FINANCIAL PLANNING
ASSOCIATION *of* AUSTRALIA

3 February 2017

Tax and Corpporate Whistleblower Protection Project
C/- Ms Jodi Keall
Senior Adviser
Financial System Division
100 Market St
Sydney NSW 2000

Email: whistleblowers@treasury.gov.au

Dear Ms Keall

Whistleblower Protections

The Financial Planning Association of Australia welcomes the opportunity to provide feedback on the Government's *Review of tax and corporation whistleblower protections in Australia.*

Whistleblower protections are necessary to encourage the disclosure of information to eradicate suspected wrongdoing. Hence, whistleblower protections must be afforded to all whistleblowers, including individuals and entities.

The purpose of whistleblower protections is to create an environment that keeps whistleblowers safe from reprisal and to minimise the potential impacts on their professional and personal life. This is an enormously complex task and must be approached from the whistleblower's perspective.

Strong, appropriate protections must be established to encourage and support whistleblowers to come forward, but should also include systems to identify and minimise the potential impact of malicious claims.

If you have any queries or comments, please do not hesitate to contact me on 02 9220 4500 or heather.mcevoy@fpa.com.au.

Yours sincerely

Heather McEvoy
Policy Manager
Financial Planning Association of Australia[1]

[1] The Financial Planning Association (FPA) has more than 12,000 members and affiliates of whom 10,000 are practising financial planners and 5,600 CFP professionals. The FPA has taken a leadership role in the financial planning profession in Australia and globally:

- Our first "policy pillar" is to act in the public interest at all times.
- In 2009 we announced a remuneration policy banning all commissions and conflicted remuneration on investments and superannuation for our members – years ahead of FOFA.
- We have an independent conduct review panel, Chaired by Mark Vincent, dealing with investigations and complaints against our members for breaches of our professional rules.
- The first financial planning professional body in the world to have a full suite of professional regulations incorporating a set of ethical principles, practice standards and professional conduct rules that explain and underpin professional financial planning practices. This is being exported to 24 member countries and the 150,000 CFP practitioners that make up the FPSB globally.
- We have built a curriculum with 17 Australian Universities for degrees in financial planning. As at the 1st July 2013 all new members of the FPA will be required to hold, as a minimum, an approved undergraduate degree.
- CFP certification is the pre-eminent certification in financial planning globally. The educational requirements and standards to attain CFP standing are equal to other professional bodies, eg CPA Australia.
- We are recognised as a professional body by the Tax Practitioners Board

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Review of tax and corporate whistleblower protections in Australia

FPA submission to

The Treasury

3 February 2017

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Introduction

The disclosure of information by whistleblowers plays a vital role in uncovering and addressing suspected misconduct or wrongdoing to protect consumers, businesses, and the provision of government services. Weeding out illegal and unethical behaviour and practices is essential for the strength of Australia's economy and prosperity of the community.

Strong, appropriate protections must be established to encourage and support whistleblowers to come forward.

The user perspective

The purpose of whistleblower protections is to create an environment that keeps whistleblowers safe from reprisal and to minimise the potential impacts on their professional and personal life, so as to encourage individuals and entities to disclose information about suspected wrongdoing.

This is an enormously complex task and must be approached from the 'user's experience'; that is from the whistleblower's perspective.

The experience of high profile whistleblowers clearly shows the current regulatory and corporate environment does not provide adequate protections to encourage others to disclose information. As described by Adele Ferguson[2], there is a high price to pay for turning whistleblower under the current system, especially when the whistleblower uses the official channels available such as internal reporting to the company or to a Regulator.

Identified whistleblowers, and even those suspected of turning whistleblower, are often portrayed negatively and shunned for betraying the implied trust of their bosses and colleagues. Whistleblowers are often bullied, face a daily atmosphere of suspicion and intimidation, loose their job and their professional reputation destroyed making it near impossible for them to gain employment in their chosen industry again. This can occur even in the absence of obvious victimisation.

It is hard to imagine how stressful it would be to endure the consequences of being a whistleblower. Some have faced death threats and have been diagnosed with post-traumatic stress disorder (PTSD), with the stress leading to family breakdowns.

