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Amendment of the Whistleblower Protection Act

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The amended Whistleblower Protection Act (the "Act") was promulgated on June 12, 2020, and is scheduled to come into effect on a date specified by a cabinet order that does not exceed two years from the date of promulgation. As a result of this amendment, business operators must implement systems that are necessary to appropriately respond to whistleblowing disclosures.

1. Background of Amendment

Almost 15 years have passed since the enforcement of the Whistleblower Protection Act in 2006. Some positive effects have resulted from the implementation of the Act, such as the establishment of whistleblower reporting systems, mostly at large firms, as well as efforts toward bolstering compliance-focused and consumer-oriented management.

However, several issues have arisen in connection with the Act:1

- Efforts to establish whistleblower reporting systems at small and medium-sized firms as well as to raise awareness of the Act among workers in general have been insufficient. Even recently these inadequacies have caused incidents in which a firm's whistleblowing reporting system did not function satisfactorily, leading to misconduct that severely impaired the safety of citizens, or to inappropriate responses from the administrative agency that receives whistleblowing reports. Therefore, it is paramount to aim for the improved viability of the reporting system for the protection of whistleblowers.
- The scope of the application of the Act's framework has been criticized as too narrow, and the requirements for a person to be protected have been criticized as too strict. Further, there have been suggestions that limiting liability under the Act to civil penalties may not be effective enough to deter disadvantageous treatment. Calls have been made to address these systemic issues.

Thus, a bill for the amended Act was submitted on March 6, 2020, legislated on June 8, and promulgated on June 12. The date of enforcement will be specified by cabinet order, within a period not exceeding two years from the date of promulgation (Article 1 of the Supplementary Provisions).

https://www.caa.go.jp/policies/policy/consumer_system/whisleblower_protection_system/research/improvement/pdf/koujou_161215_0003.pdf

¹ Revision Committee for the Improvement of Viability of the Whistleblower Protection System; p. 1 of the Final Report dated December 2016

2. Amendment to Establish Systems to Enable Business Operators to Respond to Whistleblowing Disclosures

(1) Mandatory establishment of systems to properly respond to whistleblowing disclosures

The amended Act requires business operators to establish systems in order to appropriately respond to whistleblowing disclosures, as well as to take other necessary measures (Article 11, Paragraph 2 of the Act). Business operators must also designate a person to respond to whistleblowing disclosures by investigating the reported facts and taking necessary measures for correction thereof (Article 11, Paragraph 1 of the Act). Business operators with 300 or fewer employees are obligated to make their "best efforts" to meet these requirements (Article 11, Paragraph 3 of the Act).

A guideline regarding the establishment of specific systems will be published at a later date (Article 11, Paragraph 4 of the Act). For reference, according to the December 2018 report by the Consumer Affairs Agency's Investigation Committee for the Protection of Whistleblowers, ² a system containing the following four elements should be required:

- (i) Practices that facilitate the receipt of whistleblowing disclosures, such as the establishment of a designated contact method;
- (ii) Practices that make the designated contact method well known within the organization;
- (iii) Practices that limit the sharing of information concerning the identity of the whistleblower to the requisite minimum; and
- (iv) Practices that prohibit dismissal and other disadvantageous treatment of an employee on the grounds that he or she made a whistleblowing disclosure.

(2) Installation of administrative action and penal provisions

The amended Act includes administrative actions and penal provisions in order to secure a business operator's obligation to establish the systems as described in Article 11, Paragraphs 1 and 2 of the Act. Specifically, the Secretary General of the Consumer Affairs Agency (Article 19 of the Act) will be able to require submission of reports by business operators, and to issue advice, guidance, or recommendations (Article 15 of the Act). If business operators do not comply with those recommendations, the Agency may publicize that non-compliance (Article 16 of the Act). In addition, if a business operator does not submit a report, or makes a false declaration, that business operator may be subject to an administrative penalty not exceeding JPY 200,000 (Article 22 of the Act).

