

# Legal Alert

## in the field of labour law

6 June 2023

# Weinhold Legal

## Whistleblowing --Whistleblower Protection Act

### Implementation period

The Czech Republic was obliged to implement Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of whistleblowers ("the Directive") by 17 December 2021.

The Directive is to be implemented in the Czech legal system by the Whistleblower Protection Act, a draft of which (the "Draft" or "Whistleblower Protection Act") was submitted to the President of the Republic on 5 June 2023. This Act is also referred to in the media as the 'Whistleblower Protection Act'.

### Purpose

The Directive was adopted to set minimum standards to ensure effective protection for whistleblowers, which is intended to help strengthen the enforcement of EU policies "in which the lack of whistleblowing by whistleblowers is a key factor negatively affecting enforcement and in which violations of Union law can cause serious damage to the public interest."

### Main points of the Proposal

- ▶ provides general legal protection for the whistleblower and protected persons (a whistleblower who knowingly misrepresents facts is not protected); all employers, regardless of size, must provide this protection, and no one may prevent a whistleblower from making a report,
- ▶ introduces an obligation for obliged persons to set up an internal notification system with a set process for dealing with notifications,
- ▶ establishes the obligation of the Ministry of Justice to receive and investigate notifications under the conditions set out in the Whistleblower Protection Act and the conditions under which notifications may be published outside the internal notification system or notification channel of the Ministry of Justice,
- ▶ provides for penalties, both for obliged entities and for whistleblowers of knowingly false information, as well as for other persons,
- ▶ regulates the competence of the Ministry of Justice in the area of whistleblower protection

### Efficiency

The Whistleblower Protection Act shall enter into force on the first day of the second calendar month following the date of its promulgation. If it is still published in the Official Gazette in June 2023, this new legislation will come into force as early as

1 August 2023. And from that date, all obliged persons, except private employers with 50 to 249 employees, should have internal whistleblowing systems in place.

### How to implement the internal notification system most effectively?

The implementation of an internal whistleblowing system under the Whistleblower Protection Act will normally require:

- ▶ determine whether the entity is an obliged person and, if so, whether it will have its own internal notification system (determine how notifications will be received ensure technical measures to operate a secure internal notification system) or share or vet another person to operate it,
- ▶ Appointment of a competent person or persons and their training (this may be an employee or a person outside the obliged person),
- ▶ issue an internal regulation (establish processes) governing the operation of the internal whistleblowing system - investigating notifications and taking corrective and preventive measures (it may be advisable to show examples of the most common violations that may be the subject of a notification at a given employer),
- ▶ train and inform employees,
- ▶ edit personal data processing records and personal data processing information.

A properly implemented internal reporting system can prevent potential damage, play an important role in the event of administrative or criminal proceedings, build corporate culture and reputation, but can also be required by banks, insurance companies, contracting authorities, investors or business partners.

### Announcements

A notification is considered to be "information about a possible unlawful act that has occurred or is about to occur in the case of a person for whom the whistleblower, even indirectly, has performed or is performing work or other similar activity, or in the case of a person with whom the whistleblower has been or is in contact in connection with the performance of work or other similar activity and who is":

- ▶ has the characteristics of a criminal offence
- ▶ is an offence punishable by a fine of at least CZK 100,000,
- ▶ violates the Whistleblower Protection Act,
- ▶ violates any other EU law or regulation in the field of financial services, statutory audit, financial markets, income tax, prevention of money laundering and terrorist financing, consumer protection, product safety, transport safety, environmental protection, functioning of the internal market, etc.

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A notification under the Whistleblower Protection Act must contain the name, surname and date of birth or other data from which the identity of the whistleblower can be inferred. Yes-no notifications were excluded.

### Submission of the notification

Notifications can be made via:

- ▶ an internal notification system to be set up by the obliged person,
- ▶ the notification system set up by the Ministry of Justice, where notifications are screened by authorised Ministry officials,
- ▶ to a public authority competent under another legal regulation or directly applicable regulation of the European Union (e.g. a criminal complaint to the police or a public prosecutor, notification of a possible offence to the competent administrative authority).

Protection shall also be granted to the notifier who makes the notification public under the conditions set out in Section 7(c) of the Proposal.

Conversely, a whistleblower who knowingly makes a false notification will not be protected under the Proposal.

