

DISPUTE RESOLUTION: CORPORATE INVESTIGATIONS AND EMPLOYMENT

ALERT



IN THIS ISSUE

WHAT DOES THE PROTECTED DISCLOSURES AMENDMENT ACT MEAN FOR WHISTLEBLOWERS AND EMPLOYERS ALIKE?

On 31 July 2017, President Jacob Zuma assented to the Protected Disclosures Amendment Act, No 5 of 2017 (the Amendment Act). The Amendment Act brings about numerous changes to the Protected Disclosures Act, No 26 of 2000 (the PDA).

WHAT DOES THE PROTECTED DISCLOSURES AMENDMENT ACT MEAN FOR WHISTLEBLOWERS AND EMPLOYERS ALIKE?

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On 31 July 2017, President Jacob Zuma assented to the Protected Disclosures Amendment Act, No 5 of 2017 (the Amendment Act). The Amendment Act brings about numerous changes to the Protected Disclosures Act, No 26 of 2000 (the PDA).

The PDA provides protection to whistleblowers in the private and public sector who disclose information regarding unlawful or irregular conduct by their employers or fellow employees. The Amendment Act broadens the ambit of the PDA and introduces several new provisions which places further obligations on whistleblowers and employers alike.

The Amendment Act amends some of the definitions in the PDA and also introduces new definitions. The definition of ‘occupational detriment’ has been extended to include being subjected to a civil claim for the alleged breach of a duty of confidentiality or a confidentiality agreement arising out of the disclosure of a criminal offence or information which shows or tends to show that a substantial contravention or failure to comply with the law has occurred, is occurring or is likely to occur.

The Amendment Act introduces definitions for “temporary employment service” as well as “worker”. The definition of ‘worker’ includes individuals currently or previously employed by the state as well as independent contractors, consultants, agents and those rendering services to a client whilst being employed by a ‘temporary employment service’ (ie a labour broker).

A new provision in the PDA is that of joint liability where an employer and its client are jointly and severally liable for those instances where the employer “under the express or implied authority or with the knowledge of a client” subjects an employee or worker to an occupational detriment.

The Amendment Act has also introduced a new obligation on employers, who are now required to:

- authorise appropriate internal procedures for receiving and dealing with information about improprieties; and
- take reasonable steps to bring the internal procedures to the attention of every employee and worker.

Therefore, employers need to ensure that they have measures in place to deal with employee disclosures. These procedures should be set out in a company policy which is made available to all of its employees. The aim of any whistleblowing policy is ultimately to create a culture of openness and accountability without fear of reprisals or occupational detriment to ensure that employees report knowledge of any irregularities so that management can take the necessary steps to investigate and/or deal with those irregularities identified.



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A whistleblowing policy should include information regarding matters which are to be disclosed in terms of the policy as well as the procedures that need to be followed when making such disclosures.



A whistleblowing policy should include information regarding matters which are to be disclosed in terms of the policy as well as the procedures that need to be followed when making such disclosures. The policy should also provide guidance on the amount of information that should be provided when making any disclosures (for example, the type of conduct which constitutes the alleged irregularity, the names of those individuals involved in the alleged conduct, dates and places of occurrence as well as how the information had come into the relevant employee's knowledge). In addition to making the policy available to all of its employees, employers should ensure that they provide training to their employees on the policy.

Ultimately, a whistleblowing policy should form part of a company's suite of anti-fraud and corruption policies all of which should be aimed at creating a culture within the company of zero tolerance to irregular and/or unethical conduct, as well as a culture of reporting knowledge of such conduct so that appropriate steps may be taken.

A further new provision introduced into the PDA is the duty to inform an employee or worker of the steps taken once a disclosure has been made. In this respect, employers are required to, as soon as reasonably possible, but within a period of 21 days after receiving the protected disclosure, decide whether to investigate the matter or refer the disclosure to another person or body (if that disclosure could be investigated or dealt with more appropriately by that other person or body). The employer is also required to

acknowledge receipt of the disclosure in writing by informing the employee or worker of its decision to investigate the matter or to refer it to another person or body. Should an employer be unable to make a decision within this time period, the employer will be required to inform the employee or worker, in writing, that it is unable to do so and, thereafter, advise the employee or worker on a regular basis (at intervals of not more than two months at a time) that the decision is still pending. In such instance, the employer is required to advise the employee or worker of its decision on whether to investigate the matter as soon as reasonably possible but within a period of six months after the protected disclosure has been made.

An employer need not comply with the duty to advise an employee or worker of its decision on whether or not to investigate the relevant matter if "it is necessary to avoid prejudice to the prevention, detection or investigation of a criminal offence". An employer will also be required to inform the employee or worker of the outcome of any investigation undertaken at the conclusion of the investigation.

In terms of the PDA, employees who make disclosures in terms of the PDA are required to do so in good faith. In this respect, the Amendment Act introduces a new provision in the PDA in terms of which an employee or worker who intentionally discloses false information knowing that the information is false with the intention to cause harm to the affected party and the affected party suffered harm as a result of such disclosure is guilty of an

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offence. This conduct would constitute an offence even if an employee or worker "ought reasonably to have known" that the information being disclosed is false. If an employee or worker is found guilty of this offence, he or she would be liable on conviction to a fine or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.

The introduction of this new provision is to be welcomed as it shall serve as a deterrent to employees levelling false allegations against their employers or fellow employees. It further strengthens the principle that disclosures should be made in good faith. There should be a basis on which the relevant disclosure is made and disclosures should not stem from mere speculation without any substance. This is because allegations received by a company have serious consequences for the company and any employees implicated in the allegations. This includes the cost and time spent on investigating the relevant allegations as well as the potential reputational harm that the company or relevant employee against whom the allegations are levelled may suffer as a result of any pursuant investigation.

Lastly, the Amendment Act introduces a provision whereby an employee or worker will not be liable to any civil, criminal or disciplinary proceedings for making

a disclosure which is "prohibited by any other law, oath, contract, practice or agreement requiring him or her to maintain confidentiality or otherwise restricting the disclosure of the information with respect to a matter". This provision applies to the disclosure of information that a criminal offence has been committed, is being committed or is likely to be committed or which shows or tends to show that a substantial contravention of, or failure to comply with the law has occurred, is occurring or is likely to occur. This exclusion of liability does not extend to the civil or criminal liability of the employee or worker for his or her participation in the disclosed impropriety.

The changes brought about by the Amendment Act are important. Cognizance should be taken of the now broader ambit of the PDA. Employers should ensure that they have a robust whistleblowing policy as part of its suite of anti-fraud and corruption policies. Employers should also ensure that they create a culture of zero tolerance to irregular and/or unethical conduct as well as a culture within which employees are encouraged to blow the whistle on such conduct at all levels within the organisation.

Zaakir Mohamed and Gavin Stansfield



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