

# First world protection for South African whistle-blowers

The high profile global media attention around whistleblowing has underlined its relevance to all organisations across the globe. It is in this context that DLA Piper and its global network of employment lawyers have produced a report comparing whistle-blower protective legislation around the globe.



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This report follows on from a previous report issued in early 2014, in which South Africa compared very favourably with other countries in terms of its protection of whistle-blowers. The previous DLA Piper whistleblowing research report quoting South Africa received the attention of the South Africa judiciary system, when it was quoted in a judgment delivered by the South African Labour Court.

Tlhotlhemaje, AJ, an acting judge of the Labour Court of South Africa, said in his judgment, "...South Africa's whistleblowing framework has received the highest possible rating of three stars in a report by global law firm DLA Piper for providing express protection to those making legitimate disclosures. It means South Africa trumps Germany, France, Hong Kong and Australia and is on a par with the laws in the US, UK and China."

He said in the judgment, "In the light of such 'feel-good' news, as South Africans, we should ordinarily be in self-congratulatory mood and patting ourselves at the back for having trumped such illustrious nations known generally for clean governance, and also being on par with such good company in the field of whistle-blowing."

## South Africa again receives three star rating

In the latest report just issued, South Africa - once again - achieved the highest three star rating alongside the UK, the US, China, Canada and Japan. South Africa again fared better than trading partners Germany, France, Netherlands, Australia and Hong Kong, among others, offering more protection to whistle-blowers than these countries currently offer.

"South Africa also leads the way in Africa because of its progressive and extensive protection for whistle-blowers," explains Aadil Patel, National Head of Employment at Cliffe Dekker Hofmeyr (CDH). Its employment team contributed the South African chapter to this report.

"In terms of South Africa, the report notes, however, that 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 whistle-blower's disclosure is not made internally first, or not based on a reasonable belief in the veracity of the disclosure, statutory protections are forfeited. However, the benchmark to qualify for whistleblowing protection is set fairly low, to allow for protection even if the whistle-blower may not have irrefutable proof of the truth of the disclosure," explains Patel.

He notes that the whistleblowing framework in South Africa has developed over time and includes constitutional provisions, the Protected Disclosures Act 2000 (PDA), the Labour Relations Act (LRA), the Companies Act 2008 (CA) and a body of case law. South Africa has specific legislative protection for whistle-blowers 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 victimisation/ retaliation) under the PDA.

## **Obligation to report corrupt activities**

Patel notes that South African whistle-blowers 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.

## **Report rationale**

Tim Marshall, Global Head of Employment at DLA Piper explains the rationale behind the report, "Whistle-blowers within organisations have been instrumental in revealing serious corruption and fraud in organisations and preventing mistakes from leading to disasters. However, employers face a delicate balancing act in responding to the potential for whistleblowing in their organisation.

"Over 30 countries have now adopted some form of specific whistle-blower protection. However, legal protection for whistle-blowers 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 whistle-blower protection and the challenges, which this presents to global employers seeking to minimise the risks to their business."

Marshall explains that the report also outlines the use of hotlines and states how 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 of hotlines. A global company must decide whether it can tolerate some 'regionalisation' to address jurisdictional differences in its hotline

procedures or whether it is preferable to streamline its code dramatically 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. Hotlines are considered an effective tool in whistle-blower policies.

## **Whistleblowing policy required**

Patel note that all companies in South Africa should have a well-drafted whistleblowing policy to help to avoid expensive claims by noticing disclosures at an early stage and dealing with them properly and appropriately.

"Policies set clear standards of behavior for employees. Yet 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 whistle-blower protection can lead to significant difficulties for multi-national employers seeking to impose compliance guidelines and whistleblowing reporting schemes that are effective and consistent across the organisation 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.

"Employers must also keep the procedures under review to ensure that they remain fit for purpose as the business develops and moves forward. In order to do this, they need to work with a team of legal specialists who have access to legal specialists in multiple jurisdictions and on the continent of Africa. There is simply no other way to produce an effective cross border policy," concludes Patel.

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