

## WORKPLACE INVESTIGATIONS – QUARTERLY REVIEW – EDITION 1

The framework under which businesses conduct investigations into employee-related matters faces a further shift as a result of developing legislation and regulation.

In the UK in particular, there are expected changes including around whistleblower protection, and new and expected guidance including from organisations such as the Equality and Human Rights Commission ("EHRC") and the Solicitors Regulatory Authority ("SRA"). Workplace culture will come under fresh scrutiny thanks to new requirements for employers in scope of the UK Corporate Governance Code to monitor and assess how desired company culture is embedded – and workplace investigations and reviews will be one way that is tested.

In the United States, there are newly announced incentives for whistleblowers which will impact timing of internal investigations and could create a race to report to regulators.

In the EU, the EU Directive on the Protection of Whistleblowers (Directive (EU) 2019/1937, the "Whistleblower Directive") has brought wide-ranging shifts to the set-up of reporting systems across multinational companies and the investigation of concerns since the end of 2023, with many companies still grappling with the effect on their performance-management and exit routines. A new report of the EU Commission on Compliance of EU member state implementation of the Whistleblower Directive provided to the EU Parliament on 3 July 2024 may lead to further limitations to the sharing of investigative resources across the group.

### Key issues

- Possible changes to whistleblower protection
- Update to legislative framework – sexual harassment
- Update to legislative framework – Corporate Sustainability Reporting Directive (CSRD)
- UK: SRA's draft guidance on internal investigations
- Press reported investigations by external investigators
- UK: FCA consultation on its policy on publishing information about investigations
- The UK Corporate Governance Code 2024 (the "Code")
- UK: FCA's quarterly whistleblowing data, Q2 2024
- UK: Consultation on Code of Conduct for Directors
- US: Corporate Whistleblower Awards Pilot Programme
- Approach to whistleblowing investigations in the EU

Globally, we will also be seeing the impact of increased ESG reporting requirements (for example, under the Corporate Sustainability Reporting Directive, Directive (EU) 2022/2464 "CSRD").

In this Quarterly Review we will examine recent and forward-looking developments and areas to watch that impact employee-related investigations. We also address learning points from recent high-profile investigations.

### **UK: possible changes to whistleblower protection**

The new Labour Government stated in its policy paper: [Plan to Make Work Pay](#) that it intends to strengthen protection for whistleblowers. It also indicated that women who report sexual harassment at work will be given the same protection as other whistleblowers. Neither of these proposals were expressly referenced in employment law proposals in the King's Speech, however they may be included in the Employment Rights Bill that is to be published within the first 100 days of Government (i.e. by 12 October 2024). While it is unclear what form this protection will take, any legislative change may impact the process to follow after a complaint by a whistleblower. The inference is that where organisations already have a distinct procedure to follow for whistleblowing complaints and specific oversight bodies, sexual harassment complaints will need to be included within that regime as a matter of course. If that is the case, current whistleblowing procedures may require revision and additional training provided to staff. If these amendments are included in the Employment Rights Bill, any new legislation may not come into effect before the first half of 2025 at the very earliest given the time that the Bill will take to proceed through the legislative process.

### **Update to legislative framework – sexual harassment**

From 26 October 2024 employers are under a new obligation to take reasonable steps to prevent sexual harassment of their employees in the course of employment. A breach of the legislation will be relevant to the level of compensation available to an employee by up to 25% if an Employment Tribunal upholds a sexual harassment claim.

The ECHR has published its updated [Sexual harassment and harassment at work: technical guidance](#) that updates the [2020 Sexual harassment and harassment at work: technical guidance](#). In addition, it has published a new [Employer 8-step guide: Preventing sexual harassment at work](#).

The 8-step guide focuses on developing an anti-harassment policy, staff engagement, risk assessment and reduction, reporting, training, how to address complaints, dealing with third party harassment and monitoring and evaluating the employer's actions.

The technical guidance states that the preventative duty requires employers to take reasonable steps to prevent sexual harassment by their own workers **and** third parties, such as clients and customers. As well as requiring employers to review (and keep under review) their policies and training programmes, it provides employers should ensure that a robust investigation process is followed for all sexual harassment complaints, including those against third

parties. The guidance suggests that employers should continue to review whether there are any further steps it is practicable for them to take, considering issues such as whether there have been any changes in the workplace or the workforce and the availability of new technology such as new reporting systems.

Prior to the election the Labour party indicated that it may further strengthen the obligation on employers to prevent sexual harassment in the workplace, but have not yet provided details. Some press reports have suggested that the Government is proposing to reinstate the original amendment of the Equality Act 2010 and require employers to take **all** reasonable steps. It is possible that this may be addressed in the Equality (Race and Disability) Bill that will be brought forward; albeit the timeframe for this is not yet known.

