

**LEGAL ALERT**

# Whistleblower Protection Bill 2023

Potential Implications on Whistleblowing &  
Complaints Procedures in the Workplace

Ethics and accountability are constitutional imperatives in Kenya, binding on both public institutions and the private sector as national values. For employees, these principles translate into a duty to facilitate the maintenance of such values through the effective, timely and detailed disclosure of information relating to any threat or violation. Employees are, in effect, the front-line custodians of integrity, expected and empowered to raise concerns about bribery, misuse of funds, harassment or other wrongdoing in their workplaces and beyond.

Regrettably, this responsibility often leads to the targeting of those who dare to speak out. Reporting employees may have their identities revealed, their work disrupted, their morale deliberately undermined and their livelihoods threatened, all in a bid to silence them. Without a robust legal protection framework, these employees operate at the mercy of unscrupulous individuals with no meaningful avenue for recourse.

That notwithstanding, whistleblowing in the Kenyan workplace is evolving from a culture of silence to a more structured, legally supported framework. This shift is driven by anti-corruption laws, international best practices and the anticipated enactment of a comprehensive, dedicated statute: the Whistleblower Protection Bill, Bill No. 56 of 2023 (the Bill). In essence, the Bill is expected to create a cross-cutting disclosure framework, criminalise reprisals, require Commission on Administrative Justice (CAJ) - approved internal policies and introduce a reward fund, reforms that would establish robust, accessible and trusted speak-up cultures as a governance necessity in Kenya. In this legal alert, we cover the current legal landscape, the Bill's key proposals and practical implementation guidance.

## The Legal Position Today

For a long time, Kenya's legal framework has lacked express protections for whistleblowers in a workplace context. Employers, activist groups and individuals seeking legal protection have relied on fragmented and general legislation to advocate for employees' rights not to be subjected to adverse treatment after initiating complaints or disclosing wrongdoing. The principal statutes are as follows:

1. The Employment Act (Chapter 226, Laws of Kenya) (the Employment Act) expressly protects employees against unfair termination for initiating or proposing to initiate a complaint or legal proceedings against their employer, except where the complaint is found to be unfounded. The Employment Act further addresses sexual harassment by obligating employers with twenty (20) or more employees to issue a sexual harassment policy, establish internal reporting frameworks and limit disclosure of the complainant's identity. Casual employees are also afforded a reporting avenue in respect of mistreatment by filing a complaint with a labour officer.
2. The Anti-Bribery Act (Chapter 79B, Laws of Kenya) (the Anti-Bribery Act) requires public and private entities to establish bribery and corruption prevention procedures appropriate to the entity's size, scale and nature of operations, with criminal sanctions for non-compliance. The Anti-Bribery Act also imposes a direct reporting obligation: any person with knowledge or suspicion of bribery must report the matter to the Ethics and Anti-Corruption Commission (the EACC) within twenty-four (24) hours, failing which criminal liability arises. Whistleblowers, informants and witnesses in bribery-related complaints are protected from harassment,

admonishment, unfavourable transfers, identity disclosure and dismissal, with extreme cases qualifying for protection under the Witness Protection Act (Chapter 79, Laws of Kenya) (the Witness Protection Act). The EACC has further issued the Anti - Bribery Act (Guidelines to Assist Public and Private Entities in the Preparation of Procedures for the Prevention of Bribery and Corruption), 2022 (Gazette Notice 6022 of 2022), providing a blueprint for entities to operationalise these obligations.

The Witness Protection Act provides various protections for witnesses, informants and whistleblowers who have given or agreed to give information or evidence in the context of an offence or criminal proceedings. Subject to an eligibility assessment by the Director of the Witness Protection Agency, available measures include relocation and resettlement in an undisclosed location, establishment of a new identity with disclosure controls over the old identity, physical protection through security surveillance and the use of in - camera proceedings. Notably, these protections are reserved for proceedings involving serious offences or where the witness faces a serious risk of harm.

While these provisions offer some basis for redress, they reveal critical gaps in the overall protection of whistleblowers, including the following:

1. Many protective provisions are limited in scope. Protections under the Anti - Bribery Act, including criminal sanctions for violations, apply only where the complaint relates to bribery or corruption. Similarly, measures under the Witness Protection Act apply only in the context of criminal proceedings and only after a witness has been admitted into a protection programme, a threshold reserved for serious infractions or threats.
2. Generally applicable legislation lacks proportionate enforcement mechanisms. The Employment Act, despite mandating employee protection, contains no punitive provisions for non - compliance, thereby undermining the efficacy of its protective framework.