(3) Confidentiality

A person engaged in responding to whistleblowing disclosures is subject to a confidentiality obligation, and may not divulge, without due reason, any information obtained in his or her role as the person responding to a disclosure that would enable the identification of the whistleblower (Article 12 of the Act). If such person violates that obligation, he or she may be subject to a fine not exceeding JPY 300,000 (Article 21 of the Act).

² https://www.cao.go.jp/consumer/history/05/kabusoshiki/koueki/doc/20181227_koueki_houkoku.pdf

3. Amendment to Facilitate Reporting to Administrative Agencies

(1) Relaxation of the requirements for reporting to administrative agencies

Prior to the amendment of the Act, a worker could only make whistleblowing disclosures to an administrative agency when there were "reasonable grounds to believe that the reportable fact has occurred, or is about to occur."

With this amendment, reporting is allowed when "a reportable fact is considered to have occurred, or is about to occur," provided that the whistleblower submits in writing (including by electronic recording media) certain matters, such as his or her full name, address, and details of the reportable fact (Article 3, Item 2 of the Act).

(2) Relaxation of the requirements of reporting to news media

In addition, a worker will be able to make whistleblowing disclosures to third parties, such as the news media, if the worker "has made whistleblowing disclosures to the business operator, and there are reasonable grounds to believe that the business operator would divulge, without due reason, matters in its possession regarding the whistleblower while knowing that such information may lead to identification of such person" (Article 3, Item 3(c) of the Act).

Moreover, the original Act required that "the whistleblower have reasonable grounds to believe that some damage to the *life or body of an individual* has been, or is about to be, caused" (italics added by author). However, the amended Act provides additional grounds for reporting, including the existence of damages to the "property of an individual (not including the operation of business)" that may not be recoverable, or a considerable loss incurred by a significant number of people, if those grounds were caused directly by the reportable fact (Article 3, Item 3(f) of the Act).

4. Amendment to Facilitate Protection of Whistleblowers

(1) Expansion of the definition of whistleblowers

The definition of whistleblowers has been expanded to include the following persons (Article 2, Paragraph 1 of the Act):

- (i) Retired workers (for whom one year or less has elapsed after retirement);
- (ii) Temporary workers whose work assignment has been terminated (for whom one year or less has elapsed after termination); and
- (iii) Officers (i.e., directors, executive officers, accounting advisors, auditors, commissioners, inspectors, liquidators, and other persons engaged in the management of a corporation pursuant to the provisions of the laws and regulations, but excluding accounting auditors).

In addition, the amended Act clarified that officers may claim damages against business operators if they have been dismissed as officers on the grounds of having made a whistleblowing disclosure. However, in order to file such a claim, an officer must satisfy the following requirements (Article 6 of the Act):

(i) Whistleblowing disclosures made to the recipient of labor services:3 if a reportable fact is

³ A business operator that receives the services of the officer (Article 2, Item 4(a)), or, if the business operator conducts

considered to have occurred, or is about to occur;

- (ii) Whistleblowing disclosures made to administrative agencies: if either A or B below applies:
 - A there are reasonable grounds to believe that the reportable fact has occurred, or is about to occur, despite efforts being made to conduct investigations and implement corrective measures (i.e., measures necessary for the investigation and correction of the reportable fact with the same level of care as that of a prudent manager) prior to reporting; or
 - B there are reasonable grounds to believe that the reportable fact has occurred, or is about to occur, and there are reasonable grounds to believe that some damage to the life, body, or property of an individual (not including the operation of business) has been, or is about to be, caused.
- (iii) Whistleblowing disclosures to the news media: if either A or B below applies:
 - A there are reasonable grounds to believe that the reportable fact has occurred, or is about to occur, despite efforts being made to conduct investigations and implement corrective measures (i.e., measures necessary for the investigation and correction of the reportable fact with the same level of care as that of a prudent manager) prior to reporting, and any of a, b, or c below applies;
 - a there are reasonable grounds to believe that the whistleblower will be dismissed or subjected to a salary reduction or other disadvantageous treatment if he or she makes whistleblowing disclosures to business operators or administrative agencies;
 - b there are reasonable grounds to believe that the evidence pertaining to the reportable fact might be concealed, counterfeited, or altered if the whistleblower makes whistleblowing disclosures to the business operator; or
 - c the whistleblower was requested by the business operator, without any just cause, to refrain from making whistleblowing disclosures to business operators or administrative agencies; or
 - B there are reasonable grounds to believe that the reportable fact has occurred, or is about to occur, and there are reasonable grounds to believe that some damage to the life, body, or property of an individual (not including the operation of business) has been, or is about to be, caused.

