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H/G (disclosures)

PROTECTED DISCLOSURES ACT, 2000 (ACT 26 OF 2000):

PRACTICAL GUIDELINES FOR EMPLOYEES

THE PROTECTED DISCLOSURES ACT, 2000 (ACT 26 OF 2000): PRACTICAL GUIDELINES FOR EMPLOYEES

INTRODUCTION

By remaining silent about corruption, offences or other malpractices taking place in the workplace, an employee 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.

Every employer and employee has a responsibility to disclose criminal and other irregular conduct in the workplace.

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.

PART I

1. Purpose of the Protected Disclosures Act, 2000¹

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; and
- * **protection** for an employee, who has made a disclosure in accordance with the procedures provided for by the Act, against any reprisals as a result of such a disclosure.

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These guidelines are issued by the Minister for Justice and Constitutional Development in terms of section 10(4) of the Protected Disclosures Act, 2000 (Act 26 of 2000). They are aimed at providing employees, who wish to disclose certain information, with a short summary of the Act, but do not deal comprehensively with all the provisions of the Act. The provisions of the Act are reflected at the back of the guidelines.

2. How the Act works

No employee may be victimised or penalised by his or her employer as a direct or indirect result of having made a disclosure in accordance with any one of the **procedures** provided for by the Act².

These **procedures** can be described as **routes** that can be followed in order to disclose information which show or tend to show one or more of the following—

- * that a criminal offence has been, is being or is likely to be committed;
- * that a person has failed, is failing or is likely to fail to comply with any legal obligation to which that person is subject;
- * that a miscarriage of justice has occurred, is occurring or is likely to occur;
- * that the health or safety of an individual has been, is being or is likely to be endangered;
- * that the environment has been, is being or is likely to be endangered;
- * unfair discrimination as contemplated in the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act 4 of 2000); or
- * that any matter referred to above has been, is being or is likely to be deliberately concealed.

The Act was **implemented** on 16 February 2001, and is applicable to any disclosure that was made after 16 February 2001 (it does not matter when the relevant impropriety took place, as long as the disclosure was made after 16 February 2001).

It is **important** to note that no provision in a contract of employment or other agreement which applies to an employer and employee may attempt to exclude any provision of the Act or—

- * attempt to prevent an employee; or
- * discourage an employee,

²

Sections 2 and 3 of the Act.

from making a protected disclosure. Such provision (in a contract of employment) or agreement (between an employer and employee) has no legal effect.

3. 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 to—

- * a legal representative (route 1);
- * his or her employer (route 2);
- * a Minister or a Member of the Executive Council of a province (MEC) (route 3);
- * a specified person or body (route 4); or
- * any other person, under certain circumstances (route 5).

Any **route** may be used to "blow the whistle", but take note that each **route** has certain **requirements** which must be complied with.

LEGAL REPRESENTATIVE: (ROUTE 1)³

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.

Requirements:

- * The person being consulted by the employee must be a legal representative whose occupation must involve the giving of legal advice (for example, an attorney or legal representative of the employee's labour union).
- * The information must be given for the purpose of obtaining legal advice.

EMPLOYER (ROUTE 2)⁴

An employee can make a disclosure to his or her employer.

Requirement:

- * An employee must act **in good faith** when he or she discloses the information

³ Section 5 of the Act.

⁴ Section 6 of the Act.

("good faith" means that the employee must act in a responsible and honest manner without any motives to gain any personal advantages from making the disclosure).

Take note that:

- * An employer may decide to lay down certain procedures in terms of which disclosures must be made, even that a disclosure must be made to a person other than the employer (a disclosure of this nature will also be regarded as a disclosure to the employer).
- * Many employers have established anti-corruption hot-lines which employees may use to report crime in the workplace (ask your employer whether he or she has established such a hot-line).

MINISTER OR MEC OF A PROVINCE: (ROUTE 3)⁵

An employee can make a disclosure to a Minister or an MEC of a province.

Requirements:

- * The employee must act in good faith when he or she discloses the information.
- * This procedure only applies if the employee's employer is—
 - * an individual appointed by the relevant Minister or MEC in terms of legislation; or
 - * a body (eg a board or other institution) appointed by the relevant Minister or MEC in terms of legislation; or
 - * an organ of state falling within the area of responsibility of the relevant Minister or MEC. An organ of state is any state department or administration in the national or provincial sphere of government or any municipality in the local sphere of government or any other functionary (official) or institution exercising a power or performing a duty in terms of the Constitution or a provincial constitution or exercising a public power or performing a public function in terms of any other legislation.

SPECIFIED PERSON OR BODY: (ROUTE 4)⁶

An employee can, at this stage make a disclosure to the **Public Protector** or **Auditor-General**.