### Announcer

A whistleblower may be a natural person who has become aware of a possible violation of legal regulations in the above-mentioned areas during the performance of his or her employment, service relationship, self-employment, exercise of rights associated with participation in a legal person (partners, shareholders, members of a cooperative), performance of the function of a member of a legal person's body, administration of a trust fund, volunteer activity, performance of professional practice or internship, exercise of rights and obligations arising from a contract whose subject is the provision of supplies, services, construction work or other similar performance. This may also be the case, for example, in job interviews.

If the whistleblower has a reasonable belief that the notification is necessary to detect the violation under the Proposal, the notification is not a violation of bank secrecy, contractual confidentiality obligations, confidentiality obligations under the Tax Code, or confidentiality obligations under other employment or confidentiality laws, except for enumerated confidentiality obligations (e.g. protection of classified information and information threatening ongoing criminal proceedings, in the performance of notarial practice, advocacy, activities of bailiffs, etc.).

### Retaliatory measures and protection of the whistleblower and so-called protected persons

Neither the whistleblower nor persons who have a certain relationship to the whistleblower (a person close to the whistleblower, a person who has provided assistance in ascertaining the information or assessing its reasonableness, a colleague of the whistleblower,

a legal entity in which the whistleblower is active, etc.) (hereinafter referred to as "protected persons") may be subjected to reprisal measures. Reprisal, or retaliatory, measures may include, for example, dismissal from employment, dismissal from service, removal, reassignment, non-renewal of a fixed-term employment contract or non-payment of a personal allowance, change of working hours, etc.

Protection against retaliation of both the whistleblower and the person related to the whistleblower must be ensured by the person for whom they perform work or other similar activity, i.e. any person, not just the obliged person.

### Obligation to establish an internal notification system

In addition to certain public contracting authorities and designated public authorities, the obligation to set up an internal notification system should also apply to:

- ▶ an employer employing at least 50 employees on 1 January of the relevant calendar year, unless it is an obliged person under the Act on Certain Measures against the Legalization of Proceeds from Crime and Financing of Terrorism ("AML"),
- ▶ an employer who is not an obliged person under the AML if it is
  - a person pursuant to section 135(1)(i), (p), (u), (x), (za), (zc) and (zd) of the Capital Market Undertakings Act,
  - a person pursuant to Section 534(a) to (d) of the Act on Investment Companies and Investment Funds,
  - a central counterparty or a trade repository pursuant to a directly applicable European Union regulation governing OTC derivatives, central counterparties and trade repositories,
  - a tied agent authorised to arrange consumer housing credit under the Consumer Credit Act,
  - an insurance or reinsurance company,
  - a person authorised to arrange insurance or reinsurance under the law governing the distribution of insurance and reinsurance, or
  - an institution established in the Czech Republic pursuant to the Act regulating the activities of occupational pension insurance institutions.

For the purposes of this amendment, employees under employment contracts and agreements on work performed outside the employment relationship, irrespective of the amount of weekly working hours, as well as employees of employment agencies are considered to be employees according to the explanatory memorandum to the Proposal.



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Employers employing at least 50 and fewer than 250 employees on the effective date of the Proposal will be obliged to implement an internal notification system under the Proposal by 15 December 2023. Employers employing 250 or more employees will be obliged to do so as well as other obliged persons from the effective date of the Proposal.

### Conditions for the internal notification system

The obliged entity may delegate the management of the internal notification system to another person, without prejudice to the liability of the obliged entity. Thus, all notifications enter the same system.

Private sector obliged entities that employed no more than 249 employees on 1 January of the relevant calendar year may share the internal reporting system or use the internal reporting system established by another obliged entity if it designates the person responsible for receiving the notification.

### Relevant person

The obliged entity shall designate one or more competent persons to receive and assess the validity of the notification. The competent person shall also propose to the obliged entity measures to remedy or prevent the unlawful situation (unless the whistleblower may be exposed), shall be legally bound by confidentiality, even after the termination of the activity, shall act impartially and shall comply with the instructions of the obliged entity, unless they endanger or obstruct the performance of its activities. The competent person shall not be sanctioned for the proper performance of his/her activities.

Only a natural person who is free of consent, of legal age and fully capable of exercising his or her own legal capacity may be a competent person. It does not have to be an employee of the obliged person.

