

RocaJunyent

Employment Department
21 February 2023



1. Introduction

Law No. 2/2023 has been published on 21 February, establishing the general regime for the protection of whistleblowers, transposing Directive (EU) 2019/1937 of the European Parliament of the Council of 23 October 2019 on the protection of persons who report breaches of Union law.

This law foresees mechanisms and procedures applicable to whistleblowing based on information obtained in the context of a professional activity, as well as measures intended to protect whistleblowers.

Companies with more than 50 employees will have to set up an internal information system.

The deadline for this will be 3 months from the date of entry into force of the law for companies with more than 249 workers and until 1 December 2023 for companies with between 50 and 249 workers.

Additionally, this Law establishes a punitive framework for non-compliance with the measures set out therein, foreseeing a set of serious and very serious administrative offences, and imposing fines of up to 300,000 Eur for individuals and up to 1,000,000 Eur for legal entities.

The purpose of the rule is to protect persons who, in an employment or professional context, detect serious or very serious or professional context detect serious or very serious criminal or administrative offences and report them through the mechanisms regulated therein.

It has therefore been considered necessary to extend the material scope of the Directive to infringements of national law, but limited to criminal offences and serious or very serious administrative offences, in order to allow both internal and external reporting channels to concentrate their investigative activity on infringements of national law to allow both internal and external reporting channels to concentrate their investigative activity on those infringements that are considered to have the greatest impact on society as a whole.

2. Scope of application

The law protects information relating to any act or omission that may constitute an infringement of European Union law, as well as any act or omission that may constitute a serious or very serious criminal or administrative offence.

In any case, all serious or very serious criminal or administrative offences involving those serious or very serious criminal or administrative offences that involve economic loss to the financial loss for the Public Treasury and for the Social Security.

3. Who can submit a complaint

This law shall apply to informants working in the private or public sector who have obtained information on offences in an employment or professional context, including in any case:

- a) persons having the status of public employees or employees;
- b) self-employed persons;
- c) shareholders, unit holders and persons belonging to the management or supervisory body of an undertaking, including: (a) persons having the status of

public employees or employees (c) shareholders, members and persons belonging to the administrative, management or supervisory body of an undertaking, including non-executive members;

- d) any person working for or under the supervision and direction of contractors, subcontractors and suppliers;
- e) former employees and trainees;
- f) voluntary work;
- g) persons who are in the process of selection or pre-contractual negotiation.

4. How can complaints be filed

Complaints might be submitted through internal or external reporting channels.

The Internal Reporting System is the preferred channel for reporting, provided that it can be dealt with effectively and if the whistleblower considers that there is no risk of retaliation.

Any natural person may report to the “*Autoridad Independiente de Protección del Informante*”, (A.A.I), or to the relevant regional authorities or bodies, of any actions or omissions authorities or bodies, of the commission of any actions or omissions included in the scope of application of the law, either directly or after prior communication through the corresponding internal channel.

A public disclosure may be made in the media or on social media, etc., where internal or external channels have not worked and there is a threat to the public interest or there is a risk of retaliation or actual non-treatment.

5. Can complaints be made anonymously?

Yes. Both, internal and external complaints may be submitted in writing and/or verbally, anonymously or with identification of the whistleblower. Subsequent processing of communications may also be anonymous.

6. Are companies obliged to have internal reporting channels?

Yes. Companies with more than 50 employees will have to set up an internal information system.

The deadline will be 3 months from the date of entry into force of the law for companies with more than 249 workers and until 1 December 2023 for companies with between 50 and 249 workers.

In addition, those communicating through internal channels will be informed, in a clear and accessible manner, about external information channels.

In the case of a group of companies within the meaning of Article 42 of the Commercial Code, the parent company shall adopt a general policy on the internal reporting system and whistleblower protection, and shall ensure that its principles are applied in all its constituent entities.

7. Procedural deadlines

Within 7 days of receipt of the information or communication, receipt must be acknowledged to the reporter.

The investigation may not last longer than 3 months, except in cases of particular complexity, in which case the investigation may be extended for a further 3 months.

8. How is the protection of the whistleblower guaranteed?

The regulation contains a specific section on data protection.

Anyone who makes a communication or makes a public disclosure has the right not to have his or her identity disclosed to third parties.

The identity of the informant may only be communicated to the judicial authority, the Public Prosecutor's Office or the competent administrative authority in the context of criminal, disciplinary or criminal investigation.

Persons who report or disclose wrongdoing shall be entitled to protection provided that the following circumstances exist:

- a) they have reasonable grounds to believe that the information referred to is true at the time of the communication or disclosure, even if they do not provide conclusive evidence; and
- b) the communication or disclosure was made in accordance with the requirements of this Law.

The protection against the communication of information shall also extend to the communication of information by employees' representatives, even if they are subject to legal obligations of secrecy or non-disclosure of confidential information.

9. Prohibition of retaliation

Acts constituting retaliation, including threats of retaliation and attempts at retaliation, are expressly prohibited.

Retaliation shall be considered retaliation by way of example:

- a) Suspension of the employment contract, dismissal or termination of the employment or statutory relationship, including the non-renewal or early termination of a temporary employment contract after the probationary period.
- b) Cancellation of contracts for goods or services, imposition of any disciplinary measure, demotion or refusal of disciplinary action, demotion or denial of promotion and any other substantial modification of working conditions and the non-conversion of a temporary contract of employment into an indefinite.

Unless these measures were carried out in the regular exercise of management power in the regular exercise of managerial powers under labour law or the legislation governing the status of public employees.

- c) Damages, including those of a reputational nature, or financial losses.
- d) Coercion, intimidation, harassment or ostracism.
- e) Negative evaluation or references regarding job or professional performance.
- f) Blacklisting or dissemination of information in a particular sectoral area, which hinders or prevents access to employment or the contracting of works or services.
- g) Refusal or cancellation of a licence or permit.
- h) Refusal of training.
- i) Discrimination, unfavourable or unfair treatment.

10. How long does protection against reprisals last?

The duration of protection shall be 2 years, and exceptionally the competent authority may, where justified, extend such protection.

11. Presumption of injury

In proceedings before a court or other authority relating to damages suffered by whistleblowers, once the whistleblower has demonstrated that he or she has made a public disclosure in accordance with this Law and that he/she has suffered a detriment, it shall be presumed that the detriment was in retaliation for reporting or making a public disclosure under this Law.

12. Measures for the protection of the persons concerned

During the processing of the case, the persons concerned by the communication shall have the right to the presumption of innocence, the right of defence and the right of access to the case file, as well as the same protection as that provided for informants.

13. Penalty system

This Law establishes a punitive framework for non-compliance with the measures set out therein, foreseeing a set of serious and very serious administrative offences, and imposing fines of up to 300,000 Eur for individuals and up to 1,000,000 Eur for legal entities.

Ancillary sanctions may include a warning, a ban on obtaining subsidies or other tax benefits for up to 4 years, as well as a ban on contracting with the public sector for 3 years.