-Oxley, there are also criminal penalties, including a fine or ten years' imprisonment (or both), for retaliation against a whistleblower who made a report to a law enforcement agency concerning the commission of any federal offence.

GLOBAL DIFFERENCES: THE CULTURAL CONTEXT

Governments and organizations around the globe are increasingly accepting the crucial role of whistleblowing in uncovering and deterring secret or unaddressed wrongdoing and in increasing accountability and strengthening the fight against corruption and mismanagement.



As highlighted in **Law and sanctions** there is significant global variation in the extent to which different jurisdictions have developed their national laws to provide whistleblowing reporting channels, to ensure reports are followed up, to protect whistleblowers against retaliation and to strengthen accountability.

Whistleblowing has many different aspects; it can be seen as an act of free speech, a tool in the fight against corruption, and an internal dispute mechanism. Different jurisdictions have highlighted different aspects in their definition of whistleblowing for the purposes of whistleblower protection, informed by different underlying ideas of whistleblowing and the role it has to play in society. There is a strong cultural element which influences how different jurisdictions respond to whistleblowers. In the US, real-life whistleblowers have been championed in big-budget Hollywood films such as *The Informant!* and *The Insider* as crusaders who fight corruption for the benefit of all. The US legislative framework for whistleblowing reflects a similar attitude. However, this view of corporate whistleblowing, and, in particular, methods for ensuring that corporate wrongdoing comes to light, is not universal.

Bijan Eghbal, from our french practice comments,

> Whistleblowing is not common practice in France and is mostly relevant to multi-national groups which are subject to Sarbanes-Oxley.

However, despite the apparent strength of protection in the US, potential whistleblowers nonetheless place not only their reputation, but also their employment, at risk if the information they disclose does not fall within the ambit of the law's protection.

One of the reasons for the slow development of whistleblower protection laws in Europe, as compared with the US, is the vast difference in legal culture in the protection of employees from unfair termination of their employment. In the US, the 'at will' model of employment dominates and employees have little protection against the termination of their employment. Most European countries, in contrast, have a 'for cause' model of employment rights, such that an employee can only be terminated with good reason. This provides some protection for whistleblowers in that internal disclosures at least will seldom justify dismissal. External disclosure is, however, more problematic as it may involve disclosure of confidential information which is likely to be considered to be serious misconduct.

The position in the UK is slightly different to the rest of continental Europe in that compensation rates for unfair dismissal are generally low. However, this is not the case for whistleblowing claims. Based on available information, the average compensation awarded for a whistleblowing claim in the first ten years post implementation of the legislation was £113,000. This is significantly more than the average compensation for unfair dismissal which currently stands at approximately £9,000. In the UK, the number of whistleblowing claims in the tribunal system has been increasing steadily year on year from 157 claims in 1999 to 2500 in 2011/12. **Alan Chalmers, from our UK practice says,**

> In the UK, whistleblowing legislation aims to facilitate genuine whistleblowing claims while reducing tactical claims made for an employee's own purposes. The key risks to employers are the potential damage to reputation through adverse publicity and the risk of high compensation awards.

Another reason for the lack of rigorous whistleblower protection in many countries is a cultural hostility towards whistleblowing, particularly anonymous whistleblowing. This can be attributed in some countries towards an emphasis on the importance of privacy, and in others to historical factors leading to distrust of 'informers'. In countries such as Germany and France, a stigma remains attached to anonymous informing and a mistrust of anyone who could be considered to be an informant. The European emphasis generally is on protection of personal data, due process and a presumption of innocence for those whom a whistleblower accuses of wrongdoing, which does not sit well with US-led use of whistleblowing hotlines and anonymity. Many other countries limit what can be reported beyond local management or local law enforcement agencies, are suspicious of hotlines and anonymity as leading to malicious and unfounded accusations, require "proportionality" balancing the scope of the investigation against the seriousness of the violation and limit collection and transmittance of personally identifiable information used in the investigation.

These significant cultural differences could lead multi-national companies to underestimate the significant compliance hurdles to implementing uniform whistleblowing procedures across their global organization.

