

Whistleblower Explained or Who Can Become a Whistleblower and What Protection Can Be Expected

On 18 November 2021, a draft law was published on the protection of persons who report breaches of law with the goal of implementing the Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law into the national law. The period for the implementation expires on 17 December 2021. Currently, the draft law has been sent to public consultation. Since the main mechanism preventing individuals from reporting such breaches is the fear of retaliation, the principal purpose of the Directive and the implementation law is to provide a proper level of protection to whistleblowers.

WHO IS A WHISTLEBLOWER?

According to the provisions of the Directive and the implementation draft law, a whistleblower is a natural person who, thinking of the welfare of an organization where they are employed or the public welfare, reports on information (including a justified suspicion) they have obtained in the context of their employment, about breaches of law which have occurred or are likely to occur in that organisation.

First of all, it is the employee who becomes a whistleblower. In most cases, it is the employees (former and current), usually with long seniority, who report the breaches. According to the provisions of the Directive and the implementation draft law, apart from the employees, the following persons can be considered whistleblowers: job applicants, individuals performing work other than under employment agreement, entrepreneurs, shareholders, partners, members of the legal entity's organisational bodies, individuals under the supervision and direction of contractors, subcontractors or suppliers, interns and volunteers.

PROTECTION AGAINST RETALIATION

The principal goal of the Directive is to protect a person reporting information about law breaches against retaliation or negative consequences related to reporting the law violations. At the level of the implementation draft law, such protection is provided through several legal means depending on the status of a whistleblower.

A whistleblower performing work under an employment agreement cannot experience disadvantageous treatment because of making the report. Disadvantageous treatment should be interpreted broadly, including, but not limited to, a refusal to establish employment, termination of employment upon notice or termination of employment without notice, reduction of remuneration or withholding of promotion. The employer may discharge themselves of liability for the above actions by proving that their reasons were objective, i.e. if they are able to prove that the deterioration of the employee's situation was not related to the reporting they made. Otherwise, they will be obliged to pay damages to the employee of at least the minimum amount of remuneration.

As a general rule, comparable protection will be available to individuals performing work otherwise than under employment agreement, e.g. under a contract of mandate – it will not be allowed to treat them differently because of the reporting. Disadvantageous treatment would involve, in particular, termination or refusal to establish a legal relationship, unless the other party proves that their reasons were objective. In case of disadvantageous treatment other than termination of the contract, the employing entity will be obliged to pay damages of at least the minimum amount of remuneration. Moreover, pursuant to the draft law, the unilateral legal act of terminating the legal relationship (e.g. termination upon notice or a statement of termination without notice) because of the reporting will be ineffective.

According to the provisions of the draft law, in connection with making the report, the whistleblowers would also be protected against their disciplinary liability as well as liability for any damage arising due to the infringement of the rights of others or their obligations set out in the provisions of law, and in particular, with regard to defamation, infringement of personal rights, breach of copyright, breach of personal data protection rules, breach of secrecy (including trade secrets). A whistleblower would be entitled to this type of protection only if the person making the report has justified reasons to believe that the report is necessary to reveal a breach of the law.

Similar protection rules apply to persons assisting in making the report or connected to the persons reporting the breaches.

In addition to the above-mentioned consequences, pursuant to the draft law, implementing retaliation against a whistleblower will be subject to a fine, restriction of liberty or imprisonment for up to three years.

GOOD WILL OF THE WHISTLEBLOWER MATTERS

Both, in the provisions of the Directive as well as the implementation draft law, **the protection for the whistleblower is not absolute and depends, first of all**, on their motives for making the report. Namely, the whistleblower would be protected on the condition that they have justified reasons to believe that the information about the breach of law qualifying for reporting is true at the moment of reporting. The whistleblower should not be motivated by their own interest, but the welfare of the organization where they work (or have/would have worked) or the public welfare. **Secondly**, the protection is conditional on following the required order of action – as a rule, first, the report should be made within the organisation or to the dedicated authorities, and only when it does not bring any effect – it should be brought to the media.

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