

Draft Practical Guidelines for Employees

Section 10(4)(a) of the Protected Disclosures Act, 2000 (Act 26 of 2000), which has not been put into operation yet, requires that the Minister of Justice and Constitutional Development must issue practical guidelines which explain the provisions of the Act and all procedures which are available in terms of any law to employees who wish to report or otherwise remedy an impropriety.

The Department has prepared draft guidelines aimed at addressing the first requirement as set out in section 10(4)(a) of the Act, namely to explain the provisions of the Act. These draft guidelines are made available on this website with the purpose of soliciting comments from interested persons, including Government departments and the business sector, who wish to assist the Department in identifying all procedures which are available in terms of any law to employees who wish to report or otherwise remedy an impropriety in the workplace.

It will be appreciated if the relevant comments could be e-mailed on or before 30 March 2001 for the attention of Mr H J du Preez at e-mail address: HduPreez@justice.gov.za or EStrauss@justice.gov.za

These guidelines are issued in terms of the [Protected Disclosures Act, 2000](#) (Act 26 of 2000), and are aimed at assisting employees who wish to disclose certain information.¹

PART A (HOW THE ACT WORKS)

1. Purpose of the Act

The purpose of the Protected Disclosures Act, 2000, is to provide procedures and to offer protection.

- The Act provides procedures in terms of which any employee may disclose information relating to an offence or a malpractice in the workplace by his or her employer or fellow employees.
- The Act provides for the protection of an employee, who made a disclosure in accordance with the procedures provided for by the Act, against any reprisals as a result of such a disclosure.

2. How the Act works

No employee may be victimised or penalised by his or her employer on account of having made a disclosure in accordance with any one of the procedures provided for by the Act.²

The procedures provided for in the Act can be described as routes that can be followed in order to disclose the information. An employee who discloses information through one of these routes will be protected from being victimised or penalised in his or her working environment.

- An employee can disclose the information to—
 - a legal representative;
 - his or her employer;
 - a Minister or a member of the Executive Council of a province (MEC);
 - a specified person or body; or
 - a general disclosure to any other person.

Each of these routes have certain requirements which must be complied with. These requirements become more and more comprehensive as one moves from a disclosure made to a legal representative to a disclosure made to any other person. The fewest requirements are applicable in respect of a disclosure made to a legal representative. The most requirements apply in respect of a general disclosure to any other person.

3. Why should I make a disclosure ?

The preamble of the Act states that—

- every employer and employee has a responsibility to disclose criminal and other irregular conduct in the workplace; and
- every employer has a responsibility to take all necessary steps to ensure that employees who disclose such information are protected from any reprisals as a result of such disclosure.

It stands to reason that, by remaining silent about corruption, offences or other malpractices taking place in the workplace, an employee necessarily contributes to, and becomes part of, a culture of fostering such improprieties which, will undermine his or her own career as well as be detrimental to the legitimate interests of the South African society in general.

This Act therefore purports to create an environment in which—

- every employee may without fear disclose information of criminal and other irregular conduct in the workplace; and
- every employer has a responsibility to take all necessary steps to ensure that employees who disclose such information are protected from reprisals as a result of such a disclosure.

4. How do I make a disclosure ?

If an employee decides to blow the whistle on criminal conduct or malpractices in the workplace, he or she may disclose that information by making use of the routes provided for in the Act, which are the following:

Legal representative³

A disclosure can be made to a person (legal representative) whose occupation must involve the giving of legal advice.

The information must be given for the purpose of obtaining legal advice. In many instances an employee will first wish to obtain legal advice regarding the making of the disclosure in terms of the Act and, in this process, make a disclosure to the legal adviser concerned.

Employer⁴

The Act provides that an employee can, in good faith, make a disclosure to his or her employer.

An employer may decide to lay down certain procedures in terms of which disclosures must be made which may include that a disclosure must be made to a person other than the employer. For the purpose of the Act, however, such a disclosure will also be regarded as a disclosure to the employer.

Minister or MEC of a province⁵

The employee must act in good faith when making a disclosure to a Minister or an MEC of a province.

This procedure only applies if the employer is—

- an individual appointed by that Minister or MEC in terms of legislation; or
- a body appointed by that Minister or MEC in terms of legislation; or
- an organ of state falling within the area of responsibility of that Minister or MEC.

Specified person or body⁶

The employee must act in good faith when making a disclosure to a person or body specified in terms of the Act.

The information and allegations contained therein must be substantially true.

The Act provides that a disclosure may be made to the Public Protector or Auditor-General and that the disclosure should relate to matters which in the ordinary course are dealt with by the *Public Protector or Auditor-General*.

