



JONES DAY CROSS-BORDER INVESTIGATIONS SERIES (2023)

ISSUE 1: WHISTLEBLOWING

While there are a number of ways in which organizations may become aware of potential wrongdoing internally, perhaps the most significant for its legal and compliance teams is internal reporting, or “whistleblowing,” by employees or other related individuals. In such circumstances, employers may be bound by certain obligations to the whistleblower that affect the manner in which allegations are addressed, including by providing the reporting individual with certain legal protections. While not a comprehensive list, the below table sets out the key considerations arising out of a whistleblowing situation. The table also provides a comparative view of these issues as between the United Kingdom, United Arab Emirates, European Union, and United States, each of which differ in their approach to a greater or lesser extent.



UNITED KINGDOM

In the UK, whistleblower protections are provided under employment law. The scope of what is potentially a protected disclosure is, however, very wide indeed. Employers are subject to legal obligations, chiefly concerned with protecting whistleblowers from detriment or dismissal; though adherence to the government’s advice with respect to good practice is important to protect the company from potential claims by employees. As compensation for whistleblowers is uncapped, allegations of being dismissed for raising concerns are increasingly being used to leverage a departing employee’s negotiating position. Companies regulated by the Financial Conduct Authority (“FCA”) are subject to additional obligations with respect to the maintenance of a whistleblowing policy.



UNITED ARAB EMIRATES

The UAE has three different legal systems—one Arabic language, civil law, federal system covering the majority of the country with some variation between the commercial laws

of each of the seven different Emirates (frequently referred to as the “onshore” legal system); and two separate English language, common law systems in the “offshore” financial free zones in Dubai and Abu Dhabi, respectively. Onshore UAE law does not have any stand-alone whistleblowing protections, and it is important to note that there are several onshore laws (commercial and penal) that provide a high degree of confidentiality protection against the disclosure of company information. The two offshore legal systems, on the other hand, have recently adopted whistleblower legislation (in the case of the Dubai International Financial Centre (“DIFC”)) and guidance (in the case of the Abu Dhabi Global Market (“ADGM”)) that require and encourage, respectively, a high degree of protection for whistleblowers who report concerns in good faith.



EUROPEAN UNION

On December 16, 2019, the EU adopted EU Directive 2019/1937 (the “EU Directive”) requiring all member states to implement national legislation imposing certain minimum standards with respect to the protection of whistleblowers. This includes protection from retaliation, the requirement to publish a whistleblowing policy, and directions as to the time in which an internal report must be dealt with. Prior to the EU Directive, some individual member states such as Germany, France, and the Netherlands had preexisting national legislation that provided limited protection to whistleblowers; others, such as Spain, provided no legislative protection to whistleblowers.

While many member states are yet to pass legislation to effect the EU Directive’s minimum requirements, as the deadline for transposing the EU Directive has now passed, this note focuses on the requirements as imposed by the EU Directive. Corporates with a trans-European Union presence should ensure that EU Directive-compliant systems are in place in all EU countries in which they have a presence.



UNITED STATES OF AMERICA

The U.S. system diverges significantly from those of the other jurisdictions covered by this note in the extent to which government agencies are entitled to offer financial incentives to individuals to encourage the reporting of misconduct. In this respect, the U.S. has adopted a radically different approach to the UK, EU, and UAE by permitting government agencies such as the Securities and Exchange Commission (“SEC”) to provide payouts to whistleblowers whose reports lead to successful enforcement action. The use of incentives reflects a proactive approach to enforcement by encouraging individuals to make external reports. Additionally, U.S. regulators generally take a very harsh view regarding any employer actions that may be considered as restricting an individual’s ability to report issues to the government or may be perceived as retaliation against an individual who claims whistleblower status.

While this note focuses on the SEC’s whistleblower program for the sake of comparison to the other systems addressed by this note, readers should be aware that the U.S. also has other whistleblowing laws, regulations, and policies, at both the federal and state level, that are outside the scope of this note. Please do not hesitate to contact us for more information.

