Whistleblowing by LLP Members

This briefing considers when an LLP member is protected by the whistleblowing legislation, what repercussions there may be for a firm if it does not comply with the legislation and what firms should do if a member 'blows the whistle'.

The seminal case of ***Clyde & Co LLP v Bates van Winkelhof*** determined in 2014 that a member of a law firm incorporated as a limited liability partnership (LLP) was a "worker" and therefore eligible to bring a whistleblowing claim against the LLP. Currently the position remains different for partners in a traditional partnership who are not considered to meet the worker test.

When has a member blown the whistle?

In order to be protected by the whistleblowing legislation, an LLP member (member) must have made a "protected disclosure". This means that:

- The member must make a disclosure of information (which can be in writing or verbally) about certain types of malpractice, such as a breach of a legal obligation, a criminal offence or damage to the health and safety of any individual. The wrongdoing does not need to relate to the firm; it may concern the conduct of another member, an employee of the firm or a third party. An allegation or expression of information in itself will not suffice and the distinction between this and a qualifying disclosure of information is often a subtle one;
- In the reasonable belief of the member, the disclosure must be in the public interest. By way of example, the Courts have found that when a compliance officer raised concerns about compliance issues purely out of her own concern regarding a potential liability, there was no element of public interest (***Parsons v Airplus International Limited***) whereas when a senior manager raised disclosures about manipulation of the company's accounts, which he believed had an adverse effect on commission income for over 100 senior managers including himself, this did meet the public interest test (***Chesterton Global Ltd (t/a Chestertons) v Nurmohamed***); and
- The disclosures must be made in an acceptable way - the legislation provides who the disclosure must be made to. This would include the firm but could also include the relevant regulatory body.

Whistleblowing protection

If a member has blown the whistle they have the right not to be subjected to any detriment such as having their access to resources blocked, being side-lined or ostracised, being monitored more closely than other members or having their profit share reduced. Although members cannot bring unfair dismissal claims (as they are not employees) a detriment can include a termination of their membership of the LLP. It is important to note that there is no length of service requirement for this type of claim so it protects new members. It also protects former workers so if, for instance, a member has left the firm and they are then

subjected to a detriment in relation to their capital repayments for having blown the whistle, they would be protected.

If a member has been subjected to a detriment or has been terminated, they can claim:

- for the losses attributable to the detrimental treatment - there is no cap on the level of compensation which can be awarded but the member would be under a duty to mitigate their loss; and

- injury to feelings of up to £44,000.

A reduction of up to 25% can be made in relation to the compensation if the protected disclosure was not made by the member in good faith. Whistleblowing claims can be very costly, not only because there is no upper limit on the amount of compensation which can be awarded but also in terms of the management time which has to be spent on the matter and legal costs (which are usually not recoverable in Employment Tribunal proceedings), and the negative publicity which the issues will attract. In addition, it is not just the firm that could be liable but also key decision-makers (such as other members or employees of the firm).

What should a firm do if a member blows the whistle?

The firm should ensure that it adopts and follows a comprehensive and effective whistleblowing policy which applies to all staff, including members. By having a comprehensive policy with clear reporting structures on raising concerns, which all staff are aware of and have received training on, this should encourage members to report the matter internally. It should also reduce the risk of the firm dismissing any concerns without proper consideration or taking retaliatory action.

The first step that the firm should take is to make an initial assessment of the concerns and decide who at the firm should be aware of the disclosure. This should be a small number of people at the firm and the disclosure should be kept confidential to that group.

The team should appoint an investigator to carry out an investigation into the member's concerns. Consideration should be given to appointing an external investigator (which could be a law firm) to investigate the concerns as in many cases this would be the appropriate way forward and demonstrate a greater level of objectivity than an internal investigator. The firm will want to choose an investigator who is experienced in investigations and has specialist knowledge of the subject matter of the concerns raised.

The firm should tell the member how it proposes to deal with the matter. The member should be given details of any confidential support and counselling hotline, which the firm makes available to whistleblowers. The firm may also wish to consider providing appropriate legal fees support to the member so the member can obtain their own independent legal support during the whistleblowing investigation.

A meeting should be held between the investigator and the member to discuss the member's concerns. The member should be kept informed of the progress of the investigation and its likely timescale. The investigation may require further meetings being held with the member in order to obtain further information.

On the conclusion of the investigation, the investigator should report back to the team at the firm with their recommendations. The member should also be notified. The need for confidentiality may prevent the investigator giving the member specific details of the investigation or any action taken as a result (for example, if it leads to further action being taken against another member).

The member's concerns should be dealt with fairly and in an appropriate way throughout the investigation and the member should not be subject to any repercussions for raising their concerns (unless the concerns were found to have been made in bad faith). The firm should also ensure that it is consistent in how it deals with the member's performance and profit share allocation following the member blowing the whistle and that it clearly documents its decisions to minimise the risks of whistleblowing detriment claims.

Firms should be aware that documentation created during any investigation process and any relevant e-mails and other documents may be disclosable in the event it receives a data subject access request under the General Data Protection Regulation and this documentation may also become disclosable in the event of a claim.

Provided an objective fair process is followed throughout, the potential risks to the firm, both reputationally and in terms of potential legal claims, should however be minimised.

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