

# The pending introduction of anonymous reporting for whistleblowers

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## Introduction

More than a year after the implementation of the EU Whistleblowing Directive ([EU 2019/1937](#) – the “Directive”) into Dutch legislation, one important element of the Directive still remains to be implemented, namely: the possibility of **anonymous reporting**. This is about to change as, last month, the government published the long-expected draft general order (*AMvB*) on anonymous whistleblower reporting (the “Draft Decree” – [link in Dutch](#)). The Draft Decree provides for an amendment of the Whistleblower Protection Act (the “Act” – [link in Dutch](#)). We have set out the key aspects of the Draft Decree in the below update. In a nutshell, we discuss:

- the proposed changes;
- the foreseeable implementation steps to be taken by employers; and
- the practicalities and remaining ambiguities of (the current version of) the Draft Decree.

## The proposed changes

In short, the Draft Decree calls to life an obligation for employers that are obligated to establish an internal reporting policy and reporting channel in line with the Act, to also explicitly provide for the opportunity to make an anonymous report of a (suspected) wrongdoing. Once the Draft Decree is finalized and enters into effect, employers will have to comply with the following obligations:

1. To appoint at least one independent, sufficiently skilled and experienced officer to receive anonymous reports. To limit the (additional) administrative load, an employer may appoint the same person(s) who receive(s) the non-anonymous reports to also receive the anonymous reports. However, there should always be at least one officer who can receive anonymous reports who is *not* an employee in a management position and/or in a position that primarily entails recruiting, hiring and dismissing of employees (for example a member of the HR team). The appointed officer will be responsible for:
  - i. safeguarding the reporters’ anonymity; and
  - ii. informing the employer’s management and works council / employee representative body (or - in absence thereof - the employees) at least once a year on the total number of anonymous reports made (as well as the general nature of those reports). Of course, the report may not allow the possibility of identification of individual persons.

*Please note that in principle, no one, not even this officer shall be aware of the identity of the anonymous reporter. Should a reporters’ identity be disclosed unexpectedly, then the officer must ensure that the reporter’s identity is not disclosed further to other persons involved in the report and/or the investigation thereof. In such event, it follows from the principle of being a good employer that the officer should then inform the reporter of this occurrence (and is transparent about the manner in which the reporter’s identity was unexpectedly disclosed).*

2. To timely amend the existing whistleblowing policy to ensure it includes:
  - i. the contact details of the independent officer(s) to whom a report can be made anonymously;
  - ii. an explanation of how an anonymous report can be made; and
  - iii. the stipulation that (to the extent possible) agreements shall be made between the independent officer receiving an anonymous report and the anonymous reporter on how the reporter prefers to be contacted during the course of the investigation.
3. To facilitate the appointed officer(s) in terms of time and recourses to enable them to perform their role in a proper and independent manner.

## The foreseeable implementation steps to be taken by employers

While it is not yet clear when the Draft Decree (in its final form) will be published and subsequently enter into effect, we do expect that the implementation of the obligation to provide for anonymous reporting might be time-consuming for most employers (regardless of their size).

Once more information is available on the final form of the Draft Decree and the expected date of its entry into effect, employers would be well advised to make a timely start with:

1. arrangements that will enable them to receive and process anonymous reports. While this can, in principle, be based on an analogue system, among others, the House for Whistleblowers has suggested that digital systems (i.e., software designed specifically for this purpose) could provide a practical solution (that may be better equipped to safeguard anonymity). Employers aiming to use such software would be well advised to verify that any new software is in line with all relevant obligations (both from an employment law (i.e., the Act) and a privacy perspective; and
2. a draft amendment of the existing whistleblowing policy to reflect the explicit possibility to report anonymously. *Timing wise, please note that this requires the works council's prior consent (if any).*

## The practicalities and remaining ambiguities of (the current version of) the Draft Decree

There are a number of topics that remain (yet) undiscussed in the current version of the Draft Decree. Below, we have set out the outstanding questions that we deem most important. In our view, it would be helpful if the government could provide some additional clarity and/or practical guidance for employers who would have to translate the new obligation into their day-to-day business.

- i. **How can an anonymous report be made?** We note that the Draft Decree hardly provides examples of allowed solutions, leaving the freedom but, more importantly, the responsibility to come up with a compliant method with employers. In its reaction to the consultation of the Draft Decree, the House for Whistleblowers (the Dutch authority in relation to the Act) also highlighted this ambiguity. In the House's response, it was pointed out that – among other things – it is currently unclear whether a P.O. box where employees could deposit anonymous written reports would suffice or whether it is absolutely necessary to file the report by seeking contact with the independent officer. We note that one option that appears compliant is reporting via an advisor or a lawyer. Hopefully, the Draft Decree will undergo a revision to further tackle this topic.
- ii. **When will employers have to comply?** Timing is rather important here as the process of developing a safe manner for anonymous reporting, amending the whistleblowing procedure correspondingly (and obtaining the necessary consent (*instemming*) from the works council therefore) can be time-consuming. In any event, the government has stated that it will provide employers with 'sufficient' time, but thus far no further information has been provided.
- iii. **How should an anonymous report be handled?** It is to be expected that calling to life the possibility of anonymous reporting will lower the threshold to make an internal report of a (suspected) wrongdoing. Potentially, this may lead to a decrease in external reports or disclosures. That is, however, under the strict assumption that anonymous reports can, in practice, be investigated properly where this proves necessary. The question arises how an anonymous report should be handled in practice, since the relevant whistleblower cannot be addressed in person and since the reporters' identity will also be unknown to the independent officer. In situations where handling a report in complete anonymity stands in the way of a proper investigation, this may come to the detriment of the position of other involved parties and their right to a contradictory process. This issue is partly solved in the explanatory memorandum to the Draft Decree where the government recommends employers to clarify in their whistleblowing procedure that filing an anonymous report (and insisting on continued anonymity throughout the process) may result in a report not being investigated in full. That way, the employee is provided with a choice to either accept that their report cannot be investigated any further or to disclose their identity (or any data traceable to their identity).

## Final remarks

Based on the current version of the Draft Decree, preparing for the implementation and subsequent compliance with the new obligations might prove to be challenging for employers. In its current wording, the Draft Decree is fairly limited and fails to provide any detailed guidance on how employers should actually translate the new obligations into their day-to-day practice. Relevant questions, including, how an anonymous report may be submitted and how the anonymous report should be handled, thus far, remain unanswered. Based on some of the critical reactions to the Draft Decree received during the consultation period (amongst other from the House for Whistleblowers), it is to be hoped that the Draft Decree will undergo an amendment after further evaluation. We will closely monitor this process over the coming months and will provide a more detailed update once the Draft Decree is finalized and clarity can be provided on the implementation date.

In the meantime, should you have any questions about anonymous reporting, require tailored advice or simply wish to exchange thoughts on steps to be taken (and the relevant timeframe therefore), then please feel to reach out to any member of our [Employment, Incentives & Pensions](#) team for further guidance. We are happy to discuss.



### Lucy de Ruiter

Professional Support Lawyer |  
Employment  
T +31 20 7222360  
E [Lucy.deRuiter@simmons-simmons.com](mailto:Lucy.deRuiter@simmons-simmons.com)



### Juliet Meijer

Associate |  
Employment  
T. +31 20 7222326  
E [Juliet.Meijer@simmons-simmons.com](mailto:Juliet.Meijer@simmons-simmons.com)