

Whistleblower Protection Act

Hideo Mizutani

Lawyer

I. Introduction

1. Whistleblower Protection Act

The Whistleblower Protection Act (hereafter called the “Protection Act”) was enacted in June 2004 (it came into effect as of April 1, 2006). By setting down civil rules on avoidance of dismissal, avoidance of cancellation of worker dispatch contracts, and prohibition of disadvantageous treatment regarding criticism of companies and whistleblowing that meets the conditions set down in the Protection Act, while limiting such whistleblowing to penal laws and providing for additional conditions for protection in cases where disclosure is made outside the organization in question, the Protection Act is designed to promote compliance by firms. On the other hand, for whistleblowing and other activities criticizing a company that are not provided for in the Protection Act, such activities’ validity is individually judged, as before, in relation to corporate order, based on the legal principle restricting dismissal and other general rules of the law.

2. Background of the Enactment of the Protection Act

There is a social, economic and political background to enactment of any law. As for the Protection Act, it can firstly be pointed to a succession of corporate scandals. Especially after 2000, corporate scandals occurred one after another, including Mitsubishi Motors’ concealment of recall data, Yukijirushi Shokuhin’s and Nippon Meat Packers’ food frauds, and Tokyo Electric Power Company’s concealment of data on nuclear reactor accidents. Moreover, these incidents, as they involved foods, transportation, power, etc., were all related to the basic order of a civil society. They had a direct or indirect effect on people’s lives, person, etc., and a significant impact upon society. Secondly, the majority of these corporate scandals emerged as social issues because employees and business partners of those companies reported the wrongful activities (“whistleblowing”). In the background, there were changes in employment and in the industrial structure and social environment that were brought about by the IT revolution. In other words, the advancement of the

globalized economy since the 1990s and changes in employment practices brought about by introduction of performance-based pay, restructuring, an increase in employment of non-regular employees, etc., diluted employees' feeling of belonging to their firms. The advancement of IT and the Internet also made it technically easier to disclose trade secrets outside the organization. Moreover, community activities such as volunteering and NPO activities, an increased sense of belonging to regional communities, and a growing interest in social justice made employees and society to regard "whistleblowing" and criticism of companies in a positive light and promoted disclosure of corporate scandals. Thirdly, companies that were exposed of their scandals faced a major setback, such as a dent in their profile and brand, and corporate social responsibility (CSR) and compliance were emphasized. In particular, Enron's and WorldCom's large-scale stock price scandals that were exposed after 2001 had a major impact on the corporate society in the U.S., and prompted enactment of the Sarbanes-Oxley Act (SOX) in 2002 that obligated firms to create internal control systems, including public disclosure of information, preparation of accounts, etc. These developments also led to giving a greater emphasis on compliance in corporate activities, and the need for institutionalizing "whistleblowing" was recognized.¹

II. Significance of the Enactment of the Whistleblower Protection Act

1. Need for Protection of "Whistleblowers"

As corporate scandals were mainly exposed by whistleblowing as mentioned above, countries began to adopt a policy of providing a certain measure of protection to whistleblowers in order to improve compliance by firms. Starting in the 1990s, the Public Interest Disclosure Act was enacted in the U.K. (1998), the Protected Disclosure Act in New Zealand (2000), and SOX in the U.S. (2002) (Table 1).

In Japan, as laws protecting whistleblowers on companies' violations of laws and other illegal acts, various labor laws have prohibited disadvantageous treatment of workers who, by reporting to an administrative organ, blow the whistle on their employer's illegal acts concerning working conditions and

¹ Mizutani, "'Whistleblowing' and Labor Law", 11.

occupational safety.² In recent years, provisions on protection of whistleblowers were introduced into the Act on the Regulation of Nuclear Reactors, which was revised after the nuclear fuel accident in Tokaimura in 1999. The new provisions prohibit dismissal and other disadvantageous treatment and include a penal provision (Articles 66-4 and 78). The code of ethics of national public employees, based on the National Public Service Ethics Act, which was enacted after the Ministry of Finance's payoff scandals in 1999, also substantially protects whistleblowers. The Child Abuse Prevention Act, which was enacted in 2000 as part of an effort to implement a system for early detection and reporting of child abuse and domestic violence (DV), which have surfaced as social issues in recent years, provide for effectively canceling confidentiality obligation on physicians, lawyers and other experts as well as public employees (Article 6). The DV Prevention Act of 2001 also has similar provisions (Article 6).

As described above, even though legislation has just begun to be made individually to protect whistleblowers on companies' violations of laws and other illegal acts, there were, generally speaking, no laws prohibiting disadvantageous treatment, etc. of whistleblowers and others who engaged in criticism of companies on matters related to companies' violations of laws and other illegal acts and on matters related to public safety and environmental protection.

2. "Whistleblowing" and "Corporate Order"

Needless to say, companies are required to ensure that their acts are socially and legally reasonable and may not engage in any acts that violate this. As a means to correct any acts of violation, therefore, there is value, socially and legally speaking, in protecting employees' whistleblowing and criticism. On the other hand, companies have "personality" as components of society, and

² For example, the Labor Standards Act, Article 104, Paragraph 1 provides, "In the event that a violation of this Act or of an ordinance issued pursuant to this Act exists at a workplace, a worker may report such fact to the relevant administrative organ or to a labor standards inspector" and Paragraph 2 provides, "An employer shall not dismiss a worker or shall not give a worker other disadvantageous treatment by reason of such worker's having made a report set forth in the preceding paragraph." An employer who violates this provision is subject to criminal sanction (Article 119). Similar provisions are included in the Industrial Safety and Health Act, Article 97; the Mariners Act, Article 112; the Dockworkers Act, Article 44; the Dispatched Workers Act, Article 49-3; the Security of Wage Payment Act, Article 14; the Pneumoconiosis Act, Article 43-2; the Mine Safety Act, Article 38, etc.

