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Guide to Whistleblowing

India



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Legal basis for whistleblowing

The only sector-agnostic legislation dealing with the protection of whistleblowers in India are:

- the Whistle Blowers Protection Act 2014 (Whistle Blower Protection Act), which enables any person (ie, a whistleblower) to report an act of corruption, wilful misuse of power or discretion, or a criminal offence by a public servant. This includes all public servants, including ministers, members of parliament, the lower judiciary, regulatory authorities, and central and state government employees. A specified competent authority appointed under this legislation will conduct a discreet inquiry into the complaint and conceal the identity of the complainant and public servant; and
- the Companies Act 2013 (Companies Act), which mandates the incorporation of a whistleblower policy, but primarily only by listed companies.

To date, there are no specific laws dealing with the protection of whistleblowers applicable to private, unlisted companies or unincorporated entities and their employees. Employers are free to formulate and adopt a whistleblower policy to encourage employees (or any other person for that matter) to report matters without the risk of subsequent victimisation, discrimination or disadvantage, economic or otherwise. Accordingly, for private establishments, the whistleblowing regime remains largely discretionary and policy-driven.

In addition to the laws listed above, while there are various disclosure obligations imposed on persons and entities (such as banks and listed companies) enabling early detection of fraud and wrongdoing, India has not yet adopted laws to improve the protection of whistleblowers across sectors or levels in the economy and establish adequate secure channels or mechanisms to enable whistleblowers to report without fear of disclosure, retaliation or victimisation.

Implementation of the whistleblowing procedure

2. Which companies must implement a whistleblowing procedure?

As per the Companies Act, the following types of companies are required to establish a vigil mechanism and adopt a "whistleblower policy" for directors, employees, stakeholders and any other individuals (such as auditors) to report concerns about unethical behaviour, actual or suspected fraud or violation of the company's code of conduct or ethics policy:

- listed companies;
- companies that accept deposits from the public; and
- companies that have borrowed money from banks and public financial institutions totalling more than 500 million Indian rupees.

The requirement for listed companies to adopt a whistleblower policy also arises from the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations 2015.

The abovementioned companies will be hereinafter referred to collectively as "Covered Companies".

The vigil mechanism or whistleblower policy must provide adequate safeguards against the victimisation of persons who use it. The Companies Act also requires auditors to report an offence of fraud in the company by its officers or employees if they identify or note such instances during the performance of their duties.

3. Is it possible to set up a whistleblowing procedure at a Group level, covering all subsidiaries?

Yes, this may be done. Various organisations in India have adopted a whistleblowing policy at the group level and set up a common hotline channel or speak-up portal to receive complaints of unlawful or unethical conduct and other wrongdoing within group companies.

4. Is there a specific sanction if whistleblowing procedures are absent within the Company?

As per the Companies Act, for failure to adopt and implement a whistleblowing procedure, a Covered Company and every officer of that company who is responsible for such non-compliance may be punished with a fine of up to 10,000 rupees and, if non-compliance continues, a further fine of up to 1,000 rupees a day.

5. Are the employee representative bodies involved in the implementation of this system?

While Covered Companies may factor the suggestions of the unions, associations of officers or employees before framing a whistleblowing policy, employee representative bodies are not involved in the implementation of the vigil mechanism. The whistleblowing mechanism will be overseen by a Covered Company through its Audit Committee or Board of Directors, as may be relevant.

6. What are the publicity measures of the whistleblowing procedure within the company?

Details of the whistleblowing policy and the mechanism thereof will have to be disclosed by the Covered Company on its website as well as in the Board of Directors' annual report filed with the competent regulatory authority.

7. Should employers manage the reporting channel itself or can it be outsourced?

While the reporting channel may be outsourced, in respect of Covered Companies, the mechanism should be overseen by the Audit Committee or Board of Directors, as applicable.

8. What are the obligations of the employer regarding the protection of data collected related to the whistleblowing procedure?