The impacts go the heart of the motives of the whistleblower – they are not driven by reasons of self-glory or vindication, but speak out for the greater good hoping to make a difference, usually with the end consumer top of mind. However, very few people will decide to disclose information and pay the high personal price to do the right thing under the current system.

Recommendation

A new whistleblower protection regime should be developed from the whistleblower's perspective(not the Regulator's perspective) to address the issues experienced by past whistleblowers.

[2] Adele Ferguson on the cost of whistleblowing and need for a bank royal commission, SMH, 6 May 2016

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Application of whistleblower protections within the law

The Government's discussion paper focuses on tax and corporate whistleblower protections in relation to laws administered by ASIC and the ATO. However, it does not adequately consider all incidences that may involve a whistleblower disclosing information about a person or entity regarding a potential corporate wrongdoing or breach of a law relating to Government services. For example:

- A person within a company may disclose information about suspected wrongdoing occurring by that company (ie a current or former employee, contractor, etc)
- An individual or company may disclose information about a suspected wrongdoing of an individual rogue colleague or employee (ie. information is about suspected misconduct of an individual within a company but not the company itself)
- An individual or company who is a client of a service provider may disclose information about suspected wrongdoing by that service provider
- A service provider may disclose information about a suspected wrongdoing of client who may be an individual (eg a financial planner is a whistleblower about a client's tax affairs)
- The information disclosed may relate to suspected breaches of laws administered by ASIC, APRA, AUSTRAC, ATO, Fair Work Ombudsman, Department of Human Services, Medicare, etc.
- Whistleblowers may choose to disclose information to a company, a Regulator, a government agency, a professional body, media, or other organisation or individual professional they feel may be able to act on the information.

From an individual's Centrelink fraud required to be reported to AUSTRAC and tax evasion to the ATO, to a licence breach of financial advice requirements reported to ASIC, and super fund breaches to APRA (for example), whistleblower activity crosses the enormous breadth of all Commonwealth laws.

Individual whistleblowers are usually lay persons (ie. they are not a lawyer) disclosing information about activity they believe is suspicion or wrong. A lay person does not usually have the legal knowledge to relate the suspicious activity to the relevant legal requirements. It is the organisation that receives the information that has the expertise or access to the expertise to determine whether there has been a breach of the law. As evident by past ASIC investigations, some wrongdoing involves breaches of provisions of multiple Acts and span multiple government agencies. It must be the role of the recipient of the disclosed information to determine if there are reasonable grounds for a suspicion of wrongdoing, not the whistleblower.

Many laws, such as the Anti Money Laundering and Counter Terrorism Financing (AML/CTF) Act and tax law, also mandate professional service providers to report suspicious behaviour of customers, compelling the service provider into the role of whistleblower. These obligations require entities to report suspicious behaviour based on an honest belief that wrongdoing has occurred, not provide information based on an objective test or to show reasonable grounds for reporting such information. This approach recognises the fact that entities may be small, medium or large organisations; and that not all entities have the expertise to determine whether an actual breach of the law has occurred.

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To encourage the reporting of suspected wrongdoing, whistleblower protections must be consistent, easy for individuals and entities to understand, and apply to all whistleblowers not just in certain circumstances and under certain conditions. The inclusion of provisions in each separate Act risks inconsistent and inadequate whistleblower protections that could discourage disclosure of information.

Therefore, one set of whistleblower protections must umbrella all Commonwealth laws.

Recommendation

A new whistleblower protection regime should be developed to cover all Commonwealth laws.

Separate whistleblower agency / commission

ASIC, ATO, AUSTRAC and other regulators and government agencies each have limited regulatory capture based on the laws they administer and their stated role. No existing regulator or government agency has sufficient regulatory reach to provide effective protections to cover all incidences of whistleblower activity in relation to Commonwealth laws. Charging one existing regulator or agency with the oversight of whistleblower protections would result in gaps in the effectiveness of the regime.

