



This project is funded
by the European Union

Breaking the Silence:

*Enhancing the whistleblowing policies and culture in
the Western Balkans and Moldova*



REGIONAL
ANTI-CORRUPTION
INITIATIVE

Model Provisions for Whistleblower Protection Laws

Toward ensuring the protection of witnesses in the workplace from retaliation

November 2021

In order for whistleblower protection systems to function properly – for the benefit of citizens and society – the laws that establish these systems must provide public institutions with comprehensive, loophole-free instruments to carry out the goals of whistleblower protection. Without solid legal instruments, there is a great likelihood that witnesses of crime and corruption will not be shielded from reprisals. There is high social cost for this: citizens who believe they will be protected if they report crime or corruption will suffer retaliation, with no legal recourse.

Presented here are model legislative provisions based on the “Gap Analysis of Whistleblower Protection Laws in the Western Balkans and Moldova” that was produced in 2021 as a part of this project. These are some, but not all, of the provisions that should be included in a comprehensive whistleblower law. However, they are the most crucial in terms of providing whistleblower protection oversight agencies with sufficient tools to shield witnesses in the workplaces from reprisals. Each provision is accompanied by its rationale in real-life situations.

It is recommended that these provisions be adapted to each jurisdiction’s constitutional, legal and cultural context.

Designated public institution responsible for implementation and oversight of the Act

Legislative text:

A designated public institution shall have competence for administrative remedies against retaliation; review and action on whistleblowing reports of misconduct; training; public education; oversight and transparency on the law’s record. Unless exempt due to organizational size, each institution shall:

- provide advice and counselling support to witnesses in the workplace to understand rights and responsibilities in this Act;
- investigate complaints of retaliation and order corrective action;
- have the independent authority to order temporary relief pending final legal action to cease retaliation or threatened retaliation through relief available under the Act, with the employee authorized to appeal to a competent court for relief if not granted within seven days;
- have the independent authority to find illegal retaliation and order corrective action, subject to appellate review to a competent court by either party. The employee may seek relief *de novo* from a court of competent jurisdiction if not provided within 30 days. Decisions of the competent court are subject to full appellate review;
- receive and assess for credibility reports of misconduct and public health threats;
- order investigation and report on evidence and information from credible disclosures of alleged misconduct to responsible regulatory, investigative and/or prosecutorial authorities for follow-up and corrective actions; and after receiving comments from the whistleblower evaluate whether the response and corrective action are reasonable, forwarding results to executive and parliamentary competent authorities;

Breaking the Silence:

Enhancing the whistleblowing policies and culture in Western Balkans and Moldova

- preserve and protect the confidentiality or anonymity as designated by witnesses from exposure of identity or identifying information unless there is prior written consent for discretionary releases or timely advance notice for non-discretionary releases;
- working with competent offices, monitor and assess the accuracy of compliance with this law
- have a trained staff, free from personal or institutional conflicts of interest, that reports directly to the organizational head;
- be protected against retaliation for all activities necessary to carry out the designated institution's mission;
- issue annual public reports on the law's track record, covering results and impacts of whistleblower disclosures;
- assume responsibility to raise public awareness about the law's benefits to enhance societal acceptance of whistleblowing.

Rationale:

This provision establishes the rules for the key agency responsible for the law to make a difference. It is essential in order to ensure:

- an agency with sufficient knowledge, independent authority and resources for credibility and legitimacy with whistleblowers and institutions cited in reports;
- the right to seek protection without the necessity of financing an attorney and court expenses, which often is unrealistic for an unemployed or vulnerable whistleblower;
- an agency with authority to provide timely temporary relief against retaliation during lengthy investigations;
- an agency with authority to act in a timely manner for permanent relief against retaliation, rather than being limited to recommendations;
- access to court for due process if the administrative agency fails to provide timely relief;
- reliable identity protection for whistleblowers who will only make reports if they can remain confidential or anonymous;
- authority to require investigation and action on credible reports, with enfranchisement of the whistleblower as part of independent assessment whether the response was reasonable
- transparency for results of investigation; and
- cultural acceptance reinforced by knowledge of the law's track record and how it is benefiting citizens and families.

Designated office for implementation and oversight of the Act at private entities

Legislative text:

All private entities not exempted from the law also shall have a whistleblower office that assumes the same responsibilities internally to make corresponding recommendations.

Rationale:

The EU Directive requires both public and private entities to have whistleblower offices. While providing equivalent functions and services, the private offices cannot have the authority of law, but can make corrective action recommendations on retaliation and evaluate responses to whistleblowing reports.