### Update to legislative framework – CSRD

The directive introduces mandatory European Reporting Standards. The first tranche of companies are required to report in 2025 in relation to the 2024 financial year. Many of these have a people impact. Reports may trigger questions including in relation to absent or inadequate complaints or whistleblower procedures, or with regard to related actions and/or targets.

The CSRD stipulates reporting obligations on working conditions, wages, social dialogue, collective bargaining, and other aspects if they are material to the company, which companies have been or should start preparing for now. This should include a particular focus on how these reporting requirements relate to other, similar reporting requirements, to ensure the necessary consistency of processes and responsibilities. In Germany, for example, it is expected on the basis of the current drafts and guidance that companies will be able to replace certain reporting obligations under the German Supply Chain Act (*Lieferkettensorgfaltspflichtengesetz*, "**LkSG**") with a sustainability report in accordance with the German Commercial Code.

Our fuller briefing is available [here](#).

### UK SRA's draft guidance on internal investigations

In March 2024 the SRA produced [draft guidance](#) for lawyers on conducting internal investigations, due to be finalised this year. On its face the draft guidance applies to internal and external lawyers, but also internal investigations conducted under the supervision lawyers (although the enforcement regime in that scenario is not clear). If it remains as drafted, the guidance is potentially far reaching as it relates to all internal investigations, including investigations into disciplinaries and grievances. It contains detailed draft guidance about how internal investigations should be conducted, particularly in order to ensure the independence of the investigator. By way of a few examples, it covers the following:

- the investigator(s) should have no prior knowledge of, or involvement in, the concern or alleged event;
- consideration should be given as to whether the investigator should have a role in the decision-making process, or if that impacts their independence;
- the need to ensure that the investigation process is fair for all of those involved and that their rights to be represented or accompanied and to receive and respond to evidence or findings are fulfilled; and
- the importance of the interviewer not asking leading questions and being adequately trained.

## **Press-reported investigations by external investigators**

There may be situations where there is a strong motivation to announce the appointment of an external investigator, particularly if the allegations are against a director or influential senior individual. This is a point also made in the SRA draft guidance but will be applicable in other jurisdictions. Recently there have been a spate of high-profile publicised external investigations in the spotlight, which demonstrate the need to consider the following reputation management points when publicising the commission of an external investigation:

- Will the report be published externally? If so, will this be in summary form only (and can legal privilege be claimed over the fuller version)?  
Publication of an investigation report can help with transparency and avoid protracted speculation with a negative business impact, but think very carefully before committing to publication, particularly before the outcome of the investigation is known.
- Brief the organisation's press teams and liaise with the press team of the senior individuals involved as appropriate. Individuals under investigation, particularly those with a public profile, may have their own agenda and can be difficult to engage with. Be cautious about public statements of support to individuals before a thorough investigation has been undertaken.
- Take appropriate measures to maintain the confidentiality of the investigation and the relevant evidence.

## **The UK FCA's consultation on its policy on publishing information about investigations**

In April this year the FCA [consulted](#) on a change to its policy on publishing information about investigations. It proposed to publish information when an investigation is opened, including the subject of the investigation and a summary of the suspected breach, misconduct or failing being investigated, if it is in the public interest to do so. It would also publish updates on the investigation. Decisions will be taken case-by-case, with careful consideration of whether it is in the public interest to do so.

Although the FCA's final rules on non-financial misconduct have not yet been published it is clear from [the Prescribed Persons \(Reports on Disclosures of Information\) Regulations 2017 - Annual Report 2023/2024](#) that the regulator has undertaken investigations into allegations of sexual misconduct committed against members of staff by a senior manager of a regulated bank made through its whistleblowing platform.

Given the specific legal considerations regarding information about individuals, the FCA has stated that it will *not generally* announce when it has opened an investigation into a named individual. If this proposal is adopted in the final Policy Statement it leaves open the possibility of individuals whose non-financial misconduct is the subject of an FCA investigation being named if the FCA considers that it is in the public interest to do so. Would it take this view, for example if naming would encourage other potential victims to come forward?

Although the FCA intends to state clearly that announcing an investigation does not automatically mean it has decided that there has been misconduct or breaches of its requirements and that it will be transparent if it closes cases

with no outcome, in reality this is unlikely to prevent an individual from suffering reputational damage.

In a [speech given](#) on 24 September 2024, the FCA acknowledged that regulated firms were unhappy with their proposal to disclose who they are investigating. Accordingly, the FCA has stated that 'this autumn' it will engage with firms further in relation to the proposals, and later this autumn plans to provide greater detail on how it could work in practice. It will publish case studies examining how the criteria might apply and what announcements could look like, as well as more information on the numbers of cases that might be affected.

