

Dutch House for Whistleblowers Act

The Dutch House for Whistleblowers Act (to be referred to below as the **'Whistleblowers' Act**) will enter into effect on 1 July 2016. The purpose of the Act is to improve the ways to report a concern about wrongdoing within organisations and to afford better protection for those who do so. The Whistleblowers' Act also provides for the establishment of a national **'House'**, which will be charged with providing advice and carrying out investigations with respect to the reports of wrongdoing. Many companies already have a whistleblower policy within their organisations for reporting or disclosing unethical conduct on the part of colleagues (anonymously if the reporter wishes), and there are relevant recommendations and/or obligations that ensue from, for example, the Corporate Governance Code, the Sarbanes-Oxley Act and/or codes of conduct that apply in respect of specific sectors and branches of industry.

The Whistleblowers' Act will have immediate effect. In this newsletter, we will explain the most important obligations and points of note for employers on the Whistleblowers' Act.

Internal reporting procedure

- On the grounds of the Whistleblowers' Act, employers that generally have at least 50 people working within their organisation in the Netherlands must draw up an internal procedure for reporting wrongdoing. The relevant threshold number is in line with article 2 of the Dutch Works Councils Act (*Wet op de Ondernemingsraden*). This article specifies which individuals qualify for the threshold number to establish a works council. Apart from individuals with an employment contract with the employer, temporary agency workers that have performed activities for the employer for at least 24 months need to be taken into account. A branch in the Netherlands of a non-Dutch entity can also be held to draw up an internal procedure if the threshold number is met. Of course, employees who have fewer than 50 employees can also establish such a procedure.
- The Advice Centre for Whistleblowers in the Netherlands (*Adviespunt Klokkeluiders*) has drawn up a 'Model policy on dealing with reports of concerns about wrongdoing or irregularities' as part of the information and implementation pack for the private and semi-private sector (www.adviespuntklokkeluiders.nl, also available in English). The Advice Centre for Whistleblowers, an initiative of the Dutch Ministry of the Interior and Kingdom Relations and the Dutch Ministry of Social Affairs and Employment, was established in 2012. From 1 July 2016, the Advice Centre for Whistleblowers will be incorporated into the Advice Department of the House.
- Pursuant to the Whistleblowers' Act, the works council has an explicit right of consent with respect to proposed resolutions to lay down, amend or revoke the internal reporting procedure. Please be informed, however, that also before 1 July 2016 the works

council has a right of consent with respect to complaints procedures, such as a whistleblowers policy. Thus, in practice the works council's explicit right of consent that will be implemented in accordance with the Whistleblowers' Act will not add much with respect to internal reporting procedures.

- The internal reporting procedure must also be accessible to former employees and persons other than the employer's own employees insofar as they come in contact with the employer's organisation through their work. The Whistleblowers' Act stipulates that the internal reporting procedure must be provided in written or electronic form to the persons who work at the employer. To make the internal reporting procedure accessible to all including those who no longer have access to the employer's intranet, an organisation may decide to place the internal reporting procedure on its website.

Process to follow

- The procedure prescribed on the ground of the Whistleblowers' Act stipulates that the first report should be an internal report to the officer or officers designated for that purpose. In this context, it must be clear in the organisation's internal reporting procedure what qualifies as a 'concern about wrongdoing'.
- It is the organisation's responsibility to adequately investigate a concern about wrongdoing that has been reported internally. In the event that the concern turns out to be well-founded, the organisation must take measures to resolve the wrongdoing and to remedy its damaging consequences. If the person who reported the wrongdoing requests that it is handled confidentially, it is necessary to ensure that the concern about the wrongdoing is treated in confidence.
- The Whistleblowers' Act stipulates that the employer must provide information about the circumstances under which a concern about wrongdoing outside the organisation can be reported. For example, in the event that the internal report of wrongdoing does not lead to the wrongdoing being dealt with within a reasonable term, or in the event that the person who reports the wrongdoing disagrees with the manner in which the wrongdoing has been dealt with, he must be able to report the wrongdoing externally. In such cases, the reporter will have to weigh the public interest in reporting the wrongdoing externally against the employer's interest in keeping the wrongdoing

