

## **Whistleblowing Factsheet**

### **Introduction**

This factsheet has been produced to provide advice on how to negotiate agreements and procedures on whistleblowing for branch officers and stewards. UNISON recognises that employees working in the public and private sectors are often in the best position to know when the public's interest is being put at risk. Staff are able to act as an early warning system on safety issues, help uncover fraud and mismanagement in the workplace; however staff often fear they will be putting their jobs at risk if they raise concerns.

The Enterprise and Regulatory Reform Act 2013 has introduced some changes to the Employment Rights Act 1996, which now means that a protected disclosure needs to be made in the public interest – this means that a worker must reasonably believe that it is in the public interest and that they will be protecting the public by 'blowing the whistle' on any malpractice in their organisation. Legal protection is very important if employees are to be encouraged to raise concerns; however a more open culture where staff are encouraged to raise concerns at the earliest opportunity when they fear the public's interest is being put at risk should be developed.

UNISON has a vital role to play in creating that culture in raising concerns with management, supporting members who make the decision to blow the whistle and ensure that employer's policies and practices are fair. Branch officers and stewards have a key role to play in raising concerns about wrongdoing and supporting members who speak out. There is a model agreement included in Appendix 1 of this factsheet as a guide to what you might want to include in your whistleblowing policy and advice on how to respond to members that come to you with their concerns.

### **Whistleblowing and the Law**

The Public Interest Disclosure Act 1998 introduced legal protection for individuals who disclose information to expose acts such as criminal acts. The equivalent legislation in Northern Ireland is the Public Interest Disclosure (Northern Ireland) Order 1998.

The legislation made substantial amendments to the Employment Rights Act 1996 ('ERA') – and the Employment Rights (NI) Order 1996 in Northern Ireland – to protect whistleblowers in certain circumstances from dismissal and detrimental treatment by their employer.

In some cases, whistleblowers may bring a case before an employment tribunal, which can award compensation.

If a member is being victimised or suffering from unfair treatment because of blowing the whistle branch officers and reps need to decide what action to take. This may involve bringing a claim in the employment tribunal where strict time limits apply.

### **Who is protected?**

The ERA whistleblowing provisions cover all employees in the public, private and voluntary sectors and certain other workers including agency staff, homeworkers, trainees (apprentices), contractors and all other professionals in the NHS.

Legal protection may apply if the individual has a reasonable belief in what they are reporting, they are telling the right organisation or person as defined by the ERA, and they reasonably believe that their disclosure is in the public interest.

### **Whistleblower's Rights**

The ERA whistleblowing provisions aim to protect whistleblowers from victimisation and dismissal when they raise genuine concerns about misconduct or wrongdoing. These rights were developed further in June 2013 by the Enterprise and Regulatory Reform Act 2013 with the result that:

- A disclosure must now be made in the public interest.
- A whistleblower who makes a disclosure in the public interest will be protected by the ERA and the whistleblower no longer has to demonstrate that they have made the disclosure in good faith in order to be protected, however a tribunal can reduce the level of compensation it awards if it feels that the disclosure was not been made in good faith.
- A whistleblower that makes a disclosure in the public interest is now protected if they are bullied or harassed by co-workers. A whistleblower can take a claim to an employment tribunal for compensation if they are victimised (subjected to a detriment) for blowing the whistle. Co-workers can be held responsible for bullying and harassment and in some cases employers can be liable, even if this takes place without the employer's knowledge –an employer will have to prove that it has done everything possible to protect the whistleblower from bullying and harassment.
- Confidentiality clauses, such as gagging clauses in employment contracts and severance agreements, which conflict with the protections in this Act, will not be legally binding.



A worker who blows the whistle may be protected if the disclosure is made in the public interest and is about:

- criminal offences
- A breach of any legal obligation
- Miscarriage of justice
- Danger to Health and Safety of any individual
- Damage to the environment
- Deliberate concealment of information about any of the above

Whistleblowers may be protected when they:

- Raise concerns internally
- Make disclosures to a prescribed person such as the Health and Safety Executive. A full list of prescribed persons can be found [here](#).
- Make wider disclosures (which could include to the media, MPs or the police), where the matter:
  - is exceptionally serious;
  - is not raised internally or with a prescribed person / regulator, because the worker feared he / she would be victimised;
  - is not raised internally because the worker believed there would be a cover-up;
  - was raised internally or with a prescribed person, but it was not dealt with properly.

