Ius Laboris Poland Global HR Lawyers
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PRO HR

WHISTLEBLOWERS

FOREWORD

Since the Whistleblower Protection Act of 14 June 2024 was adopted and now is pending its entry into force, we are presenting a special edition of PRO HR dedicated to what the new law will change for the employers. During more than 5 years of discussion about whistleblowers, it was easy to lose the sense of this regulation. Therefore, let us remind you what these regulations are to be used for.

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TOPIC 1

Why protect the whistleblower?

Statutory guarantees for the protection of persons who report breaches are implemented to make it easier to acquire information on breaches in sensitive areas of the functioning of EU Member States, both in the public and private sectors. The Polish legislator has extended the list of reported breaches to include corruption and human rights violations.

Management of the organisation

Communication channels established for whistleblowers are intended to improve the flow of information within the organisation. The aim of the EU Directive was to give priority to internal reporting. Then, the organisation is closest to the breach, it can react the fastest, perhaps without the need for external reporting or public disclosure.

This is not about “airing your dirty laundry”, but about proper management of the organisation and maintaining corporate governance.

What is crucial is what the employer (its organisation) will do with the information received from the whistleblower, whether the employer will investigate the reported suspicion sufficiently, reliably and independently or will approach the case so that the whistleblower will decide to handle the case outside the organisation and the employer will lose control over the course of events.

Whistleblower, and not a snitch

We do not know whether the guarantees involving prohibition of retaliation against the reporting person will be sufficient to encourage them to share information about the breaches. Some legislations provide for rewards for whistleblowers. However, we have no doubt that changes in the law may not be sufficient to change people’s behaviour and mindset.

That is why it is so important to train employees and encourage information sharing, so that such behaviour is seen as an expression of concern for the common good and not as a manifestation of disloyalty and denouncing.

Janusz Tomczak

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TOPIC 2

Whistleblower – what does it mean?

The Act describes "whistleblowers" as persons who, in connection with their work, report (either internally or externally) or publicly disclose the breach of law, provided that they act in good faith. The Whistleblower Protection Act does not apply to persons reporting breaches of labour law unless employers decide so.

Who can report?

The whistleblower status is given to anyone who has acquired (and disclosed) information about potential breaches or circumvention of law in a "work-related context". This means that organisations must receive and process reports from current and former employees, candidates for employment, trainees, people providing work under civil contracts (e.g. B2B, contracts of mandate, contracts for specific work), members of the company's bodies or volunteers etc. This is not a closed list; what matters is that the whistleblower must remain in any professional relationship with the company in which a breach of law has occurred.

Conditions for protection

The whistleblowers are protected from the time of reporting, provided that they had reasonable grounds to believe that the information reported was true and that it was information on the breach of law (good faith of the whistleblower). Any case of false information knowingly reported excludes protection against dismissal and exposes the reporting person to criminal liability for a criminal offence.

Labour law and compliance regulations

Recently, there has been a lot of discussion about the implementation of protection for whistleblowers reporting labour law breaches. Such extension of the Act scope would mean that persons reporting suspicions of mobbing, harassment, violation of OSH rules, working time standards or trade union rights would become "whistleblowers" within the meaning of the new Act. In the end, however, labour law was not covered by the Act.

This does not mean that employers cannot extend their own internal procedures to include also cases of labour law breaches. The Whistleblower Protection Act allows breaches of internal compliance standards and regulations lawfully established to be covered too. Of course, the extension of the list of breaches the reporting of which will involve protection, will impose additional obligations on employers. On the other hand, this will enable controlling a much wider range of events within the company, align protection standards and increase employee confidence in the internal reporting procedure. The latter will mitigate the risk of external reporting (e.g. complaints to the National Labour Inspectorate).

List of law breaches

The list of reports, which will obligatorily need to be covered by the Act, is on the one hand quite wide, and on the other one, specialised. At the last stage of working on the bill (still within the government), the list was extended to include a suspicion of corruption (in its broadest sense, including nepotism or conflict of interest) and breach of constitutional human rights and freedoms of man or the citizen by state authorities.

Internal procedures must cover e.g. reports of breaches of law in the following areas: public procurement, protection of privacy and personal data, security of networks and ICT systems, consumer protection, financial interests of the State Treasury, local government or the European Union.

Ewelina Rutkowska, PhD

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TOPIC 3

Whistleblower protection – what does it involve?

Whistleblower protection consists in ensuring of confidentiality of all information acquired from such whistleblower and the whistleblower's data, prohibition of retaliation in response to reporting or public disclosure and prohibition of initiating persistent procedures against the whistleblower.

Retaliation and employee assessment

The Act contains an open list and a broad definition of "retaliation". Retaliation is any behaviour that may have an adverse impact on the whistleblower, which is caused by reporting or public disclosure by the whistleblower. The employer can still make any decision concerning the whistleblower based on labour law, it may even terminate the employment contract. However, such decision cannot be dictated by the reporting.

