



International Employment Lawyer

# Guide to Whistleblowing

Japan



**Contributor:**



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# Japan



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## Legal basis for whistleblowing

### 1. Which body of rules govern the status of whistleblowers?

The Whistleblower Protection Act (the Act) governs the status of whistleblowers.

## Implementation of the whistleblowing procedure

### 2. Which companies must implement a whistleblowing procedure?

Any business operator<sup>[1]</sup> that continuously employs more than 300 workers must implement a whistleblowing procedure. Any business operator that continuously employs 300 or less workers must endeavour to implement a whistleblowing procedure. (article 11, paragraph 3 of the Act).

This applies to the questions below regarding the implementation of a whistleblowing procedure.

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[1] "business operator" means a corporation or other organizations and an individual who engages in business.

### 3. Is it possible to set up a whistleblowing procedure at a Group level, covering all subsidiaries?

Each Group company must establish a system for responding to whistleblowing, but it is possible to set up a point of contact at a Group level, covering all subsidiaries. In this case, each Group company must state in its internal rules in advance that a point of contact is established at a Group level and a responsible person of each Group company must be appointed for the "Whistleblowing Response Operation<sup>[2]</sup>"<sup>[3]</sup>. This may be an employee of a Group company or an employee of the parent company of the Group<sup>[4]</sup>.

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[2] "Whistleblowing Response Operation" means receiving whistleblower report, investigating the reportable fact (Please see question 10) pertaining to such whistleblower report, and taking necessary rectifying measures.

[3] [Consumer Affairs Agency, Explanatory Document for Guidelines on Whistleblower Protection Act](#) [Cabinet Office Notification No.118 (2021)] ("Consumer Affairs Agency Guidelines Explanation"), at footnotes 13 and 18, at pp.8-9, last visited June 28, 2022.

[4] [Consumer Affairs Agency website, Q&A regarding Establishment of a System for Responding to Whistleblowing, Q10](#)

### 4. Is there a specific sanction if whistleblowing procedures are absent within the Company?

The prime minister:

- may ask the business operator to submit reports or may give advice, guidance or recommendation to the business operator if necessary for the enforcement of the provisions of article 11, paragraphs 1 and 2 of the Act, such as ensuring the business operator establishes a system for responding to whistleblowing (article 15 of the Act); and
- may disclose the company's name if the business operator has not followed the recommendations to establish a system for responding to whistleblowing, etc. (article 16 of the Act).

Any business operator who fails to make a report or makes a false report may be fined up to 200,000 yen (article 22 of the Act).

### 5. Are the employee representative bodies involved in the implementation of this system?

The Act does not require the involvement of employee representative bodies.

### 6. What are the publicity measures of the whistleblowing procedure within the company?

The publicity measures of the whistleblowing procedure are not set out by the Act. The business operator may inform the whistleblowing procedure through various forms, such as company intranet, in-house training, distribution of intra-card and advertisement goods, and displaying of posters<sup>[5]</sup>.

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[5] [Consumer Affairs Agency Guidelines Explanation](#), supra note 3, Section 3 II (3)(i)(c), at p.19

### 7. Should employers manage the reporting channel itself or can it be outsourced?

The business operator may outsource the establishment of a point of contact to a third party, such as a subcontractor or parent company<sup>[6]</sup>.

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[6] [Id](#), Section 3 II (1)(i)(c), at p.7.

### 8. What are the obligations of the employer regarding the protection of data collected related to the whistleblowing procedure?

The "person in charge of handling the whistleblowing<sup>[7]</sup>" (person in charge, see question 9) must not leak any information identifying the whistleblower without just cause (article 12 of the Act). Breach of this obligation may lead to a fine of up to 300,000 yen (article 21 of the Act).

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[7] "person in charge of handling the whistleblowing" is defined in article 11, paragraph 1 of the Act and means the person who engages in the Whistleblowing Response Operation (please refer to the footnotes 2 above).

## 9. What precautions should be taken when setting up a whistleblowing procedure?

The business operator must appoint a person in charge of handling the whistleblowing (article 11 of the Act).