US			
×			
Federal law			State law
Whistleblower Protection Act (1989)	Individual acts in the fields of environment and atomic energy ¹	Sarbanes-Oxley Act (2002) ²	
Public sector	Private sector in the fields of the environment and atomic energy	Listed companies and securities firms	Public sector (more than 15 states also cover the private sector.)
Federal government employees (incl. former employees, applicants for employment)	Differ by applicable act	Employees of listed companies and securities firms	Differ by state
Violation of a law or regulation (fraud, bribery, etc.), a gross waste of funds, an abuse of authority, a substantial danger to public health and safety, etc.	Differ by applicable act	Fraud in transactions, violation of listing criteria, illegal acts against shareholders, etc.	Violation of the law, misgovernment, a gross waste, an abuse of authority, a threat against public health and safety (may be limited to specific violations of the law, depending on the state)
Anyone within or outside the organization	Generally, in the environment field, internal disclosure to the Congress, a government agency, or other specific agency is protected.	<ul style="list-style-type: none"> • A person with supervisory authority over the employee • A member of Congress • Law enforcement agency, etc. 	A number of states require preliminary internal reporting, while others require no preliminary reporting.
Allegation filed with the Office of Special Counsel (the complainant may appeal OSC's decision in a court proceeding)	Filing of a complaint with the Office of Administrative Law Judge of the Department of Labor (the complainant may appeal the Office's decision in a court proceeding.)	Filing of a complaint with the Secretary of Labor, etc. (if the Secretary's decision is not presented within the prescribed period, a court proceedings may be started.)	Primarily by institution of a civil suit (the complainant may request government relief prior to the institution, depending on the state.)
Reinstatement, retrospective pay, damages, etc.	Reinstatement, retrospective pay, damages, etc.	Reinstatement, retrospective pay, damages, etc.	Reinstatement, retrospective pay, damages, punitive damages, etc.

Control Act, Energy Reorganization Act, and are limited almost entirely to the fields of the environment and atomic energy. In Fields where a widespread effect can be anticipated. employee of any organization who provides information to a law enforcement officer of commission of a federal offence and

or more than an employee.
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Table 1. Outline of Whistleblower Protection Acts in various countries

Country	UK	New Zealand	Japan
Existence of a Comprehensive Act	○	○	○
Act Title	Public Interest Disclosure Act (1998)	Protected Disclosure Act (2000)	Whistleblower Protection Act (2006)
Coverage	Private and public sectors	Private and public sectors	Private and public sectors
Covered Whistle-blower	Workers under an employment contract or other contracts (including dispatched workers)	Employees of organizations ³	Workers under an employment contract or other contracts (including dispatched workers)
Reportable Facts	"A criminal offence," "failing of a legal obligation," "endangerment of the health or safety of any individual," etc.	"An illegal use of public funds and resources," "a substantial danger to public health and safety and the environment," "an illegal act," etc.	Criminal acts provided for in specific acts concerning citizen's lives, bodies, property and other interests and violation of a law or regulation that leads to a criminal act
Disclosure Made To	Disclosure made primarily to the employer or others within the organization (external disclosure to the mass media, etc. is protected under certain conditions)	Disclosure made primarily through the organization's internal procedures (disclosure to related authorities or ombudsman is protected in certain cases).	Disclosure made primarily to the employer or others within the organization (external disclosure to a government agency, the mass media, etc. is protected under certain conditions)
Procedures of Relief Against Disadvantageous Treatment	Filing of a complaint with an employment tribunal (the complainant may appeal the decision in a court proceeding)	Either institution of a suit at a court or filing of a complaint with an agency dealing with complaints related to labor issues	An administrative organ must take measures under certain conditions
Relief	Reinstatement, reemployment, or compensation	Reinstatement, damages, etc.	Voidance of dismissal, etc.

Note:

- Specifically, these include the Clean Air Act, Federal Water Pollution Control Act, Safe Drinking Water Act, Toxic Substances Act. In other words, protection is provided to internal disclosure made by those who are required to be sensitive about safety in the workplace.
 - In addition to directly protecting employees, the Act prohibits any person from taking any harmful action against an employee who provides information for imposition of penalties against such a person (Article 1107).
 - An "organization" is a group of people, regardless of whether it is incorporated or not, and includes groups with an employee.
- The table was prepared based on information of the Cabinet Office (<http://www.consumer.go.jp/info/shingikai/bukai20/>)

they obviously have rights to legal relief when whistleblowing and criticism damage their social credibility, on which they depend for their existence, and disrupt corporate order. Therefore, needless to say, employees' whistleblowing and criticism may not unreasonably or illegally disrupt corporate order or destroy a company's credibility or reputation. Against this background, the social and legal validity of "whistleblowing" was disputed in relation to whether or not it conflicted with "corporate order." In cases where a company took a disciplinary action against or dismissed an employee because the employee's act corresponded to a cause for a disciplinary action provided for in the rules of employment, such as that the employee "spread a false rumor" or "injured the company's credibility and reputation," the validity of such a disciplinary action was disputed in court.

In other words, the obligations inherent in the personal and continuous nature of labor contracts require employer and workers to act faithfully in consideration of each other's interest. As such, it is understood that a worker has an obligation to act in good faith and may not, as obligations appendant to a labor contract, leak a company's trade secret or damage its credibility or reputation, and companies have taken disciplinary action against or dismissed whistleblowers based on the rules of employment on grounds they have violated the above obligations. On this point, the courts, while assuming that an employer's rights to disciplinary action and dismissal did exist, voided it, in cases where exercise of such rights was objectively without a reasonable cause or it could not be accepted in light of the social norm, as an abuse of the rights to disciplinary action. As for dismissal, the courts voided similar cases of dismissal based on the legal principle of the abuse of the rights to dismissal. As confirming these legal principles, the revision of the Labor Standards Act in 2003 provides, "A dismissal shall, where the dismissal lacks objectively reasonable grounds and is not considered to be appropriate in general societal terms, be treated as a misuse of that right and invalid." (Article 18-2).³