Scope of protection

Legislative text:

Retaliation is prohibited against any legal or natural person who is perceived as associated with, about to communicate or communicating protected information, whether the report is to the designated person, to a person within the organization with authority to investigate and act on the issues, to a public institution, to the media, to the public, or to any other channel or outlet permitted under the law.

Rationale:

It takes more than the final messenger to have a responsible whistleblowing disclosure. This is to clarify that all people who participate in the process, and who prepare and communicate protected information that serves the law's objectives, are protected from retaliation. To prevent isolation, it is necessary to equally protect those who are wrongly perceived as whistleblowers. It assures that protection is not limited to communications with internal whistleblower offices, also protecting for those within normal institutional supervisory and oversight channels to detect and act on problems.

Scope of prohibition on retaliation:

Legislative text:

No legal or natural person may recommend, threaten, take or fail to take any action against any that would have a chilling effect on exercise of rights protected by this law, including but not limited to:

- a) suspension, lay-off, dismissal or equivalent measures;
- b) demotion or withholding of promotion;
- c) transfer of duties, change of location of place of work, reduction in wages, change in working hours;
- d) withholding of training;
- e) a negative performance assessment or employment reference;
- f) imposition or administering of any disciplinary measure, reprimand or other penalty, including a financial penalty;
- g) coercion, intimidation, harassment or ostracism;
- h) discrimination, disadvantageous or unfair treatment;
- i) failure to convert a temporary employment contract into a permanent one, where the worker had legitimate expectations that he or she would be offered permanent employment;
- j) failure to renew, or early termination of, a temporary employment contract;
- k) harm, including to the person's reputation, particularly in social media, or financial loss, including loss of business and loss of income;
- l) blacklisting on the basis of a sector or industry-wide informal or formal agreement, which may entail that the person will not, in the future, find employment in the sector or industry;
- m) early termination or cancellation of a contract for goods or services;
- n) cancellation of a license or permit;
- o) psychiatric or medical referrals.

Rationale:

Any remedial law must clearly identify the full scope of misconduct it seeks to address. As a result, the Directive and all best practice laws specifically list the common forms of prohibited retaliation, in addition to an umbrella provision for flexibility against creative new forms of harassment that could intimidate whistleblowers into silence.

Reasonable belief threshold for protection, without good faith or motivation tests

Legislative text:

Protection shall be granted to all covered persons who make an internal or external report, or public disclosure pursuant to this law with a reasonable belief that the information is accurate at the time it is disclosed, including those who report inaccurate information in honest error. A reasonable belief requires a genuine belief in information's accuracy, but a person's motives, intentions, and good faith shall not be considered as relevant factors for protected activity. Those who make knowingly false reports or disclosures are not protected by this law, and are subject to existing liability.

Rationale:

"Good faith" tests commonly are used to deny protection and put the whistleblower's motives on trial, instead of the organization's misconduct or retaliation. All that matters for the law's objectives is whether the information is true. The law's objective is a safe channel for the message, not a positive judgment about the messenger. This standard reflects a fundamental requirement of the European Union Whistleblower Directive -- that protection is based on a genuine belief of information's accuracy, not motives why an employee blows the whistle.

Choice of audience for protected reports and disclosures

Legislative text:

Any legal or natural person covered by this law may file a whistleblowing report protected by the law internally as part of professional duties or to a designated office to internal authorities of the institution; or alternatively as an external report to the designated public agency or a competent authority for the alleged misconduct. A person who makes a public disclosure shall qualify for protection under this law if any of the following conditions are fulfilled:

- a) the person first reported internally or externally, but no appropriate action was taken in response to the report within 90 days; or
- b) the person has reasonable grounds to believe that:
 - (i) the breach may constitute an imminent or manifest danger to the public interest, such as where there is an emergency situation or a risk of irreversible damage; or
 - (ii) in the case of external reporting, there is a risk of retaliation or there is a low prospect of the breach being effectively addressed, due to the particular circumstances of the case, such as those where evidence may be concealed or destroyed or where an authority may be in collusion with the perpetrator of the breach or involved in the breach.

Rationale:

For initial reports of misconduct, the EU Directive permits whistleblowers freedom of choice between informal or formal institutional internal channels, and externally to competent authorities. The whistleblower may go directly to the public under the specific circumstances listed in the text.

Burden of proof for violations of the law

Legislative text:

A person filing a retaliation complaint has the burden to prove a prima facie case, which requires that he or she made a report protected by this Act and that the employer subsequently took a

prejudicial action. The burden of proof then shifts to the employer to demonstrate that the action taken was not linked in any way to the protected activity.