Regulators and other agencies also have multiple interests, both within the organisation and more broadly with its role in the bureaucracy of government and its place within the political landscape, that create many inherent conflicts of interest with the provision of whistleblower protections. As evident with the parliamentary Inquiry into the performance of ASIC, whistleblower disclosed information can highlight inefficiencies and poor performance within a regulatory body. This results in a conflict between the protection of the whistleblower and the organisation's need to maintain community and stakeholder confidence in its ability to provide effective regulatory oversight of an industry(s) on behalf of the Government, the need to investigate and act appropriately and efficiently on the disclosed information, and the natural desire to protection its own reputation.

While regulators and other agencies may be able to act on disclosed information, such organisations are not able to protect whistleblowers. Only a separate, independent government agency specifically tasked with whistleblower protection can fulfil this role.

There is also no advocate for whistleblowers within the current system. This forces whistleblowers to rely on their own resources and knowledge or seek expensive professional advice when making decisions in relation to disclosing information, increasing the risk of whistleblowers being blindsided and exposed. This is a significant deterrent for people coming forward.

With 'user experience' at the fore of a whistleblowing regime, a separate, independent agency should:

- act as an advocate for whistleblowers
- be the primary source of information to support whistleblower individuals and entities, before, during and after the disclosure of the information
- rely on and protect the anonymity of the whistleblower
- operate a secure online reporting system for whistleblowers

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- be responsible for raising awareness of whistleblower protections, risks, and implications to Australian consumers and entities. This should include educating potential whistleblowers about their options for disclosing information that best protect their identity.
- be responsible for monitoring internal whistleblower procedures companies operating within Australia must have in place and adhere to
- work with regulators and other government agencies responsible for acting on and investigating the disclosed information, to ensure whistleblower protections are maintained throughout the investigation and handling of the information
- put in place a risk based assessment framework for:
    - receiving disclosed information
    - assessing the public risk of the misconduct
    - assessing the risk of the whistleblower being identified and the nature of any potential consequences given the nature of the disclosed information
    - identifying malicious, misguided, and aggrieved claims
- assist whistleblowers who may be subjected to reprisal
- facilitate or oversee whistleblower access to appropriate compensation
- report to Government on the operation of the whistleblower protection regime, including identifying gaps that may put whistleblowers at risk and deter information disclosure
- administer the whistleblower protection regime.

ASIC should not have oversight of whistleblower protections. However, appropriate whistleblower protections should be incorporated into all regulator and agency processes.

Appropriate and efficient information sharing arrangements should be established between the whistleblowing commission, regulators and agencies tasked with investigating the disclosed information, and other relevant entities. To ensure procedural fairness, such parties should have the ability to share information under strict confidentiality provisions and MoU arrangements to facilitate effective and timely investigation of claims of suspected wrongdoing.

This should include information sharing arrangements between government agencies, regulators, law enforcement, approved professional bodies, other parties that may specifically enhance the effectiveness and timeliness of investigations.

The information sharing arrangements must be appropriate and protect the whistleblower's identity as the priority and at all times.

The separate whistleblower agency should also consider and develop

- appropriate requirements for acting on disclosed information, such as timeframes for initial consideration of information
- processes and mechanisms for ongoing liaison with whistleblowers regarding assistance and further involvement that may be helpful to progress the investigation, when necessary

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Recommendation

A separate Government agency, independent of regulators and other government agencies, should be responsible for whistleblower protections including oversight of the new regime, advocacy for whistleblowers, and the protection of whistleblower anonymity.

Anonymity for whistleblowers

It is unrealistic and impossible to guarantee the protection of a whistleblower's identity. Individuals and entities often disclose information to organisations and authorities believing their identity is protected. However, innocuous pieces of information can give rise to suspicion about the whistleblower's identity and can cause irreparable professional and personal damage.

As demonstrate by reported experience of recent high profile whistleblowers, the inadequacies of the current system encourages the disclosure of information to third parties such as the media. Such disclosure ignores the complexity and sensitivity of some claims. It places the information in the public domain increasing the risk of whistleblower identification, misreporting, and future negative media commentary about the whistleblower. It also increases the risk of the whistleblower experiencing some kind of impact on their lives, not necessarily at the hands of the accused (eg. A disgruntled shareholder or a follow up media article).

