

Practical Implications (A)

# Employment Considerations



# Is the Whistleblowing Act Applicable to me?

Two Criteria:

1. Who is the employee?
2. Do I qualify as an employer?



# Who is an employee for the purposes of the Act?

“Employee” in Employment and Industrial Relations Act (EIRA), Chapter 452 of the Laws of Malta vs. the Whistleblowing Act;

- “... *person who has entered into or works under a contract of service, or any person who has undertaken personally to execute any work or service for, and under the immediate direction and control of another person...*” – EIRA, Article 2.
- Persons at the disposition of the employer.

# Who is an employee for the purposes of the Act?

Any person who:

- *Has entered into or works under a contracts of service with an employer including a contractor or subcontractor who performs work or supplies a services or undertakes to perform any work or to supply services; or*
- *Has undertaken personally to execute any work or service for, and under the immediate direction and control of another person, including an outworker, but excluding work or service performed in a professional capacity*

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# Who is an employee for the purposes of the Act?

Any:

- *Person in employment in the public administration, including as a member of a disciplined force\**; or
- *Former employee*; or
- *Person who is or was seconded to an employer*; or
- *Volunteer in terms of Article 2(1) of the Voluntary Organisation Act even when such work or service is not regulated by a specific contract of service*; or
- *Candidate for employment only where information concerning improper practices has been acquired during the recruitment process or other pre-contractual negotiations*;

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# Who is an employee for the purposes of the Act?

- A very important addition to the definition of 'employee' in the Act:

*Shareholders and persons belonging to the administrative, management, or supervisory body of an undertaking, including non-executive members, and paid or unpaid trainees.*

# Key Points

- The idea behind whistleblowing by employees in the public and private sector is not entirely novel.
  - Article 28 EIRA;
  - Article 20 of The Public Administration Act, 2009 (NOW REPEALED AND REPLACED)
  - The Public Administration Act, Chapter 595 (PARTIALLY IN FORCE);
  - Public Service Management Code

# BEFORE

Each Ministry of the Government of Malta

More than 250  
Employees

Total balance sheet  
exceeding  
€43,000,000

Annual Turnover  
Exceeding  
€50,000,000

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# NOW

Each Ministry of the Government of Malta

50 or more  
workers

Where a risk assessment  
requires an organisation in the  
private sector with less than 50  
workers to establish an internal  
disclosure channel and  
procedure

Voluntary organisation  
which raises more  
than €500,00

Entities falling within  
the scope of Part I(B)  
and II of the Third  
Schedule

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# Conflict between contract of service and the provisions of the Act:

- Any provision in a contract of service or other agreement between an employer and an employee is void when it:
  - purports to exclude any provision of this Act; or
  - purports to preclude or discourage the employee from making a protected disclosure.

# Why should an undertaking care?

## 1. Practical Implications

## 2. Protection

- To Whom?
- Why?

# Practical Implications For Undertakings

- Establishing or reviewing (if already in place) internal channels and procedures to adapt them to the guarantees required by the Act;
- Involve a multidisciplinary perspective (criminal, data protection and employment);
- Manage the complaints channel either internally or shared, guaranteeing impartiality in the complaints procedure;

# Practical Implications For Undertakings

- Assessment of whether the report relates to an **improper practice vs. workplace grievances**;
- Detect the responsibilities the company may incur; and
- Provide training to all staff and especially to those persons who will internally manage the channel or internal complaint procedure.

# Improper Practice or Workplace Grievance?

- Persons within an organisation can raise their concerns on issues relating to whistleblowing and workplace grievance concerns – Must be dealt with **separately**.
- Why?



# Improper Practice or Workplace Grievance?

- Workplace grievance = Personal Concern
- An employee may lodge a complaint about a fellow employee or even a manager.
- Employees are protected against these action in the EIRA and in S.L. 452.95 Equal Treatment in Employment Regulations.
- Failure of the Employer to protect the employee from these matters will be liable to fines (*multa*).

# Improper Practice or Workplace Grievance?

- Whistleblowing is a term describing grievances that consist of reporting wrongdoing at work considered to be “of public interest”.
- Whistleblowers – Disclose Information on Improper practices.
- When?

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# Improper Practice or Workplace Grievance?

Improper Practice includes:

- *Failure of compliance with any **legal obligation**; or*
- *The **endangerment of the health or safety** of any individual;*
- *Damage to the environment;*
- *Corrupt practices;*
- *Committing a criminal offence; or*
- *Miscarriage of justice;*
- *Bribery;*

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# Improper Practice or Workplace Grievance?

Very important additions to what constitutes 'improper practice' in the Act:

- *Failure to observe legal obligations on public procurement; or*
- *Failure to comply with laws pertaining to financial services, products and markets, and prevention of money laundering and terrorist financing; or*
- *Failure to comply with product safety and compliance law; or*
- *Failing to ensure transport safety; or*

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# Improper Practice or Workplace Grievance?

Other 'improper practices':

- *Endangerment of radiation protection and nuclear safety; or*
- *Failure to ensure food and feed safety, animal health and welfare; or*
- *Non-compliance to consumer protection*
- *Non-compliance to the protection of privacy and personal data, and security of network and information systems; or*

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# Improper Practice or Workplace Grievance?

Other 'improper practices':

- *A breach affecting the financial interests of the European Union; or*
- *A breach relating to the internal market, rules of corporate tax, or to arrangements the purpose of which is to obtain a tax advantage; or*
- *The attempt of concealing any of these practices.*

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# What can an Employer do?

Effective considerations distinguishing between improper practices and work place grievances:

- Design separate policies;
- Clarify policies;
- Mandatory training sessions for all employees;
- Regular training and education on the Whistleblowing Act to the WRO and other persons.

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# What is Retaliation?

The principle: a whistleblower may not be subjected to 'detrimental action' on account of having made a protected disclosure...

- Detrimental Action;
- Occupational Detriment;
- Prohibition against retaliation under the EIRA:
  - Article 28 of the EIRA
  - Article 36(14)(e)

# Way forward

Following the Whistleblowing procedure in terms of the Act is not enough...

- Create an appropriate workplace culture;
  - Trust
  - Ethical culture
  - Limiting conflict of interest
  - Responsiveness
  - Different form of internal reporting channels and accessibility
  - Employer's commitment
- Training and guidance to all stake holders;
- Professional advice at an early stage.

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# THANK YOU

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