



## **Revision of the Whistleblower Protection Act -Measures to be Taken by Business Operators-**

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### **I. Introduction**

On June 1, 2022, the amended Whistleblower Protection Act (the “Amended Act”) went into effect. Some drastic revisions made in the Amended Act include (i) expansion of the scope of the definition of Whistleblowing (e.g., Whistleblowing now includes acts of reporting not only by workers but also by officers or persons who used to be workers within the last year), (ii) enhancement of the requirements for the protection of whistleblowers (e.g., relaxing the requirements for the so-called “Item II Reports” and “Item III Reports” made by workers), and (iii) enhancement of measures to be taken by business operators/ administrative agencies (e.g., business operators are now mandated to take certain measures, and some obligations have been imposed on personnel who perform the duties of processing Whistleblowing reports).

With regard to (iii) above, the Amended Act requires that business operators that regularly employ more than 300 workers (a) designate persons for receiving internal reports, conducting investigations of Reportable Facts (as defined in the Amended Act) and implementing necessary measures required to rectify the reported situation (“Persons under Duty of Processing Whistleblowing,” as defined in the Amended Act) (“PDPWs”) (Amended Act, Art. 11, para.1), and (b) implement necessary measures required to act properly in response to internal reports, including establishment of a system for the same purpose (the “system for processing internal whistleblowing reports,” as used in the Amended Act) (the “Processing System”) (Amended Act, Art. 11, para. 2). In contrast, business operators that regularly employ 300 or fewer workers are only required to make efforts to comply with the matters described above (Amended Act, Art. 11, para. 3).

Practical details of the steps to be taken by business operators in connection with the establishment of the Processing System and other necessary measures described above are outlined in the guidelines issued by the Consumer Affairs Agency in August 2021 (the “Guidelines”).<sup>1</sup> Thus, among other things, business operators should actively examine what particular steps they are required to take in order to comply with the Guidelines in terms of, for example, the scale, type and

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<sup>1</sup> Consumer Affairs Agency, "Essential Guidelines for Proper and Effective Implementation of Measures to Be Taken by Business Operators Based on Provisions of Paragraphs 1 and 2 of Article 11 of Whistleblower Protection Act" (Cabinet Office Notification No. 118, August 20, 2021).

organizational structure of their respective business operations. In order to kick-start such examinations by business operators, a commentary on the Guidelines (the “Commentary”) was published on October 13, 2021.<sup>2</sup> Going forward, business operators are expected to first, fully understand what is described in the “Viewpoints and Concrete Examples for Ensuring Compliance with the Guidelines” presented in the Commentary, and then, properly establish and implement the Processing System after examining how they should comply with the Guidelines according to their respective circumstances.

This article aims to offer an overview of measures required to be taken by business operators under the Amended Act, based on the Guidelines and the Commentary.

## **II. Measures to Be Taken by Business Operators under Amended Act**

### **1. Designation of PDPWs (Section 3 of Guidelines)**

As mentioned above, under the Amended Act, in the context of internal whistleblowing reports received through the Hotline for Internal Whistleblowing (as defined in the Guidelines, the “Hotline”), business operators are required to designate PDPWs to perform the Duties of Processing Whistleblowing (as defined in the Amended Act, the “Processing Duties”)<sup>3</sup> and to whom information that identifies the whistleblowers is conveyed.

Under the Amended Act, business operators are required to designate as PDPW(s) “a person or persons assigned to the section which performs, as its main duty, the Duties of Processing Whistleblowing in connection with internal whistleblowing reports received through the Hotline for Internal Whistleblowing.” Furthermore, it is also required that, whenever necessary, “any person who independently handles, as his/her duty, an important part of any internal whistleblowing report received through the Hotline for Internal Whistleblowing and to whom information that identifies the whistleblower is conveyed in connection with such duty” should be designated as a PDPW, even when such person is not assigned to the section described above.<sup>4</sup> Consequently, in probable cases where the Hotline is set in the general affairs division, one way of designating PDPWs could be to maintain PDPW designations of the manager of the general affairs division and the personnel of the same division who are in charge of receiving the reports, and to additionally designate as PDPWs, when any specific report is received, other personnel of the general affairs division who may perform the Processing Duties, in the manner required by each report.

When designating PDPWs, it is important to remember that the designation should be done in

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<sup>2</sup> Consumer Affairs Agency, “Commentary on the Guidelines Based on the Whistleblower Protection Act” (Cabinet Office Notification No. 118, 2021).

<sup>3</sup> Operations considered to fall under the category of the “Duties of Processing Whistleblowing” are those through which receipt of internal whistleblowing reports, investigations and steps required for rectification are, in whole or in part, independently performed and those involving an important part of such operations (the Commentary, page 5).

<sup>4</sup> Section 3.I.(iii) of the Commentary

the way that each intended PDPW clearly understands that he/she is going to be in the position of a PDPW (i.e., he/she will be under confidentiality obligations subject to sanctions of criminal punishment) in order to avoid a situation in which such person, being unaware of such designation, unexpectedly faces such punishment. To be more specific, it is considered necessary to designate each PDPW in writing. As an alternative to designating PDPWs by separately giving notice to each individual, PDPWs might also be designated pursuant to certain categories, such as a department, a team within a department or a job title, specified, for example, in internal regulations. It should be noted, however, that, even when designating PDPWs in such a way, all potential designees should still be clearly informed of the fact that they are being assigned as the PDPW.<sup>5</sup> Confidentiality obligations imposed on PDPWs under the Amended Act require that they do not disclose, without justifiable grounds, any matters that came to their knowledge in connection with the Processing Duties and through which identification of the whistleblower becomes possible (Amended Act, Art. 12). PDPWs who fail to comply with such obligation are subject to punishment by fine of not more than 300,000 yen (Amended Act, Art. 21).

