



## **Whistleblowing NEU guidance for members in England & Wales**

This document outlines both the legal protection and union support available to members who choose to blow the whistle on employers.

### **What is whistleblowing?**

Whistleblowing is a term used to describe circumstances where a worker seeks to expose malpractice or wrongdoing within their organisation or place of work. The press is often littered with stories of individuals who are said to have 'blown the whistle' in relation to matters of fraud, national security or health and safety.

### **What should I do if I am thinking of blowing the whistle?**

Speak to your NEU rep or local officer first before taking any action. Both the government and employers have said a great deal about encouraging openness and transparency in the workplace, but case law demonstrates both the inadequacy of legal protection for whistleblowers and the less-than-enlightened attitudes of some employers. How an organisation says it will treat whistleblowers in its policies can be very different to how it treats them in practice. Therefore always seek to ensure that you are fully aware of the consequences of blowing the whistle. In certain circumstances, eg child protection and fraud, you may have a moral and a contractual duty to expose wrongdoing. This can be very stressful and can cause anxiety, so seek professional support from the union.

Also seek support from trusted colleagues. If you have noticed wrongdoing or malpractice, the chances are that others have too. The benefit of being part of a unionised workforce is that you do not have to act alone. Take collective action to expose wrongdoing whenever possible.

### **Who is protected by the whistleblowing provisions?**

The protection is for workers as well as employees. The term 'worker' includes agency workers and trainees on placement at a school or college. It applies to both former and existing workers. The term worker also applies to individuals who are self-employed and provide services directly to schools, colleges and local authorities.

### **Will I be able to blow the whistle anonymously?**

Always check your school or college whistleblowing policy if you wish to make an anonymous disclosure. Most policies do allow anonymous disclosures to be made in certain circumstances, but you should be aware that your anonymity may mean that the person investigating your disclosure will not be able to contact you to make follow-up enquiries, and that this may hamper the investigation. You could, however, ask for follow-up questions to be passed to your union rep if your school/college policy allows this (see following paragraphs).



**I have been asked as NEU rep to make a disclosure on behalf of a member who wishes to remain anonymous. Am I allowed to do this?**

You may raise a concern on behalf of a member who wishes to remain anonymous, but only if their school or college has a whistleblowing policy which allows you to do so. Where a school/college has a whistleblowing policy which allows you to raise concerns on behalf of a member, the member making the disclosure will retain protection under whistleblowing legislation, and so will you.

**What should I do as NEU rep if the whistleblowing policy does not permit me to raise concerns on behalf of members?**

In such circumstances you should limit your discussion with the member to the pros and cons of blowing the whistle to ensure that the member is fully aware of the consequences of doing so. You are encouraged, however, to take the next available opportunity to negotiate a term in the whistleblowing policy which allows staff members to disclose concerns to a union rep or officer. The rep's/officer's role will then be to inform the employer of the reported issue and ensure it is properly investigated and addressed.

**What protection is given to whistleblowers?**

Whistleblowers are protected from unfair dismissal and from any other detriment relating to their employment, provided the dismissal or detriment is as a result of blowing the whistle. School and college staff dismissed for exposing malpractice or wrongdoing will automatically be treated as having been unfairly dismissed.

**What are 'protected disclosures'?**

A whistleblower is protected from detriment and/or unfair dismissal only if their disclosures are protected disclosures. These are defined as qualifying disclosures made:

- to an appropriate recipient, and
- in accordance with the different conditions that must be satisfied when a disclosure is made to each type of recipient.

**What is a 'qualifying disclosure'?**

A qualifying disclosure is defined as: "any disclosure of information which, in the reasonable belief of the worker making the disclosure is made in the public interest and tends to show one or more of the following:

- that a criminal offence has been committed, is being committed or is likely to be committed
- that a person has failed, is failing or is likely to fail to comply with any legal obligation to which s/he is subject
- that a miscarriage of justice has occurred, is occurring or is likely to occur
- that the health or safety of any individual has been, is being or is likely to be endangered
- that the environment has been, is being or is likely to be damaged
- that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed."

**To whom may a qualifying disclosure be made?**

A qualifying disclosure may be made to one of six types of recipient. These are:



- an employer
- a legal adviser
- a Minister of the Crown (in certain circumstances)
- an MP
- a regulatory body (referred to as a prescribed person)
- a third party (eg a member of the press).

The NEU has argued that disclosures to union representatives should be treated as qualifying disclosures because many workers initially refer their concerns to representatives and often want their unions to take up concerns on their behalf. Currently, the law does not permit this and members are able to use the union only to obtain legal advice unless the school/college whistleblowing policy provides otherwise.

