

SPEAK • LISTEN • WHISTLE UP

# GUIDE

## Internal Whistleblowing Channels and the role of Trade Unions

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# EXECUTIVE SUMMARY

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**T**he EU Whistleblower Directive sets forth a **legal obligation to establish channels for internal reporting**. By December 2021, Member States must implement this rule into national law.

Internal channels should be accessible, clear, and build on organisational culture where speaking up is welcomed. Ensuring trust, creating a work environment where employees feel safe and are provided with high level of confidentiality require a **genuine effort to establish a workplace with speak-up and listen-up culture**.

The **Guide gives a pathway** to meet the EU standards of harmonisation and ensure the successful implementation of the EU Whistleblower Directive. The Guide explains both the **legal requirements and the practical steps for national policy-makers and employers** working toward ensuring adequate internal reporting channels. It also offers **clear steps trade unions can take** for an active role during the transposition of the EU Whistleblower Directive and in the whistleblowing process.

The Guide builds on the latest available data, research, and original empirical material. Interviews and surveys were conducted with relevant stakeholders in policy-making, companies, public sector organisations, non-profit representatives, and trade union representatives.

The EU Whistleblower Directive provides common standards for Member States to implement into national law, including **obligations for internal reporting channels, specific timelines, the operation of channels, ensuring confidential and secure reporting, and follow up obligations**.

Member States may introduce or must retain standards of higher protection than those foreseen in the EU Whistleblower Directive. The Guide explains the key areas in which Member States should go a step further during national transposition to **include national law in the scope** of protected disclosure, **include working conditions**, offer equal protections and **follow-up for anonymous** internal reporting, legally acknowledge the **role of trade unions** in internal reporting, legally strengthen the **value of listen-up** culture within organisations.

In practice, the vast majority of whistleblowing begins with internal reporting. The manner in which the initial report is received and handled determines the effectiveness of whistleblowing. In accordance with the EU Whistleblower Directive, internal reporting can be received by a **designated person, by a designated department, or provided by a third party**. Different concerns and implementation issues arise in practice. This Guide points to the main questions and **concerns employers should keep in mind** when setting up internal reporting channels and the kind of issues that may arise depending on the channel used.

Trade unions must play a role in internal reporting and contribute toward an improved responsiveness to whistleblowing. **Three major roles for trade unions** are identified ranging from a basic supportive role toward a more proactive role. These roles should be viewed as **mutually reinforcing**.

# I. INTRODUCTION

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**B**y December 2021, the Member States of the European Union are required to transpose the Directive on the protections of persons who report breaches of Union law (EU Whistleblower Directive)<sup>1</sup>. The EU Whistleblower Directive foresees an obligation for the Member States to ensure that legal entities in the private and in the public sector establish internal channels and procedures for reporting and following up on reports, following consultations with social partners. A key component of the Directive is the implementation of internal reporting channels in all entities with 50 employees or more.

This Guide offers practical information for national authorities implementing the EU Whistleblower Directive and companies putting in place the required internal reporting mechanisms. The Guide gives a pathway to meet the EU standards of harmonisation and ensure successful implementation of the EU Whistleblower Directive. It offers state of the art insights about internal reporting channels based on desk research together with insights from practice through interviews and surveys with relevant stakeholders in policy-making, companies, public sector organisations, non-profit representatives, and trade union representatives.

The EU Whistleblower Directive establishes external and public reporting in addition to internal reporting channels. Whistleblowers benefit from legal protection in using these channels of protection in line with the procedure set up in the Directive.

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<sup>1</sup> Directive 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law [2019] OJ L 305/ 17.

This Guide focuses on internal reporting because establishing adequate internal reporting channels is essential for whistleblower protection as the vast majority of reporting takes place internally within the organisation.<sup>2</sup> In the short term, adequate internal reporting channels can offer an efficient fix to the reported wrongdoing, and in the long term, can lead to organisational efficiency, learning, and improvement overall.<sup>3</sup> Organisations should establish internal reporting channels through a coherent approach taking into account the rights employees have for reporting through external and public channels.

