

WIN Series - Implementing the EU Directive on Whistleblowing:

Burden of proof for whistleblower claims must be fully reversed

The EU Directive on Whistleblowing requires all Member States to adopt common minimum standards for whistleblowing protection. When an individual is enforcing their whistleblowing rights, they often face a large disparity in legal and financial resource. Employers are usually able to conceal retaliatory action as justified and it is difficult for whistleblowers to access evidence to prove otherwise. The Directive therefore introduces a *reversed* burden of evidential proof which is essential to ensure a 'fair fight.' However, the wording of this vital provision is conflicting and must be carefully interpreted.

The Directive must be implemented to ensure that the burden of proof is fully reversed so that the perpetrator must show clear and convincing evidence that it would have taken any decision for independent, legitimate reasons in the absence of protected report or disclosure.

Argumentation / Refer to:

Recital 93 confirms “...*the burden of proof should shift to the person who took the detrimental action, who should then be required to demonstrate that the action taken was not linked in any way to the reporting.*”

Article 21 (5) also requires that any detrimental measures taken must be shown to be based on “...*duly justified grounds.*” This loose wording creates vulnerability to allow justification for reprisals. Language in national laws must be consistent with the Directives text including its’ Recitals which are clear that a protected disclosure must also not affect the decision in any way.

Reliance solely on proving justification is problematic, as it will incentivise employers to scope for sham reasons to take action, making a successful retaliation claim virtually impossible.

The difficulty in proving causation between the disclosure and detrimental treatment contributes for low rates of success in whistleblowing claims globally.¹

¹ See page 25 ‘Are Whistleblowing Laws Working? A Global Study of Whistleblower Protection Litigation?’ [Report](#) (2021)

National provisions should require the perpetrator to show both that the action was entirely due to independent reasons and that the whistleblowing did not affect it in any way.

Proper examination and analysis of the current national legal framework for procedural rules and evidential burdens is necessary to ensure a realistic chance of success.

Principle 25 of the Council of Europe 2014 [Recommendations](#): “*Once an employee demonstrates a prima facie case that he or she made a public interest report or disclosure and suffered a detriment, the burden shifts onto the employer, who must then prove that any such action was fair and not linked in any way to the whistleblowing.*”

Member States should also consider introducing a duty on those directly and indirectly responsible to take reasonable steps to protect whistleblowers as evidence shows detrimental treatment includes lack of support rather than deliberate victimization.²

² See section 1317AD(2A) Australia’s Corporation Act discussed page 23 2019 ‘Clean as a Whistle’ [Report](#)