

# Key things to consider about the EU whistleblowing directive

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Raymond Silverstein explains the implications for employers that are not prepared for the new regulations.

EU member states have until mid-December to implement the Whistleblowing Directive. Having left the EU, the UK is not required to introduce the directive; however, it is still relevant to employers here for the following reasons.

- An employer based outside the EU anywhere in the world which has operations in the EU could be caught by the directive;
- Notwithstanding much of the political rhetoric that surrounded Brexit such as taking back control, the commercial reality (international procurement, trading and investment decisions to name a few) is likely to require the alignment of UK whistleblowing laws with those that apply in our largest trading partner as is the case for data protection;
- As a condition for agreeing the Brexit trade deal, to ensure a level playing field, the UK and EU agreed to maintain their own labour and social levels of protection (the non-regression principle) so equivalence could be required.

## What's new?

Though some of the protections in the directive will be familiar, in principle, there are a number of innovations.

- Employers must set up secure internal reporting channels for oral or written disclosures and remove any lack of clarity on how to blow the whistle.
- Disclosures must be acknowledged within seven days.
- Feedback must be provided to the whistleblower within three months.

Feedback is new to whistleblowing. It is stated as being crucial to the regime. Something more than a generic 'thank you for raising this matter – all dealt with – nothing to see here' approach is required.

Feedback should, as far as legally possible and in the most comprehensive way possible, inform the whistleblower of what happened or what will happen as a result of their disclosure. Whether adequate feedback was provided is likely to be disputed in many cases.

Job applicants, self-employed contractors and employees of external contractors and suppliers, past or current, are all protected – in addition to employees and workers.

The whistleblower is also now protected from detriments imposed indirectly on them from colleagues and relatives as well as the employer itself, for example by an external contractor or supplier through the denial of services, blacklisting or boycotting.

## From when?

The implementation dates are from 17 December 2021 for businesses of 250 plus employees though some slippage is likely. Businesses with 50 plus employees have a further two years and employers with 49 or fewer employees are exempt, but a member state can bring them in scope.

## What should I do?

The rise in whistleblowing claims during the pandemic has encouraged many employers to review, refresh and relaunch their whistleblowing policy and procedure.

The government has committed to reviewing UK whistleblowing protections following the publication of data by Protect, which revealed that one in four Covid-19 whistleblowers who contacted its advice line were dismissed between September 2020 and March 2021. The area looks set to remain a 'hot topic' in the coming months.

Publishing revised whistleblowing policies and procedures for operations you may have in the EU should wait until the member state has announced how it will implement the directive. However, work should start now, subject to headcount, given the information that is available and the December date.

Aligning your UK whistleblowing policy and procedure to the EU's approach is recommended and could be required. Not doing so would create two tiers of protection in relation to an increasingly important issue, for example, between companies in the same group based in the UK and the EU. It would be a most unfortunate consequence of Brexit if the UK lost its leading position on protecting whistleblowers.

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## Contact



Raymond Silverstein

Partner

[raymond.silverstein@brownejacobson.com](mailto:raymond.silverstein@brownejacobson.com)

+44 (0)207 337 1021

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