Internal channels should be accessible, clear, and build on organisational culture where speaking up is welcomed. It is no overstatement to note that internal reporting can determine the entire process of whistleblowing as a success or failure on the part of the employer. To further facilitate the implementation of the EU Whistleblower Directive, this Guide could be read together with the '*Whistleblowing Toolkit: Eurocadres Best Practice Guide*',<sup>4</sup> which offers guidance for trade unions in navigating the new legal landscape of whistleblower protection.

**The Guide offers insights on:**

- What are the legal requirements set forth in the EU Whistleblower Directive for internal reporting channels?
- What should Member States improve during the national transposition of the EU Whistleblower Directive by 17 December 2021?
- How should employers establish adequate internal reporting channels?
- How can trade unions play a role for internal reporting and whistleblowing generally?

<sup>2</sup> VigiIenca Abazi, Whistleblowing in the European Union 2021 *Common Market Law Review* Vol.58, p.830

<sup>3</sup> Marcia Miceli, Janet Near, *Blowing the Whistle: The Organisational and Legal Implications for Companies and Employees* (Lexington Books, 1992); Marcia Miceli, Janet Near, Terry Dworkin, *Whistleblowing in Organisations* (Routledge 2008); David B. Lewis (ed.), *A Global Approach to Public Interest Disclosure* (Edward Elgar Publishing, 2010). See also UN Special Rapporteur to the General Assembly on the Protection of Sources and Whistleblowing, 2015.

<sup>4</sup> <https://www.eurocadres.eu/publications/whistleblowing-toolkit-eurocadres-best-practice-guide/>



## II. LEGAL REQUIREMENTS FOR INTERNAL REPORTING

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The EU Whistleblower Directive provides common standards for Member States to implement into national law. Member States cannot adopt lower standards than those set by the Directive and any national provision that would directly or indirectly weaken the protections set out by the Directive would be a breach of EU law. Member States may adopt standards of higher protection. Chapter II, Articles 7-9 of the EU Whistleblower Directive provide the legal requirements for internal reporting and follow-up.

### 1 | Obligations for Private Sector Entities

- Legal entities with 50 or more workers **must** establish internal reporting channels.
- Legal entities with fewer than 50 workers **may** be required by national law to establish internal reporting channels upon an appropriate risk assessment taking into account the nature of the activities of the entities and the ensuing level of risk for, in particular, the environment and public health.

### 2 | Obligations for Public Sector Entities

- All legal entities in the public sector, including any entity owned or controlled by such entities, **must** establish internal reporting channels.
- Municipalities with fewer than 10 000 inhabitants or fewer than 50 workers **may** establish internal reporting channels.
- Municipalities **may** share internal reporting channels provided that the shared internal reporting channels are distinct from and autonomous from external reporting channels.

### 3 | Who Can Report Internally?

- Reporting persons working in the private or public sector who acquire information on breaches in a work-related context **must** be able to report internally when the entity has an obligation to establish internal channels.<sup>5</sup>
- Other parties such as facilitators and third parties connected to the reporting person **may** use internal reporting channels.<sup>6</sup>

#### KEY DEFINITIONS

*Article 5 EU Whistleblower Directive*

**'Reporting persons'** means a natural person who reports or publicly discloses information on breaches acquired in the context of his or her work-related activities.

**'work-related context'** means current or past work activities in the public or private sector through which, irrespective of the nature of those activities, persons acquire information on breaches and within which those persons could suffer retaliation if they reported such information.

### 4 | Timeline obligations

- Acknowledge receipt of internal reporting to the reporting person within **7 Days**
- Feedback not exceeding **3 Months** from the acknowledgment of receipt or, if no acknowledgement was sent to the reporting person, **3 Months** from the expiry of the seven-day period after the report was made;

<sup>5</sup> Art 8 EU Whistleblower Directive

<sup>6</sup> Art 8(2) EU Whistleblower Directive distinction parties mentioned under Art. 4(1)(b, c, d).

## 5 | The Operation of Internal Channels

The Directive leaves open some options as to how internal reporting channels can be operated:

- Internally by a person designated within the organisation for reporting purpose
- Internally by a department designated for reporting purpose
- Provided externally by a third party

Internal reporting channels must be accessible for:

- Orally reporting, including by telephone or through other voice messaging systems
- Reporting in writing
- Upon request by the reporting person, by means of a physical meeting within a reasonable timeframe.

