

Strelia Whistleblowing insight

Which companies must set up internal whistleblowing reporting channels? October 2023

The Belgian Whistleblower Act of 28 November 2022 on the protection of reporters of violations of Union or national law transposes the EU Whistleblower Directive into national law. This Act, which came into effect on 15 February 2023, requires private-sector companies with more than 50 employees to set up an internal reporting channel for whistleblowing. In this newsletter, Strelia's Employment & Benefits Practice clarifies how you should calculate this 50-employee threshold and at what level.

Where should you start?

The Belgian Whistleblower Act refers to social election legislation only. This legislation requires companies to calculate every 4 years the average number of employees at their technical business unit (TBU) level over a specific reference period to determine if social elections should be organized. For this average number for the purpose of social elections, you take the number of calendar days between each entry and exit declaration recorded in the DIMONA system during the reference period from 1 October to 30 September and divide that number by 365.

The Belgian Whistleblower Act's reference to the above prompts many employers to ask the following:

- Should we calculate the number of employees for the reference period from 1 October (2022) to 30 September (2023)?
- Are we exempt from this obligation for 4 years if we do not have 50 employees on our payroll?
- Do we count any temporary workers when calculating this 50-employee threshold?

Upcoming clarification

The FPS Economy acknowledged (in our recent conversation with them) that the Belgian Whistleblower Act is unclear and stated that there will be upcoming legislation that should clarify some uncertainties, including the following:

- The specific reference period mentioned in social election legislation will not apply to the Belgian Whistleblower Act.
- Companies must check on January 1st of each year if they meet the 50-employee threshold, considering the previous 4 quarters (i.e., the reference period will be January 1st to December 31st). If they do, they must set up an internal whistleblowing channel. If they do not meet this threshold, they are exempt for 1 year and will have to check again on January 1st in the following year to determine again if they meet the threshold.
- Temporary workers should be counted (unless they replace a permanent employee).
- Calculating this threshold is done at the level of the legal entity and not at TBU level. Given this, companies must however not try to evade their legal obligations by setting up different legal entities (with less than 50 employees on their payroll) that belong to the same TBU.

These clarifications are the FPS Economy's latest interpretation. The Belgian legislator has yet to confirm all this, of course, which is expected in the beginning of 2024.

Our Employment & Benefits team will continue to monitor these developments closely. If you have any questions on this subject-matter or your company's compliance with the Belgian Whistleblower Act, we are standing by to assist you.



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