### The competent person shall in particular:

- ▶ shall, at the request of the notifier, receive the notification in person within a reasonable time, but no later than 14 days from the date on which the notifier so requests,
- ▶ shall be obliged to notify the notifier in writing of the receipt of the notification within 7 days from the date of its receipt, unless the notifier has expressly requested the competent person not to notify him of the receipt of the notification or it is obvious that the notification of the receipt of the notification would disclose the identity of the notifier to another person,
- ▶ is obliged to assess the validity of the notification and inform the notifier in writing of the results of the assessment within 30 days from the date of receipt of the notification (can be extended up to twice by 30 days if the case is factually or legally complex),
- ▶ shall notify the notifier in writing of the postponement if it finds that it is not a notification under this Act,

- ▶ shall propose to the obliged person measures to prevent or remedy the unlawful situation if the notification is assessed as justified,
- ▶ shall inform the notifier in writing that measures have been taken to prevent or remedy the unlawful situation (this information shall be given to the person concerned by the obliged person),
- ▶ shall not provide information that could defeat or jeopardise the purpose of the notification,
- ▶ is obliged to keep an electronic record of the data on the notifications received, to the extent prescribed by the Act,
- ▶ is obliged to keep notifications submitted through the internal notification system and documents related to the notification for 5 years from the date of receipt of the notification.

### Internal announcement system

It shall allow the receipt of notifications both orally (an audio recording or a recording that faithfully captures the substance of the oral notification) and in writing. For a person who is not engaged in work or other similar activity, this shall apply only if the guilty party has not excluded the receipt of notifications from that person.

### Obliged person:

- ▶ shall publish on the Internet information on the means of identification through the internal notification system and through the system of the Ministry of Justice, on the competent person, his/her telephone number and e-mail or other address for delivery, and whether the obliged entity excludes the receipt of notifications from a person who does not perform work or other similar activity for the obliged entity,
- ▶ shall inform the person concerned of his/her rights and obligations under this Act (a record must be made),
- ▶ shall ensure that only the relevant person has access to the notifications and that the prohibition on disclosure of data is respected,
- ▶ shall arrange for an assessment of the validity of the notification by a competent person,
- ▶ shall ensure that the notifier is informed of the receipt of the notification and of the results of the assessment of the validity of the notification,
- ▶ shall ensure that appropriate measures are taken to remedy or prevent the infringement following the notification.

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### Inspection and offences

Depending on the type of obliged entity and the specific offence, control in the area of employer protection is carried out by the Ministry of Justice and Labour Inspection.

An individual may be fined up to CZK 50,000 for knowingly making a false report.

The relevant person may be sanctioned for violation of the enumerated obligations listed in the Proposal up to CZK 100,000 (in this amount when providing information that could The relevant person may be sanctioned for violation of the enumerated obligations listed in the Proposal up to CZK 100,000 (in this amount when providing information that could frustrate or jeopardize the purpose of the notification, or in violation of the law provides information about the identity of the marker or protected person under the Proposal without their written consent).

The obliged person may be fined up to CZK 1,000,000, in particular if it allows the whistleblower or protected person to be subjected to retaliation, fails to designate a competent person, fails to ensure the possibility to submit a notification through the internal notification system, fails to ensure that only the competent person can become familiar with the submitted notifications, etc.

### However, the offence may also be committed by other persons who

- ▶ prevents another from filing a report, a fine of up to CZK 100,000 may be imposed,
- ▶ exposes or allows to expose, if employed, a whistleblower or protected person to retaliation may be fined up to CZK 1,000,000,
- ▶ gain access to notifications or to records of data on notifications received and, by providing such information, frustrate or undermine the purpose of the notification, etc.

### Related changes

#### *Changes to the Civil Procedure Code*

If an interim measure is proposed for the protection of a whistleblower under the Whistleblower Protection Act, it will not be necessary to post a bond to secure compensation for the damage or other harm that would be caused by the interim measure.

Moreover, if the applicant puts forward facts before the court from which it can be inferred that he was subjected to retaliation by the defendant because he is a whistleblower under the Whistleblower Protection Act, the defendant is obliged to prove that the adoption of the alleged measure was objectively justified by a legitimate aim and constituted a means that was directed and necessary to that aim. That is to say, the burden of proof will be reversed, as it is in discrimination litigation, if the claimant meets its burden of proof.

#### *Amendment to the Labour Inspection Act*

The Labour Inspection Act will introduce a new group of offences in the area of whistleblower protection, for which it will be possible to impose a fine of up to CZK 1,000,000.

Amendment to the Act on Certain Measures against the Legalization of the Proceeds of Crime and the Financing of Terrorism

Persons subject to AML shall establish an internal reporting system

under the Whistleblower Protection Act, which allows for a yes-or-no notification to an employee and an individual who is working for the obliged person other than in a basic employment relationship. This system cannot be run by a third party. It can only be shared by the obliged person with a tied agent.

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