As per the Whistle Blower Protection Act, notwithstanding any law in force, the competent authority will be required to conceal the identity of the complainant and the documents or information furnished by him for enquiry, unless so decided otherwise by the competent authority itself or it becomes necessary to reveal or produce the same under an order of a

competent court. Any person who negligently or with a mala fide intention reveals the identity of a complainant will be punished with imprisonment for up to three years and also a fine of up to 50,000 rupees.

The Indian Companies Act does not impose any obligations on employers regarding data protection and the confidentiality of the complainant, witnesses, the inquiry process or the outcome of a whistleblower complaint, which is a crucial part of whistleblower protection. This will be subject to any such policy adopted by the company.

9. What precautions should be taken when setting up a whistleblowing procedure?

Key aspects that should be borne in mind while formulating a whistleblower policy or procedure are:

- a special or distinct committee or channel must be created for receiving and handling disclosures, giving the whistleblowing mechanism a fair, neutral and independent institutional framework;
- the reporting mechanism should be systematic, simple and straightforward to facilitate an early and easy disclosure of any wrongdoing. The procedure for disclosure must be easily comprehensible and should be accessible by all employees or individuals associated with the organisation;
- the policy should provide adequate assurances and comfort regarding confidentiality of the identity of the whistleblower, continuity of association with the organisation, and the steps that the organisation will take to ensure that the whistleblower is not victimised, discriminated against or adversely impacted in any manner pursuant to the disclosure (including facilitating legal assistance at the organisation's cost, if necessary);
- the policy should ensure that no action will be taken against whistleblowers who make disclosures in good faith and even allow for anonymous reporting; and
- identification of what matters may be reported under the policy, the persons against whom such matters can be reported, the process that should be followed by the organisation, remedial measures, details of persons with whom reported information will be shared, and an overview of the mechanism for protecting whistleblowers and persons cooperating with an investigation, etc.

Scope of the whistleblowing procedure

10. What precautions should be taken when setting up a whistleblowing procedure?

As per the Whistle Blower Protection Act, a whistleblower may make a complaint or disclosure relating to:

- the committing of or an attempt to commit an offence under the Prevention of Corruption Act 1988 by a public servant;
- wilful misuse of power or wilful misuse of discretion by which demonstrable loss is caused to the government or demonstrable wrongful gain accrues to the public servant or any third party; and
- the committing of or an attempt to commit a criminal offence by a public servant.

The Companies Act only states that stakeholders of a company may report "genuine concerns" under the vigil mechanism. While the definition of "concerns" has not been provided for under the Companies Act, it would be a prudent assumption that it covers instances of suspected fraud and non-compliance

with applicable laws, rules and procedures or any other wrongdoing that would adversely affect the organisation or stakeholders at large (financially or otherwise).

11. Are there special whistleblowing procedures applicable to specific economic sectors or professional areas?

The Whistle Blowers Act of 2014 targets public servants and is intended to prevent corruption, misappropriation of assets and misuse of power in the public sector. Further, provided a whistleblower makes full and true disclosure of all material facts, the settlement commissions established under the Income Tax Act 1961 and the Goods and Services Tax Act 2016 have the power to grant them immunity from those statutory penalties. Similarly, the Competition Commission of India established under the Competition Act 2002 possesses the power to award a reduced penalty to an informant who is a part of an anticompetitive cartel and makes a full, true and vital disclosure. The Securities Exchange Board of India also rewards whistleblowers who are themselves guilty of violating securities law by granting anonymity and a pardon for their complete cooperation. Lastly, the Reserve Bank of India (RBI) prescribes for whistleblowing mechanisms to be adopted by various banks and financial institutions.

Identification of the whistleblower

12. What is the legal definition of a whistleblower?

As per the Whistle Blower Protection Act, a whistleblower is referred to as a "complainant" and it is defined as any person who makes a complaint relating to:

- the committing of or an attempt to commit an offence by a public servant under the Prevention of Corruption Act 1988;
- wilful misuse of power or wilful misuse of discretion by which demonstrable loss is caused to the government or demonstrable wrongful gain accrues to the public servant or any third party; or
- the committing of or an attempt to commit a criminal offence by a public servant.

The Companies Act does not define "whistleblower" but it is generally understood to be a person who has first-hand information of fraud or other kinds of misbehaviour or unethical activity or wrongdoing within an organisation and discloses the same in the overall interest of the organisation and all its stakeholders.