	ENGLAND & WALES	UNITED ARAB EMIRATES	EUROPEAN UNION	UNITED STATES OF AMERICA
<p>Legislation</p>	<p>England & Wales The Employment Rights Act 1996 (“ERA”) (as amended by the Public Interest Disclosure Act 1998) provides workers with protection from detriment and dismissal in respect of their protected disclosures.</p>	<p>UAE (Onshore) Onshore UAE does not have any stand-alone whistleblower legislation. Several onshore laws (commercial and penal) provide a high degree of confidentiality protection against the disclosure of company information.</p> <p>DIFC (Dubai offshore) DIFC Law No. 1 of 2022, the Regulatory Law Amendment Law and related Rules promulgated by the DIFC’s Regulator, the DFSA (collectively, the “DIFC Regime”), provide for, inter alia, anonymous whistleblowing and protection from retaliation.</p> <p>ADGM (Abu Dhabi offshore) The ADGM Guiding Principles on Whistleblowing (“Guiding Principles”) are non-binding principles that encourage entities to formulate their own whistleblowing framework, incorporating a broad definition of whistleblowing, protecting whistleblowers against retaliation, and protecting the confidentiality of the whistleblower, but explicitly encouraging entities to condition protections on good-faith reporting of concerns. The Guiding Principles do not create legally enforceable rights.</p>	<p>EU Directive The EU Directive requires member states to implement national legislation protecting whistleblowers from retaliation arising in respect of protected disclosures.</p> <p>Belgium The Whistleblower Act was published in the Belgian Official Gazette on December 15, 2022, and will enter force on February 15, 2023. In organizations with 50–249 workers, internal reporting channels will need to be established by December 17, 2023.</p> <p>France Law No. 2022-401 of March 21, 2022, as amended by Decree No. 2022-1284 of October 3, 2022, transposed the EU Directive into national law.</p> <p>Germany Germany has published draft legislation to transport the EU Directive. This is expected to be brought before the Mediation Committee of the Bundesrat and Bundestag and it remains unclear if and when the law will come into force in Germany.</p> <p>Italy Legislative Decree No. 24 of March 10, 2023, transposed the EU Directive into national law. It was published in the Italian Official Gazette on March 15, 2023, and will enter force on July 15, 2023. While large private organizations (>250 employees) will have to comply within such term, private entities that employed up to 249 workers on average in the previous year will need to establish internal reporting channels by December 17, 2023.</p> <p>The Netherlands The Netherlands approved draft legislation to transpose the EU Directive on January 24, 2023. For large organizations (at least 250 workers), the date of entry into force is 18 February 2023. In organizations with 50–249 workers, the legislation will enter into force at the end of 2023.</p> <p>Spain Spain has approved legislation to transpose the EU Directive. The new law will enter into force on March 13, 2023. In organizations with 50 or more workers, as well as those operating in high risk sectors or dealing with public funds, internal reporting channels will need to be established by December 1, 2023.</p>	<p>United States of America Section 21F of the Securities Exchange Act of 1934 (“Exchange Act”) (15 U.S.C. 78u-6) requires the SEC to pay awards and provide certain protections, to whistleblowers who provide the Commission with original information about violations of the Federal securities laws.</p> <p>Effective as of October 4, 2022, the SEC adopted two amendments to its whistleblower program that (i) expanded the circumstances in which the SEC can pay whistleblowers for information and assistance in connection with related non-SEC actions; and (ii) affirmed the SEC’s authority to consider the dollar amount of a potential award for the limited purpose of increasing an award, but not to lower an award.</p>