There are very strict conditions to make such disclosure protected.

### **First Steps –Whistleblowing Policy & Procedures**

Most organisations in the public service including NHS organisations should already have whistleblowing policies and procedures in place. However, these arrangements need to be reviewed annually to make sure they are effective where they have been put into practice, and to make sure they have encouraged and supported workers that have raised concerns. Branch officers and stewards have a key role to play in the review process. Having the appropriate policy and procedure in place should assist with creating an organisational culture of openness - where an employee feels that if they raise concerns internally at the earliest opportunity, that they will be listened to and believed, and that the issues they have raised will be investigated and, if appropriate, acted on.

Having current whistleblowing procedures in place is as important and relevant in the private sector as in the public sector, especially as increasing numbers of private sector employers are providing services to the public. Unless there is an effective procedure in place workers are more likely to take their concerns outside the organisation to a prescribed person, the media or the police.

### **If your workplace has no whistleblowing systems**

As a branch rep you have a major role to play in raising members' concerns about wrongdoing and reviewing your employer's policies and procedures. Explain to management the benefits of having a policy and procedure for staff, which are likely to include the following points:

- It demonstrates that the organisation is committed to ensuring an open and transparent culture where staff feel safe raising concerns and that this is part of normal business.

- It will encourage staff to raise concerns internally, rather than making wider disclosures to a prescribed person, media, MP or the police.
- It demonstrates that the organisation is committed to ensuring high standards.
- It is good employment practice.
- It shows the organisation is keen to protect public safety and public money.
- It will help develop a culture of openness and accountability.
- It will discourage wrongdoing, corruption, fraud and mismanagement.
- It will help uphold an organisation's reputation and maintain public confidence.

## **UNISON Health Branches – Whistleblowing systems**

The Francis Report and the Keogh Report both highlighted what happened when an NHS trust with an engrained culture of poor standards and poor governance, put its priority of gaining Foundation Trust status above the quality of care patients received. A lack of focus on standards of care, compounded by the trust's financial challenges evidently led the trust to deprive the hospital of the proper level of nursing staff needed.

UNISON continues to campaign for safe staffing levels in hospitals, better standards of care with appropriate skills mix on wards. The [Be Safe](#) Campaign includes specific resources for branch officers and stewards, including a notice of unsafe/unacceptable conditions for practice which relates to the NMC code of conduct and supports some clinical staff that have a duty of professional accountability to highlight unsafe standards of care.

UNISON Be Safe training has been rolled out across all countries and regions for branch officers and stewards and many regions are working with employers to roll it out across the organisation.

### **Freedom to Speak Up: Whistleblowing Policy for the NHS**

NHS improvement in partnership with NHS England have just published a single national integrated [whistleblowing policy](#) to assist NHS organisations standardise the way they support staff who raise concerns.

The national policy states that:

- NHS organisations should encourage staff to speak up and sets out the steps to take when raising concerns;
- organisations will appoint their own Freedom to Speak Up Guardian;
- any concerns not resolved quickly, will be investigated;
- investigations will be evidence based and led by someone independent in the organisation;
- whistleblowers will be kept informed of the progress of the investigation;
- the national policy will be annually reviewed and improved.

NHS organisations in England will be expected to adopt the policy by 31<sup>st</sup> March 2017. NHS organisations will still have to implement and review their own local policies which will sit beneath or be integrated into this national policy.

### **Whistleblowers Helpline**

For staff who work in the NHS there is a [whistleblowers helpline](#) which is funded by the Department of Health and gives advice on a completely anonymous and confidential basis to staff that are contemplating raising concerns. However, it is worth noting that the helpline encourages staff to seek advice from their trade union representative before they blow the whistle as a means of seeking a legal opinion if one is needed and to raise concerns internally; therefore it is important that branch officers and stewards are involved in this process and that they are familiar with their organisation's whistleblowing procedures should they need to give advice to members.

