

WHISTLEBLOWERS NOW PROTECTED UNDER WORKPLACE NONDISCRIMINATION LAW

Date: 1 February 2023

Paris Labor, Employment, and Workplace Safety Alert

By: Christine Artus, Natacha Meyer

Discriminatory practices in the workplace are strictly prohibited by Article L. 1132-1 of the French Labor Code and Article 225-1 of the French Criminal Code.

Prohibited treatment includes treating an employee, a job applicant, or an applicant for an internship or a training course differently or unfavorably compared to another person placed in a similar situation based upon a protected characteristic.

In 2022, the French Act no. 2022-401 (the Act), 21 March 2022, aimed at improving the protection of whistleblowers and implementing the EU Directive on whistleblowing¹ into French law, added whistleblower status to the list of “protected characteristics” covered by French discrimination legislation. The Act came into force on 1 September 2022.

Companies need to understand the requirements of the Act and, in particular, the significance of its introduction as an amendment to existing French discrimination law.

WHISTLEBLOWER STATUS NOW INCLUDED IN THE LIST OF PROTECTED CHARACTERISTICS

The list of protected characteristics under French discrimination law has continuously evolved over the years. The French Labor Code now contains a list of more than 20 protected characteristics.

All protected characteristics are protected equally. They relate to the person, to situations, attitudes, convictions, and professional activities.

Whistleblower status now sits alongside existing protected characteristics such as age, gender, or disability. Protection is extended not just to the whistleblower but also to any individual or nonprofit legal entity that facilitates whistleblowing by another, as well as any person who associates with the whistleblower, such as colleagues or relatives.

Under the Act, a whistleblower is defined as an individual who reports or discloses, without direct financial consideration and in good faith, information relating to (a) a crime, an offense, a threat, or harm to the public interest; (b) a violation or an attempt to conceal a violation of an international commitment that has been ratified or approved by France; (c) a unilateral act of an international organization taken on the basis of such a commitment; (d) European Union law; or (e) the law more generally.

Where the information that gave rise to the act of whistleblowing was not obtained in the course of professional activities, the whistleblower must have had personal knowledge of it.

This update to the list of protected characteristics is consistent with the general objective of improving protection of whistleblowers.

WHAT DOES THIS MEAN IN PRACTICE FOR COMPANIES?

Whistleblowers, facilitators, and associates are protected from retaliatory measures, including termination of the employment contract.

In practice, this means that an employer cannot take any measure or decision in regard to an employee based on his or her whistleblower status without running a risk of a discrimination claim.

The prohibition of discriminatory measures includes any act relating to the working relationship (e.g., dismissal, disciplinary sanction, or unfavorable treatment relating to remuneration, classification, etc.). There is no defined list of acts covered by this prohibition.

As an example, an employer's demotion of an employee because of an alert that he or she has issued would constitute a discriminatory measure.

As a reminder, companies with at least 50 employees must implement a specific procedure for collecting and processing whistleblowing reports, and that procedure should be mentioned in the company's internal regulations.

WHAT ARE THE RISKS OF FAILING TO COMPLY WITH THE FRENCH PROVISIONS ON NONDISCRIMINATION?

Under French law, any measure taken by an employer in breach of the provisions of the Labor Code regarding nondiscrimination is void and may give rise to a claim for damages from the employee.

In order to defend a claim for discrimination, an employer will need to provide evidence to show that its decision or actions were justified by objective factors unrelated to discrimination.

In addition to a potential claim for damages from the employee, a failure to comply with the provisions related to nondiscrimination is a criminal offense, potentially punishable by a prison sentence of three years and by a fine of up to €45,000 for the company's legal representative and a fine of up to €225,000 for the company itself.

Therefore, employers should ensure that they include whistleblower status as part of their regular anti-discrimination programs, including raising staff awareness of whistleblowing and conducting staff training initiatives on the meaning of whistleblowing and the protection given to whistleblowers, facilitators, and associates by the Act.

FOOTNOTES

¹ The Act amended the French Act no. 2016-1691 of 9 December 2016 on transparency, the fight against corruption, and the modernization of economic life (known as the Sapin II Law).

KEY CONTACTS



CHRISTINE ARTUS

PARTNER

PARIS

+33.1.58.44.15.38

CHRISTINE.ARTUS@KLGATES.COM

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