

Workwise

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If The Whistle Sounds, Is a Penalty Coming? - Alberta's New Whistleblower Legislation

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Introduction

On June 1, 2013, Alberta's first ever Whistleblower legislation came into effect. The *Public Interest Disclosure (Whistleblower Protection) Act* is intended to protect employees in the public sector who act as whistleblowers – employees who disclose misdeeds of their employers – by disallowing employer retaliation. The *Act*, spurred on by the increasing desire for government transparency, reflects similar changes made to American and Commonwealth laws over the past two decades.

The *Act* applies to public sector entities, including: government organizations; offices of the legislature; all employees of Alberta Public Service; public entities in the Education sector (including public school boards, private schools receiving public funding, charter schools, and designated post-secondary academic institutions); public entities in the Health sector including Alberta Health Services and all of its subsidiaries; and certain provincial entities defined under the *Financial Administration Act*, such as the Alberta Securities Commission and the Alberta Gaming and Liquor Commission.

Summary of the Act

Under the *Act*, the affected public sector bodies are required to appoint a designated officer within their organization to investigate and resolve employee complaints regarding three areas of corporate conduct: violations of provincial or federal law; acts or omissions that create a danger to the public or environment; and gross mismanagement of public funds. An employee who 'whistle blows' in good faith must be held free from corresponding "reprisal" (or threat thereof), pursuant to Section 24 of the *Act*. 'Reprisal' is defined as all employer actions that adversely affect the employee's employment or working conditions, and includes actions such as dismissal, demotion, and reprimand. Any person that takes reprisal action against the employee, or that obstructs, falsifies, conceals, or destroys information throughout the investigation, will be found guilty of an offence and liable to a maximum fine of \$25,000 for the first violation and \$100,000 for each subsequent violation.

To ensure accountability, the *Act* also engages the newly-established Office of the Public Interest Commissioner as a place of "last resort." An employee is permitted to bring a complaint directly to the Commissioner in specific circumstances, including where in-house resolution is unsuccessful; where harm to people or the environment appears imminent; and where the employee believes job reprisal is likely to result or has already occurred. The Commissioner is also permitted to take initiative by conducting investigations and issuing reports at his own discretion.^[1]

Effect on Public Sector Whistleblowers

The impact of this new legislation on public sector whistleblowers is not yet known. Some criticisms have included: the *Act* does not go far enough to protect employees; it contains no remedies for the actual whistleblowers who suffer reprisals (as opposed to sanctions against the employer); there is no mechanism to challenge the commissioner's decisions; and the commissioner's work and actions can remain secret forever. The Alberta government has thus far suggested that such criticism is premature and that, particularly because the commissioner has the power to issue a report whenever he deems necessary, the *Act* is going to be rigorously applied.

While all of this remains to be seen, the legislation at the very least can be said to establish clear legislative guidelines and avenues for whistleblowers, and sanctions for their public sector employers, where few formally existed before.

Effect on Public Sector Organizations

The impact on public sector organizations is two-fold: it encourages employees to speak up, and it mandates strict oversight of the employer's response. Of particular note is the wide amount of discretion granted to the commissioner. No matter the internal officer's decision, it is possible that the commissioner will unilaterally choose to involve himself in the investigation. Beyond simply implementing the required internal systems to handle complaints, public sector organizations are well-advised to ensure that all organization members understand that *any* adverse effect on the whistleblower's employment may incur large fines and, more importantly, significant damage to the organization's reputation. This can be a challenging task to manage, particularly for large organizations where it may be difficult to keep track of all employees' activity and interactions with the whistleblower day-to-day. A comprehensive strategy will need to be implemented by employers who receive such whistleblower complaints, to ensure that they are not only handling the matter appropriately internally, but to deal with any additional oversight and involvement of the commissioner that may ensue irrespective of internal workings of the employer.

To safeguard against violations, public sector organizations may wish to confirm legal compliance with the *Act*. Field Law is happy to assist. Please contact us for any further information you may wish to obtain about this legislation or its effect.

[1] The Commissioner can be contacted via the Public Interest Commissioner website at www.pic.alberta.ca

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