Based on such a frame of reference, the courts legally assessed the act of whistleblowing as a part of a judgment on the validity of a company's exercise

³ Daihatsu Motor Incident, the Supreme Court, the Second Petty Bench Judgment, Sept. 16, 1983, *Hanrei Jihō* [Law Cases Reports], no.1093:135; Nihon Salt Manufacturing Incident, the Supreme Court, the Second Petty Bench Judgment, April 25, 1975, *Saiko Saibansho Minji Hanrenshu* [Supreme Court Reports (civil cases)], vol.29, no.4:456; etc.

of the right of disciplinary action or dismissal. In other words, it can be said that in relation to the validity of “whistleblowing,” the courts generally judged the justifiability of a dismissal or disciplinary action by comprehensively considering the whistleblower’s objective, motive and means leading up to the whistleblowing, the level of the significance of the report made, and the truthfulness of the report. More specifically, it was ruled, for instance, that “with respect to whistleblowing, if it is made up of false facts or the claim made is otherwise unreasonable, it may have a significant impact upon the reputation, credibility, etc. of the organization in question. On the other hand, if it contains truth, such whistleblowing may offer a chance for the organization to ameliorate its management method, etc. Considering also that there is a need to make adjustments regarding the whistleblower’s personality, personal interest, freedom of expression, etc., if the whistleblowing is recognized as valid, after comprehensively reviewing whether or not the fundamental claim made by the whistleblower is truthful or there is a reasonable cause to believe truthfulness in the whistleblower, whether the objective of the whistleblowing serves the interest of the public, the significance for the organization in question of the claims made, and the reasonableness of the means or methods used in the whistleblowing, it is reasonable to interpret that even if the whistleblowing injured the organization’s reputation, credibility, etc., the organization may not dismiss the whistleblower in a disciplinary action for the damage made to the organization’s reputation, credibility, etc.”⁴

3. Developments Leading up to the Enactment of the Protection Act

As described above, since there was no legal system for generally protecting whistleblowers, the courts judged the reasonableness and validity of the act of whistleblowing in individual cases based on the legal principles of the abuse of the rights to disciplinary action and dismissal.

However, as already mentioned, as the exposure of corporate scandals through whistleblowing began to have a serious impact upon society in recent years, the idea that protecting socially and legally justifiable whistleblowing and criticism of companies and laying down legal rules on whistleblowing was beneficial in excluding companies’ violations of laws and other illegal acts

⁴ Osaka Izumi Co-operative Society (Whistleblowing) Incident, Osaka District Court, Sakai Branch Judgment, June 18, 2003, *Rodo Hanrei* [Labor Reports], no.855:22.

from society became a public opinion. Against this background, the Consumer Policy Committee of the Quality-of-life Policy Council of the Cabinet Office spoke of the need to introduce “a system for protecting whistleblowers” as a means for assuring the effectiveness of consumer measures in an interim report titled, “Ideal Consumer Policy for the 21st Century” published in December 2002. To complement the government’s monitoring system, the report called on companies to work actively towards compliance management in order to ensure compliance by employers and to protect consumer interest. At the same time, to protect employees from dismissal and other disadvantageous treatment on grounds of whistleblowing, the report pointed out the need for introducing a system for employers to respond appropriately to whistleblowing. (The proposal was originally modeled after the Public Interest Disclosure Act of the U.K.)

However, on the questions of the coverage of protection of whistleblowers, to whom a whistleblower can report a wrongdoing, and procedures for disclosure outside one’s own organization, there were repeated clashes between companies, which claimed that the coverage should be narrowed as much as possible, and consumers, who harbored strong distrust as the government’s late response to Yukijirushi Shokuhin’s and Tokyo Electric Power Company’s scandals, HIV-tainted blood product scandal, etc. was a cause for further spreading the damage. As a result, the Protection Act was finally enacted with a policy objective of setting down rules for whistleblowers to sound an alarm within their own organization, as a general rule, and providing additional conditions for disclosure outside the organization, thus providing an incentive for companies to set up their own internal disclosure system (such as a help line) to promote their compliance.

The Protection Act therefore is designed to protect certain “whistleblowers” by introducing a new and positive concept of “whistleblowing” and to encourage companies to promote compliance management by requiring companies to abide by laws and regulations relating to the basic order of a civil society, including “life, body, property, and other interests of citizens” (Article 1). It, however, limits whistleblowing to criminal acts as defined by the law and other violations of laws and regulations, and, with regard to the whistleblowing procedures, it raised the hurdle for disclosure outside one’s own organization, such as to an administrative organ and the mass media, by setting down additional conditions for such disclosure. It can therefore be described as a law for “promoting internal whistleblowing,” and as such there may be problems

employees (with a proviso in Article 7), and seafarers.⁵

- (2) Director: Company directors who are board members are not covered by the Protection Act. Board members are in a position to execute the company's business based on a contract signed with the company commissioning such a work. They generally do not receive instructions and orders from the employer. Moreover, they have a heavier duty of loyalty than workers and are in a position to prevent or correct any wrongdoing by the company and ensure compliance. In addition, it is the shareholders' meeting that resolves, based on the Companies Act, on the appointment and removal of board members. For these reasons, protection of board members is considered unnecessary.

Therefore, directors who serve concurrently as employees, a common arrangement in Japan, are considered, even if they are formally directors, as "workers" covered by the Protection Act if they are in practicality under the supervision and order of the company representative.⁶

- (3) Business partner: The Protection Act does not cover subcontractors and other business partners. However, considering that activities of group companies, such as parent companies, subsidiaries and subcontractors, are widespread in Japan, subcontractors are often familiar with what is happening within their parent companies. In Yukijirushi Shokuhin's incidence, for example, the company's business partner who exposed the company's passing off imported beef for domestic beef for fraud was forced to suspend business temporarily because all products had to be returned to the shipper. Therefore, there is a strong need for protecting such businesses. During the process leading up to the legislation, the need for protecting business partners did become an issue, but it was finally agreed that the system would have a simple design of protecting solely the workers. Today, freelancers and other so-called self-employed people are incorporated into company groups. They are for all practical purposes in the same position as "workers" and need to be protected. The law should be interpreted more flexibly in individual cases, and it should be revised in the future to cover these business partners.

