

## Whistleblowing as an opportunity: clarity through the Involvement of a law firm as a Whistleblowing Office

Dr. Patrick Stach

*A whistleblower is a person who discloses internal grievances of an organization in the public interest. Whistleblowers are usually employees who learn of illegal internal activities as a result of insider information and subsequently make these abuses public or report them to the authorities. The consequence of this can be damage to the reputation of the company or individual concerned. From a legal perspective, the establishment of a whistleblowing system is also recommended for Swiss companies.*



**Dr. Patrick Stach**  
Senior Partner

stach@stach.ch  
+41 (0) 71 278 78 28

A whistleblower is a person who discloses internal grievances of an organization in the public interest. Whistleblowers are usually employees who learn of illegal internal activities as a result of insider information and subsequently make these abuses public or report them to the authorities. The consequence of this can be damage to the reputation of the company or individual concerned. Despite numerous attempts to create comprehensive legal protection for whistleblowers in Switzerland, the legal regulations remain weak. This is partly due to the fact that the term "whistleblower" has a negative connotation in most countries, including Switzerland, because of the lack of legal regulations and the resulting uncertainties. The European Union has put an end to these uncertainties in 2019 with the entry into force of the so-called EU Whistleblower Protection Directive. Among other things, the directive includes the obligation to set up a reporting system and has also an effect on parent companies domiciled in Switzerland via a subsidiary held in the EU. From a legal perspective, the establishment of a whistleblowing system is also recommended for Swiss companies. The advantages and disadvantages for the company concerned are explained below.

### Uncertainties due to the legal situation in Switzerland

As a result of the lack of legal regulation in Switzerland regarding whistleblowers, numerous uncertainties arise for companies as well as employees. The Federal Supreme Court has therefore repeatedly stated in its rulings that employees must also comply with the reporting and fiduciary duty (Art. 321a para. 1 CO) and the duty of confidentiality (Art. 321 para. 4 CO) when whistleblowing. Accordingly, persons who are confronted with insider knowledge concerning

unfair conduct or illegal occurrences must primarily disclose this to the employer or the responsible internal bodies before contacting external persons. Violation of this duty may even result in dismissal.

Due to the unclear legal consequences, however, the motivation of an employee - to uncover a grievance - is not promoted at all. The provisions on wrongful termination, the employer's duty of care and the employee's freedom of expression are in tension with each other. All of these interests or duties are in conflict with each other. For example, the employer has a duty to protect the interests of the company in good faith and to disclose wrongdoing, which in turn increases the risk of a negative reputation. Furthermore, there is a public interest in exposing criminal acts such as corruption or fraud, which in turn conflicts with the employee's duty of loyalty. Which principle is to be given priority must be decided on the basis of the individual case. Due to these different obligations of the company and the employees, there is fundamental legal uncertainty in the area of whistleblowing.

### Recommendation for setting up a whistleblowing system

To eliminate these uncertainties, it is advisable for a company of any size to set up a whistleblowing reporting system. Although there is no legal obligation to implement a whistleblowing system in Switzerland, around 60% of companies have nevertheless set up an internal whistleblowing system. On the one hand, such a reporting system can prevent reputational damage, but it can also safeguard corporate quality through early risk identification as well as the uncovering of misconduct. Last but not least, the establishment of a whistleblowing system also leads

to improved legal certainty for employees as well as the company, since it is mandatory to establish internal whistleblowing regulations, define a clear procedure for reports and identify a suitable whistleblowing office. It is central that employees are informed and educated about the tolerated behaviors before the internal whistleblowing system is repaired. The company should also take internal measures to protect all employees.

### **Law firm as Whistleblowing Office**

As already mentioned, some legal points have to be considered when setting up a whistleblowing system. In particular, finding a suitable Whistleblowing Office is of great relevance for the company concerned. The advantage of an internal reporting system is that it gives the company the opportunity to clear up internal grievances at an early stage. These grievances can include issues such as corruption, money laundering, discrimination, human rights violations or breaches of environmental protection. Frequently, an existing grievance is reported by employees or external third parties. The aim of this reporting is to improve deficient workflows.

For many companies, the involvement of a law firm as a Whistleblowing office is of great interest, as it can provide both the company and the employees with legal advice on the subject of whistleblowing. The law firm receives reports, documents and examines them, and performs the appropriate triage. The law firm acts as an intermediary between the whistleblower and the company. A whistleblower often does not want to report publicly, especially because he or she is afraid of the consequences, which is why an anonymous report is desirable. However, these anonymous reports are not ideal, as they invite abuse, credibility cannot be verified, and inquiries are not possible. If a law firm is used as a whistleblowing office, only it knows the identity of the reporter and can therefore receive reports confidentially. As a

result, the reporter feels secure and the company can at the same time check the credibility of the reporter and ask questions through the law firm. Furthermore, a lawyer is legally obligated to treat reports of any form anonymously due to the attorney-client privilege.

However, there are also numerous advantages for employees in involving a law firm as a whistleblowing office. For example, a law firm can prevent wrongful termination (Art. 336 OR). This is because the employee enjoys protection against dismissal as a result of the employer's duty of care, which means that a termination in response to permissible internal or external whistleblowing must be qualified as wrongful.

### **An opportunity for companies**

In summary, it can be said that internal whistleblowing offers companies an opportunity to strengthen their compliance, their quality as well as their reputation. This should be reflected above all in a code of conduct or also in the lived example of the so-called zero tolerance limit for breaches of rules. It is essential that the corporate culture changes accordingly and that whistleblowing is not seen as "blowing the whistle" but rather as an improvement and a valuable contribution to strengthening the company. However, it is also important that detailed whistleblowing regulations are drawn up and that employees know how to proceed in the event of a grievance. The fear of being punished for whistleblowing should be taken into account by an appropriate suspension of a reward. Finally, based on what has been said, the procedure must be observed when setting up a whistleblowing system. It must be clearly regulated which information is passed on to which whistleblowing office, how the relevant facts are clarified and to whom and how the conclusion of the procedure is reported.

---

Stach Rechtsanwälte AG

Poststrasse 17  
Postfach 1944  
CH-9001 St.Gallen

Kreuzbühlstrasse 20  
CH-8008 Zürich

T +41 (0)71 278 78 28  
F +41 (0)71 278 78 29  
contact@stach.ch  
www.stach.ch

T +41 (0)58 332 27 27