Rationale:

This is the basic rule for what evidence each side must present to prevail and so is unsurpassed in significance for a whistleblower law's impact. It literally reflects the burdens of proof in the EU Whistleblower Directive. The Directive does not require that the employee demonstrate a causal connection between whistleblowing and alleged retaliation. Rather, once an employee shows he or she made a report and was then subject to detriment, the employer has the reverse burden of proof, which is an ultimate universal standard globally, to prove that an action had independent, innocent causes and that the stated reasons were not a pretext for retaliation.

Comprehensive relief

Legislative text:

Upon finding a violation of a person's rights under this law, the designated external public institution or a court of competent jurisdiction shall order relief to eliminate the direct and indirect effects of the retaliation, with specific authorization to provide:

- interim and injunctive relief pending final action;
- transfer or reassignment, with the employee's consent;
- compensation for any financial prejudice, and for non-financial consequences such as pain and suffering;
- attorney fees and litigation costs;
- medical and emotional treatment for the effects of retaliation;
- education, retraining and other occupational/professional support;
- any other relief the designated agency or court finds appropriate.

An employee may appeal decisions of the designated external agency on the level of relief to a court of competent authority and further appellate review.

Rationale:

This recommendation is for the right to "make whole" relief that neutralizes the direct and indirect effects of retaliation. Without comprehensive compensation, employees may still "lose by winning," which would increase the chilling effect the law seeks to overcome. However, proceedings routinely last for years, during which time an unemployed or vulnerable whistleblower must pay an attorney. Without interim relief, any eventual victory may be too late to prevent irreparable damage.

Penalties for retaliation and for failure to comply with requirements of the law

Legislative text:

Legal or natural persons that permit, order, threaten, recommend or otherwise participate in retaliation against whistleblowers, or who fail to carry out duties required by the law, shall be subject to sanction by the designated agency or a court of competent jurisdiction. Those authorities may order any employment discipline up to termination, order corrective action and impose fines to the degree necessary to prevent recurring violations of this law. A competent court may impose criminal sanctions for repetitive or egregious violations of the law.

Breaking the Silence:

Enhancing the whistleblowing policies and culture in Western Balkans and Moldova

Rationale:

This is to ensure retaliators are held to account for their actions, and to deter individuals and organisations from retaliating against whistleblowers. The EU Directive on whistleblower protection states that criminal, civil or administrative penalties are “necessary” to ensure effective protections, and that these sanctions can “discourage” retaliation.

Training and Information

Legislative text:

All parties that must implement or comply with the law shall provide annual in-person training to their management and staff on the law’s purpose, rights and responsibilities. A judicial academy (or equivalent institution) shall conduct the training. Whistleblower laws and procedures shall be posted clearly in workplaces and prominently posted on websites where their provisions apply.

Rationale:

This is to ensure personnel in whistleblower offices have adequate knowledge to implement the law, managers to obey it, and whistleblowers to be aware of their rights and responsibilities under the law. Experience repeatedly has demonstrated that training to be aware of and understand the law is an unsurpassed factor for cultural acceptance, prevention of retaliation, and enforcement of rights when needed.

Transparency of results under the Act

Legislative text:

The designated public institution responsible to implement the law annually shall prominently post on its website for the prior year the number of retaliation complaints filed, with won-loss data on outcomes; the track record for temporary and permanent relief from reprisal complaints including the length of time for decisions and the range of relief; the number of whistleblowing disclosures to the designated public institution; and public benefits from whistleblowing disclosures, with the most significant examples subject to the law’s confidentiality restrictions.

Statistics on the public impact from the law shall include:

- a. the number of reports received by the competent authorities,
- b. the number of investigations and proceedings initiated as a result of such reports and their outcome, and
- c. if ascertained, the estimated financial damage, and the amounts recovered following investigations and proceedings, related to the breaches reported.

Rationale:

It is not credible to have a transparency law without transparency about its results, which also reveal successful provisions and those that need revision to achieve the law’s objectives. Agencies responsible to promote the law must educate the public on how it has made a positive difference in their lives or been effective against corruption.

Review of laws and policies

Legislative text:

Whistleblower laws and regulations shall be formally reviewed at least every three years, with findings on strengths and weaknesses from the track record and recommendations for

improvement. This review shall include an opportunity for comments by key stakeholders, including employee organisations, business/employer associations, civil society organisations and academia.

Rationale:

This is to ensure the whistleblower framework is regularly updated and improved based on lessons learned. Requiring transparency and public comments will enhance social acceptance for the rights, as well as public recognition and use of the law.