⁵ Cabinet Office, Quality-of-life Policy Bureau, Policy Planning Division, *Detailed explanation of Whistleblower Protection Act*, 26.

⁶ Koueisyu Incident, the Supreme Court, the First Petty Bench Judgment, February 9, 1995, *Hanrei Jiho* [Law Cases Reports], no.1523:149.

related to its effectiveness.

Considering the situation in our country (lack of ability for self-purification on the part of businesses and businesses' heavy reliance on the government as the authorities have traditionally leaned towards development rather than supervision of businesses) and the structural problems of corporate scandals, which will be described below, it must be said that the Protection Act, which aims to promote compliance by companies through introduction of an internal disclosure system, is limited in its effectiveness.

III. Mechanism of the Whistleblower Protection Act

The Protection Act is a compact legislation of 11 articles in all. In line with the purpose of the act, it is explained below using a number of keywords.

1. Who Should Be Protected?

(1) Whistleblower and worker: The protected person is limited to the “worker” who blew the whistle (Article 2); business partners who are not workers are not protected. The reason the protection is restricted to “workers” is that when a company is violating the law or is engaged in other wrongdoing, workers within the company and workers of a business partner’s company are in a position to best know any wrongdoing and have the greatest motive for whistleblowing. On the other hand, as seen in court cases described above, there is a strong probability that these workers may be punished for whistleblowing and disrupting corporate order and be subjected to disciplinary action by their company. Therefore, there is a need to protect such workers.

Therefore, even though the text of the law limits “workers” to workers as defined by the Labor Standards Act, it is understood that the Protection Act covers a wider range of workers, because the Protection Act has a different purpose than the Labor Standards Act of protecting whistleblowers from being dismissed or treated disadvantageously. From this point of view, the Cabinet Office also explains that it is understood that workers include employees directly employed by the company, such as full-time regular employees, part-time workers, and temporary workers, dispatched workers, and workers of business partners’ companies as well as families and relatives living in the same household, housekeepers, supervisors, public

- (4) Retiree: For retirees, their labor contract is already terminated, and they are normally not in a position to be treated disadvantageously by their former employer. However, in cases where their retirement allowance has not yet been paid or it is to be paid as pension, they may be subjected to disadvantageous treatment in the form of reduction or forfeit of such allowance. In consideration of these cases, the Protection Act covers retirees as well (Article 5).

In the Cabinet Office's explanation, it appears that their interpretation is that the protection is to be limited to those who retired after the act of whistleblowing. However, there are no reasonable grounds, considering the Protection Act's purpose of legislation and interpretation of the provisions, for distinguishing between those who were still in employment at the time of whistleblowing and those who retired after blowing the whistle. Both should be covered by the Protection Act.⁷

2. Which Act Should Be Protected?

An act protected by the Protection Act corresponds to an act (whistleblowing) whereby a worker reports, not based on "an unlawful purpose," to the effect that a company is "about to" commit an illegal act that will violate the law ("reportable facts" will be discussed in the next section). More specifically, it can be discussed as below.

- (1) Validity of objective: Whistleblowing by a worker for the purpose of threat or other intent to do damage is against the principle of good faith in a labor contract, and obviously such an act is not protected by the law. As a condition for such "good faith," the Protection Act provides that the act must be "without a wrongful purpose" (Article 2, Paragraph 1). On the validity of objective, it was possible to set a positive condition that the act must be conducted "solely for the benefit of the public," as in the bar to defamation provided for in the Penal Code (Penal Code, Articles 230 and 230-2). This condition, however, was not introduced because whereas "alleging facts in public" to a large number of unspecified people is an condition for defamation, the Protection Act had additional conditions for "whistleblowing" outside the company, and there was little need in introducing rigorous conditions on the purpose of whistleblowing. Moreover, whistleblowing is

⁷ Cabinet Office, *Detailed explanation of Whistleblower Protection Act*, 96.

often conducted based on a complicated motive, and it was not realistic to rigorously limit the purpose of whistleblowing to “sole benefit of the public.” On the contrary, such a condition might have put a curb on the act of whistleblowing. It can be said that for these reasons, the negative condition was introduced.

As for “a wrongful purpose,” the “purpose of obtaining wrongful gain” and the “purpose of causing damages to others” are provided for. More specifically, this may include act of demanding money and valuables. On the other hand, in cases where whistleblowing is engaged in on the motive of dislike or reprisal against a specific superior or executive, such a motive alone is not considered as “a wrongful purpose,” because whistleblowing is normally engaged in based on a complicated motive and it is also normal for an investigation to be made on the responsibility of a specific executive as a result of whistleblowing. Incidentally, in the British legislation, the worker must “make the disclosure in good faith,” and when making a disclosure outside one’s organization, the worker may not “make the disclosure for purposes of personal gain,” like selling a personal scandal to a medium that cannot be trusted.

On the burden of proof, the Cabinet Office states in its explanation that “since it is not fair to require the whistleblower to claim and prove that the disclosure is “without a wrongful purpose,” the burden of proof is considered to rest with the person who claims that the disclosure does not correspond to whistleblowing.” Therefore, it is the businesses that must bear the burden of proof.⁸

- (2) Subject (the entity to whom the worker’s services are provided): The Protection Act provides that the subject of whistleblowing, in other words the business operator who violates any law or regulation (the entity to whom a worker provides his or her services to), is the entity to whom the whistleblower “actually” provides his or her services, and categorizes such an entity into four types (Article 2, Paragraph 1, Items 1 to 3).
- (i) The business operator who employs the worker (Item 1),
 - (ii) If the worker is a dispatched worker, the business operator to whom the worker is dispatched to perform such operator’s business (Item 2),
 - (iii) If the worker is to engage in work based on a contract concluded with

⁸ *Ibid.*, 34.

another business operator, that business operator (business partner, group company, etc.; Item 3), and

- (iv) Director, employee, etc. of the business operator of (i) to (iii) above (Figure 1).

