



GRAVITAS LEGAL

Whistleblower Protection Act, 2014: A cracked foundation?

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The Whistle Blowers Protection Act, 2014 (“Act”) was enacted to provide a framework to investigate alleged corruption and misuse of power by public servants and to protect persons who allege any wrongdoings. However, 7 years having passed since the enactment without any amendments having been made to the Act. There has been a rampant cry for strengthening various features of the Act to make it whistleblower friendly and providing adequate protection to whistleblowers under the same.

Salient features of the Act

Complainant: A complainant is any person who makes a complaint relating to disclosure under the Act.

Disclosure: means a complaint relating to, —

- (i) an attempt to commit or commission of an offence under the Prevention of Corruption Act, 1988;
- (ii) wilful misuse of power or wilful misuse of discretion by virtue of which demonstrable loss is caused to the Government or demonstrable wrongful gain accrues to the public servant or to any third party;
- (iii) attempt to commit or commission of a criminal offence by a public servant,

made in writing or by electronic mail or electronic mail message, against the public servant and includes public interest disclosure referred to in sub-section (2) of section 4 of the Act.

Anonymous Complaints: A complaint is only acted upon if the complainant discloses his identity in the complaint. Complainants providing false identities/anonymous complaints are not recognized.

Protection Afforded under the Act: Section 11 of the Act provides a safeguard against victimization of the complainant.

This was introduced considering countless instances where whistleblowers in India were threatened, harassed and even murdered upon complaining about the frauds taking place. Satyendra Dubey, the man behind revealing the corruption case in the National Highways Authority of India's Golden Quadrilateral project was murdered. Shanmughan Manjunath, the Indian Oil Corporation officer, was murdered after he sealed a petrol pump selling adulterated fuel in Uttar Pradesh. A senior police officer had alleged corruption and embezzlement by Mayawati's government, and he was sent to the psychiatric hospital.

However, it is pertinent to note that the Act does not clarify or lay down any standards for the meaning of victimization. Due to this, whistleblowers are still not adequately protected and in most of the cases prefer remaining anonymous in fear of the repercussions that may befall them or their family.

Punishment under the Act against false complaints: Section 17 of the Act provides that any person who makes a disclosure malafidely or knowing that the same was false or incorrect or misleading shall be punishable with imprisonment of 2 years and a fine of upto thirty thousand rupees.

USA laws on Whistleblowers

The laws in the United States of America on whistleblowers are all encompassing and very stringent in nature. There are different statutes in USA which contain whistleblower provisions under them. They all aim to provide guidance and protection to whistleblowers so that they may come forward and report frauds being committed as envisaged under the Indian Act. However, there are some features under the USA laws which makes them strongest in terms of whistleblower laws around the world:

1. Protection of Whistleblowers against Retaliation

Occupational Safety and Health Act, Taxpayer First Act, FDA Food Safety Modernization Act, Consumer Financial Protection Act, Seaman's Protection Act, Affordable Care Act, Consumer Product Safety Improvement Act, National Transit Systems Security Act, Federal Railroad Safety Act, Pipeline Safety Improvement Act, Sarbanes-Oxley Act, Energy Reorganization Act, Comprehensive Environmental Response, Compensation and Liability Act, Clean Air Act, Solid Waste Disposal Act and Toxic Substances Control Act among others, protect employees for reporting violations of various workplace safety and health, airline, commercial motor carrier, consumer product, environmental, financial reform, food safety, health insurance reform, motor vehicle safety, nuclear, pipeline, public transportation agency, railroad, maritime, securities, tax, antitrust, and anti-money laundering laws and for engaging in other related protected activities.

Under the law, retaliation occurs when an employer (through a manager, supervisor, or administrator) fires an employee or takes any other type of adverse action against an employee for engaging in protected activity. An adverse action is any action which would dissuade a reasonable employee from raising a concern about a possible violation or engaging in other related protected activity. An adverse action can be as subtle as excluding employees from important meetings.

An employee can file a whistleblower complaint under the Occupational Safety and Health Act or any of the other applicable acts. Unlike India, the person appointed to

investigate the claims is a neutral party and not a related party to either of the complainant or the respondent. The investigator will investigate the crime, peruse the evidence and provide its findings along with providing information about the remedies, if available. The parties also have a right to object the findings and appeal the same with an administrative law judge.