These cultural factors have influenced notable variations of approach around the globe particularly in relation to specific aspects of whistleblowing law:

- Attitudes to financial incentives for whistleblowers
- Positive obligations to report wrongdoing
- Confidentiality and settlement of claims

FINANCIAL INCENTIVES

The idea of financial incentives derives from the US's approach to the financial sector where, under Dodd-Frank, a whistleblower who provides original information to the Commodity Futures Trading Commission (CFTC) regarding violations of the Commodity Exchange Act or who assists the CFTC in a judicial or administrative action resulting in sanctions exceeding $1 million USD is entitled to a monetary award of no less than 10% and no more than 30% of the monetary sanction in the collected action. The rewards for whistleblowing to the SEC regarding violations of the Securities and Exchange Act are the same. Whistleblowers under Sarbanes-Oxley, as expanded by Dodd-Frank, may also recover double back pay awards. **Michael J. Sheehan comments that,**

> Providing financial incentives for whistleblowers remains controversial in the United States, but follows a 150+ year history of individuals who file lawsuits claiming fraud by federal contractors against the government under the False Claims Act (also known as qui tam lawsuits) receiving a portion (usually about 15-25 percent) of any recovered damages.

Despite the controversy, in 2012 approximately 3,000 tips were made to the SEC, with 10% of these coming from outside the US. This may suggest that the potential for reward is leading employees to make external disclosures first, rather than addressing their concerns internally.

Offering financial incentives to employees to blow the whistle is not a device which is used commonly in other countries. There are no such incentives in the

Netherlands, France, Japan, Australia, Hong Kong or Germany. Indeed, in relation to Germany, **Michael Magotsch, from our German practice comments,**

> Offering financial incentives for employees to blow the whistle would be seen critically in Germany as they might lead to denunciation of other employees.

Based on the existing position in the US, the UK Government is currently seeking views on whether a system of financial incentives for whistleblowers should be implemented. This approach is favored by the head of the UK Financial Conduct Authority, which regulates financial institutions in the UK. Further developments in UK whistleblowing law may well be driven by pressure to regulate the financial services sector. At present, under UK legislation, the only existing "incentive" is the possibility for a participating offender to be given a reduction in prison sentence or immunity from prosecution principally under the Serious Organized Crime and Police Act 2005.

In China, legislation provides that if the whistleblowing is true, the labor security administration will offer financial incentives to the whistleblower who has provided important clues or evidence for investigating material violations of labor security laws, regulations or rules. In anti-corruption and anti-bribery cases, the anti-corruption bureau, an internal organization in the people's procuratorate, may offer financial incentives to encourage whistleblowing.

OBLIGATIONS TO REPORT WRONGDOING

The US whistleblowing regime includes limited duties on individuals to report the wrongdoing of others. For example, Sarbanes-Oxley mandated the creation of new rules of professional conduct requiring attorneys who appear, or practice before, the SEC to make reports of evidence of unlawful activity to the public company's chief legal counsel, chief executive officer, or board of directors. Many US Codes of Conduct make it an employee's obligation to report violations, and impose discipline for failure to report.

In contrast, in the other countries considered in our report only Germany, the Netherlands, the UK and China have any provisions about the reporting of others' wrongdoing and they are generally limited. In the UK, although there isn't a general duty on employees to report wrongdoing either internally or externally, it has been established via case law that employees who are in a "fiduciary" position are required to report both their own and the wrongdoing of others within the employer's organization. In Germany, if an employee becomes aware of any criminal offence by another employee which is related to the employment relationship, they have a contractual secondary obligation to inform the employer. A failure to make such a report could result in dismissal. Employees are also obliged to inform their employer about imminent damage resulting from wrongful behavior of employees. However, this obligation only arises where there is a substantial threat or risk of damage. In the Netherlands, civil servants have an obligation to disclose any misconduct such as corruption and fraud. All citizens have an obligation to disclose serious crimes involving imminent moral danger. Apart from these legal obligations, the disclosure of misconduct can be interpreted as a moral duty.

In the Asia-Pacific region, China leads the way in this area with Article 108 of the PRC Criminal Procedure Law providing that any body or individual, discovering suspected criminal behavior or a wanted criminal suspect, has the right and obligation to report the case or provide information to the public security authority, people's procuratorate or people's court. In Hong Kong, Japan and Australia there are no rules obliging employees to report wrongdoing.

South African whistleblowers enjoy extensive protections, both under general employment legislation and in terms of custom legislation. However, employees who become aware of malfeasance, whether relating to employer conduct or that of other employees may well be subject to a duty to disclose this knowledge, failing which they too may suffer adverse consequences. For instance, legislation places an obligation on certain individuals such as managers and directors of companies to report corrupt activities to the South African police, failing which they will themselves be guilty of a criminal offence. Furthermore, failure to disclose the misconduct of other employees may result in disciplinary steps (which may include dismissal) against employees innocent of the misconduct, under a so-called "derivative misconduct", or breach of the duty of good faith, charge.