Third parties have a history of publicly disclosing information based on good faith with or without appropriate and non-biased investigations (particularly media). This can have flow on effects, particularly if claims are found to be malicious or unfounded, to the entity/company, its employees, suppliers, shareholders, and ultimately consumers, individuals.

Inappropriate public disclosure can also undermine future legal investigations and prosecutions relating to the disclosed information.

A new regime must protect the whistleblower by encouraging the disclosure of information using appropriate channels; channels that can act on the information while protecting the whistleblower.

The best protection for whistleblowers is a system that supports anonymity.

Recommendation

The whistleblower protection regime should recognise the right to anonymity. That is, anonymous disclosure to encourage whistleblowers (both individuals and entities) to disclose information about suspected wrongdoing.

Good faith

As previously mentioned, individual whistleblowers do not usually have the legal knowledge to relate the suspicious activity to the relevant legal requirements. It is therefore unreasonable to require an individual to meet an objective test when disclosing information about a suspected wrongdoing.

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Similarly, the AML/CTF Act recognises that entities also may not have the expertise to determine whether an actual breach of the law has occurred. Entities reporting suspicious behaviour to AUSTRAC must do so based on an honest belief that wrongdoing has occurred. When reporting suspicious matters entities are not required to meet an objective test or to show reasonable grounds for reporting this information.

The information disclosed by an individual or entity may represent only one piece of the puzzle. This piece of the puzzle may be pertinent to other information received by an authority from another completely unrelated whistleblower. It may take multiple pieces of information from multiple sources for an authority to make sense of the disclosures and identify the potential breach of the law.

This puts the onus on the legal authority receiving the information to investigate, including gathering information from multiple sources, to create a complete picture regarding the potential wrongdoing.

The whistleblowing regime must encourage all people and entities to disclose information to assist authorities in gathering all the data necessary to act on suspicious behavior or suspected breaches of the law.

Recommendation

Individual and entity whistleblowers must be permitted to disclose information in good faith based on a suspicion that wrongdoing has occurred. The regime should place the requirement to show reasonable grounds and determine a breach of law on the appropriate authority receiving the disclosed information.

Categories and definition of whistleblower

The discussion paper proposes categories of whistleblowers in relation to the Corporations Act, as well as a definition of tax whistleblower. The new regime should include a single definition of whistleblower, applicable to all relevant Commonwealth laws including the Corporations Act and tax laws.

As a principle, any individual and any entity should be considered a whistleblower and be afforded the same whistleblower protections.

Service providers, such as financial planners, are required by law to act as a whistleblower on clients for tax evasion, Centrelink fraud, ML/TF suspiscious matter reporting, etc. This places livelihoods at risk from reprisal as many financial planning practices and other professional service providers are small businesses reliant on a strong reputation and client referral. Clients who feel ‘dobbed in’ by a financial planner, or other professional service provider, may inflict damage on a business’ reputation. Companies and service providers must also be afforded protection, particularly from retaliation, to encourage them to disclose information as a whistleblower.

A single definition of whistleblower must be easily understood and encourage individuals and entities to disclose information about potential wrongdoing. It should therefore recognise all parties that may act as potential whistleblowers.

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The definition of tax whistleblower may offer a good starting point. However, the tax whistleblower definition proposed in the discussion paper should be expanded to include:

- Contractors who supply services or goods to the company (current and former)
- Officers, such as directors of the Board of the company (current and former)
- Former employees
- Representatives of the company, such as those authorised under the Corporations Act to operate a business under the company's licence
- Financial service providers and professional service providers
- Tax agents including tax (financial) advisers
- Social worker (may suspect social security misconduct by an individual for example)
- Medical practitioner
- Third party (such as a friend or family member acting on behalf of an employee where the employee is unable to disclose the information directly)
- Business or individual

However, the FPA supports the approach taken by the Australian Law Reform Commission (ALRC) in relation to reporting of suspected elder abuse. The ALRC proposes that "*any person who reports elder abuse"* should be afforded the same protection[3].

Recommendation

The new regime should include a single definition of whistleblower that is easily understood, encourages individuals and entities to disclose information about suspected wrongdoing; and recognises that all individuals and businesses may act as potential whistleblowers and should be afforded the same protections.

