



Dutch Whistleblower Protection Act

The Dutch Whistleblower Protection Act (Wet bescherming klokkenluiders) came largely into effect in early 2023. This law requires employers with a workforce of at least 50 employees to do more to protect individuals who report abuses. This publication analyses the main changes and key points to consider.

Definition of an abuse

The Whistleblower Protection Act applies in the case of an 'abuse'. In short, an abuse occurs in a situation that contravenes the public interest. This applies at all events where the situation does not just affect personal interests and there is evidence of a pattern, or occurrence of a systematic nature, or when the situation is serious or extensive. For example, the Whistleblower Protection Act does not apply when an employee is involved in an individual conflict with their employer. A broader, public interest must be involved.

Whistleblowers

The Whistleblower Protection Act expands the group of individuals who can invoke the protective rules for Whistleblowers. For example, the rules no longer just apply to employees and civil servants, but to anyone who has a relationship with an employer in the context of work-related activities. This definition should be understood in a broad sense. In principle, volunteers, interns, agency workers, self-employed workers, job applicants, contractors, shareholders, directors, supervisory board members and suppliers are also included in the scope of this definition.

Internal investigators, persons assisting whistleblowers and third parties such as colleagues or family members are also protected by the new law.

Internal reporting procedure

Under previous legislation, employers with a workforce of at least 50 employees were already required to have an internal reporting procedure for reporting abuses. Pursuant to the Whistleblower Protection Act, this reporting procedure must comply with stricter rules. The principal changes are:

- ▶ Procedures must be in place to allow reporting of a (suspected) abuse in writing, by telephone and in person (physically);
- ▶ A whistleblower must be given the opportunity of consulting confidentially with an adviser;
- ▶ A whistleblower must receive an acknowledgement of receipt within seven days of submitting the report;
- ▶ A whistleblower must receive feedback regarding the assessment of the report and subsequent follow-up action within three months of the acknowledgement of receipt;
- ▶ The employer must inform employees and other potential whistleblowers about the reporting procedure, external reporting channels and the legal protection that applies after submission of a report, either in writing or electronically.

Employers with a workforce of 250 employees or more are already required to have an internal reporting procedure that complies with the new rules. Employers with a workforce of between 50 and 250 employees have until 17 December 2023 to ensure compliance with the new rules.

Registration requirement

If a report regarding a (suspected) abuse is submitted, employers must record the report in their own internal register. This ensures that the competent authorities can verify whether reports are properly registered and handled. Given the sensitivity of the information, privacy laws must be given due consideration when setting up this register. This means, among other things, that data must be stored securely and deleted when retention is no longer necessary.

External reporting

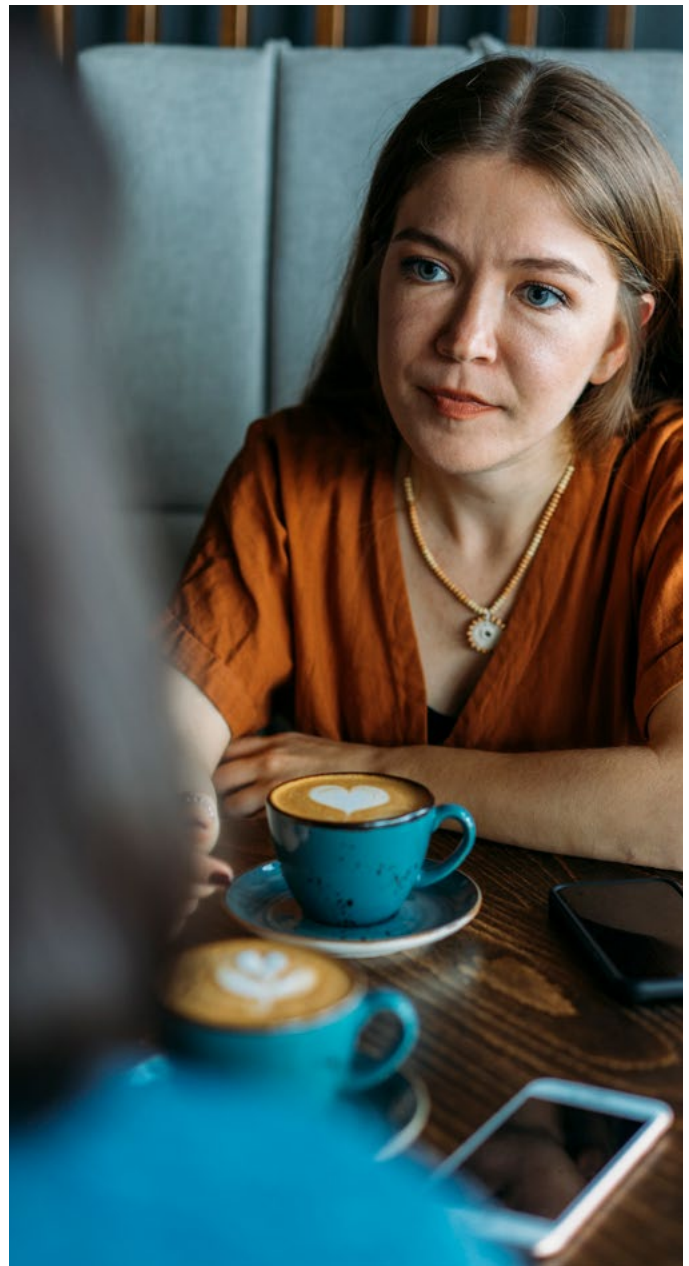
As indicated previously, employers with a workforce of at least 50 employees are required to set up an internal reporting procedure. Even so, individuals who wish to report a (suspected) abuse may not be prohibited from submitting a report directly to a competent external authority. These competent authorities include the Authority for Consumers & Markets (*Autoriteit Consument & Markt*), the Authority for the Financial Markets (*Autoriteit Financiële Markten*) and the Data Protection Authority (*Autoriteit Persoonsgegevens*). This means that whistleblowers do not have to complete an internal procedure before notifying the competent authorities of a (suspected) abuse.