(2) Expansion of the scope of reportable facts

The description of reportable facts has been amended as underlined in the paragraph below. As a result, reportable facts include not only criminal acts subject to criminal punishment, but also acts subject to administrative penalties (Article 2, Paragraph 3 of the Act).

(Definition of reportable fact)

"the fact of criminal act that constitutes the crimes provided for under the laws (including the orders based on such laws; the same applies to the following item) listed in the appended table concerning the protection of interests such as the protection of individuals' lives and bodies, the protection of interest of the consumers, the conservation of the environment, the protection of fair competition, and the protection of citizen's lives, bodies, property and other interests, or the fact forming the

business under a service agreement or other contract with another business operator, the other business operator as of the time the officer engages in the business (Article 2, Item 4(b)).

grounds for the administrative penalty provided for in this Act or laws listed in the appended table."

(3) Exemption from Liability

A business operator may not make a claim against a whistleblower for damages incurred as a result of a whistleblowing disclosure that met the requirements of Articles 3 or 6 of the Act (Article 7 of the Act). This amendment codifies a previous interpretation that claims for damages on the grounds of having been damaged by whistleblowing disclosures that met the statutory requirements were impermissible based on the prohibition against disadvantageous treatment of a whistleblower (Article 5 of the Act).⁴

⁴ Ed. Consumer Affairs Agency, Legal System Planning Division. Whistleblower Protection Act: Clause-by-Clause Commentary, p. 126

公益通報者保護法の改正

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2020 年 6 月 12 日、改正公益通報者保護法(以下、「法」といいます。)が公布され、同日から 2 年以内の政令の定める日に施行されることになりました。事業者は、今回の改正を受け、内部通報に適切に対応するために必要な体制を整備しなければなりません。

1. 改正の背景

公益通報者保護法が 2006 年に施行されてから 10 年あまりが経過し、大企業を中心に内部通報制度の整備が進み、コンプライアンス経営・消費者志向経営への取組が強化されるなど、一定の成果を挙げてきました。 しかし、同法については、なお以下のような課題があるとされています 5。

- ・中小企業等における整備状況や労働者等における法の認知度はいまだ不十分であるほか、近年においても、 企業の内部通報制度が十分に機能せず、国民生活の安全・安心を大きく損なう不祥事に発展した事例や、 通報を受けた行政機関において不適切な対応が行われた事例が発生するなど、公益通報者保護制度の実 効性の向上を図ることが重要である。
- ・法の枠組みについても、法の適用範囲が狭く、保護の対象となるための要件も厳しすぎるのではないか、民事的な効果だけでは不利益な取扱いを抑止するための効果が不十分なのではないか、といった指摘がなされており、これらの課題への制度的な手当てを講じることも求められている。

上記の課題を踏まえ、2020 年 3 月 6 日に国会に改正法の法案が提出され、同年 6 月 8 日に成立し、同月 12 日に公布されました。施行日は、公布の日から起算して 2 年を超えない範囲内の政令の定める日(法附則 1 条)とされています。

