

JUNHE SPECIAL REPORT



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Notes on the Whistleblower System in China

The State Council of the People's Republic of China (State Council) has recently issued Guiding Opinions regarding the Government's supervisory management framework, introducing the Whistleblower System on a national level. The Whistleblower System will bring about new challenges for corporations, not only in terms of compliance but also because it puts a more onerous burden on companies to provide reasonable responses to employees' related claims and demands. In this article, Li Meng, a lawyer from JunHe's Labor and Employment Practice Group, will distinguish the new Whistleblower System from related criminal law concepts, and how to strike a balance between the interests of both whistleblowers and corporations.

"Whistleblower", a term originating from the West, usually refers to insiders who report or disclose their employers' wrongdoings to the authorities. Recently, the State Council adopted this idea in their issue of *"The Guiding Opinions on Strengthening and Regulating the Government's Supervisory Management During and After an Event"* (Guo Fa [2019] No. 18, enacted on September 6, 2019, and issued on September 12, 2019, hereinafter referred to as the "Opinions"). This document detailed the need for China to establish a "whistleblower" system to allow for societal supervision and create a more

coordinated supervision mechanism. Although several existing regulations have mentioned the term "whistleblowing" or "whistleblower" before (mainly in food or drug safety-related areas), this idea has never been clearly defined by the State Council. Therefore, these Opinions represent the first time that China has sought to regulate and deploy the "whistleblower" system at the State Council level. In this regard, we believe that the following two aspects should enjoy special attention:

I. Scope of protection for whistleblowing

The Opinions propose to provide monetary awards and strict protection to meritorious whistleblowers who report "*severe violations of laws/regulations and major risk hazards*". However, while it is necessary to encourage legitimate whistleblowing, there are concerns that these benefits might induce certain employees to abuse the system for private retaliation or blackmail. Therefore, it should be noted that the Opinions expressly state that these "*profit-making 'counterfeiting' and claims shall be regulated in accordance with the law*".

In the absence of regulations or guidance on the meaning of "*severe violations of laws/regulations and major risk hazards*" and "*profit-making*

'counterfeiting' and claims", it is difficult to determine the extent of the Opinions' scope. By analyzing existing legal provisions on criminal law, we have sought to clarify the extent of the Opinions' scope below:

1. The boundary between whistleblowing and the crime of extortion

According to Article 274 of the *PRC Criminal Law*, the crime of extortion refers to the behavior of an actor, who with the intention of illegal possession of properties, asks for property of substantial value from others by threat, blackmail or other means. These are the elements of the crime of extortion: (1) the criminal object, being either public or private property rights; (2) the subjective element, being the intention of illegal possession; (3) the objective behavior, being the act of forcing others to hand over property by means of threat, coercion, blackmail, or intimidation; (4) the subject of the crime, being the person who is being extorted. In judicial practice, it is generally difficult to identify the second element of this test as it is subjective. In fact, attempts to identify this will often lead to controversy especially when the behavior of the actor appears to be a "rights safeguarding behavior".

Therefore, to distinguish the two actions - extortion

and whistleblowing - we believe that one should take the following position. Our observations show that an action is likely to constitute the crime of extortion if the value of property that the actor demands from others through threat, coercion, blackmail, or intimidation is significantly higher than the amount he is entitled to claim. However, for whistleblowing, we believe that there are other factors to take into consideration, such as the whistleblower's motivation, whether the whistleblower has exhausted the internal reporting procedures first and the authenticity of the reported information.

It is also worth noting that Article 6 of the *Interpretation of the Supreme People's Court and the Supreme People's Procuratorate on Several Issues concerning the Specific Application of Law in the Handling of Defamation through Information Networks and Other Criminal Cases* (Law [2013] No. 21) expressly deals with the actions of posting/deleting information via internet, which is relatively common in practice. Article 6 states that "whoever, on the ground of issuing, deleting or otherwise handling network information on an information network, threatens or coerces another person to seek public or private property with a relatively large amount, or commits the aforesaid conduct many times, shall be convicted of and

punished for the crime of extortion in accordance with Article 274 of the Criminal Law”.

2. The boundary between whistleblowing and the crime of malicious accusation

According to Article 243 of the *PRC Criminal Law*, the crime of malicious accusation refers to the behavior of an actor, who with the purpose of subjecting others to criminal prosecution, intentionally reports fabricated criminal facts to the public security, judicial authorities or relevant government authorities in severe circumstances. The elements of the crime of malicious accusation are: (1) the criminal object, being the personal right of other individuals; (2) the subjective element, being the intention to make others criminally pursued; (3) the objective behavior, being the action of fabricating the facts of the crime and spontaneously reporting them to the relevant authorities; (4) the subject of the crime, being the accused. Moreover, the law states that civil servants will be subject to a heavier punishment under this crime.

To clarify, the object of the crime of malicious accusation can only be other individuals (i.e. other natural persons, excluding legal entities). However, there is an exception when the malicious accusation against a legal entity may

lead to criminal prosecution against a natural person. This is because the object of the crime of malicious accusation, in this case, is satisfied.

II. Challenges faced by companies

The establishment of the "whistleblower" system will undoubtedly bring about new challenges, which require companies not only to pay close attention to and continuously improve their compliance systems but also to deal with ambiguous and difficult problems. These include the complicated issue of resolving the tension between confidentiality and whistleblowing policies, the need to properly guide and respond to employees' demands as well as the ability to handle and maintain good public relations in times of crisis (ie. In cases of whistleblowing within the company).

For initial measures to consider, we suggest that companies develop internal policies to establish an internal reporting channel and guide employees to report internally first. Moreover, we suggest that companies retain evidence when dealing with employees' claims (especially suspected improper claims) in order to protect the legitimate rights and interests of the company.

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