To whom should information be disclosed?

There must be safe avenues for the disclosure of information, both for the protection of the whistleblower and the protection of the entity receiving the information.

There have been reports of consequences to the whistleblower from disclosing information through official channels such as the company involved or the relevant Regulator. There have also been reports of heightened regulatory action resulting from whistleblowers disclosing information directly to the media.

The current system limits the application of whistleblower protections depending on, among other factors, to whom the information is disclosed. The discussion paper proposes expanding the application of whistleblower protections to cases where the information is disclosed to media, parliamentarians and other third parties. This proposal does not take into account the purpose of whistleblower protections and a common underlying motive for disclosing information – that is to encourage individuals and entities to report suspected wrongdoing in a safe environment that affords

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them protection; and the whistleblower's intention for the recipient of the information to act on that information and to stop the suspected misconduct.

However, journalists and members of parliament may not have the necessary knowledge of the relevant industry or skills to determine if their own actions may put the whistleblower at risk. As previously stated, innocuous pieces of information or enquiries can give rise to suspicion about the whistleblower's identity and can cause irreparable professional and personal damage. Acting on the information by some third parties can also jeopardise future investigations conducted by legal authorities about the suspected misconduct, and place the third party at risk of future litigation.

The new regime must create a safe environment for whistleblowers and third parties. A whistleblower may choose to disclose information to a third party such as the media, a local member of parliament, a professional body, or a union for example. The whistleblower should be afforded legal protections regardless of whom they disclose the information to, as long as it is provided in good faith.

However, the new regime should limit the protection afforded to third party recipients of whistleblower information depending on their actions:

- If the third party recipient of the information either encourages the whistleblower to disclose the information to the new whistleblower agency, or merely passes on the information to the whistleblowing agency or relevant authority, such third parties should be protected under the new regime from potential litigation or reprisal.

- If a third party makes a judgement or acts on the disclosed information, the third party should not be protected under the new regime and must take on the risk of protecting the whistleblower.

This includes information disclosed anonymously by a whistleblower to a third party.

Recommendation

The new regime should provide whistleblowers' protection regardless of whom they disclose the information to, as long as it is provided in good faith.

The media, parliamentarians, professional bodies, unions and other third party recipients of whistleblower information (including anonymous disclosure), should be afforded protection from litigation and reprisal when acting as an intermediary for the provision of the information to the whistleblower agency or a legal authority.

Compensation, rewards and penalties

With such a high risk of suffering significant personal and professional damage, the FPA questions whether it is possible to adequately or appropriately compensate whistleblowers.

However, whistleblower compensation arrangements are vital and should include the following aspects:

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- Funding of compensation - should be based on funds recouped from the accused resulting from the whistleblower information, and / or penalties and fines imposed on accused companies or individuals. It should not be funded via an industry levy.

- Companies and service providers - who act as a whistleblower on clients as required under law should be given access to appropriate compensation if the disclosure results in damage for the service provider/company. Consideration should be given to who pays for compensation when the company is required to disclose information under the law and the accused is an individual.

- Penalties for breaches of the law - the new whistleblower regime and /or relevant Commonwealth laws should ensure penalties and fines for breaches of the law are adequately and appropriately bolstered to compensate whistleblowers.

The FPA does not support rewards for whistleblowing. Rather the regime should focus on protecting and compensating whistleblowers appropriately and effectively. A moral hazard is created by whistleblower financial rewards being built into the system.

Recommendation

The new whistleblower regime should include appropriate compensation arrangement for all whistleblowers, funded through funds recouped from the accused and/or penalties and fines for breaches of the law. There should not be rewards for whistleblowing.

Professional bodies and whistleblower protections

The FPA is close to our members who operate in a variety of roles across the spectrum of financial services firms. As a professional body, we are privy to concerns of misconduct and gather valuable information and data via our formal complaints investigations and our anonymous disclosure service.

As a non-Government entity, like most third parties, professional bodies cannot guarantee the confidentiality of disclosed information as there is a risk of being compelled to produce the information by law – such as by subpoena or other legal process. This potentially exposes professional bodies to future litigation as a recipient of whistleblower disclosed information.

