

The Protected Disclosures (Amendment) Act 2022 – Prepare for Implementation – Update for Employers in Ireland

The Protected Disclosures (Amendment) Act 2022 (the "2022 Act") introduces significant changes to the Protected Disclosures Act 2014 (the "2014 Act"). It was signed into law on 21 July 2022 and is due to come into force shortly. Following on from our previous updates^{1 2} as the legislation evolved, we summarise below what employers in Ireland need to know to get ready for its implementation.

Good to Know About the New Law

- A wider group of workers and stakeholders will be protected from retaliation in connection with making a protected disclosure including non-executive directors and shareholders as well as employees, volunteers, interns, contractors and agency workers.
- The scope of "breaches" which can fit the definition of a protected disclosure has widened to include breaches related to applicable laws governing:
 - Financial services;
 - Products and markets;
 - Prevention of money laundering and terrorist financing;
 - Data and personal privacy;
 - Corporate tax rules including those governing anti-avoidance; and
 - Protection of the environment.
- All large employers (+249 employees) and many employers operating in the regulated financial services sector must have and maintain internal reporting channels and investigation procedures which comply with the 2022 Act, as soon as the law comes into force. Other smaller employers with 50-249 employees (except specific sectors such as regulated financial services sector employers) must have these procedures in place by December 2023.
- The new internal reporting channels and procedures require:
 - Adopting secure and confidential reporting procedures for protected disclosures;
 - Prompt acknowledgment of a protected disclosure (seven days);
 - Designation of a competent and impartial person to maintain contact with the reporting person and to progress the investigation of the alleged wrongdoing;
 - Completion of a thorough investigation to a satisfactory conclusion; and
 - Feedback at prescribed three month intervals to the reporting person.

¹ <https://maples.com/en/knowledge-centre/2021/12/the-protected-disclosures-amendment-bill-2021>

² <https://maples.com/en/knowledge-centre/2021/10/employment-law-series-the-protected-disclosures-regime-in-ireland>

- Employers who are in scope are required to:
 - Update existing protected disclosures policies prepared in response to the 2014 legislation to comply with the 2022 Act;
 - Appoint and train one or more designated "impartial" persons competent to progress the investigation and feedback to the reporting person; and
 - Communicate to workers, how the new procedures for reporting protected disclosures internally and externally will operate and how anonymous reports will be handled.

Anything else we should know at this point as an employer?

Yes – consider the following:

- The 2022 Act expands the anti-retaliation protection to individuals who become aware of information regarding a relevant wrongdoing during the recruitment process or pre-contractual negotiations.
- The range of conduct which can constitute "penalisation" under the 2022 Act has widened to include conduct which can be linked to making a protected disclosure such as:
 - Negative performance reviews;
 - The imposition of a disciplinary penalty;
 - Negative employment reference;
 - Blacklisting within a sector/industry; and
 - Psychiatric and medical referrals.
- It is also worth noting that the burden of proof in respect of penalisation claims has now been reversed and will shift to the employer. An act or omission shall be deemed to have been as a result of a worker making a protected disclosure unless an employer can prove that the act or omission was based on "duly justified grounds".
- An employer can use an external reporting channel requirements if there is no in-house capability to meet the 2022 Act requirements. Where the reporting channel is operated externally by a third party, employers have a responsibility to ensure the operated reporting channel conforms with the 2022 Act requirements.
- The 2022 Act confirms that "interpersonal grievances" which only affect the reporting person are not deemed "relevant wrongdoings" under the 2022 Act. However, if a worker can establish that the subject matter of the grievance affects other workers also (such as a systemic health and safety deficiency in the workplace), the grievance could be a relevant wrongdoing under the 2022 Act.
- The 2022 Act introduces extensive record keeping obligations and a record must be kept of every disclosure made under the Act. Anonymous reports must also be recorded to ensure that in cases where the reporting person is subsequently identified, that person is adequately protected.
- The 2022 Act creates several new criminal offences which include:
 - Hindering or attempting to hinder a worker in making a report;
 - Penalising or threatening to penalise or causing or permitting any other person to penalise or threaten penalisation;
 - Bringing vexatious proceedings
 - Breaching the duty of confidentiality regarding the identity of reporting persons;
 - Making a report containing any information that the reporting person knows to be false; and

- Failing to establish, maintain and operate internal reporting channels and procedures.
- The 2022 Act establishes a new Office of the Protected Disclosure Commissioner. The Commissioner will act as a recipient of last resort in respect of certain reports where no prescribed person or other suitable person can be identified.

Recap on Key Existing Provisions Which Remain Largely Unchanged

- Employers are prohibited from penalising workers for making a protected disclosure.
- Where a worker brings a complaint for penalisation for making a protected disclosure to the Workplace Relations Commission ("WRC"), the WRC may award compensation of up to five years remuneration.
- Workers can also apply to the Circuit Court for an interim order continuing pay until the determination of the complaint. An application for interim relief is no longer limited to instances where a worker has been dismissed and the interim relief measures provided for in the 2014 Act are now extended to include other forms of penalisation.

How the Maples Group Can Help

For further information, please reach out to your usual Maples Group contact or any of the persons listed below.

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