UNALOME LEGAL

NEWSletter

WHISTLEBLOWING SPECIAL SERIES – N°4
Implementing a whistleblowing policy

The new law transposing Directive (EU) 2019/1937 on the protection of persons who report breaches of EU law (the "Whistleblower Protection Act") is now in force!

It has a significant impact on Luxembourg companies, even for those which may already have a whistleblowing scheme in place at local or group level.

To assist companies in implementing the Whistleblower Protection Act, we have identified 4 main topics and the necessary practical steps that should be undertaken to ensure compliance. We will present each of these topics through a dedicated newsletter to be published every week.

In this fourth edition, we will discuss the need to have a whistleblowing policy and its content, as well as the formalities for implementing the whistleblowing scheme within the company

Why a whistleblowing policy?

The Whistleblower Protection Act not only obliges companies to set up internal whistleblowing channels and procedures (see our previous editions), but also requires them to provide employees with clear and accessible information on the use of such internal channels, as well as on the external reporting procedures to the authorities.

A whistleblowing policy is the most common way to provide the required information.

In a nutshell

- ✓ Draft a policy outlining the use of the internal whistleblowing channels, ensuring clarity ad^nd accessibility
- ✓ Include information on the procedures in place within competent authorities
- ✓ Involve staff delegation through consultation, or co-decision for companies with 150+ employees
- ✓ Communicate the policy effectively to employees and third parties, using appropriate means, such as e-mail, intranet, etc.
- ✓ Conduct information sessions to raise awareness

What should be covered in the whistleblowing policy?

While the Whistleblower Protection Act does not provide specific guidance, it is recommended to include the following items in the policy, as a matter of good practice:

- ***Scope of the whistleblowing scheme*** : Clearly define who can utilize the internal channel, specify the types of breaches that may be reported, and clarify any exclusions, such as personal grievance matters.

- ***Process for making a report*** : necessary information on how to use the channel. This includes:
  - A description of the tool(s) selected as internal channel(s), how to access it, how to make a report (anonymous or not, possibility to request in-person meeting, …)
  - A description of the steps following the receipt of the reports and its follow up, including timing
  - The department / person(s) in charge of receiving and following up on reports.

- ***Investigation process:*** As transparency is important to build trust in your internal channel, it is recommended to indicate in the policy:
  - Who may be in charge of the investigation (with possible recourse to external support)
  - An indicative explanation on the general course of an investigation (interviews of stakeholders, document collection and analysis, on-site visit, investigation in IT systems, …)
  - The rights and obligations of the parties involved in the investigation (confidentiality, right to be assisted during interviews, …)
  - The recipients of the investigation report and rules on (non-)disclosure.

- ***Confidentiality and data protection:*** the company's commitments with respect to the protection of the identity of the reporting person and of the individuals concerned by the report, as well as the obligations of those involved in the whistleblowing process.

- ***Protection of whistleblowers:*** the commitment by the company to refrain from any retaliatory measure individuals who make good faith reports, also emphasizing the obligation for all parties to abstain from any form of reprisal..

- ***Disciplinary sanctions:*** setting the range of sanctions that may be taken:
  - against employees who breach the confidentiality of the report or of the investigation process, or who retaliate against a reporting person and/or witnesses
  - against those who report information on breaches which they knew is untrue

- ***External reporting channels:*** while encouraging the use of the internal channel, the policy should provide employees with clear information on the whistleblowing procedures in place at the level of competent authorities. Providing contact details of the new *Office des Signalements* is also advised.

Is it required to involve the staff delegation?

In our opinion, and considering notably a court decision rendered in 2013 in a matter concerning internal guidelines setting up an "alert" procedure to report illegal acts, a whistleblowing policy may be considered as having the legal nature of internal rules (*"règlement intérieur"*).

This means that the adoption, and any modification, of the whistleblowing policy should be subject to information and consultation of the staff delegation in companies with less than 150 employees, and to co-decision in companies reaching the threshold of 150 employees.

Should the policy be communicated to employees and third parties?

To ensure the enforceability of obligations under the policy, and encourage the use of the internal channel, it is important to communicate the policy (including any amendments) to employees, if applicable, to third parties. The appropriate communication tool is to be determined internally, in accordance with usual practices, e.g. e-mail, intranet, link on the company's website (relevant particularly for third parties),…

It is also recommended to raise awareness among employees on the existence and functioning of the internal channel, e.g. through training or information sessions.

In our last edition, we will discuss the specific points of attention to ensure that the internal whistleblowing channels and procedures are compliant from a data protection perspective.

In the meantime, our team is at your disposal for any further information.

Contacts:

Marielle Stévenot
m.stevenot@unalomelegal.lu

Cindy Arces
c.arces@unalome-legal.lu