## **The UK Corporate Governance Code 2024 (the "Code")**

The Code, published by the Financial Reporting Council, will come into force from January 2025. It provides that the board of directors should assess and monitor culture but also consider how the desired culture has been embedded into the organisation. The Board must also seek assurance that management has taken corrective actions when it is not satisfied that policy, practices or behaviour throughout the business are aligned with the company's purpose, values and strategy. The Guidance to the new Code states that Boards will need periodic assurance from management, either conducted internally or externally, that they have effectively embedded culture and value in operational policies and practices. Organisations should consider commissioning a culture review to identify and target risk areas and be able to gather evidence to show embedding of culture and regular audits to ensure that policies are aligned with purpose.

## **The UK FCA's quarterly whistleblowing data, Q2 2024**

Of interest is that of the 253 allegations of wrongdoing, just under a third of those related to culture. The FCA are also expected in H2 2024 to release a policy statement following their consultation paper CP23/20 "Diversity and Inclusion in the Financial Sector." The consultation paper included draft FCA handbook text setting out guidance on what constitutes "non-financial misconduct" and how that should be addressed. This will influence what financial services firms investigate, and the scope and impact of those investigations on employees.

## **UK Code of Conduct for Directors consultation**

Relevant to complaints raised against directors, The Institute of Directors has consulted on the introduction of a [voluntary Code of Conduct](#) for directors to improve integrity and transparency levels. This would cover leading by example (demonstrating exemplary standards of behaviour in personal conduct and decision-making – the reference to personal conduct potentially brings into relevance behaviour outside of the workplace), integrity, transparency, accountability, fairness and responsible business. The consultation closed on 16 August 2024.

## **US: Corporate Whistleblower Awards Pilot Programme**

On 1 August 2024, the U.S. Department of Justice unveiled the details of its much-anticipated [Corporate Whistleblower Awards Pilot Programme](#) intended through individual financial incentives to help root out corporate misconduct and to encourage companies to make prompt, voluntary disclosures. The Dodd-Frank Act created whistleblower programmes at the SEC and CFTC that have proven immensely successful. The SEC's whistleblower programme resulted in awards of more than \$1.9 billion to 397 individual whistleblowers



since its inception in 2011. Also coming out of the Dodd-Frank Act was the CFTC's whistleblower programme, which focuses on violations of the Commodity Exchange Act. That programme has resulted in 41 orders, granting nearly \$350 million in awards (as of FY 2023) since issuing its first award in 2014. The CFTC has ordered over \$3 billion in sanctions in all its whistleblower-related enforcement actions. Whistleblowers may be eligible for an award pursuant to the Pilot Programme, alone or jointly with other individuals, when they provide original, truthful information about criminal misconduct relating to one or more designated programme areas that leads to forfeiture exceeding \$1 million in net proceeds forfeited in connection with a successful prosecution, corporate criminal resolution or civil forfeiture action related to corporate criminal conduct. The confluence and proliferation of whistleblower bounty programmes designed to financially incentivise individuals to report on company misconduct, and voluntary disclosure programmes designed to incentivise both companies and individuals to timely report their own misconduct, heightens the premium for companies to ensure active and adequate risk management and compliance monitoring and assurance.

## **EU: Whistleblower Directive**

The EU Commission's 3 July 2024 report to the European Parliament on the conformity of EU member states' implementation of the Whistleblower Directive re-iterates the importance it attaches to the Whistleblower Directive as an instrument to safeguard the freedom of opinion. It identifies wide-ranging shortcomings of member states' implementation. Most notably, it reiterates its strict stance on the sharing of reporting channels within the group, at the level of the parent company of a group of large legal entities. Additional limitations on the options to share channels and investigative resources within the group will not automatically result from the report, but member states may refine or make stricter their stance, with or without the pressure resulting from potential contract infringement procedures launched by the EU Commission against member states. Another focus area following the report is expected to be the whistleblower's actual access to compensation for damages incurred by retaliatory measures, including by way of injunctive relief, which may further impact on investigative tools and processes. Companies will need to monitor whether member states that have so far, like Germany, not included an express option for injunctive relief into their Whistleblower Directive implementation laws, will take steps to facilitate actual access to injunctive relief for whistleblowers reinforcing the need to implement robust processes against retaliation throughout investigations.

***Clifford Chance have launched a new Workplace Investigations and Culture Reviews hub which can be visited [here](#).***

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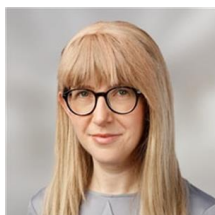
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