### **Can I whistleblow to the Teaching Regulation Agency (TRA)?**

You should not refer information relating to misconduct or wrongdoing at your school or college to the TRA in the first instance. The TRA is not a 'prescribed person' for the purposes of whistleblowing legislation and any disclosure to that body will not necessarily be protected. The union can give you advice about the proper body to make disclosures of that nature to if you do not wish to approach your employer. If you wish to make an allegation of misconduct about a particular individual at your school or college you may do so, but you should appreciate the TRA will disclose your name to the person complained of. For more information about the TRA's functions refer to the NEU guidance document Prohibited from Teaching.

### **What is the minimum requirement for protection under the whistleblowing provisions?**

In all cases (except for disclosure to a legal adviser) the minimum requirement for protection is that the disclosure is made in the reasonable belief that it is 'in the public interest' (refer to FAQs below).

### **What has happened to the requirement to make disclosures 'in good faith'?**

The requirement to make disclosures in good faith still exists, but the absence of good faith will no longer exclude a qualifying disclosure from protection. Instead the employment tribunal has the power to reduce compensation by up to 25 per cent in cases where the disclosure was not made in good faith.

Previous case law established that disclosures will not be made in good faith where they are motivated by personal antagonism. However, the Court of Appeal said that employment tribunals should only find that disclosures are not made in good faith when the dominant or predominant reason for making them is for some ulterior motive. The question of good faith is ultimately a question of fact for an employment tribunal to decide.

### **What conditions must be met if I intend to disclose information to my employer?**

A qualifying disclosure made internally to an employer (eg a local authority) or other reasonable person (eg a governing body) is protected if the minimum requirement for protection is met, ie if the whistleblower has a reasonable belief that the disclosure is in the public interest. This low threshold is intended to encourage disclosures to be made



internally, with the view that employers will honestly and diligently address the issue to which the disclosure relates.

### **What conditions must be met if I intend to disclose information to a third party?**

With the exception of disclosures to legal advisers, a disclosure to an external body or third party imposes additional conditions which must be satisfied before the disclosure is protected. These conditions are as follows:

- If the disclosure is made to a Minister of the Crown, the whistleblower's employer must be appointed under an Act of Parliament (or under something similar).
- If the disclosure is made to a prescribed person (eg a body such as Ofsted in England or Estyn in Wales), the whistleblower must reasonably believe that the failure is one which is relevant to that prescribed person and that the disclosure is substantially true.
- Other disclosures can be protected if the whistleblower reasonably believes that the disclosure is substantially true; the disclosure is not made for personal gain; it is reasonable to make the disclosure; and one of a number of additional conditions set out in the legislation are met.
- Other disclosures may also be protected if the whistleblower reasonably believes that the disclosure is substantially true; the disclosure is of an exceptionally serious nature; and it is reasonable to make the disclosure to the recipient.

### **When will a disclosure not be protected?**

A disclosure will not be protected if:

- it is made to a body or person not prescribed by legislation
- it is made to a prescribed body/person without jurisdiction to investigate the disclosure
- the pre-conditions applying to disclosure are not met (ie public interest, reasonable belief in the truth of the information disclosed etc)
- the whistleblower is not a 'worker' within the definition of the law
- the whistleblower commits an offence by disclosing information
- the whistleblower makes allegations instead of disclosing information
- the whistleblower's disclosure amounts to a grievance.

### **What constitutes 'disclosure of information'?**

This is not expressly defined in legislation, but there is plenty of case law to say that the requirement to disclose information means the whistleblower must convey facts rather than mere allegations or grievances. For example, communicating information about the state of a hospital would be: "The wards have not been cleaned for the past two weeks. Yesterday, sharps were left lying around." Contrasted with that would be a statement that "you are not complying with health and safety requirements", which the Court of Appeal said would amount to an allegation rather than the disclosure of information. More recently the Employment Appeal Tribunal said that, in their view, the distinction between 'allegation' and 'information' is a false dichotomy because disclosures are often both.

To avoid legal wrangles of this kind, always seek to provide an explanation for the concerns you are disclosing. For example, if your complaint is that your employer is failing in its legal obligation to provide a safe workplace, support your complaint with



facts which explain the point you are making. Such an explanation will, in any event, assist your employer in its investigations.

**Can the terms in a settlement agreement stop me from blowing the whistle?**

Any clause in a settlement agreement, which attempts to stop a worker making a protected disclosure, is void. Such a clause would not prevent you from making a protected disclosure. If you have signed a settlement agreement, you are advised to seek advice from the union before taking steps to blow the whistle.

**What should I do next?**

If further advice is needed, contact your NEU workplace rep in the first instance. If there is no NEU rep in your workplace, or the peripatetic nature of your employment makes contact with a workplace rep difficult, contact the NEU Adviceline in England on 0345 811 8111 or NEU Cymru in Wales on 029 2046 5000.

Further contact details may be found at: [neu.org.uk/contact-us](http://neu.org.uk/contact-us)

**Further information**

Public Concern at Work

Whistleblowing charity offering advice at: [pcaw.org.uk](http://pcaw.org.uk)