The **Public Protector** is a high level independent official who receives complaints against government agencies or officials and investigates improper prejudice suffered by a complainant for example as a result of abuse of power. Maladministration, dishonesty or improper dealings with regard to public money, improper enrichment and receipt of improper advantages can also be investigated. (For contact details see page 15.)

The **Auditor-General** who is also a high level independent official 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. (For contact details see page 16.)

Requirements:

- * The disclosure must be made in good faith.
- * The employee must reasonably believe that the impropriety which he or she wants to disclose, relates to matters that in the ordinary course are dealt with by the Public Protector or Auditor-General; and
- * that the information and allegations contained in the disclosure are substantially true.

GENERAL DISCLOSURE: (ROUTE 5)⁷

An employee can even make a disclosure to any person, for example, a member of

⁶ Section 8 of the Act.

⁷ Section 9 of the Act.

the press (people working for radio and television stations or newspapers), a police official of the South African Police Service or a person working for an organisation which keeps watch over the public or the private sector.

Requirements:

- * The employee must act in good faith.
- * The employee must reasonably believe that the information is substantially true.
- * In all the circumstances of the case, it must be reasonable to make the disclosure, taking into account—
 - * the identity of the person to whom the disclosure is made;
 - * the seriousness of the impropriety;
 - * whether the impropriety is continuing or is likely to occur in the future;
 - * whether the disclosure is made in breach of a duty of confidentiality of the employer towards another person;
- * The employee must not make the disclosure for personal gain, unless for a reward payable in terms of a law.
- * One or more of the following must apply—
 - * The employee must believe that he or she will be subjected to an occupational detriment (see paragraph 4 for more information) 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 of substantially the same information to the employer; or
 - * the criminal offence or malpractice is of an exceptionally serious nature.

4. Against what am I protected?

The Act prohibits an employer from subjecting an employee to what is called an "occupational detriment". An occupational detriment occurs when an employee

is—

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

5. What do I do if I am victimised as a result of making a disclosure?⁸

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

The Act relates to the employer/employee relationship, therefore an employee may also use the provisions of the Labour Relations Act, 1995 (Act 66 of 1995), to protect himself or herself from being subjected to an occupational detriment.

For example:

- * If an employee is **dismissed** as a result of making a disclosure in terms of the Protected Disclosures Act, 2000, that dismissal is deemed to be an "**automatically unfair dismissal**" for purposes of the Labour Relations Act, 1995.
- * All **other forms of occupational detriment** referred to in paragraph 4 above, are deemed to be "**unfair labour practices**" as contemplated in

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Section 4 of the Act.

the Labour Relations Act, 1995.

Ask your labour union to advise you on what your remedies are and how you should go about enforcing your remedies.

An employee may also request, if reasonably possible or practicable, to be **transferred** from the post or position occupied by him or her at the time of the disclosure, to another post or position in the same division or another division or if the employee making the disclosure is employed by an organ of state, to another organ of state.⁹ The terms and conditions of employment of a person transferred, may not without his or her consent be less favourable than the terms and conditions applicable to him or her immediately before his or her transfer.

PART II

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

There are other procedures, **in addition to those provided for in the Protected Disclosures Act, 2000**, which are available to employees who wish to report an impropriety in the workplace, namely—

6.1 The Public Service Act, 1994 (Proclamation No. 103 of 1994):

The Public Service Act¹⁰ provides that a complaint or grievance concerning an official act or omission may be investigated by the Public Service Commission. An employee may lodge a complaint or grievance with the relevant executing authority, defined in the Public Service Act¹¹. If that complaint or grievance is not resolved to the satisfaction of the employee, that executing authority must submit the complaint or grievance to the Public Service Commission.

The term "executing authority" means, in relation to—

- (a) the Office of the President, the President acting on his or her own;

9. Section 4 of the Act.

10. Section 35(1) of the Public Service Act, 1994 (Proclamation No. 103 of 1994).

11. Section 1(1) of the Public Service Act, 1994.

- (b) the Office of the Deputy President, the Deputy President;
- (c) a department or organizational component within a Cabinet portfolio, the Minister responsible for such portfolio;
- (d) the Office of the Public Service Commission, the Chairperson of Commission;
- (e) the Office of a Premier of a province, the Premier of that Province acting on his or her own; and
- (f) a provincial department within an Executive Council portfolio, the member of such Executive Council responsible for such portfolio.

After the Public Service Commission has investigated and considered such complaint or grievance, the Commission may recommend that the relevant executing authority acts in terms of a particular provision or provisions of the Public Service Act, 1994, or any other law if, having regard to the circumstances of the case, the Commission considers it appropriate to make such a recommendation¹². The latest rules, effective from 19 September 2003, were published in the Government Gazette No. 25209 under Government Notice No. R. 1012 of 25 July 2003. These rules are also available on the website of the Public Service Commission, at the following address. <http://www.psc.gov.za/docs/pubs/govgazette/25209.pdf>. (See page 16 for the contact details.)