CONFIDENTIALITY AND SETTLEMENT OF CLAIMS

Attitudes to whistleblowers in general are reflected in the approach which different jurisdictions take to the importance of ensuring public scrutiny of whistleblowing issues. Countries which have specific legal protection for whistleblowers tend to limit the extent to which employers can avoid genuine malpractice coming to light by enforcing confidentiality and allowing confidential settlement of retaliation claims.

In the US, employers are not permitted to implement contractual restrictions on whistleblowing and, in fact, since the passage of Dodd-Frank, Sarbanes-Oxley claims are exempt from mandatory arbitration agreements, although all other employment related claims may be subject to arbitration. To settle a Sarbanes-Oxley whistleblower case, the parties to the agreement must obtain the written approval of the DOL. Settlement agreements cannot be entered into unless they are fully reviewed by the DOL and the DOL finds that their terms are in the public interest and are fair, adequate, and reasonable. **Michael J. Sheehan comments that,**

> "Such requirements are not atypical in the US and DOL or court approval also are required for the settlement of other types of employment law claims."

This is an aspect of the law on whistleblowing which has caused great controversy in the UK. It is possible to reach a confidential settlement of a claim for dismissal or detriment brought under the UK whistleblowing legislation and in fact the majority of claims settle without a tribunal hearing. However, the inclusion of a "gagging" clause in any settlement agreement preventing the whistleblower from raising their concerns publicly is likely to be void under provisions which prevent contracting out of the whistleblowing legislation.

Public scrutiny of whistleblowing issues is far less of a hot issue in the rest of Continental Europe. In the Netherlands, provisions on confidentiality can be contractually agreed under the Criminal Code, and violation of a confidentiality obligation imposed by the employer is punishable, but not if the employee assumed in good faith that the public interest required the disclosure. In Germany, France and the Netherlands, the parties can settle claims provided legal provisions governing the validity and enforceability of settlements

agreements are complied with. In France, as in the UK, any sort of gagging clause, however, is likely to be null and void. In Germany, there is a general legal obligation on employees to not disclose the employer's business secrets. This obligation may be extended by the employment contract to all facts of which the employee receives knowledge during his employment so long as the employer is able to prove a legitimate interest in such extended confidentiality obligations.

In Australia, employers are able to settle whistleblowing claims before legal proceedings are commenced. Leave of the court must be obtained to settle proceedings after they are commenced. Under the Fair Work Act adverse action proceedings, claims may be settled. The system includes a mandatory conciliation process prior to hearing. In Japan, the parties can settle claims provided legal provisions governing the validity and enforceability of settlements agreements are complied with.

In deciding and implementing a global approach to whistleblowing, it is important for multi-national employers not only to be aware of the differing laws in the jurisdictions in which they operate but also to be sensitive to the array of cultural attitudes which exist towards whistleblowing across the globe. This is particularly important in relation to the implementation of a whistleblowing hotline which we consider in detail below.

WHISTLEBLOWING HOTLINES

Corporate compliance hotlines (whistleblowing hotlines) allow employees to report their concerns anonymously about possible violations of corporate rules by their co-workers.

When implementing a global code of ethics or compliance which deals with whistleblowing, multi-national employers often have to deal with complex legal issues regarding hotlines. Originally a US phenomenon, whistleblowing hotlines have proved more controversial in Europe. Corporate compliance or whistleblowing hotlines allow employees to report their concerns anonymously, by telephone or e-mail, about possible violations of corporate rules by their co-workers. From the would-be whistleblower's perspective, the benefits of being able to report corporate malpractice anonymously are self-evident. However, anonymous reporting poses significant problems for employers in investigating those reports and taking appropriate action.

THE US INFLUENCE

Hotlines of this type have largely come about in response to the provisions of Sarbanes-Oxley in the US. Under Sarbanes-Oxley, all companies listed on US stock exchanges are required to adopt a code of ethics for senior financial officers. The listing rules of NASDAQ and the NYSE require listed companies to have codes of conduct applicable to officers, directors and employees to ensure legal and regulatory compliance and to report illegal or unethical behavior. Sarbanes-Oxley also specifically requires implementation of procedures (or hotlines) for the reporting of questionable accounting or auditing matters and requires that the anonymity of an employee who makes a report should be maintained. Hotlines and mandatory reporting rules are now "best practice" in the US, although Sarbanes-Oxley does not specifically require employers to force employees to report on fellow co-workers or managers.

