

WHISTLE BLOWER POLICY

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ABSTRACT

In this article we will be focusing on the various laws related to Whistle blowing. The main purpose for the introduction of this policy was to protect the public interest. Non-reporting of frauds, misconduct, illegal activities and mismanagement leads to increase in the level of corruption within the organization.

In the article we will also be discussing whether various laws which came into force got implemented to its complete essence or not. The article will discuss in detail about whistle blowing policy and companies act, SEBI and the whistle blowing policy, Whistle Blowing Protection Bill 2011, advantages and challenges faced by the policy. How Indian model is different from UK and USA. We will also be discussing the crux of various legislations which were brought and also that what were the various reasons that this legislation could not succeed? Due to which we were back to square one.

Key words: Whistle Blower, Whistle blower policy, Indian purview

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INTRODUCTION

Before understanding the whistle blowing policy it is an important to understand what constitutes misconduct or wrongdoing in an organization, as they form grounds for whistleblower's divulgence. Misconduct and wrong doing can be termed as an unacceptable or improper behavior by professionals; such misconduct can include activities which seems to be illegal or unethical; a criminal wrongdoing; damage to environment; crude work environment; fraudulent conduct; anti-competitive conduct; violation of specific laws and others.

Mismanagement, fraud, illegal activities and misconduct are certain evils that an organization face in its day to day progress. But an organization is not majorly destroyed by these evils rather it is destroyed when it is being recognized by member of the organization and still ignored. Though they cannot be stopped permanently but a step to curb these activities can be taken by those who stand by the organization. **Section 177(9) of Companies Act, 2013³** provides every listed company and such other companies as may be prescribed by the act to establish a mechanism to allow its directors or employees to report genuine frauds, misconduct or illegal activities in the company.

Whistle blowing means exposing by an employee (individual) of an organization to its higher authority or to someone outside the organization about the illegal, unethical, corruption, fraud and mismanagement within the organization. Such employee or individual is known as a whistle blower. The main purpose for the introduction of this policy in the companies was to protect the public interest.

It is an old concept but has got a recent entry in the vocabulary of corporate and financial affairs of companies in India. This concept is followed in both private as well as public sector, that is, in government organizations. It can be done in two ways, that is, internal whistle blowing and external whistle blowing. In internal whistle blowing the employee informs about the misconduct and mismanagement in the organization to the higher authority but in case of external whistle blowing the employee informs about the misconduct and mismanagement to any external or outside authority like media or law enforcement agency. Non- reporting of frauds, misconduct,

³ The Company Act, 2013

illegal activities and mismanagement leads to increase in the level of corruption within the organization.

US MODEL

The first definition of whistle blowing was given in **1971 by a US consumer activist Ralph Nader**. He described whistle blowing as “An act by a men or women who is employed in the organization but considers public interest greater than the organizational interest and blows a whistle in the organization and informs about all illegal activities, fraud, misconduct and mismanagement carried out in the organization”.

The U.S. has a number of whistle blower laws at state and federal level. Apart from this, it has separate laws for whistle blowers in its legislation. Therefore, the three acts which give a broad framework to whistler protection in U.S. are as follows⁴:

1. THE WHISTLE BLOWER PROTECTION ACT 1989

This act was enacted to protect federal employees i.e. whistle blowers who report any fraud, mismanagement, misconduct and illegal activities in the organization. But with the passage of time the interest of whistle blowers started to erode due to lack of rights available to them under this act.

2. THE CORPORATE AND CRIMINAL ACCOUNTABILITY ACT (Sarbanes-Oxley Act)

This act was passed in 2002 to enhance corporate accountability and erode all frauds within the organization. The major limitation faced by this act was that it was restricted to only financial matters.

3. THE FALSE CLAIMS ACT

The process where an employee files a complaint and it turns out to be invalid. An employee can be held accountable for false claim when they are aware of the fact that the complaint, they are filing is invalid.