The *Public Protector* is a high level official who is independent of government and any political party. Receiving complaints against government agencies or officials, the Public Protector can investigate improper prejudice suffered by a complainant for example as a result of abuse of power. Maladministration, dishonesty or improper dealings with respect to public money, improper enrichment and receipt of improper advantages can also be investigated. The Public Protector can also recommend corrective action and issue reports in addition to the power to investigate certain matters. (See page 7 for contact details of the Public Protector).

The *Auditor-General* must audit and report on the accounts, financial statements and financial management of all national and provincial state departments and administrations, all municipalities and any other institution or accounting entity required by national or provincial legislation to be audited by the Auditor-General.

General disclosure⁷

The employee must act in good faith when making a disclosure to any other person. In making the disclosure the employee must reasonably believe that the information is true.

One or more of the following must apply:

- The employee must believe that he or she will be subjected to an occupational detriment if the disclosure is made to the employer; or
- the employee must believe that the employer will conceal or destroy evidence relating to the criminal offence or malpractice if the disclosure is made to the employer; or
- no action was taken in respect of a previous disclosure to the employer; or
- the criminal offence or malpractice is of an exceptionally serious nature.

5. Against what am I protected ?

It has been mentioned in paragraph 2 above, that an "employee who discloses information through one of these routes will be protected from being victimised or penalised in his or her working environment.". In other words the Act prohibits an employer from subjecting an employee to what is called an "occupational detriment". An occupational detriment is —

- being subjected to any disciplinary action;
- being dismissed, suspended, demoted, harassed or intimidated;
- being transferred against your will;
- being refused transfer or promotion;
- being subjected to a term or condition of employment or retirement which is altered or kept altered to your disadvantage;
- being refused a reference, or being provided with an adverse reference;
- being denied appointment to any employment, profession or office;
- being threatened with any of the actions referred to above;
- being otherwise adversely affected in respect of his or her employment, profession or office, including employment opportunities and work security.

Section 4(2) of the Act provides that for the purposes of the Labour Relations Act, 1995, a dismissal, referred to above, is deemed to be an "automatically unfair dismissal". Any other occupational detriment referred to above is deemed to be an "unfair labour practice".

6. What do I do if I am victimised as a result of making the disclosure ?

An employee who has been subjected to an occupational detriment as a result of making a disclosure may approach any court having jurisdiction for protection.

Since the Act relates to the employer/employee relationship, an employee may also use the relevant procedures provided for in terms of the Labour Relations Act, 1995 (Act 66 of 1995). For example, if an employee is dismissed as a result of making a disclosure in terms of the Protected Disclosures Act, that dismissal is deemed to be an "automatically unfair dismissal". All other forms of occupational detriment referred to in paragraph 4 above, are deemed to be "unfair labour practices" as contemplated in the Labour Relations Act, 1995.

The employee who was dismissed may refer the dispute in writing within 30 days of the dismissal to a council if the parties fall within the registered scope of that council or to the Commission if no council has jurisdiction.

PART B (OTHER AVAILABLE PROCEDURES)

7. Are there any other procedures to report or remedy an impropriety?

The question may be asked whether there are any other procedures, separate from those provided for in the Protected Disclosures Act, 2000, which are available to employees who wish to report or otherwise remedy an impropriety in the workplace. An employee who wish to report or otherwise remedy an impropriety may make use of the following procedures—

- Section 31 of the National Environmental Act, 1998 (Act 107 of 1998). Disclosure of evidence of an environmental risk to—
 - a committee of Parliament or of a provincial legislature;
 - an organ of state responsible for protecting any aspect of the environment or emergency services;
 - the Public Protector;
 - the Human Rights Commission;
 - the National Director of Public Prosecutions.

A disclosure may also be made to one or more news media subject to certain requirements mentioned in section 31.

Contact details: The Public Protector

National Office	Private Bag X677 PRETORIA 0001	(012) 322-2916 (tel) (012) 322-5093 (fax)
Eastern Cape Office	P O Box 1400 BISHO 5605	(040) 635-0299 (tel) (040) 636-4339 (fax)
North West Office	P O Box 512 MAFIKENG 8670	(018) 381-1060 (tel) (018) 381-2066 (fax)

Bookmarks

1. This guideline is issued by the Minister for Justice and Constitutional Development in terms of section 9(4) of the Protected Disclosures Act, 2000 (Act 26 of 2000). It provides a short summary of the Act and does not deal comprehensively with all the provisions of the Act.
2. Section 3 of the Protected Disclosures Act, 2000 (Act 26 of 2000).
3. Section 5 of the Protected Disclosures Act, 2000 (Act 26 of 2000).
4. Section 6.
5. Section 7.
6. Section 8.
7. Section 9 of the Protected Disclosures Act, 2000 (Act 26 of 2000).