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Protected Persons	<p>England & Wales</p> <p>The ERA provides protection to “workers,” a broadly defined term that includes, inter alia, employees, contractors, and trainees. It can include partners in LLPs.</p>	<p>DIFC (Dubai offshore)</p> <p>The DIFC Regime provides protection to officers, employees, and agents of a regulated entity.</p> <p>ADGM (Abu Dhabi offshore)</p> <p>The Guiding Principles do not specify who should be considered to be a protected person, but encourage organizations to socialize protections with “staff and, where appropriate, third parties.”</p>	<p>EU Directive</p> <p>In addition to employees, the EU Directive provides protection to a wide range of individuals connected to an organization, including:</p> <ul style="list-style-type: none"> • Self-employed workers; • Shareholders, directors, and trustees; • Volunteers and paid or unpaid trainees; • Contractors; and • Individuals connected to the whistleblowers (e.g., colleagues or family members). 	<p>United States of America</p> <p>The Exchange Act provides protection to an individual that voluntarily provides the SEC with information in writing that the person reasonably believes relates to possible violation of federal securities law; whether such violation has occurred, is ongoing, or is about to occur.</p> <p>Only individuals can act as whistleblowers. A company or other similar entity is not eligible for whistleblower status.</p>
Protected Disclosures	<p>England & Wales</p> <p>Workers are only entitled to protection under the ERA where their report concerns a “protected disclosure.”</p> <p>A protected disclosure requires the whistleblower to reasonably believe that it is in the public interest to report the issue, and the report itself concerns at least one of six specified categories of wrongdoing:</p> <ul style="list-style-type: none"> • A criminal offense; • A failure to comply with a legal obligation; • A miscarriage of justice; • Health and safety risks; • Environmental damage; or • The attempted or actual cover-up of any such wrongdoing. <p>Personal grievances, such as harassment or discrimination, are not protected by the ERA unless they can be shown to be in the public interest. Courts and tribunals have taken a very liberal approach to the question of whether the disclosure is one of a failure to comply with a legal obligation—often determining that the “public interest” test is met if more than one person is potentially impacted by the wrong disclosed.</p>	<p>DIFC (Dubai offshore)</p> <p>Employees and contractors are only entitled to protection where disclosures are made in good faith and relate to a reasonable suspicion of at least one of the following:</p> <ul style="list-style-type: none"> • Breach of a provision of the Regulatory Law or any rules arising therefrom; • Breach of any other legislation administered by the DFSA; or • Money laundering, fraud, or any other financial crime. <p>ADGM (Abu Dhabi offshore)</p> <p>The Guiding Principles encourage employers to adopt a broad definition of whistleblowing, suggesting the inclusion of fraud, money laundering, corruption, breaches of legal or regulatory requirements, unethical conduct, and/or acts to cover up wrongdoing. The Guiding Principles further encourage employers to condition protections on the reporting being in good faith.</p>	<p>EU Directive</p> <p>The EU Directive provides individuals with protection from retaliation arising out of reports in relation to breaches of particular European laws, including those relating to:</p> <ul style="list-style-type: none"> • Public procurement; • Financial services, products, and markets; and prevention of money laundering and terrorist financing; • Product safety and compliance; • Transport safety; • Protection of the environment; • Radiation protection and nuclear safety; • Food and feed safety, and animal health and welfare; • Public health; • Consumer protection; and • Protection of privacy and personal data, and security of network and information systems. 	<p>United States of America</p> <p>A person is protected from retaliation if they voluntarily provide information in writing to the SEC that the person reasonably believes relates to a possible violation of federal securities law. Generally, the type of conduct reported under the SEC Whistleblower Program includes:</p> <ul style="list-style-type: none"> • Ponzi schemes, pyramid schemes, or a high-yield investment program; • Theft or misappropriation of funds or securities; • Manipulation of a security’s price or volume; • Insider trading; • False or misleading statements about a company (including false or misleading SEC reports or financial statements) or false accounting entries or practices; • Abusive naked short selling; • Regulatory failures by SEC-registered broker-dealers, investment advisors, and investment companies; • Bribery of, or improper payments to, foreign officials; • Fraudulent conduct associated with municipal securities transactions or public pension plans; • Initial Coin Offerings and cryptocurrencies; and • Other fraudulent conduct involving securities or unregistered offerings.