It remains unclear whether the foreign subsidiaries or branch offices of US-listed companies need to comply with these requirements of Sarbanes-Oxley (and the supplemental provisions of the Dodd-Frank Act). There is limited case law on this issue and the law that does exist is in conflict. The norm, however, is for US-listed multi-national companies to adopt corporate compliance hotlines not only in the US, where the obligation arises, but also for their operations in other countries. This is not as easy as it may sound, however, as following a series of court cases in France and Sweden, the legality of whistleblowing hotlines has increasingly been called into question largely on the basis that they contravene European data protection regulations. Both the courts and data protection regulators of certain European countries have resisted the introduction of such hotlines.

Ute Krudewagen, from our US practice comments,

> Getting a global whistleblowing hotline wrong can have significant consequences. Not only may the company have violated data privacy and employment laws (which can be criminal in some jurisdictions), but it may not be possible to use evidence collected through the hotline against the employee, along the lines of the "fruit of the poisonous tree" concept. Some companies have been ordered to reinstate employees who claimed unlawful dismissal in local courts since the employer could not rely on the evidence that came to light through an overreaching hotline.

LIMITATIONS ON HOTLINES

The limits placed on whistleblowing hotlines tend to fall into four categories:

- Restrictions against hotlines accepting anonymous reports
- Limits on the types of wrongdoing about which hotlines can accept reports
- Limits on who can use the hotline or be reported via the hotline
- Hotline registration requirements.

A summary of the restrictions placed on whistleblowing hotlines in the countries covered in this report is set out below.

WHISTLEBLOWING HOTLINES

Little or no protection ★ Some protection through general laws ★★ Express protection ★★★

	US	UK	Germany	France	Netherlands*	Hong Kong	Japan	China	Australia*	South Africa
Level of hotline restriction	★	★	★★	★★★	★★★	★	★	★	★★	★
Must be confined to certain topics?	X	X	✓	✓	X	X	X	X	X	X
Proportionality required?	X	X	✓	✓	✓	X	X	X	X	X
Anonymous calls permitted?	✓	✓	✓ ⋆	✓ ⋆	✓ ⋆	✓	✓	✓	X	X
Registration required?	X	X	X	✓	X	X	X	X	X	X

* But discouraged/not encouraged.

HOTLINE SOLUTIONS

Emerging regulatory guidance and case law across the globe has forced many multi-national companies, which had initially implemented robust Sarbanes-Oxley compliant reporting hotlines, to revisit their procedures with a view to achieving global compliance. However, as these employers have discovered, observance of not only European data protection legislation but also other laws/ corporate policies mandating the use of whistleblowing hotlines can be challenging to achieve.

Possible strategies to adopt include the following –

Using one worldwide hotline that complies with both European and Sarbanes-Oxley obligations

While this approach is an achievable one, the hotline would need to comply with European constraints which include –

- Limiting reportable offences to, for example, accounting, auditing and related matters
- Discouraging anonymity and encouraging named, confidential reports
- Respecting the rights of any person incriminated by a report including personal data rights
- Respecting the existence of "alternative reporting channels" such as local or European works councils, trade union representatives or ombudsmen
- Complying with EU privacy laws which restrict the transfer of data outside Europe
- Excluding the requirement for mandatory reporting by employees
- Ensuring internal investigations are based on a presumption of innocence and follow due process
- Complying with local rules requiring notification or approval of hotlines.

Because of these limitations, this approach is likely to be unacceptable to most multi-national corporations for although it achieves strict legal compliance, the resulting hotline would not reach US standards of best practice.

Using two hotlines – one for Europe and one for the rest of the world

The "rest of the world hotline" would be US best practice compliant whereas the European hotline would take account of the constraints identified above.

Implementing hotlines which are tailored for each jurisdiction's individual restrictions

Under this strategy it would be possible to have a US and "rest of the world" hotline which fulfills US best practice but this would be complemented by separate policies, based on the US standard but tailored for all the more restrictive European jurisdictions. This approach avoids the need for a watered down approach across the entire world and rather than treating European restrictions as uniform across the continent allows for degrees of differentiation. This strategy would, however, produce a somewhat disordered assortment of procedures around the globe which many multi-nationals may find objectionable. However, in the last few years providers have developed software systems that attempt to streamline such an approach, with drop-down menus and "traffic cop" like procedures that direct reports that extend beyond the specific country's permitted reporting topics back to local management and only let through the global hotline those reports that are within the confines of required topics of reporting by Sarbanes-Oxley or such other topics that such jurisdiction perceives to be permissible for global reporting.

