



## **NEW REQUIREMENTS FOR WHISTLEBLOWER SYSTEMS AND PROTECTION OF WHISTLEBLOWERS**

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### **Introduction**

17 December 2021, the EU Directive 2019/1937 of 23 October 2019 on the protection of persons who report breaches of EU law (the “Whistleblower Directive”) will come into force. The purpose of the Directive is to strengthen the enforcement of EU regulation by implementing specific minimum standards for securing a high level of protection for persons reporting on breaches of legislation.

The is expected to process the current draft legislation on the implementation of the Whistleblower Directive in April 2021 (the “Whistleblower Act”). In its current draft version, the Whistleblower Act requires all public and private employers with 50 employees or more to establish internal whistleblower systems and secure adequate protection of whistleblowers.

In the following we examine the content and effects of the Whistleblower Act in its current proposed draft form.

### **Scope of the Whistleblower System**

The Whistleblower Act applies to violations of specifically listed EU legislation, other serious violations of the law and other serious matter which can be reported via the internal whistleblower systems.

The relevant EU regulation includes regulation on public procurement, financial services, products and markets, and prevention of anti-money laundering and terrorist financing. “Other serious matters” include sexual harassment and other forms of gross harassment in the workplace. Ordinary confrontational issues between employees or regular complaints will generally not be covered by the scope of the Whistleblower Act.

### **Internal Whistleblower System**

All private and public employers with 50 employees or more must establish an internal whistleblower system where violations subject to the scope of the Whistleblower Act can be reported.

The employer must appoint an impartial person or department to receive submissions and to be in contact with the whistleblower, follow up on reporting, and provide feedback to the whistleblower. This function may be outsourced to third parties who must comply with the obligations under the Whistleblower Act. Access from unauthorized persons must be avoided.

Upon receipt of any report, the relevant authorized persons must secure that the whistleblower receives a confirmation of receipt within 7 days. The authorized persons are obligated to ensure thorough investigations as well as ensure that the whistleblower is informed of any actions, planned or executed, without undue delay and no later than 3 months after confirmation of receipt.

Companies are obligated to document the whistleblower system and related procedures in writing.

### **Protection**

A general prohibition against employers imposing retaliatory measures against whistleblowers and related parties will be imposed. A condition for the protection against retaliatory measures is that the whistleblower assumed in good faith that the information contained in the reporting was correct and subject to the Whistleblower Act.

Retaliatory measures include all types of unfavourable treatment of the whistleblower following the reporting, including any threats and attempts to prevent or discourage the use of the

whistleblower system and termination of employment. If measures are taken by the company against the employee following use of the whistleblower system, the burden of proof will lie with the company, i.e. the company must prove that the measures were not taken as a retaliatory measure.

In addition to the whistleblowers themselves, the protection against retaliatory measures applies to all intermediaries, third parties and companies which the whistleblower owns, works for, or has a business relation to.

In addition, the company is obligated to design, establish, and operate the whistleblower system in a manner which ensures confidentiality of the identity of the reporting person and the content of the reporting. The whistleblower will not be punishable for any violation of confidentiality or non-disclosure obligations, if relevant.

### **Sanctions**

Any violation of the company's obligations regarding the procedures for internal reporting and follow-up, appointment of internal authorized responsible person or department, provision of information and documentation may be fined.

If a company takes retaliatory measures against a reporting person, the company must compensate the reporting persons according to the fine levels of the Danish Equal Opportunities Act.

If a company dismisses a reporting person as a retaliatory measure in violation of the Whistleblower Act, the reporting person will be able to present a claim for re-employment. The reporting persons may freely choose between claiming compensation or re-employment.

Employees who intentionally submit wrongful information via the whistleblower system may also be fined.

### **Enforcement Deadlines**

Companies with more than 250 employees must have established the whistleblower systems and procedures no later than 17 December 2021.

Companies employing 50-249 employees must establish a whistleblower system before 17 December 2023 and may share resources with other companies for the operation of the whistleblower system and for performing the consequential investigations.

### **Our Comments**

We recommend that all companies start preparing for compliance with the new requirements as soon as possible to secure implementation in due time. For companies currently operating a voluntary whistleblower system, we recommend that an assessment of any required adjustments is initiated to secure compliance when the directive comes into force.

### M&A Transactions

The current proposed legislation will become a point of attention in M&A transactions going forward.

When an M&A transaction is in the due diligence process, it should be confirmed that the target is in the process of assessing the consequences of the proposed regulation and that steps are taken towards implementation and compliance.

If target is a company employing 50 persons or more, and the company does not implement and secure compliance with the new whistleblower requirements, this will constitute a breach of the whistleblower regulation after 17 December 2021 – depending on the Whistleblower Act being adopted in its proposed form. Accordingly, it should be duly confirmed in such case that the target is in taking steps towards implementation of the whistleblower system and whistleblower protection regulation.

**If you have any questions or require further information regarding any of the above, please do not hesitate to contact us:**



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