



CECA MAGÁN
ABOGADOS

GUIDE

Key issues of the Law 2/2023 of February 20

PROTECTION OF WHISTLEBLOWERS

March 2023

Whistleblower

Law 2/2023 of February 20th, 2023, regulating the protection of people who report legal infractions and anti-corruption practice, represents a deadline for private companies to adapt their whistleblower reporting systems to the new legal requirements or, if they do not have any, to implement them.

In this guide, we try to provide direct and simple answers to the main questions that this regulation raises for organizations concerned.



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1. What is the aim of the law?

To provide protection against retaliation to people who report infractions of EU Law but also criminal and administrative serious and very serious infringements of National Law (specially Tax and Social Security Laws) of which they become aware in the course of their work and establish minimum standards for reporting channels.

2. Who is protected from retaliation?

Employees, even if the relationship has ended; self-employed workers; shareholders and members of the management body; employees of contractors and suppliers; volunteers; interns; trainees, even if they do not receive a salary; candidates; the works council; the work colleagues assisting the whistleblower during the process; colleagues of the informant or relatives of the informant in the company and finally the company for which the informant works or is a shareholder with voting rights.

3. When does the law enter into force?

The Law will become applicable on March 13th, 2023. In general, companies must implement an Internal Information System by **June 13th, 2023**. In the case of private sector companies with 50 or more employees but less than 249 employees, such deadline is extended to **December 1st, 2023**.

4. Who is responsible for the implementation of the Internal Whistleblowing Channel?

The management body of the company. Prior consultation with the works council is required.



5. Which companies are required to implement a Whistleblowing Channel?

Private **companies with 50 or more employees**. Also, all those included in the EU acts on financial services, products and markets, money laundering or financing of terrorism, transport safety and environmental protection regardless of the number of employees.

6. Can the management of the whistleblowing channel be outsourced?

Yes, but the company will remain fully responsible of its legal obligations.

7. What sanction can be imposed if the company does not implement an internal information channel when it falls under the application of the Law?

Failure to comply with the obligation to implement an internal information system is classified as a very serious infringement and carries a fine of between 600,001 and 1,000,000 euros.

Likewise, (i) prohibition to obtain public funds or other tax benefits for a period of 4 years and (iii) prohibition to tender for contracts with the public sector for 3 years may also be imposed.

8. I already have other channels for specific matters (money laundering or harassment), should I create an additional one?

The Law does not impact those channels that are mandatory by Law and that should be integrated with the one regulated in the new law.

In any case, it is recommended to review the existing channels and, if necessary, adapt them to the new standard within the legal deadline.



9. Which are the statutory whistleblowing channel safeguards?

Must be safe; confidential about the identity of the whistleblower and any other person mentioned in the information; confidential about the proceedings and data protection compliant, preventing access by unauthorized personnel.

10. What are the channel requirements?

- ✓ **There must be a manager who shall be an executive (or the existing compliance officer) of the company. Must be independent and avoid conflict of interest.** The Management Body is competent to appoint and remove such person. The Authority must be notified of both the appointment and the removal (which must be justified) within 10 working days. The manager must receive **training**.
- ✓ **The system must allow written or verbal information**, or both, as well as the possibility of presentation at a face-to-face meeting within a maximum period of 7 days.
- ✓ **Verbal communications should be documented**, subject to the informant's consent, either by recording or by a complete and accurate transcription of the conversation (subject to the informant's offer to rectify and sign the minute).
- ✓ Submission and processing of **anonymous** complaints must be allowed.
- ✓ There must be an internal **policy** containing the general principles and also the **procedure for managing** the information received. In the case of groups of companies, the holding company can approve a general policy.
- ✓ Such policy must be **published** in the company (if the company has a website, the information must appear on the home page, in a separate and easily identifiable section).
- ✓ A confidential track **record** of the complaints and internal investigations carried out is also required. It may only be disclosed at the request of a Court and may not be kept for more than **10 years**.

11. What rights does the person affected by the information have?

Right to be informed of the actions or omissions attributed to such person. Right to be heard at any time. Presumption of innocence and right of honour.

12. How long does it take to resolve a complaint?

Once the complaint has been received, the company will send an acknowledgement of receipt to the informant within a maximum period of 7 calendar days, unless this would jeopardize the confidentiality of the communication. The deadline for responding to the complaint may not exceed three months from receipt of the complaint. The period may be extended by an additional three months in cases of complexity.

13. What are the requirements for the whistleblower in order to get protection?

Whistleblowers must act in good faith, i.e., report or disclose violations, provided they have **reasonable reasons** to believe that the information reported is truthful and when it has been made **in accordance with the requirements established in the Law**.

Expressly **excluded** from protection: people who communicate or disclose information that has been inadmissible through any internal channel or when such information are unfounded; do not constitute an infraction or there are rational indications of having been obtained through the commission of a crime; complaints concerning interpersonal disputes or concerning only the informant and the persons to whom the communication relates; or information already public or mere rumors.