## What the Bill would change

The Bill contains landmark proposals aimed at establishing mandatory internal reporting systems, confidentiality safeguards and explicit protections against retaliation in statutory terms, backed by penal sanctions for violations. The key proposals are highlighted as follows :

1. Procedures for managing and investigating disclosures: the Bill proposes to obligate every public and private body to establish and maintain written procedures, including time periods, for managing and investigating disclosures by employees. At minimum, these procedures would be required to include:
  - a. procedures for receiving and reviewing disclosures together with timeframes for recommendations for corrective action;
  - b. procedures for referring a disclosure to an appropriate public body where the disclosure would more appropriately be dealt with by that body;
  - c. procedures for referring a disclosure to the Commission on Administrative Justice as soon as reasonably practicable if the designated officer reasonably believes that the matter to which the disclosure relates constitutes an imminent risk of a substantial or specific danger to the life, health or safety of individuals, or to the environment;

- d. procedures for investigating other forms of improper conduct if, during the investigation of a disclosure, the designated officer has reason to believe that another form of wrongdoing has been committed or may be committed;
- e. procedures respecting the confidentiality of information collected in relation to disclosures and investigations, which procedures would apply unless there is an imminent risk of a substantial and specific danger to the life, health or safety of individuals, or to the environment;
- f. procedures for protecting the identity of individuals involved in the disclosure process, including an employee or a person making the disclosure, individuals alleged to have committed the improper conduct and witnesses, subject to any other Act or regulation and to the principles of procedural fairness and natural justice; and
- g. procedures for reporting the outcomes of investigations and for the enforcement and follow-up of any disciplinary action or corrective measures taken or directed pursuant to the Bill.

These procedures are to be formulated according to the entity's size, scale and nature of operations and modelled on binding guidelines to be issued by the CAJ within six (6) months of the Bill coming into force. The CAJ would be mandated to review and approve such written procedures in respect of private entities. Where an entity has not yet established its procedures, the CAJ would be empowered to receive disclosures directly, with the entity liable to criminal sanctions for non-compliance.

2. Disclosure of employer procedures arising out of the Bill: The Bill proposes to require employers to ensure that information relating to their compliance with the Bill and any procedures established pursuant to the Bill are communicated to the employees and are available for public inspection.
3. The Bill proposes to harmonise the definition of improper conduct subject to whistleblowing by encapsulating the following within its ambit: a contravention of an Act of Parliament, a County Assembly Act or any regulation made pursuant thereto; an act or omission creating a substantial and specific danger to life, health, safety or the environment; gross mismanagement of public funds or a public asset; bribery, corruption or economic crimes as defined in the Anti-Corruption and Economic Crimes Act (Chapter 65, Laws of Kenya) or any other written law; misuse of public funds; a criminal offence; a violation of human rights and fundamental freedoms under Chapter Four of the Constitution of Kenya 2010 (the Constitution); the offer, solicitation or acceptance of any gift or advantage that might reasonably be seen to influence the exercise of official duties; failure to comply with any legal obligation; unfair discrimination contrary to Article 27 of the Constitution or any law made pursuant thereto; deliberately concealing the occurrence of any of the above; or knowingly directing or counselling an individual to commit any of the above.
4. Employee protections where the employee is a whistleblower or has disclosed information pursuant to the Bill: the Bill proposes to outlaw reprisal and adverse actions against an employee found to have disclosed information in accordance with the Bill or deemed to be a whistleblower. A whistleblower is defined to be any person who has personal knowledge of or access to any data, information, fact or event constituting improper conduct and who makes a disclosure of that information in accordance with the Bill, or a person who assists such an individual. The Bill proposes protection measures such as the maintenance of employment

terms and location, and the protection of payments due to the employee.

5. The Bill proposes an incentivised approach to whistleblowing through a reward system based on the whistleblower's eligibility and the value of proceeds recovered because of the disclosure. A monetary reward may be granted where a disclosure leads to the recovery of illicit gains, at a proposed rate of 10% of the amount or value recovered. The Bill further proposes to grant whistleblowers immunity from civil and criminal liability in respect of claims arising from a disclosure, provided that the disclosure was made in good faith.

## What this Means for Employers, Boards and HR

Organisations should treat whistleblowing as a core element of their compliance architecture rather than a peripheral HR process. In practice, this means designing an end- to- end "speak up and response" system in which disciplinary and grievance pathways are aligned with whistleblowing procedures, ensuring that any employee who raises concerns is insulated from retaliation and afforded a demonstrably fair hearing.