13. Who can be a whistleblower?

There are no limitations or qualifications on who can be a whistleblower. Any person with knowledge of a breach or wrongdoing may report it and qualify as a whistleblower.

14. Are there requirements to fulfil to be considered as a whistleblower?

Not applicable.

15. Are anonymous alerts admissible?

As per the Whistle Blower Protection Act, a complaint is only acted upon by the competent authority if the complainant discloses their identity in the complaint. Complainants providing false identities or anonymous complaints are not

recognised.

However, there is no embargo under the Companies Act against anonymous reporting concerning the activities of companies. The Audit Committee or Board of Directors may independently assess the contents of the anonymous complaint and take necessary action or attempt to reach out to the whistleblower for further information and cooperation. Leading business organisations in India allow anonymous complaints and have put in place processes to safeguard the identity of whistleblowers, and ensure the confidentiality of the investigation process.

16. Does the whistleblower have to be a direct witness of the violation that they are whistleblowing on?

There is no such requirement prescribed under applicable laws and the information provided by whistleblowers may be independently assessed and acted upon, notwithstanding the fact that the whistleblower was not a first-hand witness to the reported act.

Processing of the whistleblowing procedure

17. What are the terms and conditions of the whistleblowing procedure?

For Covered Companies, the terms and conditions, as well as the whistleblowing procedure, will be subject to the policy adopted by them. As regards the procedure under the Whistle Blower Protection Act, upon receipt of a complaint the competent authority should conceal the identity of the complainant, or the public servant in the first instance, and make a discreet inquiry, as may be appropriate, to ascertain whether there is any basis for proceeding further to investigate the disclosure. If the competent authority, either as a result of the discreet inquiry, or on the basis of the disclosure itself without any inquiry, believes that the disclosure needs to be investigated, it shall seek comments, explanation or reports from the Head of the Department of the organisation or authority, board or corporation, or office concerned. Pursuant to this, if the competent authority believes that such comments or explanations or report reveals either willful misuse of power or willful misuse of discretion or substantiates allegations of corruption, it shall recommend that the public authority take appropriate measures against the public servant, which may range from corrective action to initiation of criminal proceedings against the public servant.

18. Is there a hierarchy between the different reporting channels?

This would be subject to the policy and reporting channels prescribed under the whistleblowing policy.

19. Should the employer inform external authorities about the whistleblowing? If so, in what circumstances?

There is no blanket requirement for an employer to inform external authorities upon receipt of disclosure from a whistleblower. However, depending on the nature of the disclosure, its gravity and impact, employers may be required to report the same to certain authorities, including but not limited to the Securities Exchange Board of India, RBI or relevant stock exchanges (in the case of listed companies) or even the Serious Fraud Investigation Office.

20. Can the whistleblower be sanctioned if the facts, once verified, are not confirmed or are not constitutive of an infringement?

There are no sanctions prescribed under the Companies Act if the facts, once verified, are not confirmed or do not constitute an infringement.

However, as per the Whistle Blower Protection Act, only persons who make any disclosure with a mala fide intention or knowing that it was incorrect or false or misleading, shall be punishable with imprisonment for up to two years and a fine of up to 30,000 rupees.

21. What are the sanctions if there is obstruction of the whistleblower?

Protection is only offered to whistleblowers under the Whistle Blower Protection Act after they report fraudulent activity or non-compliance, and not before. Accordingly, there is a lacuna in the Whistle Blower Protection Act (as well as the Companies Act) as far as they fail to prescribe sanctions to those who obstruct an individual from reporting fraudulent activity or non-compliance.

Whistleblower Protection

22. What procedure must the whistleblower follow to receive protection?

As per the Whistle Blower Protection Act, if any person believes they are being victimised because they filed a complaint, made disclosures or rendered assistance in an inquiry under the Act, they may apply to the competent authority designated under the Whistle Blower Protection Act and seek protection.