⁴WHISTLE BLOWING Balancing on a tight Rope, Knowledge Paper Series-5, 13-14

UK MODEL

In United Kingdom, the Public Interest Disclosure Act, 1998 was introduced for protecting the interest of Whistleblowers. This Act protects whistleblower from inequitable behavior. Even in the condition of Non-Disclosure Agreement between the employer and employee doesn't restrain employee to blow the whistle. Earlier in this year (2019) the consultation suggested to have limitation on confidentiality clauses.

Freedom to Speak up review was the review into whistle blowing policy by National Health Service in England to layout twenty principles and actions for improvement and to have right conditions to speak when things go wrong in future. Principle and actions led by sir Robert Francis includes concerns related to Culture of raising concern, culture free from bullying, Training and supports.

INDIAN MODEL

In India there are no adequate provisions in our legal system for the protection of whistle blowers. But **Whistle Blowers Protection Bill, 2011** was passed to protect persons disclosing any information related to fraud, mismanagement, misconduct or illegal activities to higher authority or any other person outside the organization for e.g. Media. Any person acting as a whistle blower can make disclosure of complaints to the central vigilance commission (CVC). It is necessary for the complainant to disclose his identity in the complaint but CVC cannot disclose the identity of the whistle blower to any authority. The bill also provides for charging of penalties on persons making false complaint.

The Whistle Blower Protection Bill, 2011 which seeks to need to protect honest officials from unreasonable exploitation on the other hand protecting the whistleblowers who was disclosing problems in public Interest. Recently, followed bill is the **Whistle Blower (Amendment) Bill, 2015**. This Bill amends Whistle Blower's Protection Act, 2014. Amendment bill prohibits the reporting of corruption relating to disclosure if it related to i) Economic, scientific interest and security of India; ii) Cabinet proceeding; iii) intellectual property; iv) that received in a fiduciary capacity, etc.

But the provisions that deal with whistle blowing and protection of corporate governance or in other words provisions that help in elimination of fraud by establishing a mechanism which allows directors or other employees of company to report fraud are dealt under **Section 206 to 229 to the Companies Act, 2013**⁵. Section 208 authorizes Inspector to scrutinize company records and equip any recommendation to conduct investigation whereas section 210 of the Act, gives power to the central government to order Investigation in matters Concerning,

- 1) Receipt of a report by registrar or inspector of company.
- 2) On notification of special resolution passes by the company that affairs of company must be inspected.
- 3) To keep the public Interest.

Under Section 211 of the Act, the serious fraud Investigation office (SFIO) is established, which has authority to arrest any person on charges of fraud in the company. Draft Rule 12.5 of the Companies Act, 2013 makes it compulsory to have whistle blowing policy as bylaws of companies i.e. either listed, companies accepting deposits from public or has borrowing more than fifty crores from bank or other financial Institution and vigil committee to setup to ensure policy is effectively implemented.

Additionally, according to the SEBI, **Clause 49 of the Listing Agreement** incorporate the articulation of whistle blower policy in Indian Company. However, it's not mandatory for companies to have whistle blowing policy. But recently in 2015, the Listing Agreement has been replaced by the SEBI (Listing and Disclosure Requirements) Regulation, 2015. This regulation makes it mandatory for listed companies to have whistle blower mechanism for employee.

As whistle blower policy in India seeks to safeguard interest of public. The policy must also include provisions for establishment of internal committee for protection of whistleblowers at every level of management. There have been various cases in India where not just the employees but middle and top-level management has been the whistle blowers and stop the company from being big fail. For e.g. the E.g. **Satyendra Dubey**⁶ a qualified engineer, was working as Deputy

⁵ SHIVI GUPTA, WHISTLE BLOWER POLICY IN INDIA: LAW AND CHALLENGES (Oct. 12, 2018)

<https://www.myadvo.in/blog/whistleblowing-policy-in-india-the-law-and-challenges/>

