

# Employers as the key players ensuring effective whistleblower protection and reporting of irregularities

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On 23 April 2022, a new Act on the Protection of Persons Reporting Irregularities entered into force, implementing the so-called Whistleblowing Directive (Directive (EU) 2019/1937) in the Croatian legal system. As the name suggests, the main purpose of the Act is to create preconditions that, through the increased protection of "whistleblowers", encourage reporting of irregularities. The main role in this task was handed over to employers, who have been bound with a number of new and extensive obligations regarding the establishment and the structure of internal irregularity reporting systems. As the implementation deadlines are swiftly approaching, each employer should promptly re-examine its internal processes, make the required adjustments and cause its business to be compliant with the Act.

## Who should be concerned?

The obligations set forth by the Act apply to employers with at least 50 employees, as well as generally to specifically identified business activities and legal areas<sup>1</sup>, regardless of the employee count.

## What obligations do employers have?

The employers are, among others, obliged to:

- (i) by 23 June 2022 adopt an Ordinance on the Procedure for Internal Reporting of Irregularities

and the Appointment of a Confidential Person; and

- (ii) by 23 July 2022 appoint the Confidential Person and his/her deputy.

The remaining employers' obligations are, for instance, taking measures for remediation of identified irregularities, protection of whistleblowers from retaliation, ensuring conditions for adequate record keeping of received reports, as well as ensuring

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<sup>1</sup> Financial services, products and markets, anti-money laundering and terrorist financing, transport security and environmental protection.

confidential treatment of all information received.

### **Who is this Confidential Person and what are his/hers obligations?**

A Confidential Person is merely a legal term for a person who is responsible to oversee and take care of the compliance with the Act at a particular company. The employer can appoint him/her among its employees, but it can also hire an external service provider.

In addition to receiving irregularities' reports and preserving the confidentiality of the received data, a Confidential Person is obliged to ensure that the whistleblower is protected from retaliation, as well as to investigate the reported irregularities and to notify the competent authorities should they not be adequately addressed by the employer.

A responsibility that is often overlooked in practice is the filing of a statement with the Ombudsman about the received reports and outcomes thereof within 30 days as of deciding about a particular report.

Furthermore, the Act also introduces some novelties as regards the appointment of the Confidential Person. Previously, a confidential person was appointed upon the proposal of at least 20% of all employees, while under the new Act he or she will be appointed upon the proposal of the Workers' Council (or trade union commissioner). If these bodies are not established, the regime remains the same, i.e. he/she is appointed upon the proposal of 20% of all employees.

Under the new regulation, the Deputy Confidential Person is appointed based on the same procedure as the Confidential Person, which means that the Confidential Person lost its discretionary power to choose his/hers own deputy, which was possible under the previous Act.

Should the Confidential Person breach the confidentiality of the whistleblower's identity or other received information, or should he/she misuse its authority, a fine ranging HRK 3,000.00 to HRK 30,000.00 may be imposed to the Confidential Person and his/hers deputies.

### **Who is the irregularity reporter (whistleblower) and what are his rights?**

A whistleblower is any person who reports or publicly discloses irregularities that he/she came across in his/her working environment. The working environment is a very broad concept and it is sufficient that a person has acquired certain information about irregularities through or in connection with the performance of a particular professional activity. This does not require a formal link with the "working environment". It is completely irrelevant whether the person has learned about the irregularity during the conventional employment relationship or while working as a student or even a volunteer. Any form of participation in the employer's activities is sufficient, even a mere passive holding of business shares in the employer.

In order to effectively protect whistleblowers and consequently encourage reporting of irregularities, whistleblowers have been provided with a package of guaranteed rights. These rights vest immediately upon reporting by a whistleblower and remain in effect until the potential judicial resolution of the issue at hand. The rights include, among others, the right to primary and secondary pro bono legal assistance, judicial protection, compensation of damages and - one of the main guidelines of this Act – identity protection and confidentiality.

### **What are the available venues to report irregularities?**

The methods (venues) of reporting irregularities have not changed. They are the same as in the previous Act, i.e. (i) internal reporting (via a Confidential Person), (ii) external reporting (to an ombudsman), and (iii) public disclosure (via media, social networks, etc.). The Act, nonetheless, introduces certain novelties as to the particular conditions of each method of reporting.

#### **Which novelties have been introduced in relation to external reporting?**

Unlike the earlier regulation, which required the fulfilment of a number of different conditions for external reporting, the new Act entitles whistleblowers to decide whether to file a report through an internal reporting system or immediately directly to the ombudsman (irrespective if the possibility of internal reporting was utilized beforehand).

#### **Which novelties have been introduced in relation to public disclosure?**

The new Act strengthens the conditions under which a whistleblower can exercise the rights

guaranteed by the Act in case he/she makes a public disclosure of alleged irregularities. Against this background, to be entitled to the whistleblower's rights, before a public disclosure of irregularities, it is required that:

- (i) the whistleblower had first submitted a report via the internal and external reporting system, or directly to Ombudsman, but no appropriate measures have been taken within the prescribed deadlines; or
- (ii) the whistleblower has reasonable grounds to believe that (a) the irregularity may pose an imminent or obvious danger to the public interest, or (b) that in the case of external reporting there is a risk of retaliation or the chances that the irregularity will be effectively eliminated is low due to the specific circumstances of the case at hand.

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