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Procedures and Policies: Publication	<p>England & Wales Under the ERA, there is no mandatory obligation to have a whistleblowing policy in place. However, government guidance highlights the importance of having clear policies and procedures to demonstrate an organization's commitment to encouraging and appropriately dealing with whistleblowing incidents. The presence of adequate whistleblower policies, and the publication thereof, will be considered when determining whether a company can avail of an adequate procedures defense in relation to potential UK Bribery Act offenses. Companies regulated by the FCA are required to communicate appropriate internal procedures to their employees.</p>	<p>DIFC (Dubai offshore) The DIFC Regime does not prescribe the precise form of the policies or concern handling mechanisms; instead providing a flexible approach to ensure the policies and procedures are appropriate for the size, complexity, and business purpose of the entity.</p> <p>ADGM (Abu Dhabi offshore) Entities are encouraged to have policies and procedures that are clear, simple, accessible, and easily understood.</p>	<p>EU Directive The EU Directive requires organizations with 50 or more employees to have a whistleblowing policy in place. Organizations with fewer than 50 employees that operate in 'high risk' sectors may also be required to comply with the requirements of the Directive.</p>	<p>United States of America Most SEC registered publicly traded companies are required by exchange listing standards to disclose Codes of Ethics applicable to employees involved in financial reporting, which generally include whistleblower provisions and protections.</p>
Procedures and Policies: Content	<p>England & Wales The sophistication of any policy should be relative to the scale of the organization, but as a minimum it should include:</p> <ul style="list-style-type: none"> • An explanation of whistleblowing, including a clear comparison to personal grievances; • An explanation of the organization's procedures; and • An employee training plan. <p>Beyond demonstrating an organization's commitment to adequate whistleblowing procedures, comprehensive procedures encourage employees to make disclosures internally rather than externally. This allows companies to control the internal investigation and self-reporting to appropriate authorities.</p>	<p>DIFC (Dubai offshore) Organizations must put in place "effective policies and procedures" that prohibit retaliation against whistleblowers and mandate the retention of written records of internal concern reporting. The DIFC Regime does not prescribe the precise form of the policies or concern handling mechanisms, instead providing a flexible approach to ensure the policies and procedures are appropriate for the size, complexity, and business purpose of the entity.</p> <p>ADGM (Abu Dhabi offshore) At a minimum, entities are encouraged to adopt policies addressing the protection of whistleblowers and adopt a policy of non-retaliation.</p>	<p>EU Directive The EU Directive requires:</p> <ul style="list-style-type: none"> • Whistleblowers to be allowed to report their concerns orally or in writing; • Organizations to establish an impartial person or department to communicate with the whistleblower and provide feedback; and • Organizations to provide details for whistleblowers to report their concerns externally to a relevant regulator. 	<p>United States of America Under the Exchange Act, employers must not discharge, demote, suspend, harass, or in any other manner discriminate against an employee for providing information to the SEC under the whistleblower program, or assisting the SEC in any investigation or proceeding based on the information submitted. In addition, no person may take action to impede an individual from communicating directly with SEC staff about a possible securities law violation, including enforcing or threatening to enforce a confidentiality agreement with respect to such communications.</p>
Confidentiality	<p>England & Wales The ERA does not oblige employers to protect the confidentiality of a whistleblower. However, as a matter of best practice employers are encouraged to treat disclosures consistently, fairly, and confidentially to the greatest extent possible. (In some circumstances, employees may be prohibited from keeping disclosures confidential under the law). Not doing so may potentially constitute a detriment under the ERA.</p>	<p>DIFC (Dubai offshore) The DIFC Regime authorizes anonymous whistleblowing, and authorizes, but does not oblige, employers to protect the confidentiality of a whistleblower</p> <p>ADGM (Abu Dhabi offshore) The Guiding Principles encourage employers to adhere to strict principles of confidentiality.</p>	<p>EU Directive The EU Directive requires organizations to maintain the confidentiality of whistleblowers (save where necessary or proportionate under EU or national law).</p>	<p>United States of America Under the Exchange Act, the SEC cannot disclose any information (including in response to a Freedom of Information request) that could reasonably be expected to reveal the identity of a whistleblower provided that the whistleblower has submitted according to the proper procedures, except where a disclosure is required by law or in connection with certain federal court or administrative actions.</p>