Confidentiality

Anyone involved in a report of a (suspected) abuse, or an investigation to be conducted in that context, is obliged to maintain secrecy in respect of confidential information, unless disclosure is necessary to comply with the law. This means, among other things, that a whistleblower's identity may not be disclosed without the whistleblower's consent, unless disclosure of the whistleblower's identity is required by law.

Confidentiality and non-disclosure clauses

The Whistleblower Protection Act also contains a prohibition to forbid individuals to disclose a (suspected) abuse when the rules set out in that Act are complied with. In short, this means that a (suspected) abuse may be disclosed when a report has first been submitted to the employer or a competent authority and there are reasonable grounds to believe that investigation of the reported abuse is not progressing adequately. Any agreement limiting this right, such as a confidentiality or non-disclosure clause, is null and void.



Ban on prejudicial measures

The Whistleblower Protection Act also introduces a ban on prejudicial measures against individuals who report a (suspected) abuse. This means that whistleblowers may not suffer any disadvantage because they have a reported (suspected) abuse. This includes, for example, dismissal or suspension, as well as a negative employee appraisal, excluding the employee from promotion opportunities or a reprimand. The only exception is if the whistleblower did not have reasonable grounds to believe that the report was a true representation of the facts.

Burden of proof

If any prejudicial measure is implemented after a (suspected) abuse has been reported, it is presumed under the new rules that the prejudicial measure is a direct result of the report. This shifts the burden of proof from the whistleblower to the employer and means that the employer must then prove that the prejudicial measure was justified or had nothing to do with the report. If the employer cannot do so, the prejudicial measure is automatically considered to be unjustified.

Exemption from liability

If the whistleblower has reasonable grounds for believing that the report is true, then, in addition to the ban on prejudicial measures, the whistleblower also enjoys exemption from liability. This means that the whistleblower cannot be held liable for damages if the report is found to be false at a later date. After all, the whistleblower submitted the report in good faith. This ensures that individuals do not refrain from submitting reports due to liability concerns.

Employee representation

Employers should be aware that a Works Council or Employee representative body has a right of consent regarding modification, adoption or revocation of an internal reporting procedure. If no Works Council or Employee representative body has been set up, and there is no obligation to do so, the employer must obtain the consent of more than half of the employees, unless the procedure for reporting a (suspected) abuse is already regulated in a collective bargaining agreement.

Enforcement and penalties

Pursuant to the Whistleblower Protection Act, any interested party can request the subdistrict court to order an employer to establish an internal reporting procedure that complies with the new rules within a certain period of time. Furthermore, the Whistleblower Protection Act offers whistleblowers new opportunities to claim compensation when treated in a way that violates the rules. In addition, in the future, the Dutch Whistleblowers Authority (*Huis voor Klokkenluiders*) will have the ability to impose administrative sanctions, such as a fine.

Culture and awareness

Establishing an internal reporting procedure that complies with the new laws and regulations is the first step. After doing so, however, action must also be taken to ensure that this regulation receives regular attention within the organisation and does not get forgotten. Employees should be familiar with the rules and know that they can submit a report. A further essential requirement is that there is a safe company culture in place, resulting in an environment in which employees feel that they can submit a report without fear of reprisals. Implementing the new rules therefore requires the organisation to do more than to simply put an internal reporting procedure on paper.

What are the key points to consider for employers?

Employers with a workforce of at least 50 employees must take action to ensure compliance with the new rules. Specific attention is required for the following:

1. An internal reporting procedure that complies with the new rules must be in place by 17 December 2023 at the latest. Government agencies and departments, and employers with a workforce of at least 250 employees must already have such a reporting procedure in place. This also applies to employers with a work force of fewer than 50 workers in specific high-risk sectors, such as finance, civil aviation, the maritime sector and offshore oil and gas.
2. A register must be created for the purpose of recording reports of a (suspected) abuse. Given the sensitivity of the information, adequate attention for privacy laws is important in this regard.
3. Provisions that prohibit employees from disclosing information, such as confidentiality and non-disclosure clauses, should be amended to prevent the provisions from becoming null and void.
4. Employees have a right of consent regarding the internal reporting procedure. A meticulous and thorough process is required to gain broad support and avoid problems.

BDO can be of service to you

BDO's specialists will be happy to help you with analysing and identifying the consequences of the new legislation, and drafting or modifying an internal reporting procedure and can provide support during an employee participation process. As a result, you will quickly have a suitable arrangement in place, specifically set up for your organisation, and eliminate the possibility of nasty surprises.

In addition to implementing the formal requirements, BDO's specialists can also audit your organisation's compliance culture and your employees' compliance awareness. This ensures that your organisation is set up so that employees have sufficient opportunities to report abuses in a timely manner. By doing so, you contribute to creating a working environment based on fairness, integrity and safety.

MORE INFORMATION

Do you need a tailor-made scheme for your organisation, advice on creating a safe working environment or would you like more information about the Whistleblowers Protection Act? Please contact one of our specialists without obligation.



Corina Roks
Partner BDO Tax & Legal
E corina.roks@bdo.nl
T +31 (0)70 338 08 36



Frank van Vierssen
Senior Manager Tax
E frank.van.vierssen@bdo.nl
T +31 (0)26 352 56 51



Lilian Maters-de Groen
Manager Internal Audit, Risk & Compliance
E lilian.maters.de.groen@bdo.nl
T +31 (0)30 284 97 14

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