New draft bill on private sector whistleblowing

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Introduction

The inadequacy of whistleblower protection in Switzerland has been widely criticised for years. Despite the legislation on public sector whistleblowing which was introduced in 2011, there is no concise legal framework specifically addressing respective issues in the private sector. Now, the Federal Council is launching a second attempt to fill this gap by way of a new bill on private sector whistleblowing.

This newly submitted piece of legislation must be seen against the background and history of its predecessor. A first attempt to pass whistleblowing legislation in 2015 failed in Parliament. At the time, both chambers agreed in principle on the need to pass legislation to protect whistleblowers, but the bill was rejected for its overly complicated structure and wording. Therefore, with this new draft bill, the Federal Counsel proposes a leaner and more understandable piece of legislation, which will be introduced into the section governing employment contracts in the Code of Obligations. Whether the draft bill survives parliamentary scrutiny remains to be seen.

Three-step reporting process

The three steps that a whistleblower must observe before reporting to the public have been established by case law. Like its predecessor, the new draft bill provides for a three-step escalation procedure that involves:

- informing employers via internal or designated reporting points;
- notifying competent authorities; and
- informing the public.

The process has been streamlined and contains fewer definitions.

Principle

Draft Article 321(a)*bis* of the Code of Obligations(1) sets out the basic rule that employees must act in line with their duties of loyalty and confidentiality towards their employer when irregularities are reported pursuant to the three-step procedure. 'Irregularities' are broadly defined as actions against criminal and administrative law or any other statutory regulations, as well as internal rules and regulations (eg, transgressions or violations of a company's internal rules and regulations, guidelines or employee handbook).

Step one: informing employers

The threshold that needs to be met in order to report irregularities to an employer's internal or designated reporting point is reasonable suspicion. The grounds for what constitutes 'reasonable suspicion' are not defined in the law; however, they appear to be less demanding than the sufficient grounds for suspicion that employees had to have before reporting irregularities under the first (and rejected) bill.

If an employer receives such a report based on reasonable suspicion, it must observe an adequate time limit, which may not exceed 90 days, to follow up on the irregularity. Further, the employer must confirm receipt of the report to the reporting employee and inform them about any follow up relating to the reported matter.

However, the bill does not provide for employers' compulsory accountability concerning action taken to follow up on irregularities that are reported anonymously, even though technical solutions are available to maintain the anonymity of whistleblowers while letting them monitor their employers' response. Therefore, an anonymous report of an irregularity will in most cases prohibit a whistleblower from taking steps two and three of the escalation procedure, because they will be unlikely to know with the requisite degree of certainty as to whether the employer has taken appropriate follow-up measures.

Step two: informing competent authorities

Draft Article 321(a)*ter* of the Code of Obligations provides that irregularities can be reported to the competent authorities if there is reasonable suspicion of irregularities and either:

- the employer has not taken the adequate measures to follow up on the report; or
- the employee has received a notice of termination or suffered any other disadvantage because of the report.

Therefore, in contrast to the previous bill, the proposed legislation no longer allows employers to bar employees from approaching the authorities by merely establishing a designated internal reporting point. The new draft requires employers to take effective action (ie, to follow up on the report within a specific time limit, inform the employee and take appropriate measures to deal with the irregularity).

Whistleblowers may inform the competent authorities directly if:

- the report to the employer would be to no effect;
- the competent authority would otherwise be encumbered to take effective and timely action; and
- there are immediate and serious threats to the life, health and safety of persons or the environment, or immediate danger of significant damages (Draft Article 321(a)*quarter* of the Code of Obligations).

Further, Draft Article 321(a) contains a legal presumption on the term 'effect': the law assumes a report to have effect if the employer:

- has designated an independent point for reporting;
- has established rules to follow up on reports;
- prohibits terminating reporting employees or other disadvantages as a consequence of a report; and
- allows for reporting on an anonymous basis.

Step three: informing public

According to Draft Article 321(a)*quinquies*, employees are entitled to inform the public about an irregularity provided that they have:

- serious reasons to believe that the matters reported are true;
- already lodged a report with the competent authority, but:
    - the authority failed to adequately inform the employee about the measures taken to follow up the matter within 14 days from a respective request for information; or
    - the employee was terminated or suffered other disadvantages as a consequence of reporting.

Whistleblower protection

The protection offered to whistleblowers under the draft bill does not exceed the protection

provided to any other employee against abusive termination by their employer. Draft Article 336(2)(d) of the Code of Obligations deems a termination abusive if it is issued because an employer has made a report on irregularities in line with their obligations of loyalty and trust. As is the general rule in Swiss employment law, abusiveness of a termination does not render the termination itself invalid or void; rather, it entitles the employee to compensation, which is capped at six months' salary.

Interestingly, the draft bill expressly states that an employee may seek the counsel of a person who is subject to statutory rules on professional secrecy. In other words, employees may talk to a member of the legal profession about irregularities that have come to their attention without breaching their obligations of duty and loyalty towards their employer. The conclusion *e contrario* is that employees break their obligation of duty and loyalty towards their employer if they divulge this information to any other person.

Comment

Will the situation for private sector whistleblowers change if this new bill is passed? Arguably, it will. Compared to the current legislation, the draft bill provides clarity and guidelines for employers and employees; however, it does not strongly incentivise whistleblowing. The bill seems reasonably well balanced in providing for a duty of employers to effectively tackle reports on irregularities, render accounts about measures taken and protect whistleblowers from retaliation on the one hand and stipulating fairly strict prerequisites and limitations to be observed by employees when reporting (actual or presumed) irregularities to any party other than the employer on the other.

As a rule, whistleblowing continues to be dealt with by employees and employers privately. Reporting to authorities or information of the public will remain the exception. However, in order to benefit from this employer-friendly concept, Swiss undertakings are advised to establish an internal reporting process that:

- designates an independent whistleblowing unit;
- specifies rules on the procedure to follow up on reported irregularities;
- prohibits dismissal or disadvantages because of reports; and
- allows for anonymous reports.

As studies show that reporting points and processes meeting these requirements remain rare in SMEs (less than 10%), a fair amount of work remains to be done.

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Endnotes

(1) The draft bill is published in BBl 2018 6127. The numbering of Article 321(a)*bis* has been erroneously redacted to Article 321(a)*bis*.