

The OSC Whistleblower Program: What Employers Need to Know

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On July 14, the Ontario Securities Commission (the Commission) formally launched its Whistleblower Program (the Program) (OSC Policy 15-601), which seeks to encourage individuals and companies to report suspected violations of Ontario securities laws to the Commission. Coincident with the launch of the Program, the Ontario legislature made certain revisions to the Ontario *Securities Act* (the Act) to prevent a person or company from taking any action that would adversely affect an employee's employment because the employee has cooperated with the Commission, including by reporting conduct under the Program.

The Whistleblower Program

The Program is largely unchanged from the proposal (read our analysis of the proposal [here](#)) released by the Commission in October 2015. The key elements of the Program—which is the first of its kind in Canada—are as follows:

- **Financial incentives.** A monetary incentive is available to eligible whistleblowers who provide the Commission with timely, credible and robust information that leads to an enforcement outcome (up to \$5 million, depending on the outcome). Whistleblowers who are complicit in violating Ontario securities law are eligible for these financial incentives, although the Commission retains the right to bring enforcement proceedings against the culpable whistleblower.
- **No requirement for internal reporting.** While the Commission "encourages" whistleblowers to report potential violations of Ontario securities law through their own internal compliance and reporting mechanisms, it does not require internal reporting as a condition to receiving a whistleblower award.
- **Submission of documentation to the Commission.** Commission Staff may ask whistleblowers to provide them with relevant documents, unless those documents are not in the whistleblower's possession or control.
- **Eligible whistleblowers.** Generally, internal audit and compliance personnel, auditors, directors, officers and in-house counsel are ineligible to receive whistleblower awards. However, the Program contains certain exceptions, including where whistleblowing is necessary to prevent substantial injury to the entity or investors, the whistleblower believes the subject of the information is engaging in conduct that will impede an investigation, or 120 days have elapsed since the whistleblower received the information and either reported it internally or became aware that it had been reported internally.

The Commission has also established an Office of the Whistleblower to field tips received under the Program.

Preventing Retaliation Against Employees

Coincident with the launch of the Program, the Act was amended to prevent retaliation against an employee who has, among other things:

- provided information relating to a potential breach of Ontario securities law to the employer, the Commission, a self-regulatory organization or other law enforcement agency; or
- cooperated in an investigation or proceeding commenced by the Commission, a self-regulatory organization or other law enforcement agency relating to a potential breach of Ontario securities laws.

Further, the Act now voids any contractual provision which purports to preclude an employee from cooperating with the Commission, a self-regulatory organization or other law enforcement agency in the manner described above.

- **Key Considerations for Employers**

Given that employment law is a matter of provincial jurisdiction, the amendments to the Act which purport to void contracts that preclude employees from cooperating with the Commission may only be enforceable against companies who have employees working in Ontario. However, the OSC retains its public interest jurisdiction to address these issues more broadly, and it remains to be seen how the OSC intends to address violations of the Act in respect of employers outside Ontario. It also remains to be seen whether other provincial securities commissions will adopt similar policies.

In light of these developments, employers should consider taking the following steps:

- Review existing confidentiality policies to ensure they do not conflict with the Program and the related amendments to the Act. Confidentiality policies should be clear that employees are prohibited from disclosing confidential information except as permitted or required by law.
- Review existing discipline policies to ensure they do not conflict with the amendments to the Act. Discipline policies should be clear that employees will not be disciplined for exercising their rights under any provincial or federal statute.
- Ensure that all supervisors and other individuals with the power to discipline employees are aware of the new prohibition against retaliation and its implications.
- Review existing whistleblower, ethics and internal control policies to ensure that they are consistent with the Program, and consider ways to ensure that internal programs are effective, understood by, and accessible to key employee groups and functions in the organization.

To discuss these issues, please contact the author(s).

This publication is a general discussion of certain legal and related developments and should not be relied upon as legal advice. If you require legal advice, we would be pleased to discuss the issues in this publication with you, in the context of your particular circumstances.

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