The business operator may provide internal rules, including matters required under the Consumer Affairs Agency Guidelines on the Whistleblower Protection Act[8].

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[8] Consumer Affairs Agency, Guidelines for promoting appropriate and effective implementation of the due measures by the business operators based on Article 11, Paragraphs 1 and 2 of the Whistleblower Protection Act (“Consumer Affairs Agency Guidelines”) [Cabinet Office Notification No.118], , Section 4 (3)(iv) ,at p.4

## 10. What precautions should be taken when setting up a whistleblowing procedure?

The Act covers whistleblowing of a “reportable fact” as defined in article 2, paragraph 3 of the Act) which is:

(i) a fact of an occurrence of a criminal act under the laws listed in the Appended Table of the Act[9], (including orders based on the laws) concerning the protection of individual lives and security of the person; consumer interests; environmental conservation; fair competition; lives, personal security and property of citizens; and other similar interests (“Appended Table Laws”), or a fact forming the grounds for an administrative fine provided for in the Act or Appended Table Laws; or

(ii) a fact which is the reason for a disposition such as an order of a competent authority in the case where a violation of a disposition pursuant to the Appended Table Laws constitutes a fact in item (i) above (including the fact which is the reason for a different disposition or recommendation, in the case where the reason for disposition is the fact which is in violation of a different disposition or the fact which is not complying with a recommendation, etc. under the Appended Table Laws )[10].

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[9] The Appended Table of the Act lists the following:

(i)Penal Code;  
(ii)Food Sanitation Act etc. ;  
(iii)Financial Instruments and Exchange Act;  
(iv)Act on Japanese Agricultural Standards,  
(v)Air Pollution Control Act;  
(vi)Waste Management and Public Cleansing Act;  
(vii)Act on the Protection of Personal Information; and  
(viii)Other laws designated by cabinet order as laws concerning the protection of individual lives and security of the person; consumer interests; environmental conservation; fair competition; the lives, personal security and property of citizens; and other similar interests.

[10] An example of a reportable fact in the case of (ii) would be a violation of Food Labeling Standards under the Food Labeling Act. To be more specific, a violation of Food Labeling Standards itself does not constitute a criminal act, but if there is a violation of Food Labeling Standards, the prime minister may instruct the violator to comply with the Food Labeling Standards, and if after receiving the instruction, the violator does not take the measures pertaining to such instruction without just cause, the prime minister may order such violator to take the measures pertaining to such instruction. A violation of such order constitutes a criminal act. Therefore, a violation of Food Labeling Standards would be included in a reportable fact under this clause (Consumer Affairs Agency, Handbook for whistleblowing, at p.8, last visited June 28, 2022).

## 11. Are there special whistleblowing procedures applicable to specific economic sectors or professional areas?

No, there are no special whistleblowing procedures applicable to specific economic sectors or professional areas.

### Identification of the whistleblower

## 12. What is the legal definition of a whistleblower?

A whistleblower is a person who has conducted “whistleblowing” (article 2, paragraph 2 of the Act).

“Whistleblowing” must satisfy the following conditions:

- it must be made by a person listed in question 13;
- the information disclosed must concern misconduct of the Recipient of Services[11];
- it must not be for a wrongful gain, causing damage to others, or any other wrongful purpose (collectively referred to as the “wrongful purpose”);
- the information disclosed must be a reportable fact (see question 10);
- the reportable fact must have occurred, or be about to occur; and
- it must be reported to the reporting channel (the Recipient of Services etc.[12], an administrative organ with authority, or any person to whom reporting the reportable fact is deemed as being necessary to prevent the occurrence of the reportable fact or any damage caused by the reportable fact (collectively, the Others).

