

June 2015

In focus: Law on the Protection of Whistleblowers

The Law on the Protection of Whistleblowers (“Official Gazette of RS” no. 128/14), which entered into force on December 4th 2014, has become applicable as of June 5th 2015 (hereinafter: the “Law”).

The establishment of efficient and effective protection of whistleblowers, i.e. persons reporting corruption and other forms of abuse and illegal conduct is an obligation which the Republic of Serbia took over on the basis of ratified international treaties and one of the goals set by the Nacional Strategy for Combating Corruption and the accompanying Action Plan.

Whistleblowing is defined by the Law as the disclosure of information on a violation of regulations, violation of human rights, the acts of a public authority which are contrary to its entrusted purpose, the danger to life, public health, security, environment, as well as preventing large-scale damage.

The Law distinguishes between three types of whistleblowing:

- **internal** – disclosure of information to the employer;
- **external** – disclosure of information to the competent state authority;

- **public whistleblowing** – disclosure of information through the media, via the internet, at public meetings or in any other way in which information can become available to the public. Public whistleblowing, without prior notification of the employer or the competent authority, may be performed only in extremely extenuating circumstances provided by the Law (e.g. in case of imminent danger to life, public health, security, etc.). Likewise, if information contains classified data, a whistleblower cannot alert the public unless otherwise provided by law.

A whistleblower is entitled to protection in accordance with the Law if he/she: (i) discloses information with the employer, competent authority or public in the manner prescribed by law, (ii) discloses information within one year from the day of learning about the committed action which he/she is disclosing and no later than ten years from the commission of such action and (iii) under the condition that the disclosed information is of such nature that, at the moment of its disclosure, on the basis of available data, a person with average knowledge and experience similar to the whistleblower would believe that the disclosure is true.

The Law protects not only the whistleblower, i.e. any natural person who performs whistleblowing in connection with his work engagement, employment process, using the services of state and other authorities, holders of public authorities or public services, business cooperation and ownership rights over a company, but also certain categories of persons who are not whistleblowers within the meaning of the Law, namely: (i) an associated person, if he makes probable that a damaging action has been undertaken against him due to his connection to a whistleblower, (ii) a person who makes probable that a damaging action has been undertaken against him by another person who mistakenly deemed him to be a whistleblower, i.e. a person connected to him, (iii) a person who, while executing official duties, discloses information if he makes probable that a damaging action has been undertaken against him due to such disclosure and (iv) a person who requests data regarding certain information, if he makes probable that a damaging action has been undertaken against him due to requesting such data.

When disclosing information, a whistleblower is not obliged to reveal his identity, i.e. whistleblowing can be performed anonymously. If the whistleblower submitted his personal data, the Law specifically stipulates that the personal data of whistleblowers shall be protected in accordance with the Law on the Protection of Personal Data, and that the same may be disclosed to the competent authority only in exceptional cases if the actions of this authority would not be possible without disclosure of the whistleblower's personal data.

Special obligations of the Employer

Employers have special obligations in regards to the protection of whistleblowers. The Law provides protection in connection to whistleblowing not only to employees but to all persons employed with the employer, which includes persons who work outside employment, volunteers, persons who perform a specific function and persons who perform factual work for an employer.

Employers primarily have the obligation to inform, in writing, all employed individuals of their rights in accordance with the Law, as well as to appoint a person authorized to receive information and conduct the procedure regarding whistleblowing.

Employers who have more than ten employees are obliged to, no later than December 4th 2015, adopt a general act which shall regulate the procedure of whistleblowing and post the same in a visible place, as well as on their webpage if such is technically feasible. The provisions of the general act on the whistleblowing procedure with the employer must comply with the Law and Rulebook the manner of internal whistleblowing, method of determining the person authorized by the employer, as well as other issues of importance for internal whistleblowing with the employer who has more than ten employees (*“Official Gazette of RS” no. 49/2015*) which entered into force on June 13th 2015.

Employers are obliged to, within their powers, undertake measures to eliminate identified irregularities regarding the information. They are also obliged to

protect the whistleblower from a damaging action, and undertake necessary measures in order to discontinue the damaging action and eliminate its consequences.

The Law explicitly prohibits the employer to, by acting or failure to act, place a whistleblower or associated person in a less favorable position (e.g. regarding employment, promotion at work, determining disciplinary measures and penalties, working conditions, salary and other earnings, termination of employment, etc.). In this sense, it is specifically stated that the provisions of the general act by which a whistleblower's rights are denied or violated, i.e. which place him in a less favorable position regarding whistleblowing, shall be null and void.

Court protection of whistleblowers

A whistleblower whose right has been endangered or violated or is placed in a less favorable position in connection to whistleblowing, may file a lawsuit with the competent court for protection in connection to whistleblowing, within six months from the date of learning of the undertaken damaging action, i.e. within three years from the date on which the damaging action occurred.

Before initiation or during court proceedings, the whistleblower may, through a proposal for temporary measures, request that the court postpone the legal effect of an act, prohibit performance of the damaging action, as well as order the elimination of consequences caused by the damaging

action. During the proceedings, the court may also *ex officio* order provisional measures.

The Law prescribes a special rule of reverse burden of proof according to which the whistleblower should make probable that he had suffered a damaging action in connection to whistleblowing, and the employer or competent authority shall be obliged to prove that the damaging action is not in a causative connection to whistleblowing. This procedure is urgent and the court has been given wider powers in the sense that the same can determine the facts that are not disputable between the parties or investigate the facts which were not presented by any party to the proceedings, if it deems it to be of significance for the outcome of the proceedings.

Penalties in case of violating the Law

Violation of the provisions of the Law, including those which prescribe the obligation of employers to submit a written notice to all employees of their rights under the Law, to designate a person authorized to receive the information and conduct the procedure in connection to whistleblowing, as well as the obligation of employers who have more than ten employees to adopt and post in a visible place the general act which shall regulate the whistleblowing procedure, is sanctioned as an offense.

The Law provides for monetary fines in amounts that vary depending on whether the Law was violated by an employer with the status of a legal entity (a monetary fine

from 50.000 to 500.000 dinars for a legal entity and a monetary fine from 10.000 to 100.000 dinars for the responsible person in a legal entity) or an entrepreneur (a monetary fine from 20.000 to 200.000 dinars).

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