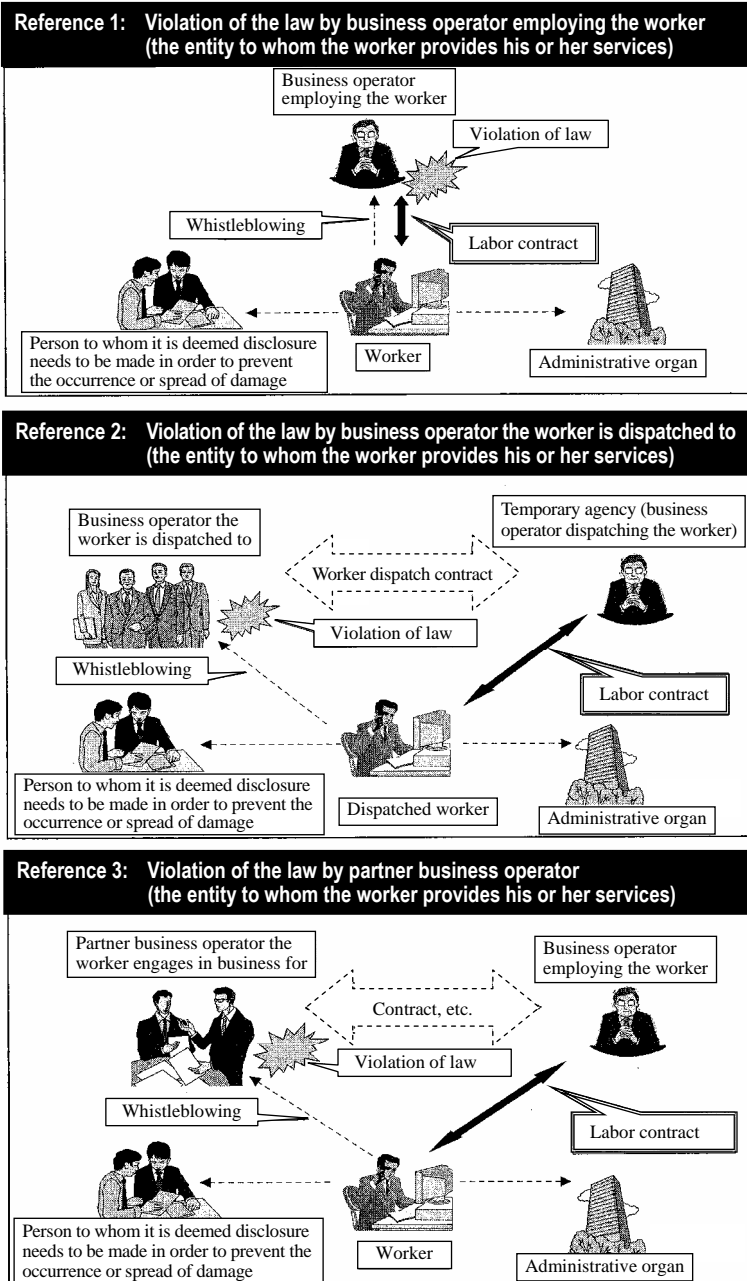
The Protection Act provides that, without regard to the worker's employment relationship, "the entity to whom the worker actually provides his or her services" must be the party violating the law, the violation that may be disclosed under the Protection Act (especially in (ii) and (iii) above). It is apparent that by having the whistleblower disclose the fact of violation to the business operator who is in a position to be able to directly investigate and correct the violation of the law, the Protection Act aims to promote compliance by companies by giving business operators the opportunity to correct the act of violation and by encouraging whistleblowing.

Therefore, if, in a situation involving a parent company and a subsidiary or among group companies, for example, a worker from a subsidiary is dispatched to work for the parent company and on discovering violation of the law by the parent company, the worker discloses this fact to the subsidiary, which is the worker's employer, this disclosure will be considered not as "internal" disclosure, because the subsidiary is not the entity to whom the worker actually provides his or her services, but as "external" disclosure. In cases like this, however, happenings within a parent company will have a significant bearing upon a subsidiary, and a worker's disclosure of the fact to a subsidiary that is the worker's employer will be deemed valid as beneficial and lawful operations reporting. Even though the disclosure will be considered as "external" disclosure under the Protection Act, the disclosure will be protected as a valid act under general legal principles.

If, in a similar situation, the worker discovers violation of the law by the subsidiary, which is the worker's employer, and reports this fact to the parent company, the disclosure will be deemed as "external" disclosure in relation to the subsidiary, and the validity of the disclosure will again be judged based on general legal principles. In cases, however, where the parent company wholly owns the subsidiary and the two companies are considered to be practically the same even though they are formally separate companies, the disclosure will be protected as "internal" disclosure.⁹

⁹ *Ibid.*, 88.

Figure 1. The entity to whom the worker provides his or her services



- (3) Act giving rise to whistleblowing: The Protection Act provides that whistleblowing must be “about Reportable Fact that has been occurred, is being occurred or is about to be occurred,” in other words, about occurrence of an act that violates a law or regulation or a fact that a law or regulation “is about to be violated.” For the purpose of preventing misconception of the facts by the worker and business operator, it is understood that both the probability of the occurrence of the reportable fact and the urgency with respect to time must be high. However, it is already clear from nuclear energy accidents, harmful effects of chemicals, etc. that disclosure after the fact will cause a significant damage on citizens’ life, body, and safety. From the viewpoint of preventing and minimizing damage, the Protection Act should be interpreted more flexibly based on individual cases. Revision of the provision should also be considered in the future.

3. To Whom the Disclosure Should Be Made?

The Protection Act provides that the whistleblower may disclose the fact (1) within the business operator’s organization, (2) to an administrative organ, or (3) outside the business operator’s organization (the mass media, etc.). The conditions for disclosure become more rigorous in the order of (1) , (2) and (3).