## 6 | Confidential and Secure Internal Reporting

Internal reporting channels must:

- Be designed, established, and operated in a secure manner
- Ensure the confidentiality of the identity of the reporting person
- Ensure the confidentiality of any third party mentioned in the report
- Prevent access by unauthorised staff

## 7 | Follow-up Obligations

- Diligent follow-up to the reporting person
- Diligent follow-up, provided by national law, to anonymous reporting

## 8 | The Obligation to provide clear and accessible information

Legal entities have an obligation to provide clear and easily accessible information regarding the procedures for reporting externally to competent authorities both at the national and European Union level.

## III. GOING A STEP FURTHER: NATIONAL IMPLEMENTATION

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**P**rior to the EU Whistleblower Directive, rules and protections for whistleblowers at the national level were in a fragmented state and most Member States lacked adequate protections. The purpose of the EU Whistleblower Directive is to even the level playing field and establish a minimum level of protections for whistleblowers across the EU. By 17 December 2021, Member States are legally required to transpose the EU standards into national law.

### **MORE FAVOURABLE TREATMENT AND NON-REGRESSION CLAUSE**

#### **Article 25 EU Whistleblower Directive**

Member States may introduce or retain standards of higher protection than those foreseen in the EU Whistleblower Directive.

Member States cannot lower existing national protections on the grounds of implementing the EU Whistleblower Directive.

Member States can further advance protections in national reporting channels in the following:

### **1. Include national law in scope of protected disclosure**

The Directive refers to protections for reporting breaches of ‘Union law’ however as EU law continuously expands and has an imprecise scope, a clear delineation from what may constitute strictly national law is extremely difficult if not impossible for a reporting person to know. Member States should stipulate in national law that all breaches, whether of ‘Union law’ or ‘national law’ are within the protected scope of disclosure.

## **2. Adopt a horizontal approach or at minimum include working conditions, occupational safety and health, and non-discrimination**

National laws should include all policy fields, i.e. adopt a horizontal approach to the material scope of whistleblower protection. The EU Whistleblower Directive covers only 12 policy fields, including public procurement, financial services, products and markets, prevention of money-laundering and terrorist financing, product safety and compliance, transport safety, protection of the environment, radiation protection and nuclear safety, food and feed safety, animal health and welfare, public health, consumer protection, protection of privacy and personal data, and security of network and information systems. It does not however at present include working conditions and health and safety of workers. COVID-19 urgently demonstrates the need to ameliorate this limitation of the EU Whistleblower Directive and clearly stipulate protected disclosure also in the field of working conditions and health and safety of workers. Hence, at minimum, should adopting a horizontal approach not be possible, Member States should include working conditions, occupational safety and health, and non-discrimination in the scope on national law of whistleblower protection.

## **3. Offer equal protections and follow-up for anonymous internal reporting**

Anonymous whistleblowing reports can have significant value and should be protected and followed-up equally to reports made by persons in confidential manner. In the case of anonymous reporting, protection can be offered by first, not making attempts to find out who the whistleblower is, and second, if the identity of the whistleblower subsequently becomes known, the whistleblower would qualify for protection retrospectively. The EU Whistleblower Directive allows national discretion for diligent procedures in the follow-up of anonymous reporting, which Member States should act to adopt similar rigors and diligent procedures as for confidential internal reporting.

## **4. Legally acknowledge the role of trade unions in internal reporting**

Member States have duties and multiple options to strengthen the role of trade unions both within the internal reporting process as well as prior to

the internal reporting. As social partners, trade unions should be consulted and agree on the establishment and follow up to the internal reporting channel and procedures. Trade unions should be part of the designated department for internal reporting, should be acknowledged in national law to facilitate the reporting person, and should assist in addressing conflict with management. On a yearly basis, entities should inform and consult the works council and trade unions on whistleblower cases as well as inform them on the follow-up provided by the entity.

### **5. Legally strengthen the value of listen-up culture within organisations**

Member States may require organisations, both in the public and private sector, to make reports publicly available about cases of whistleblowing and follow-up procedures as well as make it mandatory to provide clear and accessible information to employees about their whistleblower rights. Entities should be required to offer trainings to employees on how to blow the whistle, their rights, and follow-up duties of the organisations.