Leadership should commission or refresh confidential reporting channels, including at least one route that bypasses line management, and define clear investigation governance covering intake, scoping, evidence handling, decision - making, documentation and outcome communication. Access to case files should be strictly limited to named roles.

Managers must be trained to understand that adverse treatment following a disclosure can give rise to employment remedies and, in certain circumstances, criminal liability. For corruption - related allegations, anti - bribery controls and escalation criteria should be integrated with the speak - up process, and immediate steps should be taken to preserve evidence, maintain the chain of custody and prevent interference.

Data protection and confidentiality disciplines should include role - based access to reports, separation of personally identifying information from case facts wherever practicable and need - to- know protocols throughout the lifecycle. Investigators should receive specialist training on lawful processing of personal data, interviewing and record keeping standards, and how to provide outcome feedback without revealing sensitive personal information.

Public bodies and regulated private entities should map their touchpoints with the CAJ, the EACC and relevant sector regulators, and prepare to compile and submit annual statistics should legislative requirements come into force. Where operations involve heightened corruption risk or public funds, a senior - level oversight group should be established to supervise investigations and actively monitor for signs of retaliation.

## Practical Considerations for Implementation

### 1. Escalation of disclosures within the organisation

Whistleblowing frameworks should provide a clear pathway for escalation to the most senior appropriate authority, particularly where allegations concern senior management or involve significant legal, financial or reputational risk. This includes direct reporting to the Board or a designated committee, or an independent non - executive director. Escalation protocols should be documented, trigger - based and time - bound to ensure that serious matters are not suppressed or delayed.

## **2. Reinforcing Anonymity**

Anonymity is central to encouraging disclosures, particularly in environments where there is a fear of reprisal. Firms should implement secure reporting systems that allow anonymous disclosure and carefully control information relating to whistleblowing.

Policies must clearly prohibit attempts to identify anonymous whistleblowers and establish disciplinary consequences for breaches of confidentiality.

## **3. Providing feedback to whistleblowers**

To maintain trust in the whistleblowing mechanism, whistleblowers should receive timely acknowledgment of the receipt of their disclosures and, where possible, updates on progress. Where practical, organisations should communicate key milestones, such as whether an investigation has commenced or concluded. Transparent feedback demonstrates seriousness of intent and encourages future reporting.

## **4. Structured and comprehensive investigations**

Investigations into whistleblowing disclosures must be conducted in a structured, impartial and confidential manner that safeguards the whistleblower while preserving evidence for potential disciplinary, civil or criminal action. The circumstances of each disclosure should guide the scope of the investigation and the need for external assistance.

## **5. Resolution of disclosures**

Effective whistleblowing frameworks should provide clear resolution procedures encompassing investigations, documentation of findings, remedial actions and accountability measures. Outcomes should be proportionate to the nature and severity of the misconduct identified. Organisations should also ensure that systemic control weaknesses revealed through disclosures are addressed, not merely the individual misconduct.

## **6. Assuring integrity of reporting channels**

Reporting channels must be secure, independent and protected from interference. This includes ensuring that hotlines, email systems and digital platforms are technically safeguarded, access - controlled and regularly tested. The perceived and actual independence of the reporting mechanism is critical. Engagement of an external service provider often enhances credibility and integrity.

## **7. Provision of multiple disclosure channels to cater for convenience**

A range of reporting channels will accommodate different preferences and accessibility needs, including allowing internal stakeholders to report without being identified and at a convenient time. These may include telephone hotlines, web - based portals, dedicated email addresses, in - person reporting, or external independent channels. Providing multiple options reduces barriers to reporting and increases the likelihood that concerns are raised promptly.

## **8. Creating and enhancing awareness among stakeholders**

A whistleblowing mechanism is only effective if stakeholders are aware of it and understand how to use it. Firms should conduct regular awareness campaigns, training sessions and policy refreshers for employees, contractors and, where appropriate, suppliers and customers. Communication should emphasise protection from retaliation and the organisation's commitment to ethical conduct.

## 9. Periodic assessment of the efficacy of the whistleblowing strategy

Organisations should periodically evaluate the effectiveness of their whistleblowing framework through internal audits, surveys, trend analysis and benchmarking against leading practice. Metrics such as reporting volumes, resolution timelines and user feedback provide valuable insight into performance. Regular review ensures continuous improvement and regulatory alignment. Importantly, whistleblowing is only one element of an organisation's ethical environment, visible action on disclosures is essential for trust in the system to grow.

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