

Ius Laboris Webinar

How to manage whistleblowing and other HR investigations

Thursday 10 June

15:00 CEST / 9:00 EDT





WHISTLEBLOWING RULES ACROSS THE GLOBE

WHISTLEBLOWING RULES - USA

WHAT DOES WHISTLEBLOWING MEAN IN THE US?

- Whistleblowing versus anti-retaliation provisions in various laws
- Federal versus state laws
- Key focus and agencies at Federal level:
 - Workplace safety (OSHA)
 - Protected Concerted Activity (NLRB)
 - Non-discrimination (EEOC)
 - Wage and hour (DOL)
- Key focus of state laws:
 - Public policy
 - Violation of law, rule or regulation
- Specific regulatory/safety focus by industry:
 - Finance
 - Transportation
 - Food
 - Energy
 - Healthcare
 - Government contractor
- What kinds of acts can be deemed 'retaliatory'
- Private right of action versus agency versus exhaustion of administrative remedies

WHISTLEBLOWING RULES - UK

THE UK POSITION

- The UK has had whistleblowing protection for over 20 years (since 1998)
- Employees and the broader category of 'workers' are protected
- To blow the whistle (make a qualifying disclosure) the individual must disclose some information, more than a mere allegation.
- The disclosure must tend to show that one of the following things has happened (or is likely to happen):
 - A crime
 - Breach of any legal obligation
 - A miscarriage of justice
 - Danger to health and safety of any individual
 - Damage to the environment
 - Deliberately concealing information about any of the above
- The person making the disclosure must have a reasonable belief in the information disclosed
- The disclosure must be made to the right person, usually to the employer (or a third party nominated by the employer)
- The person making the protected disclosure is protected from detriment and dismissal because of the disclosure

WHISTLEBLOWING RULES - POLAND

STATUS – JULY 2021

- No whistleblowing' legislation at present
- Whistleblower protection in practice depends on the organisational and legal culture of an employer, as well as legal awareness of the person who decides to report the irregularity
- Awareness is much greater in the private sector, in large enterprises
- The treatment of whistleblowers as 'squealers' appears in many statements
- Legal protection of whistleblowers requires coordinated action in various areas of law

WHISTLEBLOWING RULES - RUSSIA

LEGISLATIVE BASIS

- Corporate whistleblowing is not specifically governed by Russian law
- Anti-corruption laws include a range of questions regulating whistleblowing rules, which are mandatory only for state organisations and some specific state-owned companies
- Corporate whistleblowing systems are subject to general law, including data protection and employment law:
 - Russian Constitution
 - Russian Labour Code
 - Russian Federal Law 'On Personal Data'
- Basic principles:
 - Legitimacy
 - Confidentiality and security
 - Compliance with Russian data-localisation and cross-border transfer rules
 - Formalisation by local policies to be binding
 - Transparency
 - Non-discrimination



INVESTIGATIONS – THE PRACTICALITIES

INVESTIGATIONS – THE PRACTICALITIES (RUSSIA)

PRACTICAL ISSUES

Enforcement tools for internal investigation based on whistleblowing

- Is a whistleblowing report a sufficient legal basis for conducting an investigation and taking further enforcement action?
- Legislative requirements for conducting and formalising internal investigations in each country

Privacy and confidentiality issues

- Are there any privacy implications that can be sticking points for whistleblowing implementation or further investigation?

Enforcement

- Disciplinary action: limitation periods, formalities, restrictions
- Can a whistleblowing report be the basis of a criminal case?

INVESTIGATIONS – THE PRACTICALITIES (RUSSIA)

FORMALISATION OF AN INTERNAL INVESTIGATION

- The outcome of an internal investigation should be launched formally, properly conducted and documented in a timely manner
- Any evidence confirming facts about an employee's misconduct must be examined carefully to understand whether they are sufficient to dismiss the employee
- In order to properly formalise an internal investigation, the investigator must take the following mandatory steps:
 - formalise the launch of the investigation and create a working group pursuant to an internal order
 - interview employees and request explanations from them during the investigation
 - formalise the results of the investigation by issuing a report outlining the main findings
- Privacy issues:
 - an employee's written consent is a general ground for data processing and data transfers
 - the processing of data obtained from third parties (not directly from data subjects) based on prior notice to those data subjects
 - the processing of employee personal data cannot be excessive
- Disciplinary action taken following an investigation must be formalised and initiated not more than one month from the date the violation was discovered and no later than 6 months since the committal of the relevant act