## IV. PRACTICAL STEPS FOR EMPLOYERS

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The vast majority of whistleblowing begins with internal reporting. The manner in which the initial report is received and handled is paramount to effective whistleblowing. Therefore, employers should adopt adequate internal reporting mechanisms to both comply with their legal obligations as well as to ensure that whistleblowing can be an effective tool for building ethical culture within the organisation. Research shows that organisations with adequate internal reporting channels have a strategic competitive advantage, for example in having almost 3% increase in return on assets, almost 7% fewer material lawsuits, and 46% fewer negative public stories.<sup>7</sup> Yet, in order for internal reporting channels to work, the employees must trust that their reporting is taken seriously, that their voice is actually heard, that they would not be subject to any adverse effects, and that the organisation takes all the necessary steps toward addressing the concern raised. In accordance with the EU Whistleblower Directive, internal reporting can be received by a designated person, by a designated department, or provided by a third party.

**#STAKEHOLDER VOICES:** To ensure compliance with the EU Whistleblower Directive employers must have an ACTION PLAN that among other things includes...

- The choice of a technological tool that correctly guarantees the confidentiality of the whistleblower's identity and prevents access to the information by persons who do not manage the complaints.
- Clear definitions about the functions of managers and the process of processing of complaints
- The development of training and awareness actions for all parties involved.

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<sup>7</sup> Stubben, Stephen and Welch, Kyle, Evidence on the Use and Efficacy of Internal Whistleblowing Systems (February 29, 2020).

## Reporting to a Designated Person

Designating a person within an organisation to receive whistleblowing disclosures may be more suitable for smaller entities, but at the same time, there can be a risk involved for the organisation and whistleblower due to smaller groups and issues of impartiality. Securing the confidentiality of the received report is crucial although this aspect too can be a challenge as the smaller number of employees may make it easier to identify which person possibly made the report.

### IF YOU ARE CONSIDERING DESIGNATING A PERSON TO RECEIVE REPORTS, KEEP IN MIND TO:

- ✔ Designate a trusted person as a specially appointed 'Whistleblowing Officer'
- ✔ Ensure and invest in proper confidentiality procedures
- ✔ Allocate adequate time for the workload of the Whistleblowing Officer
- ✔ Ensure procedures in place for the possibility of replacement of whistleblower officer, either due to the person's possible direct involvement in the matter disclosed or other reasons
- ✔ Ensure the Whistleblowing Officer is impartial and possibly does not have a line manager duty toward other employees
- ✔ The Whistleblower officer's career development and remuneration should be based on objective clear criteria discussed with trade unions
- ✔ Also provide for anonymous reporting channel
- ✔ Routinely offer training to the Whistleblowing Officer and staff
- ✔ New staff must be clearly informed about the designated Whistleblowing Officer and whistleblowing procedures





## Reporting to a Designated Department

Designating a Department is a desirable action for organisations, especially when resources allow an organisation to set up a team of staff professionally trained and equipped to function as the 'Whistleblowing Office'.

### IF YOU ARE CONSIDERING DESIGNATING A DEPARTMENT TO RECEIVE REPORTS, **KEEP IN MIND TO:**

- ✔ Establish a 'Whistleblowing Office' separate from Human Resources
- ✔ Ensure and invest in proper confidentiality procedures
- ✔ Allocate adequate time for the workload of the Whistleblowing Office
- ✔ Also provide for anonymous reporting channel
- ✔ Routinely offer training to the staff of the Whistleblowing Office and staff in general
- ✔ New staff must be clearly informed about the designated Whistleblower Officer and whistleblowing procedure

### INTERNAL REPORTING CHANNELS CAN HAVE MANY NAMES, INCLUDING...

- Whistleblowing line
- Hotline
- Speak-up line
- Confidential helpline
- Fraud hotline



## Reporting provided by an External Third Party

An active market is emerging to provide AI based tools for companies and organisations as third party providers for internal reporting channels. Hotlines are already established in companies of major sizes, especially those either based in countries where hotlines were an obligation or for companies who are listed in the U.S. stock exchange even if they are based in Europe. Stakeholders in Europe have mixed opinions about the value and functioning of third party providers.