## **2. Establishment of Processing System and Other Necessary Measures (Section 4 of the Guidelines)**

(1) Establishment of a cross-divisional system for the Processing Duties (Section 4.1 of the Guidelines)  
Under the Amended Act, business operators are required to (a) establish the Hotline, and (b) specify the department and a person in charge of (i) receiving internal whistleblowing reports through the Hotline, (ii) conducting investigations, and (iii) taking necessary measures to rectify the situation.

When internal whistleblowing reports involving the head of the organization or other executives are received through the Hotline, the Processing Duties with respect to such cases must be performed by securing independence from such persons. Examples of possible steps to be taken include: (a) reporting, additionally, to outside director(s) and/or possible auditing organs (e.g., a company auditor, the Audit and Supervisory Committee (as used in the Companies Act) or an audit committee), (b) making the performance of the relevant Processing Duties subject to monitoring by outside director(s) and/or auditing organs, and (c) establishing the Hotline externally (e.g., in an outsourced entity or the parent company).<sup>6</sup>

Moreover, while performing the Processing Duties, business operators are obligated to (i) receive internal whistleblowing reports through the Hotline and initiate necessary investigations, unless justifiable grounds exist<sup>7</sup>, (ii) promptly implement remedial measures as necessary when the

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<sup>5</sup> Section 3.I.2(iii) of the Commentary

<sup>6</sup> Section 3.II.1(2)(iii) of the Commentary

<sup>7</sup> Cases with “justifiable grounds” may include cases where the report has been made with respect to a closed case, and where it is difficult to verify reported facts because the whistleblower can no longer be reached (Section 3.II.1(3)(iii) of the Commentary).

results of such investigations reveal any non-compliance with laws or regulations in connection with Reportable Facts, and (iii) confirm, once necessary measures have been taken, whether such measures had the anticipated effect, and if not, implement other remedial measures. It is also considered necessary to accept anonymous internal whistleblowing reports in order to ensure the effectiveness of the Processing Duties, and, in the course of taking remedial measures, to internally discipline or otherwise take proper actions as necessary against the parties concerned, followed by further steps, such as reporting to the relevant authorities, if necessary (Commentary, page 9-11).<sup>8</sup>

Lastly, in order to eliminate possible conflicts of interests in performing the Processing Duties, proper measures must be taken to prevent any personnel related to each case from being involved in the Processing Duties performed in connection with internal whistleblowing reports received through the Hotline. Possible examples of such measures include exclusion of the personnel concerned in the relevant case from carrying out investigations or pursuing remedies.<sup>9</sup>

#### (2) Establishment of a system to protect whistleblowers (Section 4.2 of the Guidelines)

To prevent whistleblowers from being treated unfairly, business operators are required to: (i) prevent their workers, officers and/or other personnel from giving whistleblowers any disadvantageous treatment, (ii) keep monitoring whether whistleblowers are treated unfairly, and if any disadvantageous treatment is found, take appropriate remedial/restorative measures, and (iii) when any disadvantageous treatment has taken place, take disciplinary actions or other appropriate steps against the workers, officers and/or other personnel who gave such treatment, by taking into account the surrounding circumstances, including in what manner such treatment was given and the degree of damages sustained as a result of such treatment.

In addition, to prevent information from being shared beyond the intended scope (“Extensive Sharing”) and whistleblowers from being searched (“Searching”), business operators are required to: (i) prevent their workers, officers and/or other personnel from conducting Extensive Sharing, and if any Extensive Sharing has taken place, take appropriate remedial/restorative measures, (ii) prevent Searching, except in cases where compelling grounds exist, for example, where it is essential to identify the whistleblower in order to conduct investigation in cases of real necessity, and (iii) when any Extensive Sharing or Searching has taken place, take disciplinary actions or other appropriate steps against the workers, officers and/or other personnel who engaged in such acts, by taking into account the surrounding circumstances, including in what manner such acts were done, and the degree of damages sustained as a result of such acts.

#### (3) Measures to ensure effectiveness of the Processing System (Section 4.3 of the Guidelines)

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<sup>8</sup> Section 3.II.1(3)(iii) of the Commentary

<sup>9</sup> Section 3.II.1(4)(iii) of the Commentary

In addition to the foregoing, according to the Guidelines, business operators are required to implement necessary measures to make effective use of the Processing System, including measures relating to (i) education/awareness programs for workers, officers and former workers, (ii) notifications of remedial measures or other actions, (iii) storage of records, review and improvement of the Processing System, and disclosure of actual results achieved in processing internal whistleblowing reports to workers and officers, and (iv) establishment and implementation of internal regulations. As this article does not go into the specifics behind the above-mentioned items, for a more detailed treatment, readers may wish to refer to the relevant sections in the Guidelines and the Commentary.

[Article Overview]

This article addresses measures to be taken by business operators pursuant to the Whistleblower Protection Act, amended as of June 1, 2022.