INVESTIGATIONS – THE PRACTICALITIES (US)

STEPS TO TAKE IN THE US

- Develop and implement appropriate compliance policy and procedure
- Foster a culture of compliance and transparency
- Investigate and document properly
- Pick the right investigator
- Provide for multiple options to report – and anonymity
- Consistency, consistency, consistency
- Train staff
- Engage counsel when appropriate

INVESTIGATIONS – THE PRACTICALITIES (UK)

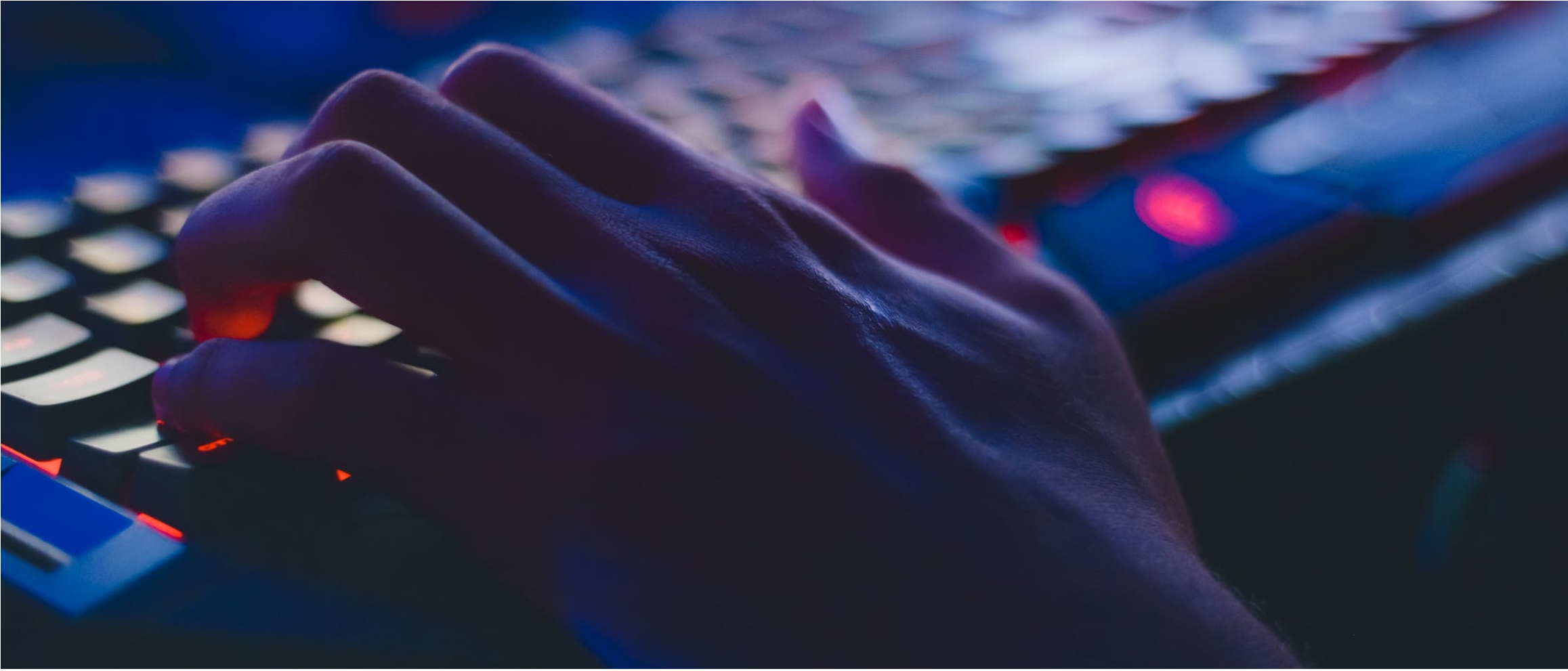
THE UK POSITION

- There is no legal requirement to investigate when someone blows the whistle, but it is generally not prudent to ignore a protected disclosure to the legal and reputational risk that poses
- Investigations can be conducted by the employer, or a third party investigator might be appointed (such as an external law firm)
- Where using an external party, the employer will usually want to retain decision-making power, with the investigator limited to fact finding and possibly recommendations
- The employer should consider the status of the investigation – will it be legally privileged? This may not always be possible, in which case documents produced may need to be disclosed to a regulator or in litigation
- Who is the investigator reporting to? Consider whether that person has the necessary authority to act on the outcome
- Depending on the nature of the investigation, sensitive personal data might be disclosed – the investigator needs to address this and ensure that appropriate privacy notices and protections apply
- If a criminal offence is alleged, alleged wrongdoers may need to be given the time to consult a lawyer
- If an allegation involves people/companies in different countries, make sure the investigator is aware of any specific rules which might apply in those jurisdictions