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[11] “Recipient of Services” includes the following business operator (Article 2, Paragraph 1 of the Act):

(i)a business operator who employs the worker or who employed the person who has been the worker within one year prior to the date of the whistleblowing;

(ii)a business operator who receives the services of worker dispatched or who received the services of worker dispatched within one year prior to the date of the whistleblowing;

(iii)when a business operator listed in the preceding two items engages in business based on a service agreement or any other agreement with another business operator and when the worker engages or was engaged in such business within one year prior to the date of the whistleblowing, such another business operator; and

(iv)(a) a business operator who has its Officer perform his/her duties or (b) when the business operator listed in sub-item (a) engages in business based on a service agreement or any other agreement with another business operator and when the Officer of such business operator engages in such business, such another business operator.

[12] “Recipient of Services, etc.” means the recipient of services or the person designated by the recipient of services in advance (article 2, paragraph 1 of the Act).

## 13. Who can be a whistleblower?

A worker[13], dispatched worker[14], a worker of a business partner (eg, a counterparty under a service agreement), and officers[15] of juridical persons and a worker, a dispatched worker and a worker of business partners who quit within 1 year after resignation can be a whistleblower (article 2, paragraph 1 of the Act).

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[13] A worker means a worker as provided for in Article 9 of the

Labor Standards Act (Act No. 49 of 1947).

[14] A dispatched worker means a worker in Article 2, Item (ii) of the Act on Securing the Proper Operation of Worker Dispatch Business and Improvement of Working Conditions for Dispatched Workers (Act No. 88 of 1985).

[15] "officer" means an executive officer, operating officer, accounting advisor, auditor, director, inspector, liquidator, or any person other than those persons who engage in the management of a corporation based on the provisions of laws and regulation (excluding accounting auditor).

#### **14. Are there requirements to fulfil to be considered as a whistleblower?**

Please see question 12.

#### **15. Are anonymous alerts admissible?**

Yes, anonymous whistleblowing is admissible[16].

[16] Consumer Affairs Agency Guidelines Explanation, supra note 3, Section 3 II (1)(iii)(c), at p.10.

#### **16. Does the whistleblower have to be a direct witness of the violation that they are whistleblowing on?**

When reporting to the Others or the administrative organs of the authority, the whistleblower must have reasonable grounds to believe that a reportable fact has occurred, or is about to occur. This is called "truth equivalence", and it is necessary that it is not just speculation or hearsay, but has considerable grounds, such as evidence supporting the reportable fact and highly credible statements by the people concerned[17]. However, if reporting to administrative organs with the authority and the reportable fact is considered to have occurred or is about to occur and a document with (i) the whistleblower's name and address, (ii) the reportable fact, (iii) reasonable grounds to believe that the reportable fact is considered to have occurred, or is about to occur and (iv) reasons to believe that measures based on laws and regulations or other appropriate measures is considered to be needed to be taken with respect to the reportable fact are submitted, truth equivalence is not required.

If reporting to the Recipient of Services etc., truth equivalence is not necessarily required, and in such cases the whistleblower must satisfy the prescribed requirements such as that the reportable fact is considered to have occurred or is about to occur.

For further information, please see question 22.

[17] [Consumer Affairs Agency website](#), last visited June 28, 2022.

### **Processing of the whistleblowing procedure**

#### **17. What are the terms and conditions of the whistleblowing procedure?**

A point of contact will accept the whistleblowing report, and the necessary investigation will be conducted unless there is a just reason not to do so. When it becomes clear that a violation of laws and regulations has occurred as a result of the investigation, the business operator needs to promptly take necessary measures to stop the violation or make other

necessary rectifying measures. In addition, after taking action, the business operator needs to confirm whether such measures are effective, and if they are not, take the necessary measures again[18].

When whistleblowing is accepted in that they have taken measures to stop the violation or other necessary rectifying measures or that there is no violation, provided it does not impede the course of business and the protection of the confidentiality, credibility, honour, privacy, etc, of interested parties[19].

[18] Consumer Affairs Agency Guidelines, supra note 8, Section 4(1)(i)&(iii), at p.2.

[19] Id, Section 4(3)(ii), at p.3.

#### **18. Is there a hierarchy between the different reporting channels?**

If reporting to the Recipient writing, the business operator must promptly notify the whistleblower of Services etc., there is a method of reporting to a point of contact and a method of reporting directly to the reporting line, such as a superior.