(1) Within the business operator’s organization: The Protection Act provides disclosure to the “the entity to whom the worker provides his or her services” or to “a person designated by such an entity” as disclosure within the business operator’s organization.

- (i) The entity to whom the worker provides his or her services: “The entity to whom the worker provides his or her services,” as described above, is the business operator to whom a worker actually provides his or her services. In practice, this disclosure is likely to be made through a help line, a hot line or other office charged with receiving reports from a whistleblower, the department of internal audit, a director or other top manager, or a worker’s immediate superior. A report made to a superior will often be considered as “consultation” (an act of receiving advice from another) done before disclosure (an act of notifying a certain fact to another).

Disclosure within the business operator’s organization may be made by a worker if the worker “considers” that a reportable fact has

occurred, is occurring or is about to occur. It suffices that such disclosure is made based on the whistleblower's subjective perception, and the whistleblower is not required to present objective proof of the truthfulness of the fact. As long as the disclosure is without "a wrongful purpose," the whistleblower will be protected even if the disclosure is a "misunderstanding." (Incidentally, the Code of Criminal Procedure, Article 239 provides that a person may inform investigative authorities of a suspected crime if the person "considers a crime has occurred.") This is in line with the purpose of the Protection Act to lower the hurdle for internal disclosure and encourage such disclosure. It is also believed that such an arrangement will not be of particular detriment to business operators.

- (ii) "A person designated by such an entity": By setting a lower hurdle, as described above, for internal disclosure in comparison with disclosure to an administrative organ or other external disclosure, the Protection Act is designed to promote introduction of a disclosure system within the business operator's organization. Cooperation with an external law office, specialist service provider, labor union, and other help line is required to fulfill such a function, and these partners are considered as "persons designated by such an entity."
- (iii) Method of disclosure: The Protection Act does not specifically provide for the method of disclosure. It does provide, however, that only when the disclosure is onymous and made in writing (including via the Internet) to the business operator that the business operator is obligated to make an effort in notifying the whistleblower of the measures taken to correct any violation (Article 9). The business operator does not have this obligation obviously if the disclosure is anonymous and if the disclosure is not made in writing, even if it is onymous. The Protection Act also protects external disclosure in cases where a business operator who was notified by a whistleblower of a wrongdoing fails to investigate into the case and take other measures for 20 days after such disclosure is made, provided that the disclosure to the business operator was made in writing (Article 3, Item 3d). These provisions suggest that the Protection Act encourages disclosure in writing. (Anonymous disclosure obviously cannot be protected.)

- (2) Administrative organ: The Protection Act requires disclosure to “an Administrative Organ with the authority to impose disposition or recommendation, etc.” Considering that it is normally difficult for a whistleblower to know which administrative organ has the authority to impose disposition or recommendation, etc., the Protection Act provides that if disclosure is made to an administrative organ without such authority, that administrative organ must “inform” the whistleblower which administrative organ has such authority (Article 11).

On disclosure by a worker to an administrative organ, the Protection Act provides an additional condition of objectivity that the worker must have “reasonable grounds to believe” that a reportable fact has occurred, is occurring, or is about to occur. “Reasonable grounds” on the truthfulness of the fact are generally considered as grounds that are objectively reasonable in light of the social norm, and a whistleblower is likely to be required in ordinary circumstances to present internal documents to ensure the truthfulness of the fact. However, since the administrative organ with the jurisdiction can investigate the matter and confirm the truthfulness of the fact for itself, there is no reason in setting a higher hurdle for a whistleblower’s disclosure to an administrative organ compared with informing the police or the Public Prosecutor’s Office, which have jurisdiction over criminal offences (as mentioned above, a person only needs to “consider a crime has occurred”). (Incidentally, in the British legislation, it suffices that the whistleblower has “reasonable belief” in the truthfulness of the fact to disclose the information to a designated administrative organ or to make other external disclosure.)

- (3) Outside the business operator’s organization (the mass media, etc.): When a worker intends to make disclosure outside the business operator’s organization, the Protection Act requires the worker to meet, in addition to the condition mentioned under (2) above, two conditions of (i) the person to whom external disclosure is made and (ii) truthfulness.
- (i) Person to whom external disclosure is made: The Protection Act provides that external disclosure must be made to “any person to whom such Whistleblowing is considered necessary to prevent the occurrence of the Reportable Fact or the spread of damage caused by the Reportable Fact (including person who suffers or might suffer damage from the said Reportable Fact, but excluding any person who might cause

damages to the competitive position or any other legitimate interests of the Business Operator) (Article 3, Item 3 and Article 2, Paragraph 1). This person to whom external disclosure may be made is interpreted broadly and may include newspapers, television networks and other news media, NPOs run by lawyers, accountants, etc., employers' organizations promoting member firms' compliance activities, consumer groups, and members of the Diet.

The "person who suffers or might suffer damage from the said Reportable Fact" may include residents of a locality where a harmful substance is being removed and purchasers of harmful foods and chemicals. (Disclosure to a competition or to a crime syndicate that may use the information for extortion, etc. is likely to be excluded as it will also be contrary to a worker's contractual obligation to act in good faith and not to unreasonably infringe upon the employer's interest.)

- (ii) Truthfulness: In addition to the condition of truthfulness of the reportable fact required as in disclosure to an administrative organ, a worker may disclose the fact outside the business operator's organization only when meeting any one of the following cases:

- (a) The whistleblower may be subjected to dismissal or other disadvantageous treatment if the whistleblower makes the disclosure within the business operator's organization or to an administrative organ; (b) evidence of wrongdoing may be concealed, etc. as a result of the whistleblower's disclosure within the business operator's organization; (c) the worker was asked by the entity to whom the worker provides his or her services not to make the disclosure within the business operator's organization or to an administrative organ; (d) the business operator does not commence investigation into the wrongdoing without any justifiable reason even though the whistleblower disclosed the fact within the business operator's organization; and (e) a person's life or body is at risk.

