

SMALL BUSINESS, ENTERPRISE AND EMPLOYMENT ACT 2015

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 11: EMPLOYMENT

Whistleblowing

Section 148: Protected disclosures: reporting requirements

814. This section inserts a new section 43FA in to Part 4A of the Employment Rights Act 1996 (ERA), which provides protection for workers who blow the whistle on malpractices by their employers or third parties.
815. The whistleblowing framework was established by the Public Interest Disclosure Act 1998. Its purpose is set out in the preamble as, “an Act to protect individuals who make certain disclosures of information in the public interest; to allow such individuals to bring action in respect of victimisation”.
816. A worker who blows the whistle, by making a protected disclosure in accordance with the criteria set out in Part IVA sections 43B to 43H of the ERA, has the right not to be unfairly dismissed or suffer a detriment as a result of having made that disclosure.
817. For a disclosure to be protected by the provisions, the worker must make sure it is either made internally to their employer or another responsible person or to various external bodies including a legal advisor, a Minister of the Crown or a prescribed person listed on the Public Interest Disclosure (Prescribed Persons) Order 1999 (PID(PP)O).
818. Under the existing legislation, there is no legal obligation on prescribed persons to take any action in relation to the public interest disclosures that they receive.
819. During the passage of the Enterprise and Regulatory Reform Act 2013, the Government committed to run a call for evidence on whistleblowing in order to establish if there was a case to make changes to the whistleblowing framework. The responses to the call for evidence indicated a lack of consistency in the approach taken by bodies on the PID(PP)O, and a lack of communication by prescribed persons.
820. This section provides a power for the Secretary of State to require certain bodies listed on the PID(PP)O to report annually on disclosures by workers. The content of the report will be prescribed by regulations, which will also determine how the report is published and timing of the report. The Secretary of State also has the power to make further regulations setting out additional bodies to report annually. These regulations will be subject to parliamentary scrutiny by debate in both Houses.
821. The section makes provisions to protect both the identity of the individual who has made the disclosure and the employer or organisation to which the disclosure relates.

822. This section also allows the Secretary of State to make later amendments to the content of the annual report or prescribe different methods or timing for publication of the report. This would be subject to a lighter parliamentary procedure. This flexibility enables the Secretary of State to ensure that the information being captured and reported is relevant as circumstances change over time and to ensure that the method of publication remains effective.

Section 149: Protection for applicants for employment etc. in the health service

823. This section inserts a new section into the Employment Rights 1996, which gives the Secretary of State a power, through Regulations, to prohibit defined NHS Employers in England, Scotland and Wales from discriminating against job applicants because it appears to the NHS employer that the applicant has made a protected disclosure (within the meaning given by section 43A of the Employment Rights Act 1996). For the purposes of this section, an NHS employer discriminates against an applicant if, because it appears to the NHS employer that the applicant has made a protected disclosure, the NHS employer refuses the applicant's application or in some other way treats the applicant less favourably than it treats or would treat other applicants in relation to the same contract.
824. The section defines who would be an 'applicant' for the purposes of Regulations. In addition, the Secretary of State through such regulations may also confer jurisdiction (including exclusive jurisdiction) on employment tribunals or the Employment Appeal Tribunal, make provisions for the grant or enforcement of remedies specified by a court or tribunal, and make provision for the making of awards of compensation calculated in accordance with the regulations.