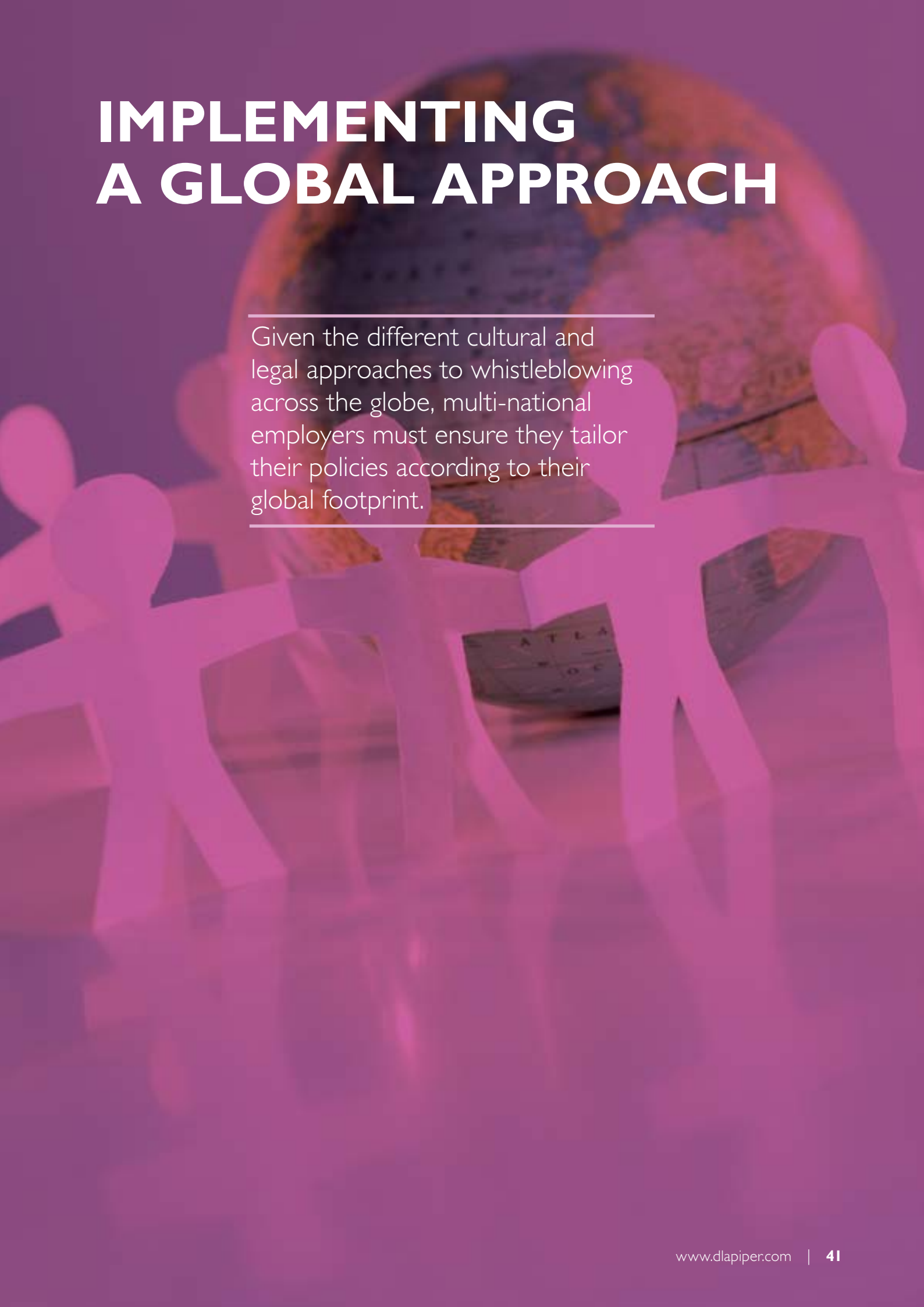
Adopting the view that foreign subsidiaries or branch offices of US-listed companies do not need to comply with the requirements of Sarbanes-Oxley and, on this basis, do not implement hotline reporting in Europe

Given the uncertainty over the territorial reach of Sarbanes-Oxley this is a potentially risky strategy which is also unlikely to be an attractive option for a multi-national employer given the current corporate culture of best-practice in regulatory compliance.

A global company must decide whether it can tolerate some "regionalization" to address jurisdictional differences in its hotline procedures or whether it is preferable to dramatically streamline its code to produce a limited but uniformly acceptable hotline. The implementation of any solution, however, requires a proper understanding of local laws and implementation of strategy which works both at global and, importantly, local level.

IMPLEMENTING A GLOBAL APPROACH

Given the different cultural and legal approaches to whistleblowing across the globe, multi-national employers must ensure they tailor their policies according to their global footprint.