More specifically, (a) above corresponds to a case where the worker or the worker's colleague was subjected to demotion or other disadvantageous treatment for disclosure within the business operator's organization of the company's past scandal. (b), which may overlap with (a) in many instances, corresponds to a case where a company as

a whole systematically engaged in violation of the law or concealment of evidence. (c) corresponds to cases where work rules prohibit whistleblowing or the worker's superior forbids the worker from whistleblowing. (d) corresponds to a case where the business operator fails to notify the whistleblower for a period of 20 days commencing from the date on which the whistleblower made the disclosure within the business operator's organization. (e) corresponds to a case where a food product that may be harmful to public health is sold to consumers.

In addition, for (a), (b) and (e), the whistleblower is required to have "reasonable grounds to believe" and has the burden of proof.¹⁰

By providing for these rigorous conditions on disclosure outside the business operator's organization, the Protection Act aims to restrain external disclosure and promote disclosure within companies. However, it can be said that such restraint on external disclosure may, on the contrary, allow companies to do nothing about introducing a compliance system within them. To begin with, there is no need or validity in providing for additional conditions for disclosure outside the business operator's organization that go beyond the condition of the truthfulness of the fact required for disclosure to an administrative organ. The conditions for disclosure outside the business operator's organization are too rigorous and should be abolished in the future. For the implementation of the current provisions, individual cases should be interpreted flexibly. At the least, the burden of proof should be on the business operator to prove that the worker does not meet the conditions for disclosure outside the business operator's organization.

4. What Are Reportable Facts?

The Protection Act defines reportable facts as criminal acts provided for in the Acts concerning "the protection of citizen's lives, bodies, property and other interests" and violation of a law or regulation that leads to a criminal act (Article 2, Paragraph 3).

(1) Reportable fact: The Protection Act covers two types of reportable facts as shown below.

(i) The first is facts that are considered as a criminal act in the acts

¹⁰ *Ibid.*, 90.

“concerning the protection of citizen’s lives, bodies, property and other interests” covering five genres (as of the end of March 2007, 7 acts shown in the appendix of the Protection Act and 409 acts provided for by government ordinance: a total of 416 acts).

These acts include (a) acts concerning the protection of individuals’ lives and bodies, such as Food Sanitation Act, Act on the Regulation of Nuclear Source Material, Nuclear Fuel Material and Reactors, Penal Code, Road Traffic Act, and Medical Practitioners Act; (b) acts concerning protection of interest of consumers, such as the Securities Trade Act, Installment Sales Act, Bank Act, and Construction Industry Act; (c) acts concerning conservation of the environment, such as the Air Pollution Control Act, Water Pollution Control Act, and Waste Disposal and Cleaning Act; (d) acts concerning protection of fair competition, such as the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade and Act against Unjustifiable Premiums and Misleading Representations; and (e) other acts concerning protection of citizens’ lives, bodies, properties and other interests, such as the Act on the Protection of Personal Information, Labor Standards Act, Companies Act, and Bankruptcy Act.

- (ii) The second is facts that are considered as an illegal act for which the acts of (i) above do not directly provide for a penalty but a penalty will be imposed on the offender if the offender fails to abide by the administrative disposition or recommendation made against such an illegal act. In other words, the Protection Act protects disclosure of violation of any of the above laws for which no penalties are immediately applicable but for which penalties will apply if there is violation of the administrative disposition, etc.

- (2) Acts that are considered outside the coverage of the reportable facts

Whistleblowing may be engaged in in relation to acts concerning the protection of citizen’s lives, bodies, property, etc., and any other acts are excluded. For example, various tax laws, acts related to political activities, such as the Public Offices Election Act and the Act to Regulate Money Used for Political Activities, and acts related to defense and foreign relations, such as the Immigration Control and Refugee Recognition Act, Foreign Exchange and Foreign Trade Act, and Self-Defense Forces Act, are excluded as acts “specifically concerning state functions.” Whistleblowing, however, is particularly effective

against companies' large-scale tax evasion and illegal donations to politicians. Considering also that one of the principal aims of the legislations in the U.K., U.S., etc. is to eliminate such illegal acts, it must be said that Japan's Protection Act lacks consistency.

The reportable facts are also limited to criminal acts and violation of a law or regulation that leads to a criminal act. Violation of a civil law or regulation (violation of public order and standards of decency, tort, and default) and "unjustifiable" acts (such as violation of obligation to make an effort provided for in various basic acts) lack predictability in whistleblowing and are excluded as damaging legal stability.

(3) Legal protection of disclosure not covered by the Protection Act

On the legal protection of disclosure not covered by the Protection Act (for example, disclosure to an administrative organ or other external disclosure that do not meet the conditions provided for in the Protection Act), the Diet, at the enactment of the Protection Act, passed a collateral resolution to the effect, "General legal principles will apply as before to disclosure not covered by this Act. The enactment of this Act may not be construed to the contrary."

As described above, court decisions formed the legal principle on restriction of dismissal in Japan, and the Labor Standards Act, Article 18-2 (came into effect in 2003) was provided as a result of accumulation of the court decisions. In cases where, prior to the enactment of the Protection Act, the validity of dismissal on grounds of whistleblowing was disputed, the legal principle on restriction of dismissal was applied. On the relation between this legal principle on restriction of dismissal and the Protection Act, it is understood that the Act, "by setting down specifically and clearly the conditions for avoidance of dismissal of whistleblowers, aims to protect workers who intend to engage in a rightful act of making disclosure for the public interest" and provides that the Act "does not preclude the application of the provision of Article 18-2 of the Labor Standards Act" (Article 6, Paragraph 2).

With respect to whistleblowing not covered by the Protection Act, there was a concern that the prohibition on dismissal of whistleblowers based on the general legal principles of abuse of rights might be compromised by the enactment of the Protection Act. The above collateral resolution was passed in response to such a concern. The validity of acts of disclosure not covered by the Protection Act will be judged individually based on the application of the general legal principles.