## **Negotiating a Whistleblowing Policy and Procedure for your workplace**

A good whistleblowing policy is designed to encourage employees to speak out at the first opportunity if they have concerns about wrongdoing in the workplace. The policy should support staff that raise concerns internally, but it should do nothing to deter staff from making disclosures externally to a prescribed person if they feel this is necessary and the disclosure is being made in the public interest.

A whistleblowing policy should state who is covered by the policy, including the employer's commitment to tackle malpractice and wrongdoing and reiterate that if any cases of wrongdoing are upheld that they will be dealt with seriously. This policy will relate in some way to an organisation's disciplinary, grievance and bullying and harassment policies; the relationship between these policies should be explicit in the whistleblowing policy and procedures.

The policy should state what its aims are, who the policy covers, set clear time-lines of how any concerns raised are dealt with, ensure that feedback is given to the whistleblower and any outcome of the investigation. The policy should state wherever possible that employees wanting to raise concerns can seek the help of their trade union representative.

The employer should ensure confidentiality for the whistleblower (if this is requested), but also make it clear that if legal proceedings commence as a result of the investigation, then it may not remain possible to keep the whistleblower's identity undisclosed.

All concerns and responses should be recorded properly and in writing, as the ERA has rules whistleblowers must meet to be legally protected. The table below sets out some important negotiating points that should be included in any whistleblowing policy:

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- 1** Any whistleblowing policy which is agreed should ensure trade union representatives can advise and represent members during investigations.
  - 2** There may be some cases when the concerns raised are so serious that there has to be an inquiry. You should try to ensure that inquiries are covered as part of the organisation's whistleblowing procedure and that the union reps are involved with the inquiry in drawing up terms of reference for the panel and implementation of the recommendations of the inquiry.
  - 3** Creating a culture of safety, openness, valuing staff and raising concerns is paramount to giving staff the freedom to speak out. Trade union representatives are often key in discussing concerns with management on behalf of members. If management has an open door policy for raising concerns this can be advantageous.
  - 4** Alongside a whistleblowing policy and procedure, it is important to negotiate a procedure evaluating standards of service delivery in the workplace – the union should be involved in this process.
  - 5** The employer's disciplinary; grievance and bullying and harassment policy will also need to be amended to take into account the whistleblowing policy and procedure. It should be made clear that harassment of a co-worker who has raised concerns is a serious disciplinary offence and will be dealt with under the disciplinary policy.
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## **The role of trade unions**

The employer should recognise the right of whistleblowers to be advised and represented by their union.

Branch officers and stewards should encourage members to raise concerns internally unless they are serious enough to make an external disclosure to a prescribed person. In these cases branch officers and stewards should contact their Regional Officer to get advice and in some cases legal assistance.

When a branch officer or steward is supporting a member who wishes to make a public disclosure, they should:

- Check if the whistleblower has reasonable belief that the concerns they are raising are true and whether they have any evidence.
- Contact the UNISON Regional Officer and check the evidence submitted by the whistleblower before making any disclosure to a prescribed person, or wider disclosure to the media, MPs or the police.

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## **Designated Officer**

It is good practice for the employer to appoint a designated officer to be a single point of contact for staff to go to if they wish to raise concerns – the designated officer's contact details are often published in the whistleblowing policy so that staff are clear on who they need to contact. The designated officer should be senior and report directly to the most senior person in the organisation. The designated person should be impartial and capable of taking on an independent view.

## **Raising a concern**

The model whistleblowing policy in Appendix 1 states that an employee should normally raise concerns internally with their direct line manager. The concern which is raised should be in the public interest. The manager should then inform the designated officer to look into investigating the matter. When it is not possible to do this because the matter is sensitive or serious or the whistleblower believes that their line-manager is implicated, the whistleblower should contact the designated officer instead of their manager.

## **Employer's response**

The designated officer or the line manager should organise an interview with the members of staff who has raised their concerns about wrongdoing. The whistleblower should be reassured and be reminded of their protection under the ERA. Normally when individuals should make disclosures internally the identity of the whistleblower can be protected at all stages; however this cannot be guaranteed if external legal action takes place as a result of the disclosure.