WHY HAVE A ROBUST WHISTLEBLOWING PROCESS?

- Good business and risk management and good corporate governance
- Deter malpractice and avoid wrong-doing thus maintaining or improving performance
- To protect staff, customers and the public
- To meet the expectations of regulators
- By encouraging employees to raise matters internally, it avoids the potential for external disclosure
- It can reduce financial losses
- Letting employees know that wrong-doing will not be tolerated can improve staff morale
- Demonstrating a commitment to good governance is likely to enhance the employer's reputation and increase investor confidence

A well-drafted whistleblowing policy should help to avoid expensive claims by picking up on disclosures at an early stage and dealing with them properly and appropriately. A policy and prompt response to disclosures may also limit the risk of notifications to regulators. Whistleblowing policies are required in various jurisdictions either by legislation (as in the US) or by regulators (as in the UK, where the Financial Conduct Authority will expect regulated companies to have a policy). Policies also set clear standards of behavior for employees.

Companies operating in a global business environment with subsidiaries and operations across a large number of jurisdictions face a daunting challenge. The global variation in levels of whistleblower protection can lead to significant difficulties for multi-national employers seeking to impose compliance guidelines and whistleblowing reporting schemes which are effective and consistent across the organization but at the same time observe applicable local law particularly in relation to data protection and privacy. However, comprehensive and well-drafted policies provide an opportunity for employers to set our clear rules about how employees may express their concerns about malpractices in the workplace. Given the different cultural and legal approaches to whistleblowing across the globe, multi-national employers must ensure they tailor their policies according to their global footprint. They will need to understand and embrace the different regimes to ensure that the policy is fit for purpose, and carry out appropriate training of staff so that the workforce is educated in respect of its rights and obligations. In doing this, employers will be able to have confidence that they are minimizing litigation risks and potential threats to reputation.

In order for whistleblower provisions to function well employees must also be aware of both statutory protections and the variety of channels through which disclosures or wrongdoing may be reported. The protections must be sufficiently effective to overcome employee reluctance to use them. It is also vital that whistleblowing procedures are committed to, and supported, at the highest level of the employer's management structure. The organization's culture and approach to whistleblowing forms the keystone of an effective process. Procedures which promote integrity and transparency, and demonstrate a receptive, rather than hostile, stance to employees who 'rock the boat' will ensure genuine concerns can be raised through the proper channels and should deter malpractice from occurring in the first place. Employers who simply pay 'lip service' to proper processes for managing the disclosure of workplace wrongdoings are likely to face employee confusion leading to inappropriate disclosures to inappropriate third parties… a situation which benefits no-one. Employers must also keep the procedures under review to ensure that they remain fit for purpose as the business develops and moves forward.

Our checklists below will assist employers to focus on the key issues and to ensure that whistleblowing is raised up their business agenda.

IMPLEMENTING A WHISTLEBLOWING POLICY AND PROCEDURE

Whistleblowing policies should encourage employees to speak out if they have legitimate concerns about wrongdoing as distinct from individual grievances, and establish an accessible process for doing so, whether as a freestanding policy or as part of a more general code of conduct. Consider the following:

- Identify where appropriate ownership of and responsibility for implementation of the policy lies within the organization and set up the team responsible for its management
- Ensure visible and active senior and board level support
- Ensure good communication throughout the organization about the policy and the reasons for it to foster a culture of trust
- Consider implementing a related code of ethics to guide employees on right and wrong
- Consider the use of appropriate and culturally sensitive language – for example, many organizations have a "speak up" rather than a whistleblowing policy
- Consider including trade unions or employee representatives in formation of the policy to ensure their support. In certain jurisdictions, such as France and Germany, implementation of a whistleblowing policy and procedure is subject to the prior information and consultation of the works council so ensure that local requirements of this nature are complied with
- Consider whether anonymous reporting will be permissible
- Comply with any local obligations to notify or have the scheme checked by any national authority. Many countries have data protection laws which limit the collection and use of information gathered through whistleblowing schemes. In some of these jurisdictions, local data protection supervisory authorities will expect to be notified of and (in some cases) approve arrangements.
- Take account of cultural sensitivities in relation to whistleblowing
- Train management on the operation and principles of the policy and encourage a culture of openness and transparency so that potential whistleblowers feel confident that their concerns will be taken seriously
- Provide training on the policy as part of induction training and at launch provide training on the policy across the entire organization

CONTENT OF A WHISTLEBLOWING POLICY

A good whistleblowing policy should:

