Cassels

Whistling at Work: Ontario's New Whistle-blowing Protections and the Insurance Industry

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Recently, Ontario introduced certain amendments to the *Financial Services Regulatory Authority of Ontario Act, 2016* (the FSRA Act), which provide protections for persons and entities who, in good faith, report alleged or intended contraventions of the *Insurance Act* (Ontario) (the Insurance Act), among other legislation. This means that, once the amendments are proclaimed into force, there will be protections for whistle-blowers who report to the Financial Services Regulatory Authority (FSRA) concerns about compliance in Ontario's insurance industry.

Who is a Whistle-blower?

Pursuant to the amendments, a person or entity is a "whistle-blower" where all of the following occur:

1. They disclose to the CEO of FSRA, in good faith, an alleged or intended contravention of the Insurance Act (among other legislation outside the scope of this discussion).
2. They request that their identity as a whistle-blower be kept confidential.
3. The CEO of FSRA provides them with an assurance of confidentiality.

What Protections are Afforded to Whistle-blowers?

Pursuant to the amendments, no person or entity is permitted to take a reprisal against a whistle-blower, whether directly or indirectly, for making the disclosure described at #1 above. The amendments provide the following as just some examples of such prohibited reprisals:

1. Terminating or threatening to terminate the whistle-blower's employment, contract, position, or office.
2. Demoting, disciplining, or suspending, or threatening to demote, discipline or suspend, a whistle-blower from their employment, position, or office.
3. Imposing or threatening to impose a penalty, or withholding or threatening to withhold a benefit, related to the whistle-blower's employment, contract, position or office.
4. Intimidating or coercing a whistle-blower in relation to their employment, contract, position, or office.
5. Otherwise detrimentally affecting the whistle-blower by any act or failure to act, regardless of whether the act or failure to act is related to the whistle-blower's employment, contract, position or office.

With some exceptions, whistle-blowers are also protected by confidentiality, under which the CEO of FSRA

is required to keep the whistle-blower's identity confidential and not disclose such identity or any information or record that may reasonably be expected to reveal the whistle-blower's identity. The exceptions to this confidentiality include instances where the whistle-blower consents to the disclosure of their identity or the CEO of FSRA believes the whistle-blower reasonably believes the whistle-blower has committed a criminal offence or an offence under certain legislation (including the Insurance Act).

Are Directors and Officers Liable if There Are Reprisals?

Potentially, yes. If a corporation takes a reprisal against a whistle-blower (discussed above), every director and officer of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the reprisal, or who failed to take reasonable care to prevent the corporation from taking the reprisal, is guilty of an offence. Every such director and officer are liable to (a) a fine of up to $100,000 or (b) imprisonment for a term of up to one year, or both (a) and (b).

Can Whistle-blowers Get Paid to Blow the Whistle?

Not necessarily. While whistle-blowers are not offered financial rewards from FSRA for "blowing the whistle", if they experience any reprisals (discussed above), in addition to any other remedies they may otherwise take, the amendments provide they may take the following action (if applicable): (a) make a complaint to be dealt with under binding settlement by arbitration under a collective agreement or any other agreement that provides for such a resolution, or (b) bring a civil proceeding in Ontario courts.

Can You Contract Out of Whistle-blower Protections?

No. Pursuant to the amendments, a provision in an agreement, including a confidentiality agreement, is void to the extent it is intended to preclude a person from being a whistle-blower or, among other things, co-operating with an investigation into their claims.

Conclusion

Ontario's insurance Industry participants should not fear this new whistle-blower legislation. They should embrace it as an incentive to further strengthen their compliance with the Insurance Act.

Insurers and brokers would do well to champion a culture of compliance internally and encourage their employees, contractors and service providers to report any compliance concerns to internal resources. To reduce the chances of a "chilling effect," an anonymous "tips" line could be established and run by the compliance department to field such concerns where the individuals submitting the concerns would feel comfortable that their identities will be kept confidential. With a lack of financial incentive from FSRA for being a whistle-blower, such a "tips" line would likely steer complainants toward voicing their concerns internally first, which would provide the insurer or broker an opportunity to address the issue in a way that

reduces the likelihood of the complainant reporting to FSRA.

A compliant culture should be championed internally not only to prevent whistle-blowers. Such a culture also does much more. For example, a compliant culture provides a working environment in which people need not worry about “doing the right thing” over a non-compliant business opportunity that would eventually lead to regulatory fines. A level playing field for all employees to “do the right thing” means they are all incentivized to pursue profitable and compliant business opportunities, which is good for both business and consumers.

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