Following the interview a summary will be drawn up which both the designated officer / line-manager and the whistleblower need to agree. The designated officer would then need to set up any investigation if necessary. In exceptional cases where the most senior person in the organisation is implicated the chair of the board / governing body would need to decide how to proceed – this may trigger an external investigation.

## **The investigation**

It may be necessary to carry out the investigation in strict confidence without the employee under investigation being informed. Where there are allegations of misconduct or malpractice it may be necessary to suspend the employee under investigation.

The designated officer should give regular feedback to the whistleblower on what is the outcome of their investigation and if the investigation finds there is a case to be answered then the disciplinary procedure should be triggered.

If following the investigation there is no case to be answered the designated officer needs to ensure that the whistleblower is protected under the safeguards in the Public Interest Disclosure Act. If it is proven through the investigation process that an allegation of wrongdoing has been made maliciously, then the employee who made the allegations may face disciplinary action.

## **After the investigation**

After the investigation the most senior person in the organisation would be briefed by the designated officer about the outcome. The designated officer would then meet with the whistleblower to give them feedback on their disclosure. The feedback and outcome of investigation should have agreed time limits. If the concern has been dealt with internally a note of the concern and how it was resolved should be logged by the designated officer.

If the whistleblower is not satisfied with the outcome of the investigation, the designated officer should notify them of their right to make an external disclosure to a prescribed person.

## **Time limits**

Time limits should be allocated for each stage of the procedure.

## **Dealing with whistleblowing cases in your branch**

Whistleblowing procedures and legislation offer important protections for employees wishing to raise concerns about malpractice or wrongdoing. A formal whistleblowing procedure can go some way to changing the culture of any organisation and enable concerns to be dealt with a local level. A whistleblowing agreement can be an important tool at building up union organisation in your workplace.

It is very likely that you may be the first port of call for members who are concerned about wrongdoing, malpractice or misconduct in the workplace. Part of the whistleblowing policy you agree with your employer should establish the role branch reps have in advising and representing members when they raise concerns.

As a branch rep you will need to know how to deal with:

- Members who wish to act independently.
- Members who have already blown the whistle, without coming to you first.
- Whistleblowing cases within the branch – involving branch officers.
- Conflicts of interest – where the whistleblower and the wrongdoer are both members.

### **Members who wish to act independently**

In some cases a member may wish to make a public interest disclosure without the assistance of the union. As a branch officer or steward make sure you discuss with the member their concerns and explain to them the process for whistleblowing. If they wish to make an external disclosure to a prescribed person, inform them to contact the appropriate body in the [Department for Business Innovation and Skills list of prescribed persons and bodies](#).

### **Members who have already blown the whistle before getting advice**

Branch officers and stewards may have to deal with a case where a member has already blown the whistle externally without coming to you for advice first. In such cases it is important to seek advice from your Regional Officer.

### **Dealing with whistleblowing cases in the branch**

In these cases members should go directly to the region. UNISON has structures in place to respond to any concerns members may have about wrongdoing or malpractice and members should feel their concerns will be heard and acted on.

### **Conflicts of interest**

There may be an occasion when both the whistleblower and the alleged wrongdoer are both UNISON members. In these cases both members are entitled to representation. The branch should ensure that if an investigation is conducted that they are both represented by separate branch representatives.

## **Appendix 1 – Model Whistleblowing Policy**

### **1. Introduction**

- 1.1 The word whistleblowing in this policy refers to the disclosure internally or externally by workers of malpractice, as well as illegal acts or omissions at work.
- 1.2 Employees are often the first to realise that there may be something seriously wrong within an organisation. However they may not feel they can express their concerns through fear or harassment or victimisation or they may feel that their concerns may be ignored and not acted on.
- 1.3 [Organisation's Name] has an open and honest culture, where employees are encouraged to raise concerns at the earliest opportunity. It encourages staff to use internal mechanisms for reporting malpractice or illegal acts or omissions by employees or ex-employees. Employees will be listened to and serious concerns will be investigated and acted on. Confidentiality will be maintained as far as is possible. It is guaranteed at the point of making a protected disclosure and will be maintained throughout the investigation and hearings, other than when a disclosure of identity is needed due to cross examination of the staff member as a witness to any subsequent procedure.
- 1.4 This policy is to enable and encourage employees to raise concerns within [Organisation's Name]. It does not override workers' legal rights to make a protected disclosure to certain prescribed persons or bodies under the Public Interest Disclosure Act 1998, as incorporated into the Employment Rights Act 1996.