⁶ www.humanrightsinitiative.org/programs/ai/rti/news/whistleblowing-law.htm

General Manager with the National Highway Authority of India. He was managing the Grand Trunk Road which was a section of the National Highway II. The project aimed at connecting major Indian cities. The reason for his death was that he acted as whistle blower in his company and complaint about the corruption (**financial irregularities carried out by one of the contractors**) on Golden Qualified project to the then Prime Minister's Atal Bihari Vajpayee. He made a request of keeping his name confidential. But his name was not kept confidential. Rather, the letter he submitted at the Prime Minister's office was send to the Ministry of Road, Transport and Highway who in-turn sent it to the National Highway Authority of India where he was an employee. While he was returning from a marriage on November 27, 2003, he was murdered but the documents showed that his murder was accidental while a robbery was being committed. This clearly showed the lack of protection provided to whistle blowers by our legislation.

Another e.g. which explains the lack of protection to whistle blowers in the late 2005 was through the case of **Manjunath Shanmugam**⁷, who was a sales executive for the Indian Oil Corporation. One day, he found that two of the petrol pumps of the company were selling adulterated fuel. When after the warning also the petrol pump didn't stop selling adulterated fuel, he conducted a surprise raid and was shot dead.

However, Whistle blowing policy is facing many challenges and shortcoming in India as law is salient on various points as well as law is vague and ambiguous on certain points when compared with other countries domain of the policy or bill is small.

COMPARITIVE STUDY OF INDIA, UK&USA

There has been accreditation of whistle blowers in recent years and information they provide is indispensable. In order, many nations either emulated or propounded various policies in favor of whistleblowers either by protecting their rights and even incentivizing such individuals. Still there are some states that don't have any policies concerning whistleblowers. Furthermore, there are some nations which are able to make laws, but unable to implement such laws or policies effectively. This arises question how legislation different in these countries.

⁷<https://www.accdocket.com/articles/an-indian-perspective-on-whistleblowing.cfm>

In United Kingdom people may be dispirit to blow the whistle i.e. to reporting regarding misconduct or wrongdoing because they fear doing so. Believed that identity of reporting person is revealed that the person's employer or colleague may subject him or her to disparage, belittle or demean. Here laws are ambiguous as reporting person may find it onerous and difficult in attaining justice. Whereas, USA and India case can be filed by attorney on behalf of employer and can remain anonymous. Coming to the most important point coverage, whistleblower policy legislations are formed with main aim to provide legal security to whistleblower; Identify and abolish the wrong doing; boost organizational structure that value and initiates whistleblowers. US had a history that country has laws that are truly enforceable whereas UK and India embark law but unable to enforce it well. It is also very essential to discuss whether fiduciary relationship is important or whistle blowing; US has initiated to take a charge on the companies where the company has bylaws relating to restrain whistleblower, In UK also whistle blowing policy is atop Non-Disclosure agreement i.e. when an employee is bound with such agreement and he blows the whistle, he gets protection under the public interest disclosure Act, 1998.

CONCLUSION

Whistle blowing is very important to prevent company from major failure. Eventually, whistle blowing has gained momentum and lately whistleblowers seen growing recognition for misconduct they reveal. But becoming a whistle blower requires a great courage as one works totally for the public interest. He lets forgo all the risk and harm he causes to life at the time of becoming a whistle blower. Many people in India have lost their life's only because they acted as whistle blowers of the company. Also, many people who are against the whistle blower policy are of the view that when a person becomes an employee of the company, he creates a bond of loyalty with the company. Informing about the illegal acts or wrongdoings in the company either to internal or external authority leads to breaking of the bond that he creates with the company.

But India needs to develop strong and elaborate laws for the protection of whistle blowers. Laws should be so harsh that no one attempts to commit any wrong against the whistle blower.

References:

- 1) <https://www.ibanet.org/Conferences/whistleblowing.aspx>
- 2) http://freedomtospeakup.org.uk/wp-content/uploads/2014/07/F2SU_web.pdf
- 3) https://www.academia.edu/9901507/WHISTLE_BLOWING_COMPARATIVE_ANALYSIS_OF_INDIA_AND_U.S
- 4) https://en.wikipedia.org/wiki/Public_Interest_Disclosure_Act_1998
- 5) www.prsindia.org