

Japanese Employment Law Update



January 18, 2022

An amendment to the Whistleblower Protection Act (the “Act”) made in June 2020 will become effective in June 2022. Pursuant to the amended Act, on August 20, 2021, the Consumer Affairs Agency issued a policy on the obligation of businesses to establish a system to handle whistleblowing appropriately (the “Policy”). Please note that this obligation is mandatory only for businesses with more than 300 employees; other employers are simply required to make best efforts to establish such a system.

In this issue, we explain the main points of the amended Act of which businesses need to be aware.

1. Who can be protected as a “whistleblower” under the Act

The amended Act expands the scope of a “whistleblower” who is eligible for protection under the Act. In addition to existing employees who are protected under the current Act, dispatched workers, former employees whose employment has ended within one year, and officers may be protected as whistleblowers

2. Obligation to establish a system to handle whistleblowing

Businesses have an obligation to establish a system to handle whistleblowing complaints appropriately. The Act enumerates the following two distinct obligations.

(1) Identifying person(s) who engage in handling whistleblowing

Businesses must identify in a clear manner, such as by designating in writing, person(s) who engage in receiving, investigating and taking necessary action to address whistleblowing. It must be noted that person(s) engaged in handling whistleblowing have a confidentiality obligation regarding the whistleblower, and failure to comply with this obligation may result in criminal penalty being imposed on such person(s) (a fine up to

300,000 yen).

(2) Having a system to respond to whistleblowing

Apart from clearly identifying the person(s) who engage in handling whistleblowing, businesses are required to establish a system to handle whistleblowing appropriately. Namely, the Policy requires businesses to take such measures as the following.

(a) Establishing a mechanism to handle whistleblowing complaints across departments, by:

- i. establishing a point of contact for complaints,
- ii. establishing reporting routes that are independent from upper management,
- iii. properly conducting investigations and, if appropriate, rectification measures, and
- iv. eliminating conflicts of interest.

(b) Ensuring that the system operates effectively, by:

- i. providing employees, officers and former employees with sufficient education regarding and raising their awareness of the system, and
- ii. notifying whistleblowers of the rectification measures taken as a result of the whistleblowing.

If the directors of a company fail to establish such a system, it may constitute a violation of the Act, and they may be held liable for breaching their duties under the Companies Act.

3. Whistleblowing to government agencies

A whistleblower who makes a report to the government agency having authority over the matter can be protected under the current Act only if there are reasonable grounds to believe that a reportable fact has occurred, or is about to occur.

Under the amended Act, in addition to the foregoing, a whistleblower to a government agency can be protected if the whistleblower believes that the reportable fact has occurred, or is about to occur, and submits a document to the agency which contains the following items:

- (a) name and address of the whistleblower

- (b) information about the reportable fact
- (c) the whistleblower's reason to believe that the reportable fact has occurred, or is about to occur, and
- (d) the whistleblower's reason to believe that appropriate measures need to be taken regarding the reportable fact.

The amended Act requires government agencies to establish systems to handle whistleblowing reports to ensure the appropriate handling of such reports.

4. External whistleblowing to other third parties

Under the current Act, external whistleblowing to third parties such as the media can be protected only under certain circumstances specified in the Act. The amended Act expands the cases that may be protected to include the following, as long as there are reasonable grounds to believe that the reportable fact has occurred, or is about to occur:

- (a) there are reasonable grounds to believe that an employer will disclose the whistleblower's identity without justifiable reason, and
- (b) a person has suffered irreparable damage to the person's property (or a large number of people have suffered significant damages to their property), or there are reasonable grounds to believe that there is imminent danger that such damage will occur.

5. Expansion of whistleblower protection

The current Act prohibits businesses from dismissing whistleblowers because they make a whistleblowing complaint that is protected under the Act. The current Act also sets forth a general rule that businesses must not subject a whistleblower to disadvantageous treatment. In addition, under the amended Act, businesses are prohibited from seeking compensation from a whistleblower for loss or damages caused by the whistleblowing.

The Policy requires businesses to take disciplinary actions or other appropriate measures against those who subject a whistleblower to disadvantageous treatment.

The Policy also recommends that information that could lead to the identification of the whistleblower not be disclosed outside the permissible scope of information sharing.

6. What to do under the amended Act

Businesses, especially those with more than 300 employees, should now review their existing practices for handling whistleblowing, and perhaps will need to adopt new rules and procedures or to revise their current rules and processes, in order to be in compliance with the amended Act and the Policy.

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