Hotlines are already a reality for some organisations or viewed by others as the way to comply with reporting obligations provided by the EU Whistleblower Directive. Whether your organisation is new to hotlines or you already have a hotline in place, this Guide in the steps below provides the key points to keep in mind.

Most importantly, it should be well understood that the mere establishment of a hotline does not mean that the organisation's legal obligations have been met and it does not mean that no other steps should be adopted, especially in terms of follow-up and handling the report. A hotline should be mostly viewed as a tool of how reporting can be done and it is highly encouraged to establish multiply internal reporting channels.

Many third party providers offer the establishment of hotlines. Your organisation should be careful in selecting a provider that knows and understands the process of whistleblowing and does not merely offer 'fast' compliance 'solutions. Depending on the specific services included, market prices for hotlines range between €2000 to €7000.

### #STAKEHOLDER VOICES: DO HOTLINES WORK?

- "Maybe at the big workplaces (hundreds of workers) but most of the workplaces are very small and I don't think that internal hotlines would work there."
- "Definitely not [provided] by HR, since HR is also often involved in measures against the reporter. Provided by a third party offers more security and better confidentiality. Also, the function can be professionalized in a better way."
- "Reporting channels can be alternative internal reporting channels or reporting channels operated by an outsourced whistleblowing service provider. Common methods for receiving reports can include in person conversations, the use of internal or external telephone lines, web based online, email, digital or mobile application reporting by post or internal letterbox."
- "No. An alternative would be a trusted person"
- "Unionists/works councils have to be careful, that the Hotlines are not mistaken as "rubbish bin" for every little error, but that they encourage the reporting of heavy faults, which are a threat to society as a whole (e.g. environmental pollution)"

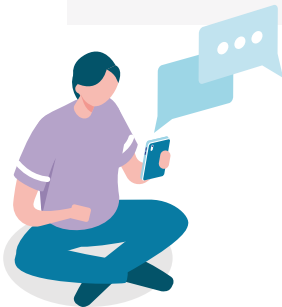
**ARE YOU NEW TO HOTLINES? KEEP IN MIND TO:**

- ✔ Ensure the third party provider offers reporting on all subject matters covered by the EU Whistleblower Directive
- ✔ Adopt an internal organisational policy, trainings, and relevant department for handling the received reporting
- ✔ Avoid the mistake in thinking that you are solving your compliance obligation by simply 'outsourcing' the receipt of reporting to the hotline – responsibility lays with your organisation
- ✔ Adopt an internal organisational policy and organisational structure in receiving and handling reporting
- ✔ Ensure the language offered by the hotline service matches all the language spoken in your organisation
- ✔ Routinely offer training to the staff
- ✔ New staff must be clearly informed about the hotline and internal policy

**DOES YOUR ORGANISATION ALREADY HAVE HOTLINES?**

**KEEP IN MIND TO:**

- ✔ Ensure the third party provider offers reporting on all subject matters covered by the EU Whistleblower Directive
- ✔ Inform staff that internal reporting to hotlines is not mandatory; staff can choose to opt for reporting to external bodies as per EU Whistleblower Directive
- ✔ Ensure the language offered by the hotline service matches all the language spoken in your organisation
- ✔ Routinely offer training to the staff
- ✔ New staff must be clearly informed about the hotline and internal policy



**A GOOD WHISTLEBLOWING HOTLINE MUST:**

- Be secure, easy to use, independently managed
- Free of charge for the reporting person
- Be confidential and offer anonymous reporting
- Available via telephone, mobile, online or in person
- Be accessible at all times
- Be available in all native languages used by employees

# V. ROLE FOR TRADE UNIONS: ENHANCE INDIVIDUAL AND COLLECTIVE VOICE

**T**rade unions must play a role in internal reporting and contribute toward an improved responsiveness in whistleblowing.<sup>8</sup> The EU Whistleblower Directive may be utilised as an opportunity to enhance the collective and trade union rights as trade unions can establish an active role not only for individual reporting but for speak-up and listen-up culture, for how workers are treated, and how accountability is realised within organisations. Through the rights of trade unions in collective negotiations, trade unions must take a role in ensuring effective rights for employees in whistleblowing. Trade unions can opt to have different roles ranging from a basic supportive role toward a more proactive role, which should be viewed as mutually reinforcing.