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Deadlines for acknowledging receipt of a report	<p>England & Wales The ERA does not specify a mandatory deadline by which an employer needs to acknowledge receipt of a report. However, as a matter of best practice, employers are encouraged to provide feedback to workers, including by providing an indication of timings for any actions or next steps.</p>	<p>DIFC (Dubai offshore) The DIFC Regime does not specify a mandatory deadline by which an employer needs to acknowledge receipt of a report.</p> <p>ADGM (Abu Dhabi offshore) The Guiding Principles do not provide any guidance as to when acknowledgment of receipt should be provided.</p>	<p>EU Directive The EU Directive requires organizations to provide acknowledgment of receipt of a report to a whistleblower within seven days of receipt.</p>	<p>United States of America The SEC confirms receipt of a whistleblower complaint only to the person submitting it or their attorney. The SEC otherwise generally does not comment on whether it has opened an investigation in a particular matter or the status of its investigations.</p>
Deadline for providing feedback to whistleblowers	<p>England & Wales See above.</p>	<p>DIFC (Dubai offshore) See above.</p> <p>ADGM (Abu Dhabi offshore) See above.</p>	<p>EU Directive The EU Directive requires organizations to provide feedback to a whistleblower within a reasonable timeframe. This must not exceed three months from the acknowledgment of receipt.</p> <p>France French Law requires organizations to meet with the whistleblower no later than 20 working days after the report (if the report is made orally).</p>	<p>United States of America See above. The SEC posts on its website Notices of Covered Action (“NoCA”) exceeding \$1 million in sanctions. Whistleblowers who believe they voluntarily submitted new information that was used in the Covered Action can become eligible for an award if they complete and return Form WB-APP to the Office of the Whistleblower within 90 calendar days of the NoCA’s posting to the SEC website.</p>
External Reporting	<p>England & Wales Employees may report suspected wrongdoing to external organizations. The UK Government has provided a list of “prescribed persons” to whom a disclosure may be made outside of an employee’s organization. This includes the Bank of England and HMRC, as well as specific bodies for certain industries or issues.</p>	<p>DIFC (Dubai offshore) The DFSA has provided an ascending order of whistleblowing recipients, which commences with recipients internal to an organization and escalates to (i) the DFSA; and (ii) a local criminal law enforcement agency.</p> <p>ADGM (Abu Dhabi offshore) The Guiding Principles encourage organizations to identify external channels for whistleblowing.</p>	<p>EU Directive The EU Directive requires individuals to be permitted to make an external report, even without making a prior internal report, with the onus on competent authorities to establish appropriate external reporting channels.</p>	<p>United States of America Whistleblowers may submit information to the SEC through one of the following methods: (i) through the Commission’s website located at www.sec.gov; or (ii) mailing or faxing the SEC Office of the Whistleblower.</p>
Incentives	<p>England & Wales The ERA does not provide any incentive system to encourage whistleblowing.</p>	<p>UAE None of the UAE legal systems provide any incentive systems to encourage whistleblowing.</p>	<p>EU Directive The EU Directive does not provide any incentive system to encourage whistleblowing.</p>	<p>United States of America The SEC will pay an award or awards to one or more whistleblowers who voluntarily provide the SEC with original information that leads to the successful enforcement by the SEC of a federal court or administrative action in which the SEC obtains monetary sanctions totaling more than \$1 million. The range for awards is between 10% and 30% of the money collected (not merely the money order to be paid).</p>

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Penalties	<p>England & Wales If an employer subjects a worker who has made a protected disclosure to a detriment or dismisses them, they may be subjected to a claim. Damages are potentially unlimited, and there have been examples of large multiples of annual income being awarded. Punitive damages will not be awarded.</p>	<p>DIFC (Dubai offshore) A person protected by the DIFC Regime may be entitled to compensation or other relief if they have been subjected to any loss or employment as a consequence of making a report.</p> <p>ADGM (Abu Dhabi offshore) N/A. The Guiding Principles are not legally binding.</p>	<p>EU Directive Member states are required to provide dissuasive penalties to prevent:</p> <ul style="list-style-type: none"> • Hindering of reporting; • Retaliation against whistleblowers; and • Breaching of the duty of confidentiality owed to whistleblowers. 	<p>United States of America The SEC may investigate and bring an enforcement action against an employer who retaliates against a whistleblower. The SEC may also investigate and bring an enforcement action against any person who impedes an individual from communicating directly with SEC staff about a possible securities law violation.</p>

CONTACTS

For further information regarding our Investigations & White Collar Defense Practice, please contact your principal Firm representative or one of the lawyers listed in this publication. General email messages may be sent using our “Contact Us” form, which can be found at www.jonesday.com/contactus.



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