2. 事業者自ら不正を是正しやすくするとともに、安心して通報を行いやすくするための改正

(1) 公益通報に適切に対応するための体制の整備の義務付け

内部通報により適切に対応するために、事業者は、公益通報対応業務従事者(公益通報を受け、通報対象事実についての調査を行い、その是正に必要な措置を取る業務に従事する者)を定める(法11条1項)とともに、公益通報に適切に対応するために必要な体制の整備及びその他の必要な措置をとらなければならないこととされました(法11条2項)。なお、常時使用する労働者数が 300 名以下の事業者については、これらの義務は努力義務とされています(法11条3項)。

具体的な体制の整備については、追って指針が定められます(法11条4項)。参考までに、消費者庁公益通報者保護専門調査会の平成30年12月報告書『によれば、以下の4点が機能するような体制の整備を求めるべきとされています。

- ① 内部通報受付窓口の設置など、内部通報を受け付ける運用
- ② 内部通報受付窓口を組織内で周知する運用

⁵ 公益通報者保護制度の実効性の向上に関する検討会 平成 28 年 12 月最終報告書 1p https://www.caa.go.jp/policies/policy/consumer_system/whisleblower_protection_system/research/improvement/pdf/kouj ou 161215 0003.pdf

⁶ https://www.cao.go.jp/consumer/history/05/kabusoshiki/koueki/doc/20181227_koueki_houkoku.pdf

- ③ 通報者を特定可能な情報の共有を必要最小限の範囲にとどめる運用
- ④ 公益通報をしたことを理由に解雇その他不利益な取扱いを禁止する運用

(2) 行政措置·罰則の導入

上記の法11条1項及び2項の体制整備義務の実効性確保のために、行政措置・罰則が新たに導入されました。具体的には、消費者庁長官(法 19 条)は事業者に対し報告を求め、助言指導または勧告をすることが可能とされました(法 15 条)。勧告に従わなかった場合は、その旨を公表することができます(法 16 条)。また、事業者が報告をせずまたは虚偽の申告をした場合は、20 万円以下の過料に処される可能性があります(法 22 条)。

(3) 守秘義務

また、公益通報対応業務従事者については、正当な理由なく公益通報対応業務に関して知り得た事項で公益通報者を特定される事項を漏らしてはならない旨の守秘義務が課されました(法 12 条)。この義務に違反した場合、公益通報対応業務従事者は30万円以下の罰金に処される可能性があります(法 21 条)。

3. 行政機関等への通報を行いやすくするための改正

(1) 権限を有する行政機関への通報条件の緩和

労働者が行政機関へ公益通報をすることができる場合について、従前は「通報対象事実が生じ、又はまさに 生じようとしていると信ずるに足りる相当の理由がある場合」に限られていました。

本改正では、公益通報者の氏名、住所、通報対象事実の内容等一定の事項を書面(電子的記録媒体も含む)で提出した場合、「通報対象事実が生じ、又はまさに生じようとしていると思料」することで足りることになりました(法3条2号)。

(2) 報道機関等への通報条件の緩和

また、労働者が報道機関等への第三者へ公益通報をすることができる場合について、「事業者への公益通報をした場合、事業者が公益通報者について知り得た事項を、当該公益通報者を特定させるものであると知りながら、正当な理由なく漏らすと信ずるに足りる相当の理由がある場合」が追加されました(法3条3号ハ)。

また、従前「個人の生命又は身体」に危害が発生し、又は発生する急迫した危険があると信ずるに足りる相当の理由があることとの要件について、通報対象事実を直接の原因とする「個人(事業を行う場合を除く)の財産」の損害で、回復することができない損害または著しく多数の個人における多額の損害についても対象に加えられました(法3条3号へ)。

4. 通報者がより保護されやすくするための改正

(1) 公益通報者の範囲の拡大

公益通報者の範囲が拡大され、以下の対象者が新たに公益通報者に加えられました(法2条1項)。

- ① 退職した労働者(退職後1年以内の者)
- ② 労働者派遣を終了した派遣労働者(終了から1年以内の者)
- ③ 役員(取締役、執行役、会計参与、監査役、理事、監事、及び清算人並びにこれら以外の者で 法令の規定に基づき法人の経営に従事している者。ただし、会計監査人は除く)