- Contain an introduction setting out the context, purpose and the organization's commitment to the policy
- Describe the type of issues which the policy covers and any issues which are excluded, e.g. individual grievances, bullying and harassment (which may be covered by a different procedure)
- Describe the categories of personnel who may report or be reported
- Encourage early reporting
- Set out the mechanism for raising a concern (for example, initially to line manager and then to a helpline) and explain who will see any report
- Allow employees to bypass the person or part of the business to which the concern relates

- Provide information to the employee about the whistleblowing hotline e.g. is it run internally or by an external provider and who within the business will have sight of reports generated
- Address anonymity/confidentiality. To avoid the risk of false or malicious allegations, make clear that in such cases there is a risk of disciplinary action
- Make it clear that retaliation against anyone who makes a whistleblowing report in good faith will not be tolerated
- Warn that the victimization of genuine whistleblowers but also malicious allegations and other abuses of the whistleblowing policy are disciplinary offences which may, in appropriate cases, lead to dismissal
- Explain the rights of any reported person
- Explain what will happen on receipt of a report including investigation timeframes, feedback and confidentiality

THE WHISTLEBLOWING POLICY IN OPERATION

- Produce guidance for managers on how to deal with a whistleblowing report, emphasizing the importance of establishing and retaining legal privilege
- If using a third party service provider to help operate a hotline or analyze reports, ensure clear contractual protections in place to protect the confidentiality of reports received by the service provider and (in the case of reports originating from Europe) control the flow of data outside Europe to ensure consistency with EU privacy laws
- Establish a protocol for calls made to a hotline
- Remember to document every step from the initial report to the conclusion of the case
- Investigate thoroughly to establish if the allegations are substantiated
- Ensure that the organization complies with the commitments it has made in the policy on reporting back to the employee
- Consider communicating the outcome of any investigated cases (in generic terms if necessary) to encourage confidence in the system
- Monitor use of and regularly review the policy

AT A GLANCE: PROTECTION RATINGS ACROSS THE GLOBE

Little or no protection ★ Some protection through general laws ★★ Express protection ★★★

EUROPE

Austria	★★
Belgium	★
France	★★
Germany	★★
Hungary	★★
Italy	★★
Netherlands	★★
Norway	★★
Poland	★★
Spain	★★
Romania	★
Sweden	★★
Turkey	★★
United Kingdom	★★★

AMERICAS

Brazil	★
Mexico	★★
US	★★★

AFRICA

South Africa	★★★

ASIA-PACIFIC

Australia	★★
China	★★★
Hong Kong	★
Japan	★★★
South Korea	★★★
India	★
Indonesia	★
Malaysia	★★
Singapore	★
Thailand	★★

MIDDLE EAST

UAE	★★
Kingdom of Saudi Arabia	★★
Qatar	★★
Bahrain	★
Kuwait	★★

OUR GLOBAL EMPLOYMENT TEAM

DLA Piper's Employment group is a market-leading practice with whistleblowing expertise across the globe. The map below shows our global footprint and lead contacts from the employment team.

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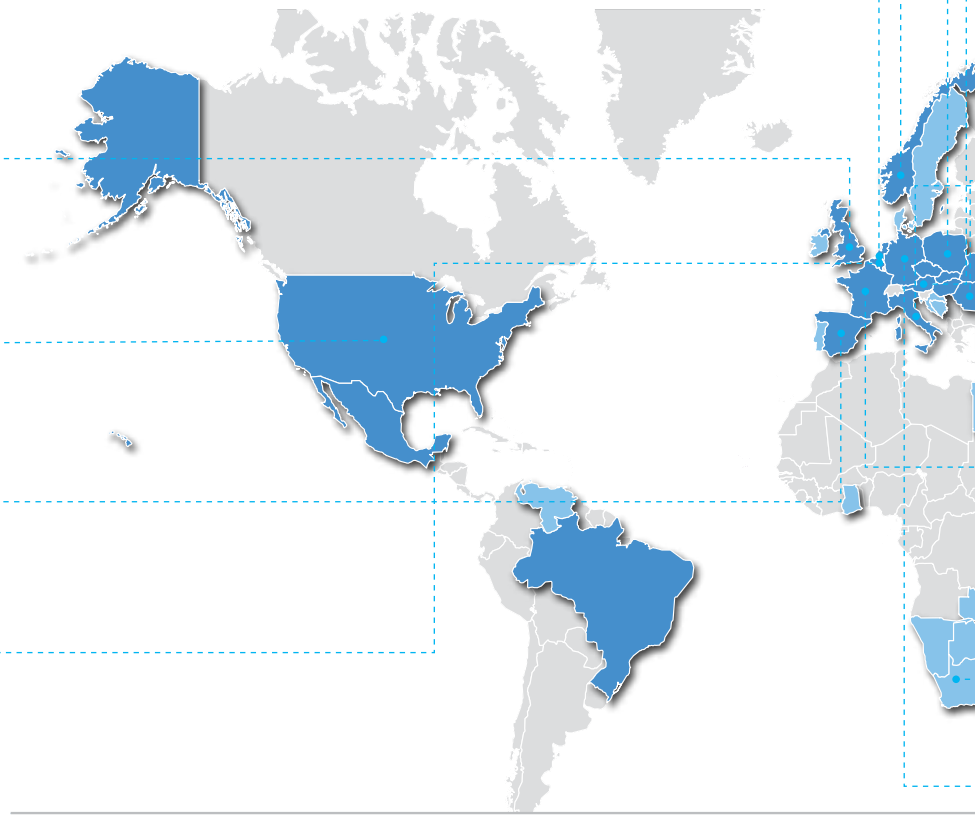