The Whistleblowers' Act – compliance checklist

- Do at least 50 people normally work within your undertaking or undertakings in the Netherlands?
- Has an internal reporting procedure or whistleblower policy already been established within your organisation, in which the following aspects have been laid down:
 - the manner in which the internal report will be handled;
 - a description of what constitutes wrongdoing;
 - the employees to whom concerns about wrongdoing can be reported internally;
 - the obligation for the employer to treat the report in confidence if the employee requests to do so; and
 - the possibility for the employee to consult with an advisor in confidence with respect to a suspicion of wrongdoing?
- Has the internal reporting procedure been provided to your employees (please note: in addition to your own employees, this also applies to other people who work within your organisation, such as freelancers, trainees and volunteers)?
- Have your staff members (employees and others) been provided with information about 1) the circumstances under which a suspicion of wrongdoing outside your organisation can be reported, and 2) the legal protection that the employee will be afforded when reporting a suspicion of wrongdoing?

confidential. The employee can contact the Advice Department of the House (see below under "the House's role") to obtain advice about such matters.

- Under certain circumstances there may be a reason to skip the internal report, ie if the person reporting the wrongdoing cannot reasonably be expected to report the wrongdoing internally first. This could be the case, for example, if the situation is very serious and urgent, or if it is the highest management of the organisation itself that is involved in the suspected wrongdoing.

- If a concern about wrongdoing is reported externally, it should be reported to the authority that is most suited to handle the matter. This could be an inspectorate or supervisory authority depending on the type of wrongdoing. With respect to external reports of the types of wrongdoing that are defined in the Whistleblowers' Act, the House's Investigation Department (see below under "the House's role") functions primarily as a backup; it will investigate external reports in the event that other external agencies are not authorised to do so or have not handled the report (or have not handled it properly).
- The House's Advice Department will provide information, advice and support to the employee regarding the steps to be taken with respect to the concern about wrongdoing. This may also include referring the reporter to the relevant agencies or supervisory authorities in the case of an external report.
- The House's Investigation Department will be able to start an investigation into the concern about the wrongdoing and the manner in which the employer has acted towards the reporter in response to the report. The House's Investigation Department will have specific powers and will have the authority to request the employer to cooperate with the investigation. In principle, the employer will be obliged to truthfully provide all the relevant information and to allow the documents that are needed for the investigation to be examined. The House can subsequently formulate general recommendations with respect to how a report of a concern about wrongdoing should be handled.

Protection against unfair treatment

- The Whistleblowers' Act states that the employer may not treat the employee unfairly if he reports a concern about wrongdoing in good faith and in the proper manner.
- In good faith and in the proper manner means that the employee has followed the procedure with all due care. Thus, in principle the employee must report the suspected wrongdoing internally first, and if he finds it necessary to report it externally he must make sure that the facts are reported in a suitable and proportionate manner. In addition, the employee must have reasonable grounds for suspecting that the relevant facts are correct and that reporting them (internally or externally) serves a public interest that prevails over the employer's interest in keeping them confidential. In many cases, reporting a concern about wrongdoing externally without prior notice will be deemed not to have been done with due care.
- Unfair treatment can take many forms, such as dismissal or failure to extend a temporary contract, refusing to give a promotion or salary increase and/or transferring the employee (or refusing a request by the employee to be transferred).
- The prohibition against unfair treatment pertains to the period of time during and after the investigation of the report. This is to be understood as protection for the reporter for an ample period of time.

The House's role

- The House, which will be established on 1 July 2016, will consist of two separate departments: an Advice Department and an Investigation Department.

Miscellaneous

- Regarding the processing of the personal data in the context of the internal reporting procedure, the employer is required to comply with the Personal Data Protection Act (*Wet bescherming persoonsgegevens*), for example by reporting to the Dutch Personal Data Authority (*Autoriteit Persoonsgegevens*) and adequately informing employees about the processing of their data.

Sanctions

- The Whistleblowers' Act does not stipulate any sanction in the event that a company that is required to draw up an internal reporting procedure fails to do so. This is based on the awareness that employers consider it important to be able to resolve cases of wrongdoing in their organisation and that they have an interest in having a clear procedure with respect to what is and what is not worthy of being reported and what steps an employee must take if he has a concern about wrongdoing. Having an internal reporting procedure will furthermore form an important element to an effective compliance program.
- The public report issued by the House's Investigation Department may contain recommendations to the employer in order to resolve the wrongdoing that has been identified. Employers are expected to respond to

these recommendations and not to ignore them without further substantiation. Each year, the House will submit a report to the Lower House of the Dutch Parliament to ascertain how the employers have dealt with the recommendations. The Investigation Department is authorised to start an investigation into the manner in which employers have implemented recommendations that were made in an earlier investigation. The public investigation report will be anonymised; personal data and company names will not be published. Nevertheless reputational damage cannot be ruled out.

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This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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