INVESTIGATIONS – THE PRACTICALITIES (POLAND)

INTERNAL INVESTIGATIONS IN POLAND

- Conducting internal investigations in Poland is based on good practice and regulations derived from various fields (employment law, criminal law, data privacy law, IT security law, etc.)
- Following implementation of the EU whistleblowing directive the law will develop and may require further regulation
- There are huge differences in the approach to explaining and investigating reported irregularities, depending on the organisation type (e.g. international versus local organisations, such as family businesses)
- A key question that is often asked: whether there is a duty to report the case to enforcement authorities



SOME SPECIFIC ISSUES

SOME SPECIFIC ISSUES - POLAND

WHISTLEBLOWER ACTING IN BAD FAITH

- This unfortunately often happens in practice (motives could be personal revenge, competition etc.)
- Proving bad faith in practice is a serious challenge from an evidentiary point of view, especially when the report is anonymous

PENALTIES

- If employment contract: termination without notice
- Potential employer claims for damages against employee (what about B2B?)
- Potential actions from a party wronged by a report submitted in bad faith

SOME SPECIFIC ISSUES - US

KEY AREAS OF DIFFERENCES ACROSS WHISTLEBLOWER SCHEMES/LAWS

- Who can sue and when?
- What legal evidentiary standard will be applied?
- Does there need to be an actual violation – or just a good-faith belief?
- Can employees be terminated or disciplined for ‘bad faith’ complaints?
- How do the remedies differ?

SOME SPECIFIC ISSUES - UK

THE UK POSITION

- The person making the disclosure must have a reasonable belief that the information tends to show the relevant type of wrongdoing (e.g. that a crime has been committed)
- They do not have to prove the information is true or that it amounts to wrongdoing BUT they must believe this to be the case AND their belief must be objectively reasonable
- Since 2013, it is also a requirement that the person making the disclosure reasonably believes the disclosure is in the public interest
- It is possible for a disclosure which relates to a breach of the individual's own employment contract to be a protected disclosure in some circumstances
- Claims for dismissal or detriment can be brought against the employer and personally against any responsible individuals (e.g. managers)
- Compensation is uncapped – in some cases career long loss has been awarded. Injury to feelings awards can be made in detriment cases
- Tribunals can pass information to relevant regulators

SOME SPECIFIC ISSUES - RUSSIA

GOOD FAITH/BAD FAITH


- No requirements from a legal perspective
- Internally-adopted policies on whistleblowing must include the definitions and procedures for complaint-reporting for whistleblowers

PENALTIES




- Administrative fines on the company of up to RUB 75,000 (approximately EUR 842), which may be imposed repeatedly if the individuals concerned have initiated separate administrative procedures
- If an individual makes a claim to a supervisory authority, this may cause the inspection of the company's activities
- Suspension and further termination of unlawful data processing activities, with various fines (up to RUB 6,000,000 (approximately EUR 67,500))
- If an individual claims to the court they may be awarded damages for harm suffered (including moral damages)
- If data are collected through a website, failure to comply with the privacy laws may result in the blockage of the website for Russian users
- The Russian DPA may order the cessation of the unlawful data processing

