

LEGAL UPDATE LABOUR AND EMPLOYMENT LAW

Cologne, 12. May 2023

Suddenly things are happening quickly – the German Council gives the Whistleblower Protection Act the green light

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The wait is at an end. Under pressure from infringement proceedings initiated by the European Commission against Germany before the Court of Justice of the European Union (CJEU), the German parliament (Bundestag) and the German Council (Bundesrat) have agreed a majority version of the Whistleblower Protection Act (Hinweisgeberschutzgesetz, HinSchG) with the assistance of the Conciliation Committee.

Overview of the legislative process

The Whistleblower Protection Act is based on [EU Directive \(2019/1937\)](#), which was supposed to have already been implemented by 17 December 2021. After the Whistleblower Protection Act was passed by the Bundestag on 16 December 2022, the Bundesrat raised constitutional concerns when voting on the draft bill on 10 February 2023 and refused to approve the bill. The Bundesrat criticised the protection of whistleblowers for being too far-reaching, as the draft bill had greatly increased the scope of application of the directive and therefore could lead to overregulation. For this reason the German Government (Bundesregierung) referred the matter to the Conciliation Committee, which proposed a compromise and presented this to

the Bundestag on 9 May 2023. The Bundestag adopted this on 11 May 2023 and the Bundesrat approved this just one day later on 12 May 2023. Consequently, the Whistleblower Protection Act will come into force as soon as it is signed by the German President (Bundespräsident), which is expected to take place in mid June 2023.

Content of the Whistleblower Protection Act

The Act governs the handling of reports about fraud, corruption and other abuses in companies and authorities. The aim is to make it mandatory to set up suitable structures to protect whistleblowers who report such abuse from being threatened with disadvantages and consequences under employment law. Suitable structures are, for example, setting up internal and external reporting offices, as well as measures to protect whistleblowers from retaliation. This is based on the idea that legal violations in companies and authorities are often first noticed by workers so they can considerably contribute to avoiding further violations.

Conciliation Committee's compromise solution

In its meeting on 9 May 2023 the Conciliation Committee made some changes in relation to anonymous reporting, the material scope of application, evidence regulation and fines in order to counteract the overregulation the Bundesrat warned of.

Anonymous reporting

The final version differs from the previously adopted draft law in terms of an adjustment made to the reporting processes. External and internal reporting offices are no longer obligated to design reporting channels to be able to send anonymous reports. It merely prescribes that the reporting offices must be able to process anonymous incoming reports. The suggestion also contains a provision where internal reporting offices would be preferable if they can effectively address violations.

Professional context restriction

The material scope of application has now been restricted to information in a professional context. Information on violations must accordingly relate to employers or other bodies with which the whistleblower has come into contact with as part of their profession.

Evidence regulations for disadvantages

The reversal of the burden of proof, i.e. the employer must present evidence that disadvantages that have occurred to a whistleblower is not retaliation for whistleblowing, is retained. However, the rebuttal only applies if the whistleblower asserts this.

Lower fines

The maximum fines threatened to be imposed for violations of the Act is now only EUR 50,000 rather than EUR 100,000.

Prompt implementation: one month deadline

In comparison to the original draft bill, the Whistleblower Protection Act that has now been adopted is supposed to come into force within one month of promulgation.

Comments

All parties subject to obligations under the Whistleblower Protection Act are urgently advised to review their present compliance systems, guidelines and relevant regulations for compliance with the new legal requirements and to set up an internal reporting office. Particular attention should be paid to organising internal reporting offices in such a way that they can effectively react to reports of violations. This may contribute to a preferred consultation with internal reporting offices so that any abuses can be first investigated and resolved internally.

The prompt implementation of the Act after only one month of its promulgation has significantly increased the sense of urgency for those subject to obligations under the Whistleblower Protection Act. They should start setting up an internal reporting office as soon as possible. Since violation of this obligation can only be prosecuted as an administrative offence six months after the promulgation of the Act, those subject to obligations under the Whistleblower Protection Act risk that faced with further delay a whistleblower would contact an external reporting office. The same applies to private employers who generally have 50 to 249 employees, to whom the extended deadline of 17 December 2023 applies for setting up an internal reporting office. Companies subject to obligations under the Whistleblower Protection Act who have set up works councils for their operations should also react particularly quickly, as it

is usually mandatory for works councils to be involved with the introduction and configuration of internal reporting offices. Works councils usually have co-determination rights if an internal reporting process is set up to guarantee order in the company and to control the behaviour of the employees. This also applies if the employer decides to outsource the internal reporting office to an external third party. In addition, works councils may exercise a mandatory right of co-determination if technical facilities must be set up when structuring the internal reporting office

which are suitable for controlling the performance and behaviour of employees.

We would be happy to help with the implementation of the new provisions of the Whistleblower Protection Act. In particular, we can provide advice on all aspects of legally implementing an internal reporting office. An overview of all these services can be found here (German only): [Whistleblower systems | GÖRG services \(goerg-dienstleistungen.de\)](https://www.goerg-dienstleistungen.de).

Note

This overview is solely intended for general information purposes and may not replace legal advice on individual cases. Please contact the respective person in charge with GÖRG or respectively the author Pia Pracht on +49 221 33660535 or by email to PPracht@GOERG.de. For further information about the author visit our website www.goerg.com.

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