Delphi

Whistleblowing

How do you decide whether it is a whistleblowing case or not?

Rebecka Thörn / Partner / Advokat

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In our capacity as external receiver of whistleblowing cases for clients, investigator of whistleblowing cases and sounding boards in whistleblowing cases, we are often asked how to determine whether a case is an actual whistleblowing case or not. This question is important in order to determine which obligations an organization has regarding a report received in a whistleblowing function. If it is an actual whistleblowing case, the reporting person is protected against retaliation in the form of, for example, dismissal and redeployment, and the organization has an obligation to investigate the reported misconduct and provide feedback to the reporting person. Below is a summary of the types of situations that we usually encounter in our work with whistleblowing cases.

Whistleblowing cases under the Whistleblowing Act

The Whistleblowing Act (Act 2021:890 on the protection of persons who report misconduct) applies when reporting in a work-related context information about misconduct that there is a public interest in their disclosure or conditions that are otherwise in breach of Swedish or EU law, for example:

- Corruption and financial irregularities, such as bribery, unfair competition, money laundering and fraud.
- Health and safety offences; for example, health and safety offences and serious product safety failures
- Environmental offences; e.g. illegal handling of hazardous waste
- Privacy offences; for example, improper use of personal data

Breaches of the Code of Conduct

It is relatively common for organizations to state in their whistleblowing policy/guidelines that it is also possible to whistleblow about violations of the organization's Code of Conduct. An organization's Code of Conduct usually contains regulations that go beyond the law, such as stipulations that employees should avoid conflicts of interest between their private interests and the interests of the organization. In these cases, for example, a manager hiring a close relative may constitute a whistleblowing case, but not if only the Whistleblowing Act is applicable. In our experience, it may be appropriate to include violations of the Code of Conduct in what employees and others can whistleblow about. However, organizations should be cautious about including violations of policies and guidelines in general.

Workers who commit offences unrelated to the workplace

Sometimes reports are received that a particular employee has committed a criminal offence. If the criminal offence is related to work, it is generally a whistleblowing case. For example, a report is received that an employee is handling drugs. If the handling takes place at the workplace, as a general rule it is considered a whistleblowing case, but the presumption is the opposite if there is no link to the employment.

The misconduct relates to the reporting employee's own work situation.

Abuses that only affect the reporting person's own working or employment conditions are not normally of public interest, unless they are completely unacceptable from a broader societal perspective. As an example of such circumstances, the preparatory works gives as an example a person working under almost slave-like conditions. If the misconduct is not of this very serious nature, it generally falls outside what is to be regarded as a regular whistleblowing case. If the corresponding report is instead received from a colleague of the person affected by the abuses, or if the report concerns, for example, the collective situation of a work group in which the reporting person is involved, the assessment may be different.

It is important to note that the employer, according to other laws and regulations, may have an obligation to investigate reported grievances that are not to be regarded as regular whistleblowing cases. If harassment or sexual harassment is suspected, the employer has an obligation to investigate under the Discrimination Act. If there is a suspicion of victimization or bullying, the employer is obliged to conduct an internal investigation in accordance with the Swedish Work Environment Authority's regulation (AFS 2015:4) on organizational and social work environment.

Irregularities committed by co-operation partners

Sometimes organizations receive reports of misconduct at a supplier or some other form of close cooperation partner. In other words, the reported misconduct has not been committed within the organization itself and it is therefore not a whistleblowing case that the organization is responsible for investigating under the Whistleblowing Act. Even if the case is not classified as an actual whistleblowing case in the organization itself, it may still be of importance to the organization receiving the report. They often have an interest in investigating what has happened in order to be able to enter into a dialogue with the cooperation partner and possibly make demands on them.

Establishments with less than 50 employees

Before the current Whistleblowing Act entered into force in December 2021, there was a restriction that the misconduct had to be committed by a person in a leading or key position in the organization in order for it to be an actual whistleblowing case. This limitation is found in the Swedish Data Protection Authority's regulation DIFS 2018:2 and continues to apply to organizations with less than 50 employees, i.e. to those organizations that choose to have a whistleblowing function even if there is no legal requirement. The distinction between organizations with 50 or more employees in relation to organizations with less than 50 employees is unfortunate and impractical, but it is still there.

How should reports that are not actual whistleblowing cases be handled?

Even an HR matter, such as an inappropriate manager, can be as important to investigate as an actual whistleblowing case. Feedback to the reporting person, as in an actual whistleblowing case, is often valuable and appreciated.

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