India in comparison: Under the Act, the competent authority to whom any complaint on victimization can be made is usually the senior official in the hierarchy. This makes it difficult for the informant to complain against retaliation or receive any protection.

2. **Protection of Identity of the Whistleblower**

While the level of anonymity afforded to whistleblowers differs due to the state and federal laws applicable, most of the laws in USA allow for anonymity of the whistleblower complaints. A whistleblower is allowed to provide his claims through an attorney, who shall submit all the relevant documents and proof, provided by the whistleblower to the requisite authority for investigation while always keeping the identity of the whistleblower anonymous.

False Claims Act allows for the identity of the whistleblower to be anonymous during the first phase of the investigation while the government investigates. The IRS treats all information as confidential with strict rules on who can deal with the information. The Motor Vehicles Safety Act allows for filing of confidential claims.

India in comparison: The Act does not allow anonymous complaints to be submitted and any anonymous complaints received are not investigated.

3. **Independent Reporting Channel**

All whistleblower complaints are supposed to be reported to an independent arbiter to investigate. There are separate offices established under different laws with neutral investigators who are responsible for investigating any claims submitted to them by a whistleblower. They are specifically designed to receive and investigate whistleblower complaints.

India in comparison: Under the Act, any complaint by a whistleblower must be submitted to the Competent Authority as defined under the Act. The Competent authority differs in relation to the person against whom any complaint is being made. However, the Competent Authority under the Act is usually the senior official in the same hierarchy of the person against whom a complaint is being made. This negates the neutrality of the investigation and the findings reached at are usually biased.

4. **Rewards Mechanism**

Various laws in the US provide for different reward systems payable to a whistleblower whose complaints turn out to be valid. The mechanism behind the same is unique as it considers the money that the whistleblower helped save or recover for the authority by making such a complaint and then rewards the whistleblower a certain percentage of that amount (which usually varies between 10-30 percent under different acts). The False Claims Act requires a payment of between 15 to 30 percent of the government's monetary sanctions collected if they assist with prosecution of fraud in connection with government contracting and other government programs. The Dodd-Frank Act allows payment ranging between 10 percent to 30 percent of the monetary sanctions collected,

if they assist with prosecution of securities and commodities fraud. The IRS whistleblower law, requires payment of 15 to 30 percent of monetary sanctions collected if they assist with prosecution of tax fraud.

Unsurprisingly, this reward amount is not capped at any number. This has led to some whopping payouts being awarded to whistleblowers. The highest paid out reward amounts to \$104 million to Bradley Birkenfeld, an international banker who blew the whistle on the practice of using undeclared Swiss bank accounts by US taxpayers to avoid paying taxes to the IRS. As a result of his disclosure, the treaty between US and Switzerland was amended in order to turn over the names of the Americans holding offshore bank accounts.

India in comparison: The Act does not provide for any reward being granted to a whistleblower upon successful investigation of his claims. However, the Securities Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015 provides for payment of rewards, at their sole discretion, where the reward is awarded at the rate of 10 percent of the monetary sanctions. However, this reward is capped at Rs. 10 crores.

5. Penalties for False Information

With a generous rewards system being prevalent in the US, the penalties against false information are just as hefty. The False Claims Act provides for a penalty of \$23,331 for each separate violation of law plus three times the amount of damages that the government sustains. A single fraudulent scheme can involve thousands of such violations.

India in comparison: The Act provides for a punishment in the form of imprisonment of up to two years and to fine which may extend to up to thirty thousand rupees.

These features highlighted above, adopted by USA, ensures that genuine whistleblower complaints are received. It incentivizes people to complain in case they observe any wrongdoings while at the same time penalizes them if their complaint was malicious. It also has strong anti-retaliatory measures in place to protect the whistleblower and at the other end of the spectrum, also allows for anonymity of whistleblowers.

India needs to amend the Whistle Blowers Protection Act, 2014 keeping these features in mind if they want whistleblowers to come forward with complaints about the fraudulent activities taking place. Without such measures, the Act will never be successful in attracting whistleblowers to report frauds at different levels.



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