IV. Summary: Is the Whistleblower Protection Act Useful for Promoting Compliance by Companies?

1. Merit of the Protection Act: Protection of Whistleblowers

The Protection Act provides for avoidance of dismissal, avoidance of cancellation of worker dispatch contracts, and prohibition of disadvantageous treatment (demotion, pay cut, request for replacement of dispatched workers, etc.) on grounds of whistleblowing, and provides furthermore for not precluding the application of the provision of Article 18-2 of the Labor Standards Act (the legal principle on abuse of the rights to dismissal) (Articles 3 to 6). Therefore, with regard to criticism of companies and disclosure that meet the conditions of the Protection Act, there are now civil protection standards and rules in place dealing not only with avoidance of dismissal, but also with avoidance of cancellation of worker dispatch contracts and disadvantageous treatment such as demotion and pay cut. In the past, the validity of such dismissal, cancellation, etc. was individually judged in the court. In addition to the Labor Standards Act (Article 18-2), the Protection Act sets additional regulation with respect to civil rules by clearly providing for avoidance of dismissal, cancellation of worker dispatch contracts, prohibition of disadvantageous treatment, etc., and these provisions should be considered meaningful.

2. Limitations of the Protection Act: Narrow Coverage

The Protection Act has its limitations particularly because its effectiveness has been compromised by narrow coverage and the setting of rigorous conditions for disclosure to an administrative organ and other external disclosure. The Protection Act should be made more effective by flexible implementation of the law at the onset and by revision of the law planned in 2011 in the future. As a number of issues related to the Protection Act have already been pointed out, the author will point out a few other points in this concluding section.

It has already been pointed out, with respect to the coverage of protection, that the Protection Act does not cover tax laws and the Act to Regulate Money Used for Political Activities, the fields in which whistleblowing is most effective. In the U.K. and U.S., in addition, there have noticeably been cases of whistleblowing against accidental firing of arms, illegal accounting, tax evasion, etc. not only by companies, but also by the police, military, hospitals,

universities, religious organizations, etc., and countries are taking steps to protect such whistleblowing. Expanded application of the Protection Act in these fields should be made an issue in the future.

On the procedures of protection, it is a problem that protection is restricted to workers within an organization and that conditions for external disclosure, such as disclosure to the mass media, are too rigorous. In the majority of corporate scandals that became an issue, the company as a whole was systematically engaged in the wrongdoing or the company's executives were directly or indirectly involved. In the legislations in the U.K., U.S. and other countries, even if whistleblowers are limited to insiders (i.e. workers), internal and external disclosure are equally protected (the U.S. federal laws Whistleblower Protection Act, SOX, etc.), or even if disclosure should first be made to the business operator, disclosure to a related administrative organ or an ombudsman, etc. under certain conditions is equally protected (the U.K. and New Zealand). The Japanese legislation, where whistleblowers are limited to insiders (business partners are not included) and conditions for external disclosure are rigorous, is exceptional. It is difficult for such a legal system to function effectively in preventing and eliminating corporate scandals. The conditions for external disclosure should be eased to make the Protection Act more effective.

The protection's effect is also limited to avoidance of dismissal of whistleblowers and prohibition of disadvantageous treatment. To assure the truthfulness of the disclosure, a whistleblower will in fact be required to present documents and other information, and in removing such documents and information, the whistleblower may be subjected to criminal charges of larceny, etc. or civil charge for damages. Protection against such charges is also lacking.

Moreover, while the Protection Act is designed to promote and encourage internal disclosure, it does not obligate firms to introduce an internal disclosure system, which is an important key to promoting compliance by companies. It must be said therefore that the Act's effectiveness is compromised. Therefore, if companies, without introducing an internal disclosure system, obligate workers by work rules, etc. to give precedence to internal disclosure at all times, the Protection Act, contrary to its purpose, would lack rationality as described further below.

3. To Secure the Effectiveness of the Whistleblower Protection Act

The policy objective of the Protection Act is to promote compliance by companies through reinforcement and introduction of an internal disclosure system, and it should be considered that as long as it is within the company that disclosure should primarily be made to, the business operator as the employer has a contractual obligation to the workers to prepare an internal disclosure system within the business operator's company. Therefore, in accordance with the purpose of the Protection Act, a worker may demand an employer who does not prepare an internal disclosure system to prepare such a system. It may also be said that from the point of view of the obligation of good faith in labor contracts, an employer may not, without preparing an internal disclosure system, obligate workers to give precedence to internal disclosure at all times, dismiss or disadvantageously treat workers who make external disclosure, or bring a civil charge against such workers.

On the other hand, the Protection Act alone cannot promote compliance by companies. There is a need to reinforce the Act's effectiveness in coordination with various other acts that have been enacted. The Act on Prohibition of Private Monopolization and Maintenance of Fair Trade was revised, and the revised act came into effect in January 2006. By this revision, the base percentage used for calculation of penalties imposed on companies that engage in bid-rigging or form a cartel was raised. At the same time, a system for reducing penalties on those companies that admit wrongdoing to the Fair Trade Commission was introduced to encourage external disclosure about cartels, bid-rigging, etc. to administrative organs. As a result, large-scale bid-rigging incidents have been exposed. The Companies Act was also revised in May 2006. By this revision, the board of directors of large companies (a capitalization of ¥500 million or more or liabilities of ¥25 billion or more) and of companies with committees was obligated to resolve on "building up internal control," which effectively obligated such companies to introduce an internal disclosure system. In addition, the Japanese version of SOX, which is expected to be introduced in 2008, is likely to obligate preparation of the internal disclosure system in greater detail.

As examined above, the Whistleblower Protection Act, while having various limitations, is expected to fulfill a certain role in eliminating corporate scandals and promoting compliance by companies in coordination with other legislations.

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* English translation of Whistleblower Protection Act: <http://www.cas.go.jp/jp/seisaku/hourei/data/WTA.pdf>.