また、役員について、公益通報を理由として役員を解任された場合に事業者に対し損害賠償を請求することができる旨が明記されました。ただし、そのような損害賠償請求を行うためには、以下の要件を満たすことが必要

とされています(法6条)。

- ① 役務提供先 ⁷への公益通報-通報対象事実が生じ、又はまさに生じようとしていると思料する場合
- ② 行政機関に対する公益通報-以下の A または B に該当する場合
 - A 通報に先立ち調査是正措置(善良な管理者と同等の注意をもって、通報対象事実の調査及びその 是正のために必要な措置)を取ることに努めたにもかかわらず、なお当該通報対象事実が生じ、又は まさに生じようとすると信ずるに足りる相当の理由がある場合
 - B 当該通報対象事実が生じ、又はまさに生じようとすると信ずるに足りる相当の理由があり、かつ、個人の生命若しくは身体に対する危害又は個人(事業を行う場合を除く)の財産に対する損害が発生し、 又は発生する急迫した危険があると信ずるに足りる相当の理由がある場合
- ③ 報道機関等の第三者に対する公益通報-以下の A または B に該当する場合
 - A 通報に先立ち調査是正措置(善良な管理者と同等の注意をもって、通報対象事実の調査及びその 是正のために必要な措置)を取ることに努めたにもかかわらず、なお当該通報対象事実が生じ、又は まさに生じようとすると信ずるに足りる相当の理由があり、かつ、以下の a,b,c のいずれかに該当する場合
 - a 事業者または行政機関に対する公益通報をすれば解任、報酬減額その他不利益な取扱いを受けると信ずるに足りる相当の理由がある場合
 - b 事業者に対する公益通報をすれば、通報対象事実に係る証拠が隠滅、偽造、または変造される おそれがあると信ずるに足りる相当の理由がある場合
 - c 事業者から、事業者または行政機関に対する公益通報をしないよう正当な理由なく要求された場合
 - B 当該通報対象事実が生じ、又はまさに生じようとすると信ずるに足りる相当の理由があり、かつ、個人の生命若しくは身体に対する危害又は個人(事業を行う場合を除く)の財産に対する損害が発生し、 又は発生する急迫した危険があると信ずるに足りる相当の理由がある場合

(2) 通報対象事実の拡大

通報対象事実について、下記の下線部が追加され、刑事罰の対象となる犯罪行為だけではなく、行政罰である過料に該当する行為についても、公益通報の対象となりました(法2条3項)。

(通報対象事実の定義)

「個人の生命又は身体の保護、消費者の利益の擁護、環境の保全、公正な競争の確保その他の国民の生命、身体、財産その他の利益の保護に関わる法律として別表に掲げるもの(これらの法律に基づく命令を含む。次号において同じ。)に規定する罪の犯罪行為の事実又はこの法律及び同表に掲げる法律に規定する過料の理由とされている事実」

(3) 損害賠償責任の免除

事業者が公益通報者に対し、法3条または6条の要件をみたす公益通報により損害を受けたことを理由として 損害賠償を請求することはできないことが定められました(法7条)。

⁷ 当該役員に職務を行わせる事業者(2 条 4 号イ)またはイの事業者が他の事業者との請負契約その他の契約に基づいて事業を 行う場合において、当該役員が当該事業に従事するときにおける当該他の事業者(2 条 4 号ロ)

なお、要件をみたす公益通報により損害を受けたことを理由とする損害賠償については、従前より不利益な取扱い(法5条)にあたり許されないものと解されており⁸、本改正については、従前の解釈を明文化したものと考えられます。

⁸ 消費者庁消費者制度課編「逐条解説 公益通報者保護法」126p

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