

Newsletter Prawa Pracy i HR

Whistleblowers – the latest bill

Soon Polish entrepreneurs will be burdened with numerous obligations in the field of compliance, this time related to the protection of persons reporting abuses or violations of the law - the so-called **whistleblowers**. Poland must implement an EU directive that effectively protects whistleblowers (Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons reporting breaches of EU law). It is already known that Poland will implement EU regulations in the form of an act on the protection of persons reporting breaches of the law, and the latest draft of this act is dated April 6, 2022. Rycak Labor Law and HR firm presents the most important assumptions of the bill on the protection of persons reporting breaches of the law. What has already been decided is the need for employers to prepare appropriate procedures, **including a procedure for reporting violations of the law and for taking follow-up, hereinafter referred to as "the internal procedure"**. The most difficult tasks also include the creation of an appropriate fraud reporting system, communication channels, internal investigation or ensuring the protection of the whistleblower himself, including the personal data of the reporting person and other data allowing for the identification of his / her identity.

Whistleblowers are persons reporting breaches of European Union law who, when reporting, qualify for protection provided that they had reasonable grounds to believe that the reported information on breaches was true at the time of reporting, and made an internal or external report or made a report. public disclosure. These include violations related to public procurement, services, products and financial markets, product safety and compliance with requirements, transport safety, environmental protection, radiation and nuclear safety, food and feed safety, animal health and welfare, public health, protection of privacy and personal data, and the security of

network and information systems, the financial interests of the Union. Whistleblowers reveal information on a range of cases of various gravity: from serious abuses consisting in falsifying the results of methane concentration tests in mines, through information about corruption in the health service, to the abuse of power by superiors. Disclosing such information can often help prevent serious risks in the workplace, preventing the employer from suffering a damage and employees from – losing their workplaces.

So what is the difference between a whistleblower and an informer? The whistleblower aims to protect the public interest, whereas informing serves only the informer. In this regard, the law provides for three types of notifications:

1. **internal** reporting made by means of internal communication channels; this is the preferred method of reporting if the irregularity can be remedied internally and the person aware of the breach has reason to believe that he will not be subject to retaliation;
2. **external** notification submitted to the competent public authorities in accordance with the Directive is not a condition for making use of external reporting without first using internal channels; such a person is protected on an equal footing with an external whistleblower;
3. **public** disclosure, which consists in making information about violations public, in any form.

The Act has a very wide scope of application. The Act applies to a natural person who reports or publicly discloses information about a breach of law obtained in a work-related context, including: 1) an employee, also when the employment relationship has already ended, 2) a temporary employee, 3) a person providing work on a basis other than an employment relationship, including a civil law contract, 4) an entrepreneur, 5) a shareholder or partner, 6) a member of a body of a legal person, 7) a person performing work under the supervision and management of a contractor, subcontractor or supplier, including on the basis of a civil law contract, 8) an intern, 9) a volunteer, 10) an apprentice, 11)

an officer, 12) a professional soldier. The Act also applies to a natural person in the event of reporting or public disclosure of information about a breach of law obtained in a work-related context, prior to entering into an employment relationship or other legal relationship constituting the basis for the performance of work or services or the performance of a function or delivery of goods, or when such a relationship has already ended.

The obligations resulting from whistleblower protection extend to both private sector employers (generally companies with more than 50 employees) as well as public sector employers. In practice, this means that **all "larger" employers** will be forced to implement appropriate procedures.

As already mentioned, an important obligation of the employer will be to establish an **internal procedure** that defines the internal procedure of reporting violations of the law and taking follow-up actions in accordance with the requirements set out in the Act. Pursuant to the draft act, the internal procedure is established by the employer after consultation with: 1) the workplace trade union organization or 2) representatives of employees, selected in the manner adopted by a given employer - if the employer does not have a workplace trade union organization. Consultations should last no less than 7 days and no longer than 14 days from the date the legal entity presents the draft of the internal procedure.

The internal procedure consists of obligatory and optional elements. The obligatory elements include:

1. an internal organizational unit, a person within the organizational structure of a legal entity or an external entity authorized by the legal entity to receive notifications;
2. the methods of submitting reports by the notifier together with his contact address (at least the possibility of submitting reports orally or in paper or electronic form);
3. an impartial, internal organizational unit or person within the organizational structure of a legal entity, authorized to take follow-up actions, including verification of the notification and further communication with the notifier, including requesting

additional information and providing feedback to the notifier; this role may be performed by an internal organizational unit or a person referred to in point 1, if they ensure impartiality;

4. obligation to confirm receipt of the notification to the notifier within 7 days from the date of its receipt, unless the notifier has not provided a contact address to which confirmation should be sent;
5. an obligation to undertake, with due diligence, follow-up actions by the organizational unit or person referred to in point 3;
6. the maximum time limit for providing the notifier with feedback, not exceeding 3 months from the acknowledgment of receipt of the notification or, in the case of failure to provide the confirmation, 3 months from the expiry of 7 days from the date of submission of the notification, unless the notifier has not provided a contact address to which the feedback should be provided;
7. understandable and easily accessible information about making external notifications to the Ombudsman or public authorities and, where appropriate, to the institutions, bodies, offices or agencies of the European Union.

Optional elements of the internal procedure include in particular:

1. indication of violations of internal regulations or ethical standards binding in this legal entity, if the legal entity establishes reporting of such violations;
2. identification of risk factors corresponding to the business profile of the legal entity favoring the possibility of specific violations of law related, in particular, to the violation of regulatory obligations, other obligations specified in law or the risk of corruption;
3. defining a system of incentives to use the internal procedure;
4. information that the notification may in any case also be made to the Ombudsman or a public body, bypassing the internal procedure.

Thus, it is worth **analyzing whether and which optional** elements should be established in this internal procedure,

taking into account the interest of the employer.

Employers will have to ensure that the internal procedure and the related processing of personal data prevent unauthorized persons from gaining access to the information covered by the report and ensure that the confidentiality of the identity of the reporting person, the person concerned and the third party indicated in the report is protected. The protection of confidentiality will apply to all information on the basis of which the identity of such persons can be directly or indirectly identified. Additionally, employers will be obliged to keep a register of internal reports and to act as an administrator of data collected in this register.

EU law obliges us to adopt dissuasive sanctions for retaliatory actions that make it difficult to report or conduct proceedings or violate the obligation to keep the identity of the whistleblower confidential. The Polish legislator provided for the following penalties for employers. And so, hindering the notification is subject to a fine, the penalty of restriction of liberty. In turn, failure to establish an internal procedure for reporting violations of the law or taking follow-up actions, or establishing a procedure that violates the provisions of the Act, is punishable by a fine. An additional incentive to properly establish an internal reporting system is the fact that otherwise employees may be more likely to use external reporting. Rycak Labor Law and HR Firm provides professional legal assistance to employers, including the implementation of obligations under the Act on the Protection of Persons Who Report Legal Infringements, and in particular, the Law Firm develops internal procedures of reporting legal violations and internal procedures.

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Our team consists of very experienced lawyers, with a huge practice in court litigation, labour law assistance on day-to-day services for business companies, HR and compliance practice, which allows us to provide our clients with individually tailored advice.

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