## 1. SUPPORT: A Basic Role for Any Trade Union

As a basic layer of support, trade unions may take all or some of the measures of support:

- Inform workers about their rights related to whistleblowing

<sup>8</sup> D. Lewis and W. Vandekerckhove, 'Trade Unions and the Whistleblowing Process in the UK: An Opportunity for Strategic Expansion?' (2018) 148 Journal of Business Ethics 835.

- Give advice and (legal) support on an individual basis
- Provide workers representatives with models for reporting wrongdoing
- Provide training to trade union representatives
- Ensure workers can seek advice in confidence from trade unions on how to best proceed if they consider to report.
- The union can help the individual formulate the disclosure in a manner that the shared concern is received as such by the organisation rather than misunderstand the nature of disclosure, for example perceive it as individual complaint.

**#STAKEHOLDER VOICES: TRADE UNIONS SHOULD...**

“Accompany and defend the whistleblower individually to enable him/her to have his/her rights respected; Accompany and advise the whistleblower on the management of his alert; Carry out the whistleblowing in the whistleblower’s place, to protect him/her from any reprisals. In this case, unions must benefit from the same protections as whistleblowers.”

“...offer legal, moral and financial support to the whistleblower, and they can advocate the cause for protection and adequate handling of reported wrongdoings in politics and in negotiations with employers.”

## 2. ACT: Enhancing Whistleblowing

Beyond a supportive role, trade unions can have an active role and ensure that they facilitate the process of reporting on an individual level as well as run activities that enhance the integrity at the workplace and the reporting culture of organisations. The following acts can be taken:

- Seek publicity for an individual whistleblower if necessary and consented by the whistleblower
- Take over the reporting of wrongdoing, especially when a collective issue raised by the union is more likely to be addressed
- Investigate the perception of integrity amongst workers

**#STAKEHOLDER VOICES: TRADE UNIONS HELP THE REPORTING PROCESS IN NUMEROUS WAYS, INCLUDING BECAUSE...**

“If a reporting person first consults the union, completely unjustified and irrelevant reports may be avoided”

“...they make it possible for complaints or irregularities to be filed without it being necessary, in the first instance, for the employee to confront his or her manager, and provide the necessary legal support in case it is needed.”

“...they will be, in many cases, the only option that workers will have to channel the information and the steps to follow for the correct use of this type of complaints and above all to protect the complainant.”

### **3. ADVOCATE: Building Cultures of Speak-Up and Listen-Up**

The collective voice of trade unions can amplify not only an individual whistleblower's voice but also take away the focus from an individual person and rather place the spotlight to the issue being reported. Among key ways trade unions can advocate for a positive change of work culture and one that encourages both a speak-up and a listen-up culture include:

- Lobby for and negotiate on standards for whistleblowing in legislation, statements, codes of conduct, guidelines on all relevant levels
- Exchange information and collaborate with non-profit organisations and public authorities in raising awareness about whistleblowing and issues that whistleblowers face
- Run awareness raising campaigns for the right to whistleblowing to be genuinely recognised and exercised as part of rights for workers.
- Trade unions may monitor the effectiveness of the national rules and the follow-up of concrete cases and the protection accorded to workers, so as to assess the functioning of the new rules.

- A program establishing a certain financial security for whistleblowers who lose their job as (possible) reprisal for blowing the whistle may also (especially if the persons in question have been guided by their trade union) grant the said persons a certain peace of mind until the end of a possible court case and may at the same time add to the image value of the union.

**#STAKEHOLDER VOICES: THE EU WHISTLEBLOWER DIRECTIVE IMPACTS EXISTING LABOUR AND INDUSTRIAL RELATIONS...**

“...the reversed burden of proof will have a huge impact, since it dramatically will improve the protective rights of the employee in- and outside court cases”

“It is possible to improve the prevention model, prevent criminal liabilities, identify bad practices or prevent the materialisation of threats in significant economic losses and, in short, to implement a culture of compliance in labor and industrial relations, which in the end are the most important channel for uncovering fraud offenses committed within organisations.”

“there will need to be a better working relationship between employers and the relevant trade unions in their workplace. This will include recognition, negotiation, and effective collective agreements that adhere to the new legislative requirements.”

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# NOTES



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