The Code of Conduct for the Public Service¹³ also places an obligation on an employee to report on certain matters and provides as follows:

An employee, in the course of his or her official duties, shall report to the appropriate authorities, fraud, corruption, nepotism, maladministration and any other act which constitutes an offence or which is prejudicial to the public interest.

An employee who fails to comply with this provision is guilty of misconduct.¹⁴

The above applies to persons who are employed in the public service, namely—

12. Section 35(2) of the Public Service Act, 1994.
13. Regulation C.4.10 of Chapter 2 of the Public Service Regulations, 2001.
14. Regulation B.3 of Chapter 2 of the Regulations.

- (a) employees of all national departments, provincial administrations and provincial departments and organisational components listed in Schedules 1 to 3 of the Public Service Act, 1994; and
- (b) employees in the South African Police Service, the South African National Defence Force, Department of Correctional Services, state educational institutions, as defined in the Public Service Act, 1994, the National Intelligence Agency, and South African Secret Service, but only insofar as they are not contrary to the laws governing their employment.

6.2 The Defence Act, 2002 (Act 42 of 2002):

The South African National Defence Force employs two categories of employees, namely persons employed in terms of the Public Service Act, 1994, or in terms of the Defence Act, 2002.

Persons employed in terms of the Public Service Act, 1994, are subject to the provisions mentioned in paragraph 6.1 above, and persons employed in terms of the Defence Act, 2002, are subject to the Military Discipline Code¹⁵ which, among others, provides for the following:

Section 7: Offences relating to the failure of a person to report activities likely to endanger the safety of the S A Defence Force to his or her superior officer;

Section 21: Any person who is aware of or suspects that an offence in relation to the acquisition or disposal of public property has been or might be committed to report it to his or her superior officer without delay;

Section 134: A grievance procedure that has to be followed by a person who is aggrieved by any act or omission of any person subject to the Code.

6.3 The South African Police Service Act, 1995 (Act 68 of 1995):

15. The First Schedule to the Defence Act, 1957 (Act 44 of 1957).

The South African Police Service Act¹⁶, provides that an employee commits misconduct if he or she "withholds or unreasonably delays any complaint or an adverse communication in connection with another employee or person employed by the Service". The relevant regulation should be read with regulation 18(9) which provides that "[a]n employee commits misconduct, ... if the employee knowingly makes a false accusation against any employer or person employed by the Service, or during an investigation, trial or inquiry makes a false statement or wilfully suppresses or conceals material facts."

The Independent Complaints Directorate¹⁷, investigates complaints in respect of offences and misconduct by members of the SAPS. The Anti-Corruption Command Unit of the Directorate in particular investigates complaints of corruption against members of the SAPS. Another mechanism which is available to address complaints against members of the SAPS is the National Inspectorate.

National Instruction 1 of 1999 deals with special arrangements regarding members who provide information to the Anti-corruption Unit of SAPS. A member or other employee of SAPS who has provided information to an anti-corruption unit may apply in writing to the Divisional Commissioner: Management Services for a temporary or permanent transfer or that such other arrangement concerning the performance of his or her duties or functions be made. The relevant application must be submitted to the Commander of the National Anti-corruption Unit who will make a recommendation to the Divisional Commissioner: Management Services regarding the application.

6.4 National Environmental Management Act, 1998 (Act 107 of 1998):

Evidence of an environmental risk may in terms of the National Environmental Act¹⁸, be disclosed to—

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16. Regulation 18(10) of the South African Police Service Discipline Regulations, issued under section 24(1)(g) of the South African Police Service Act, 1995.
 17. Established in terms of sections 50 to 54 of the South African Police Service Act, 1995.
 18. Section 31 of the National Environmental Act, 1998.

- * 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 South African 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.

6.5 The Western Cape Public Protector Act, 1994 (Act 6 of 1994):

The Western Cape Public Protector Law¹⁹, provides that any person (which includes employees of the Western Cape Province) may report any—

- * maladministration in connection with the affairs of government at provincial and local authority level;
 - * abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct or undue delay by a person performing a public function;
 - * improper or dishonest act or omission or corruption with respect to public money;
 - * improper or unlawful enrichment, or receipt of any improper advantage, or promise of such enrichment or advantage, by a person as a result of an act or omission in the public administration or in connection with the affairs of government at provincial level or of a person performing a public function; or
 - * act or omission by a person in the employ of government at provincial level, local authority level or a person performing a public function, which results in unlawful or improper prejudice to any other person,
- to the Western Cape Public Protector who may endeavour to resolve any dispute or