The authority may take such action, as appropriate, and give suitable directions to the concerned public servant or the public authority (including the jurisdictional police) to protect such person from being victimised or to avoid such victimisation. However, it is important to note that the Whistle Blower Protection Act does not clarify or lay down any standards or definitions for "victimisation", and the same is subject to the assessment of the competent authority.

The process to be followed by whistleblowers in respect of Covered Companies or other establishments is subject to the policy adopted by such establishments.

23. What is the scope of the protection?

While the Whistle Blower Protection Act does not define the specific scope of protection that may be provided to the complainant, the competent authority has a wide range of powers to take such action, as it deems fit, depending on the facts and circumstances of each case, and may give suitable directions to the concerned public servant or the public authority (including the jurisdictional police) to protect the whistleblower or witnesses.

However, the competent authority is not empowered to impose civil or criminal sanctions against perpetrators for any sort of physical harassment or attacks on whistleblowers.

24. What are the support measures attached to the status of whistleblower?

The Whistle Blower Protection Act and Companies Act do not

prescribe any support measures for the status of whistleblowers.

25. What are the risks for the whistleblower if there is abusive reporting or non-compliance with the procedure?

Apart from the risk of retaliation and adverse action in terms of withholding or denial of benefits, termination of the engagement, etc, historically, whistleblowers in India have also faced the risk of death and physical injury, especially in matters that involve public institutions related to scams and frauds. It may not be possible to identify and list all the risks that a whistleblower may be subjected to, as it will depend on the nature of the activity reported by him, the persons involved in such activity, the gravity, magnitude and impact of the disclosure and the position of the whistleblower within the organisation.

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Anshul is a Partner at Khaitan & Co and leads the Employment Labour and Benefits (ELB) practice of the Firm from its Mumbai office.

Anshul and the ELB practice under his leadership have won several awards and recognitions over the years being ranked Tier-1 across league tables. Individually, Anshul has been recognized as Leading Individual Lawyer (Labour & Employment) by Legal 500 Asia Pacific, Top Individual Lawyer (Labour & Employment) in Forbes India Legal Powerlist 2020-21 besides being recognized by BW Legal World among Top 40 Under 40, "Finest Lawyers" & "Legal Eagles" of the Indian Legal Ecosystem, ranked amongst Asian Legal Business Super 50 lawyers in India and honorably ranked and highly recommended by Chambers & Partners Asia Pacific while also awarded by Asia Law Profiles for Client Service Excellence. More recently, Anshul was recognised as a Leading Lawyer in the area of Labour and Employment in Legal Era Leading Lawyers Rankings 2022.

Anshul exclusively advises several prominent domestic and international clients on full suite of contentious and non-contentious employment law and related matters concerning workforce management, social security, industrial relations and trade union strategy, transition due to business transfers, workplace harassment & discrimination, structuring benefits & incentives, health & safety, internal inquiries, workforce restructuring, internal investigations and representation before labour authorities.

Anshul also leads the Firm's thought leadership initiative on advocacy & knowledge sharing in employment and labour law space, and actively shares insights on evolving jurisprudence in the employment & labour law space in several industry publications, print media and public speaking events organized by industry bodies.

Anshul and the ELB team have been working towards updating clients and creating awareness within the industry at large regarding the recently introduced Labour Codes 2020, and the expected changes to the labour law regime in the country.

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Kruthi is a Senior Associate in the Employment Labour and Benefits (ELB) practice group in the Mumbai office. Kruthi has advised various prominent domestic and international clients on compliance requirements with the applicable labour and employment laws, drafted employment documentation for senior officials of companies, and also assisted in various labour and employment related due diligences.

Kruthi has also advised clients in relation to exit of senior officials of companies, enforcement of restrictive covenants, workforce restructuring (including in the backdrop of government-initiated lockdown due to the COVID-19 pandemic), cross border engagement of personnel and transition of employees pursuant to corporate restructuring exercises.

Kruthi has also been advising clients in relation to the new Labour Codes, and the expected changes to the labour law regime in the country. She has also been involved in conducting labour audits and disciplinary inquiries.

Kruthi has been acknowledged as a 'Rising Star' by Legal500 in their Asia Pacific Rankings for the years 2021 and 2022, for her experience and expertise in Indian labour and employment laws.