However, professional bodies offer a unique contribution to combatting misconduct and other wrongdoing and should be considered as part of the new whistleblower protection regime:

- Individuals and entities who disclose information in good faith to professional bodies should have access to whistleblower protections

- Professional bodies who receive information from whistleblowers in good faith and pass the information onto the whistleblower agency or relevant legal authority, should be afforded third party whistleblower protection, and

- The new whistleblower agency, regulators and government agencies should be authorised and encouraged to enter into MOUs to permit information sharing with recognised professional bodies.

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Recommendation:

The new whistleblower regime should protect whistleblowers and professional bodies when information is disclosed in good faith, and permit information sharing between recognised professional bodies, the whistleblower agency, regulators and legal authorities.

Competing duties and confidentiality clauses

Employment agreements commonly include confidentiality clauses. There is a lack of clarity around the legal implications for reporting suspected wrongdoing by an employee (current or former), officer, or representative of a company and such confidentiality clauses.

Similarly, most client contracts include provisions to protect the confidentiality of information disclosed by and about or pertaining to the client. However, professionals have a duty to the profession and the public good to disclose suspected wrongdoing. This creates competing duties to the client versus the profession and the community.

Financial planners and other entities also have an obligation under the law to report suspicious matter to AUSTRAC.

Recommendation:

Whistleblowers should have access to protections when required to breach contract duties with their employer or client (for example) to disclose information of suspected wrongdoing.

Legal privilege

Legal professional privilege is a client focused duty. It requires lawyers to maintain their confidential duty to their client. Under legal privilege a lawyer is not permitted to disclose information unless a client waives their right to legal privilege and permits the disclosure.

Financial planners are required to enquire about various aspects of their client's circumstances in order to provide personal advice that meets the best interest obligations in the Corporations Act. Financial planners are also required under law to report clients suspected of tax evasion, Centrelink fraud, suspicious matters relating to money laundering and terrorism financing, and other wrongdoing.

Lawyers and tax agents who are accountants have similar reporting obligations however, lawyers and tax agents who are accountants also operate under legal privilege. Financial planners do not operate under legal privilege.

Tax agents must register with the Tax Practitioners Board (TPB). Financial planners are also required to register with the TPB as a tax agent or tax (financial) adviser. A tax (financial) adviser is considered by the TPB as a type of tax agent.

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The inconsistent application of legal privilege places an unfair and significant risk on one group of professional service providers who are required by law to report on their clients without the same protections afforded to their professional service counterparts.

The financial planner-client relationship is not protected by privilege. This puts at risk the trust client's place in their planner, and may impact the disclosure of information made by a client during the 'know your client' process used by planners to understand a client's circumstances. This is fundamental to ensuring the quality of the advice and in meeting the legal best interest requirements in the Corporations Act.

Recommendation

1. Develop the concept of financial planner-client professional privilege to protect a client's financial disclosures to their financial planner for the purposes of obtaining financial advice

2. Clarify how conflicts between the financial planner's duty to preserve his or her client's privilege, and the financial planner's legal obligations to disclose information, are to be resolved.

Reference checking disclosure

As discussed above, high profile whistleblowers have experienced loss of employment and considerable damage to their professional reputation significantly impacting their ability to gain future employment in their chosen industry.

Whistleblower protections should prevent an employer from disclosing to a recruiter or potential employer or other entity conducting an employment reference check, the fact that a current or former employee (including contractor etc) had been a whistleblower.

Corporate misconduct is currently investigated by Regulators and professional bodies and can occur in many different forms and on a variety of scales. While many high profile investigations indicate a concern with the corporate culture, while some show that the misconduct was at the hands of a rogue individual rather than the business.

The new whistleblower regime should minimise the risk of rogue individuals who have been proven to have breached the law continuing to put consumers at risk.

The new regime should also require entities to disclose to recruiters and potential employers or other entity conducting an employment reference check, proven matters of misconduct or breaches of the law by a current or former employee (including contractor etc).

Recommendation

The new regime should include reference checking requirements for entities and recruiters.

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