### **2. Aims and Scope of this Policy**

- 2.1 This policy aims to provide staff with an avenue to raise concerns internally and receive feedback on any action taken. It allows staff to take the matter further if they are dissatisfied with the management response and reassures employees that they will be protected from harassment or victimisation from co-workers for raising concerns.
- 2.2 This policy is intended to cover concerns which fall outside of the scope of the grievance procedure. [Organisation's Name] has a range of policies that deal with standards of behaviour at work; they cover disciplinary, grievance, bullying and harassment. Employees are encouraged to use the provisions in these policies if appropriate.
- 2.3 This policy applies to temporary, casual and agency staff, work experience, trainees as well as employees.
- 2.4 An employee can raise a concern if they reasonably believe that one or more of the following has occurred:

- A criminal offence
- A failure to comply with a legal obligation
- Improper unauthorised use of public funds or other funds
- A miscarriage of justice
- Maladministration, misconduct or malpractice
- Endangering of an individual's health and safety or welfare
- Damage to the environment
- Deliberate concealment of any of the above

2.5 If the disclosure is not included in the list, advice may be sought from the Human Resource Department or from a Trade Union Representative on the use of the appropriate policy.

2.6 [Organisation's Name] recognises employees may wish to seek advice and be represented by their trade union(s) officers when using the provisions in this policy.

### **3. How to Raise a Concern**

3.1 An employee's concerns should be raised with his/her line manager, who should report it to the designated officer. Employees can approach the designated officer directly if a protected disclosure relates to the line manager. The designated officer will then confirm how the matter will be investigated.

3.2 Concerns should be raised in writing. The letter should set out the background and history of the concerns, giving names, dates and places where possible, and the reason why the employee is making the disclosure. If the employee does not feel able to make the disclosure in writing an interview will be arranged.

3.3 The employee raising concerns does not have to prove the allegation but they must demonstrate that there are sufficient grounds for concern.

### **4. Designated Officers**

4.1 The following people have been nominated and agreed by [organisation's name] as designated officers for concerns under this procedure [list designated officers below]

### **5. How [Organisation's Name] will respond**

5.1 Each case will depend on the nature of the disclosure. The matters raised may be investigated internally. More serious disclosures may be referred to an external prescribed person or body and may form the subject of an independent inquiry.

5.2 In order to protect employees that raise concerns a line manager or designated officer will decide if an investigation is appropriate.

5.3 Some concerns may be resolved without the need for an investigation.

5.4 Within ten working days of a concern being raised the individual with whom the employees raised the matter with will write to the employee setting out:

- Acknowledgement the concern has been received
- Indicating how the matter will be dealt with
- Give an estimate of how long it will take to get a final response
- Tell the employee if an investigation has been started

5.5 When any meetings are arranged with the employee who has made a protected disclosure they have a right to be accompanied by a union representative. The meeting can be off site if requested.

## **6. Safeguards – Harassment and Victimisation**

6.1 [Organisation's Name] understands that raising a concern can be difficult for staff, especially if they fear reprisal from those responsible for the malpractice. [Organisation's Name] will not tolerate harassment and victimisation and will protect staff when a concern has been raised.

6.2 This policy encourages employees to put their name to their concerns. Concerns expressed anonymously are harder to follow up and have an effective outcome.

6.3 If an employee makes an allegation in good faith, but the allegation is not confirmed by the investigation, no action will be taken against that employee.

## **7. How the matter can be taken further**

7.1 This policy is intended to provide a route by which employees can raise concerns internally, however if an employee is unhappy with the outcome of an investigation they are free to take the matter outside of the organisation to a prescribed person or body.