When the whistleblower reports to a point of contact, the person in charge, who has a confidentiality obligation that is subject to a criminal penalty, will manage the whistleblowing. On the other hand, if the whistleblower reports directly to the reporting line, the person who accepts the report does not necessarily have a confidentiality obligation that is subject to a criminal penalty[20]. However, this person will not conduct "out-of-scope sharing[21]" if out-of-scope sharing is prohibited under the internal rules of the business operator [22].

In addition, the protection requirements are different depending on whether the report is made to the Recipient of Services etc., an administrative organ within the authority, or the Others. On this point, please see question 22.

[20] Consumer Affairs Agency Guidelines Explanation, supra note 3, Section 3 II(3)(i)(c) at p.19.

[21] "Out-of-scope sharing" means the acts of sharing matters that identify whistleblowers beyond the necessary minimum range (Consumer Affairs Agency Guidelines, supra note 8, Section 2, atp.2.).

[22] Consumer Affairs Agency Guidelines Explanation, supra note 3, footnote 36, at p. 19.

#### **19. Should the employer inform external authorities about the whistleblowing? If so, in what circumstances?**

If necessary, the business operator must report to the relevant administrative agencies when its investigation reveals that there is a violation of laws and regulations but there is no specific provision prescribing the cases in which reports should be made to the relevant administrative agencies[23].

[23] Id, Section 3 II(1)(iii)(c), at p.11.

#### **20. Can the whistleblower be sanctioned if the facts, once verified, are not confirmed or are not constitutive of an infringement?**

The business operator cannot sanction the whistleblower simply because the facts are not confirmed or do not constitute an infringement. However, if the report is made with a wrongful purpose, it will not be protected as "whistleblowing", and the worker who made that report may also be subject to

disciplinary action. The business operator bears the burden of proof of the wrongful purpose.

## 21. What are the sanctions if there is obstruction of the whistleblower?

The business operator should specify in its internal rules that workers must cooperate in good faith with the investigation conducted by the department in charge and that workers must not engage in any activity that interferes with the investigation[24]. If there is any obstruction of the whistleblower, such obstruction may result in disciplinary action according to such internal rules.

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[24] Id, Section 3 II(3)(iv)(c), at p.23.

## Whistleblower Protection

## 22. What procedure must the whistleblower follow to receive protection?

The protection requirements are as follows, and are different depending on whether the report is made to the Recipient of Services etc., an administrative organ of the authority, or the Others:

- Reporting to the Recipient of Services etc. (article 3, item (i) of the Act) – if the reportable fact is considered to have occurred or is about to occur;
- Reporting to an administrative organ of the authority (article 3, item (ii) of the Act) – if there are reasonable grounds to believe that the reportable fact has occurred, or is about to occur; or the reportable fact is considered to have occurred, or is about to occur, and the document with the whistleblower's name and address and the reportable fact etc., are submitted;
- Reporting to the Others (article 3, item (iii) of the Act)
- there are reasonable grounds to believe that a reportable fact has occurred or is about to occur and when any of the following applies:
  1. if the whistleblower has reasonable grounds to believe that he or she will be dismissed or suffer other discriminatory treatment if he or she makes a report to the Recipient of Services etc. , or the administrative organ;
  2. if the whistleblower has reasonable grounds to believe that evidence of the reportable fact might have been concealed, counterfeited or altered if they make a report to the Recipient of Services etc.;
  3. if the whistleblower has reasonable grounds to believe that the Recipient of Services will leak information identifying the whistleblower without just cause if the whistleblower makes a whistleblowing report to the Recipient of Services etc.;
  4. if the whistleblower was asked by the Recipient of Services, without any just cause, not to make a report to the Recipient of Services etc., or the administrative organ;
  5. if the whistleblower does not receive a notice from the relevant Recipient of Services etc. about the beginning of an investigation on the reportable facts within 20 days of the day the report was made to the Recipient of Services etc.in writing, or where the relevant Recipient of Services etc. does not investigate without any just cause; or
  6. if the whistleblower has reasonable grounds to believe that some damage (limited to damage that cannot be recovered or considerable damage to an extremely large number of individuals directly caused by the reportable fact) to the life or body of an individual has occurred or is about to occur.

