

3 Key takeaways

Whistleblower Protection Act webinar

On 18 February 2023, the Whistleblowers Authority Act was amended to the Whistleblower Protection Act. The Whistleblower Protection Act implements the European Union's Whistleblower Directive which aims to increase protection for whistleblowers. In a recent webinar on the new Whistleblower Protection Act, Geert Raaijmakers, Maartje Govaert, Sascha Allertz, Simone Honig and Nienke Keressies discussed what this means for reporting persons and employers. During the webinar, the over 100 participants got answers to the many questions currently on their minds. These are the three main takeaways.

#1

Stricter requirements on internal reporting procedures for more employers

The obligation to establish an internal reporting procedure for suspected wrongdoing already applied to employers with at least 50 employees. Now, it also applies to employers working in specific sectors (such as the financial services industry) regardless of the number of employees. Within groups, each legal entity with at least 50 employees must have its own internal reporting procedure. There are, however, some possibilities for flexibility, such as sharing resources between medium-sized enterprises (for receiving the report, as well as conducting investigations into it). Internal reporting procedures must meet stricter requirements. Among other things, because it should be stipulated that reporting should be possible in writing, orally or on site, and because concrete deadlines should be given for the acknowledgement of receipt and information on follow-up steps.

#2

Whistleblowers have better protection when they report a suspected wrongdoing

The Whistleblower Protection Act is an improvement in several respects from a whistleblower protection perspective. For instance, the prohibition of prejudice has been extended and the burden of proof has been shifted to the employer. The reporting person only has to prove that he had reasonable grounds to report, and that there was prejudice. It is then up to the employer to prove that there is no causal link. Furthermore, the act provides that confidentiality clauses limiting or depriving the right to report or disclose suspected wrongdoing are null and void in principle. Also, in the case of suspected wrongdoing, a reporting person is not liable for a breach of a confidentiality clause. Finally, reporting persons are also exempt from liability for acquiring or accessing the information contained in the report or made public, unless acquiring or accessing that information is criminalised (e.g. in the case of hacking).

The House for Whistleblowers gets new powers to impose sanctions on employers

The Whistleblower Protection Act will provide the House for Whistleblowers with administrative sanctioning powers towards employers and clients of reporting persons. Sanctions can be used if they:

- do not behave well towards the reporting person;
- fail to follow the recommendations of the House for Whistleblowers; and/or
- have not set up a proper internal reporting channel.

Depending on the nature of the violation and its consequences, the House for Whistleblowers may impose a remedial sanction (an order subject to a penalty for non-compliance) or a punitive sanction (an administrative fine). The new sanctioning powers for the House for Whistleblowers and the amount of the administrative fine it may impose have not yet entered into force. This will be further elaborated in an Order in Council.

In addition, it is possible to enforce both under criminal law and civil law with regard to both employers/clients and reporting persons. For example, defaming a reporting person, employer or client can be criminally sanctioned for libel or slander. If employers, clients or reporting persons violate the confidentiality obligation laid down in the Whistleblower Protection Act, they will act in violation of the prohibition on the violation of a statutory duty of confidentiality, as provided in the Dutch Penal Code. This can also be sanctioned under criminal law.

“The act is an improvement from a whistleblower protection perspective. For instance, the burden of proof in respect of retaliation has shifted from the whistleblower to the organisation. Moreover, new requirements are introduced for internal speak-up policies. We advise organisations to reassess their internal policies in this respect, and do everything they can to build a safe speak up culture.”

Upcoming legislative amendment

The provisions of the act have been in force since 18 February 2023. An exception has been made for organisations with 50 to 249 employees: they have until 17 December 2023 to align their internal reporting procedure with the requirements in the act. The Minister of the Interior and Kingdom Relations is currently working on an order in council to strengthen the internal reporting procedure regarding anonymous reporting. Another outstanding issue is the sanctions that the House for Whistleblowers may impose on employers. The Minister’s aim is to submit the next bill for consultation in autumn 2023. This will include topics arising from the evaluation of the Whistleblowers Authority Act in 2020. There is also a proposal for setting up a fund for the legal and psychosocial support of whistleblowers.

Follow-up: what does this mean for you?

We will be happy to help you draw up or update internal reporting procedures. In the event of a report, we can also advise you on the appropriate follow-up and approach. Do you have questions about the new act or the meaning of specific aspects of it? Or would you like to receive our newsletter on this subject or participate in future webinars? We look forward to hearing from you!

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