14. What protection will a good faith whistleblower have?

No reprisals may be taken against a good faith whistleblower for his or her actions **for 2 years**. Exceptionally, the period of protection may be extended.

The **prohibition of reprisals** includes (i) dismissal (ii) discrimination and harassment (iii) suspension of the contract (iv) intimidation (v) unfavorable treatment or (vi) conduct detrimental to the whistleblower's reputation.

In turn, the Law establishes certain **support measures** for whistleblowers including:

- Full and independent information and free advice on procedures, protection against reprisals and rights.
- Legal assistance in cross-border criminal and civil proceedings.
- Psychological and financial support, etc.

Whistle-blowers will be exempt from liability for breach their duty of confidentiality. This applies in particular to the works council, which is not liable for disclosing information despite its duty of confidentiality.

15. How long does it take for the company to be sanctioned?

This offence is time-barred after 3 years. The penalty may be graduated according to recidivism; the extent and persistence in time of the damage; intentionality of the perpetrator and the financial result of the previous financial year of the offender.

This administrative sanction is independent of the disciplinary regime that the company may undertake against the offender.



16. Can the informant who has participated in the reported facts exonerate or mitigate his or her responsibility?

This possibility is only contemplated for administrative infractions.

The Internal Communication System will establish mechanisms to exempt the informant from responsibility when he/she reports an infraction prior to the notification of the initiation of the investigation or sanctioning procedure.

The power to exempt from responsibility corresponds to the competent body to resolve the procedure, which shall issue a reasoned resolution, considering: (i) the cessation of the infringement (ii) identification of participants or those benefited by the action (iii) their cooperation in the investigation (iv) evidence provided and, if applicable (v) reparation of the damage.

The partial concurrence of the above-mentioned circumstances may mitigate the responsibility.

17. May I reveal the identity of the informant?

No. Anyone who submits a communication or makes a public revelation has the right not to have his or her identity revealed to third parties.

They will be **expressly informed** that their identity will in any case be kept confidential.

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

18. Can individuals be held liable even if the work relationship with the entity has been terminated?

Yes, even if they no longer work for the company. In the case of an infraction committed by a collective body, the members will not be liable if they voted against the agreement.

19. Do I have to inform the judicial authorities if a crime is detected as a result of an internal investigation?

Article 9 of the law establishes that the information must be sent immediately to the Public Prosecutor's Office when the facts could be indicative of a crime.

However, this obligation should be modulated or corrected, in our opinion, in the event that the crime investigated may generate criminal responsibility for the legal entity under Article 31 bis of Spanish Criminal Act, in which case they are protected by the constitutional right not to incriminate themselves.

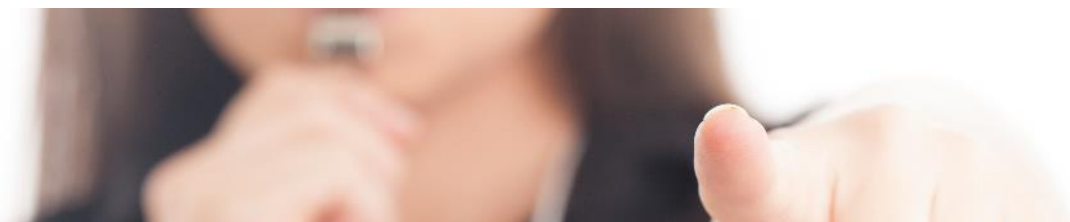
20. What is the independent whistleblower protection authority (AAI)?

Along with the internal systems for the public and private entities, the law provides for the creation of a public reporting body at the national and regional level to which whistleblowers can turn directly or after making a report through the internal system, which has priority status.

This channel will be managed by a public authority (AAI) - or its regional counterpart - which will determine whether an investigation should be initiated, whether it should be rejected or whether it should be referred to another competent authority for processing.

21. Who can sanction if the company fails to comply?

The sanctioning power is attributed to the independent whistleblower protection authority and to the competent bodies of the Autonomous Communities in Spain, in addition to the disciplinary powers that the competent bodies may have within each organization.



HOW CAN CECA MAGAN HELP ME COMPLY WITH THE REQUIREMENTS OF THE NEW LAW?

From CECA MAGAN Abogados, a multidisciplinary team of specialists in employment law, compliance, criminal law, and data protection, as well as technology consultants:

- ✓ **We support and advise** our clients in the review, **design** and implementation of a complaint management **system or channel**, proportionate, safe and effective, in accordance with legal requirements and aligned to the specific needs or peculiarities of each organization, public or private.
- ✓ We assist our clients as **external managers** of the communication systems and offer advice and agile and **coordinated support** to the responsible for the system, in the reception and, if necessary, **investigation of the communications received**, as well as in the decision making during or after the investigation.
- ✓ **Decision-making** on the reporting of investigation results and **corporate litigation**.



¿Can we help you?



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