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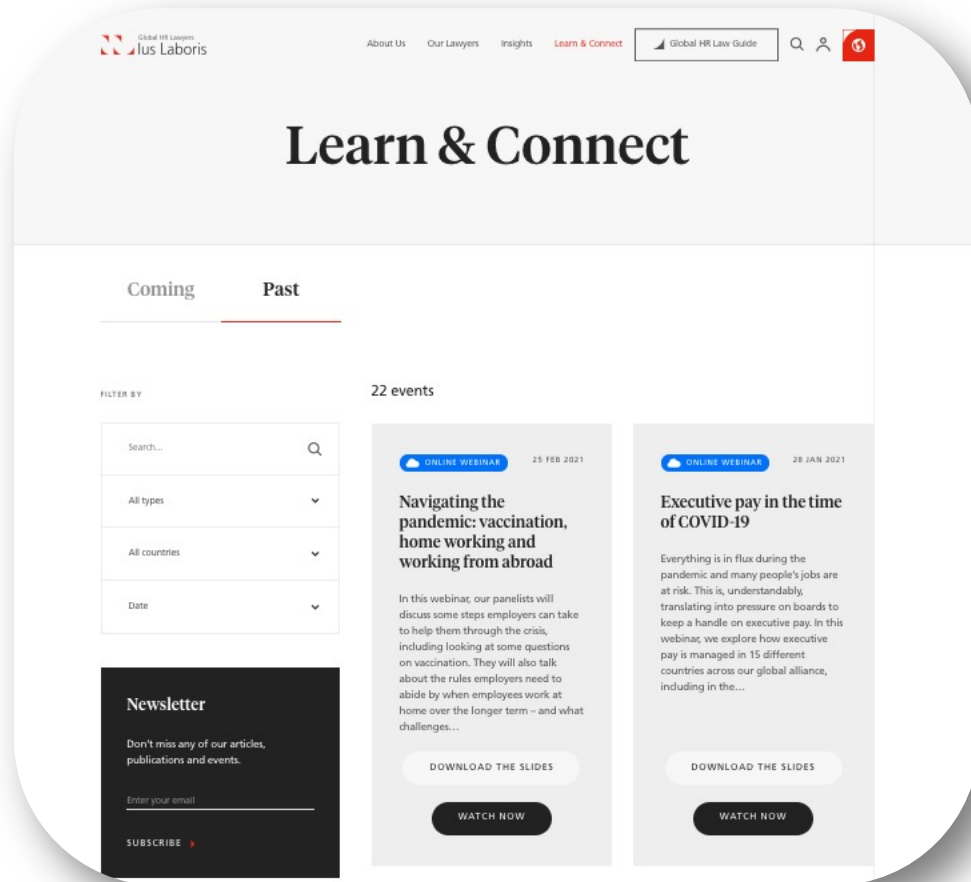
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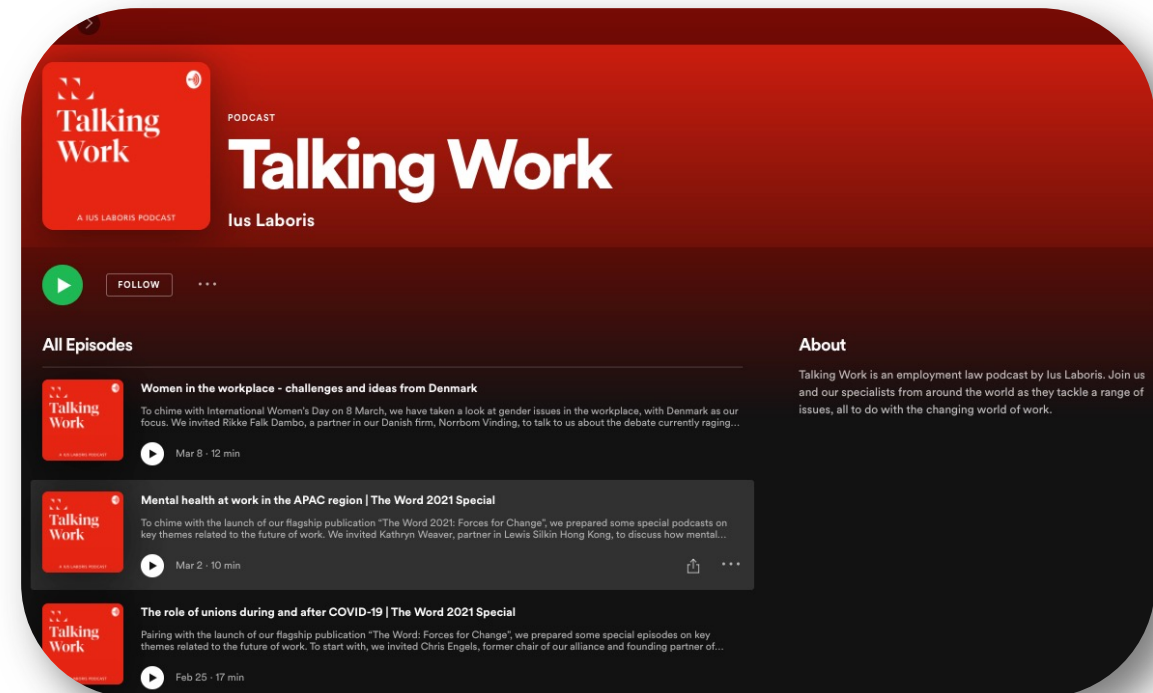
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