If the whistleblower is an officer, additional protection requirements (eg. the reportable fact has occurred or is about to occur despite conducting an internal investigation and taking rectification measures) are required when reporting to an administrative organ with the authority and the Others (Article 6, Items 2 and 3 of the Act).

## 23. What is the scope of the protection?

If a whistleblower is dismissed by the business operator because of a report that fulfils the requirements under the Act, the dismissal will be null and void (article 3 of the Act).

If the whistleblower is a dispatched worker under the direction of the business operator, termination of the dispatch contract (meaning a contract by which one party to the contract agrees to carry out worker dispatched to another party) because of a report that fulfils the requirements under the Act will be null and void (article 4 of the Act).

The business operator must not discriminate against a whistleblower through a demotion or salary cut; requesting that another business operator, who dispatched the whistleblower to the business operator, replace him or her with another worker; or a pay cut (article 5 of the Act).

If a whistleblower who is an officer is dismissed by the business operator because of a report that fulfils the requirements under the Act, they may claim compensation for damages against the business operator (article 6 of the Act).

The business operator may not claim compensation for damages against the whistleblower because of the whistleblowing (article 7 of the Act).

Leaking of information identifying the whistleblower is prohibited and the person in charge is required to protect the confidentiality of identifying information as mentioned in question 8.

The business operator must take appropriate relief and recovery measures if they become aware of any discriminatory treatment.

If a worker or officer is discriminated against, disciplinary action or other appropriate measures should be taken against perpetrators by taking into account various circumstances such as the context, the extent of the damage and other circumstances[25].

Disadvantageous treatment includes the following:

- (i)the gain and loss of a position of a worker (eg. dismissal, constructive dismissal, termination of contracts, refusal to renew contracts, or refusal of regular employment or reinstatement);
- (ii)personnel handling (eg. orders for demotion, transfer, secondment or long-term business trip, or disadvantageous treatment in promotion or disciplinary action);
- (iii)financial treatment (eg. pay cuts and other salary discrimination, changes to lump-sum payments, retirement allowances, claims for damages);
- (iv)treatment affecting the mental state of workers (eg. harassment)[26].

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[25] Consumer Affairs Agency Guidelines, supra note 8, Section 4(2)(i)(b), at p.3.

[26] Consumer Affairs Agency Guidelines Explanation, supra note 3, Section 3 II (2)(i)(c), at p.13.



## **24. What are the support measures attached to the status of whistleblower?**

The business operator is required to take measures to prevent out-of-scope sharing such as:

- limiting the number of persons who can view and share records and materials related to whistleblowing;
- clearly confirming the scope of such persons in the internal rules of the business operator; and
- clarifying the way records related to whistleblowing are kept and accessed in the internal rules of the business operator.

In addition, the business operator is required to take measures to prevent “searching[27]” except in unavoidable circumstances. An example of the measures to prevent searching is stipulating in the internal rules that searching is not allowed and is subject to disciplinary action or other appropriate measures, and educating and publicising such information[28].

In case of out-of-scope sharing or searching, disciplinary action or other appropriate measures will be taken against workers and officers who do it, by taking into account various circumstances such as the context, the extent of the damage and other circumstances[29].

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[27] “Searching” means the acts of attempting to identify whistleblowers (Consumer Affairs Agency Guidelines, supra note 8, Section 2, at p.2.)

[28] Consumer Affairs Agency Guidelines Explanation, supra note 3, Section 3 II (2)(ii)(c), at p.15.

[29] Consumer Affairs Agency Guidelines, supra note 10, Section 4 (2)(ii)(c), at p.3.

## **25. What are the risks for the whistleblower if there is abusive reporting or non-compliance with the procedure?**

The abusive reporting may become subject to disciplinary action if the abusive reporting is prohibited under the work rules of the business operator.

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