



Developments with the PDA

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Whistleblowing is defined as raising a concern about wrongdoing within an organisation. The Protected Disclosures Act 26 of 2000 (PDA) was enacted to protect whistleblowers and to help combat corruption.

The purpose of the PDA is to make provision for procedures in terms of which employees, in both the private and the public sector, may disclose information regarding unlawful or irregular conduct by their employers or other employees in the employ of their employers, and to provide for the protection of these employees who make a disclosure that is protected in terms of the PDA and to further provide for matters connected therewith.

In August 2017 the Protected Disclosures Amendment Bill was passed, resulting in many changes to the PDA. The amendments have created additional safeguards for whistleblowers and an environment in which whistleblowers may freely disclose information. This reflects progression in the law, in particular pertaining to the anti-corruption and anti-bribery space, which is welcomed in the public and private sector to minimise the economic loss posed by unlawful and unethical conduct in the workplace.

The changes include an extended application of the PDA to individuals previously in the employment of the state. This inclusion is expected to greatly assist corruption watchdogs where those previously employed by the state may come forth to report irregular conduct during their employment.

Furthermore, the recipient of the protected disclosure is now legally obliged, upon consideration of the protected disclosure, to decide on either investigating such disclosure or referring it to another body for investigation within 21 days.

The whistleblower is further afforded immunity from civil, criminal or disciplinary proceedings in instances where the disclosures made show that a criminal offence has been committed, is being committed or is likely to be committed, and such disclosures are prohibited by any law or confidentiality agreement. Although such a disclosure may still give rise to occupational

detriment, it avoids the deterrent of costly looming litigation faced by whistleblowers who report irregular workplace conduct.

In instances where there is an intentional disclosure of false information, the Act now provides for criminal liability in the form of a conviction to a fine or imprisonment of up to two years. It is suggested that although this will deter false disclosures, it may also discourage whistleblowers who have not yet verified the authenticity of their information that could assist in investigating matters.

The amendments have now also imposed joint liability on employers and their clients in the event that an employee is subjected to an occupational detriment.

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. Exclusion of liability therefore does not extend to the civil or criminal liability of the employee for his/her participation in the disclosed impropriety.

It is suggested that all companies in South Africa, have well drafted whistleblowing policies to avoid expensive claims, by picking up on disclosures at an early stage and dealing with them properly and appropriately. It is further suggested that employers must keep the procedures under review to ensure that they remain appropriate. The employer must further ensure that it does not subject employees to occupational detriment as dismissals in such instances are automatically deemed to be unfair in terms of section 187 of the LRA and may result in an award of compensation of a maximum of 24 months.

An occupational detriment in relation to the working environment of an employee means:

- being subjected to any disciplinary action
- being dismissed, suspended, demoted, harassed or intimidated
- being transferred against his/her will
- being refused transfer or promotion
- being subjected to a term or condition of employment or retirement that is altered or kept altered to his/her disadvantage
- being refused a reference, or being provided with an adverse reference, from his/her employer

- being denied appointment to any employment, profession or office
- being threatened with any of the actions referred to above, or
- being otherwise adversely affected in respect of his/her employment, profession or office, including employment opportunities and work security.

Other occupational detriments, not resulting in dismissal, are deemed unfair labour practices that could give rise to a maximum of 12 months compensation.

As a result, South Africa has been compared very favourably with other countries in terms of its protection of whistleblowers, with the reports showing that South Africa has whistleblower legislation rating alongside countries such as the USA, the United Kingdom and China, currently faring better than trading partners Germany, France, Netherlands, Australia and Hong Kong, among others.

Article by Jordyne Loser, candidate attorney.

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