It will be up to the employer to prove that the decision (e.g. dismissal) was caused by something else, e.g. assessment of the work of the reporting employee.

Whistleblower immunity

Whistleblowers, due to the reporting, may not be accused of breach of personal rights, violation of secrecy or employee duties and no related proceedings can be instituted against them. Such specific immunity may lead to discontinuation of cases unless it is proven that they are not related to the reporting. The prohibition of initiating persistent procedures applies to internal (disciplinary), civil (including labour law) and criminal procedures.

Confidentiality – the key to protection

The key to effective whistleblower protection is the confidentiality of their data.

The fewer people within the organisation have access to reports and know who the whistleblower is, the lower the risk of retaliation as retaliation will not be behaviour taken by a person who is unaware of the reporting. By definition, such behaviour cannot be retaliation because it is not related to the reporting.

Damian Tokarczyk, PhD

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TOPIC 4

Step-by-step implementation of the Act

Implementation of the Whistleblower Protection Act requires review of the existing procedures, establishment of reporting channels and persons operating them and preparation (in consultation with employees) of the appropriate procedure.

Schedule of actions

The Whistleblower Protection Act will enter into force (for private entities) three months after its publication in the Journal of Laws. During this time, employers must adapt their organisation and procedures to the new requirements. When planning such actions, consultation with trade unions or employees' representatives must be undertaken.

How to implement the Act?

Employers who have reporting systems for breaches or irregularities already in place must adapt them to the Act. If there are no such regulations, they must be developed from the scratch. Companies must establish reporting channels; the Act requires reporting to be made at least in writing (also online) and orally.

Reports can be received by a person within the organisational structure of the company (e.g. compliance officer, HR director), an organisational unit of the company (e.g. legal department, compliance department, HR department), as well as a third party entity (for example, a channel for the group managed by the parent company). In the latter case, it is necessary to conclude an agreement laying down the terms of cooperation. Importantly, a group company that receives reports concerning other group companies should be treated as a third party.

The reporting procedure must be consulted with the public, i.e. trade unions or employees' representatives. Such consultation may also include separate policies for reporting breaches in the area of labour law.

What about group policies?

Within groups, companies may establish a common internal reporting procedure though this does not release individual companies from consultation with the public and formal establishment of the procedure by the management board. Entities with at least 50 but not more than 249 workers may establish common rules for receiving and verifying internal reports and follow-up. This may include e.g. common investigations or use of the same reporting channels. Such rules must be laid down an agreement between these entities, but the Act does not require the entities to be members of the same group.

Łukasz Kuczkowski

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TOPIC 5

System of incentives and penalties

The internal reporting procedure may (but does not have to) include a system of incentives encouraging internal reporting. In turn, breaches of whistleblowers' rights are liable to prosecution and penalties.

Training and incentives

It should be important for companies that implement systems for reporting breaches of law that employees want to use them. Thus, they need to get to know them during training courses and through consistent communication. There is no need to convince anyone that there is more benefit to internal reporting and internal proceedings than to notify public authorities. The Act does not specify what incentives for internal rather than external reporting can be introduced by the employer. It only stipulates that these should not be monetary incentives. It is a pity since in many countries with developed whistleblower protection systems, remuneration is already the standard.

The best incentive for internal reporting is strict observance of the procedure by the employer. Reliable processing of reporting, informing the whistleblower about the investigation progress and, above all, effective protection against retaliation are the most important measures encouraging the use of internal reporting channels. Reporting and participation in proceedings may also be taken into account when assessing the employee's attitude for the needs of promotions, training and salary increases, while maintaining confidentiality of the whistleblower's data.

Criminal liability

The Act's chapter on criminal liability is much more extensive. First of all, it will be a criminal offence for anyone to use retaliation, that is, making the legal or actual situation of the whistleblower worse in connection with the reporting. Therefore, such offence can be committed not only by the employer (e.g. a member of the management board), but also by the superior, the head of the department / organisational unit and even

a whistleblower's colleague. It will also be punishable to prevent or hinder reporting by the whistleblower. This may involve misleading as to the way of reporting, active and persistent deterring or direct threatening the whistleblower with negative consequences.

Persons receiving reports and conducting investigations must carefully protect the identity of the whistleblower. One should remember that it can be disclosed upon the consent of the whistleblower or at the request of state authorities. In other cases, such disclosure will be a criminal offence.

The Act also provides for criminal liability of a person who knowingly makes a false report or public disclosure. Not only will they commit a criminal offence liable to up to 2 years of imprisonment, but they will not enjoy any protection. People affected by reporting false information will be able to claim compensation for their damage or harm against the "snitch" and even accuse them of defamation.

Damian Tokarczyk, PhD

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EVENTS

We invite you to participate in the 8th edition of the Compliance Day conference.

Save the date: 3 October 2024

Hotel Verte, Warsaw

The event will be held in Polish.

For more details click HERE.

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