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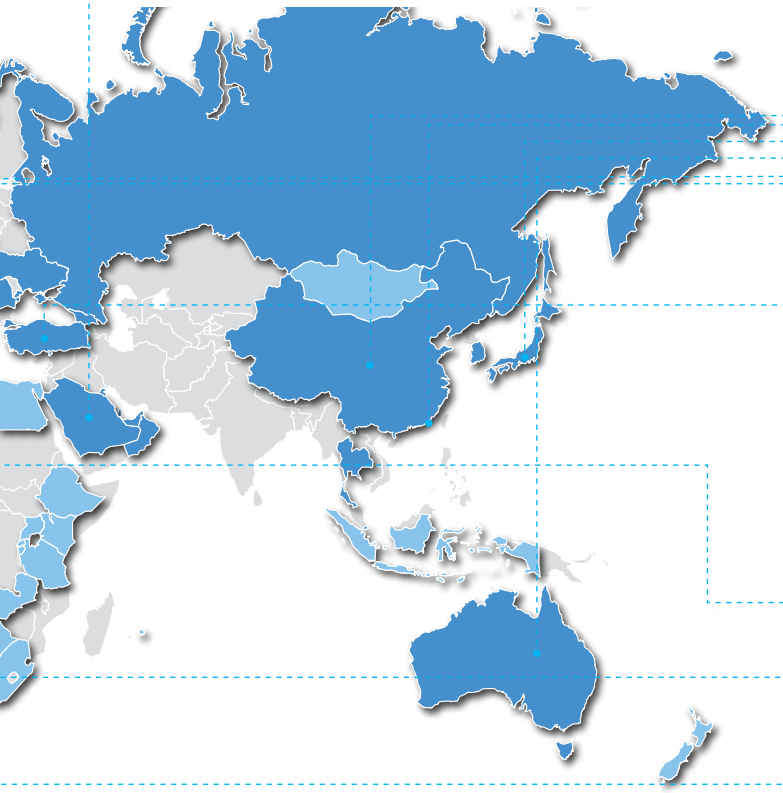

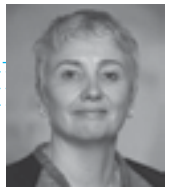

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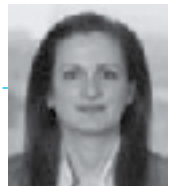

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Lusaka

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ABOUT DLA PIPER'S EMPLOYMENT GROUP

DLA Piper's Employment group is a market-leading global practice with a strong reputation for delivering solutions-based advice and supporting clients in the day-to-day management of their people legal issues and risk. It includes over 300 specialist lawyers globally, on a strategic and operational level, on both contentious and non-contentious matters across the public and private sectors. The group advises on all areas of employment, including trade union and employee relations, discrimination and diversity management, global mobility and data privacy. We also advise on the legal, tax and regulatory aspects of remuneration, employee share incentives and other benefits, and we assist clients generally in designing and delivering their reward strategies.

DLA Piper has extensive experience of handling whistleblowing issues across the globe, from advising employers on how to manage employee disclosures, to conducting investigations, to setting up whistleblowing hotlines. Our team can advise multi-national companies on how to improve their organizations policies and procedures, provide effective and appropriate ways for employees to voice their concerns, put in place effective management procedures for handling allegations and, ultimately, minimise the risk of litigation.

Our Pensions lawyers cover every aspect of pension provision, including the creation, operation, regulation and restructuring of all types of pension funds in the private and public sectors, as well as the management of pension disputes.

We also have a specialist employment law training team called Advance, which delivers training on a commercial basis.

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