

**Statement concerning methods for dealing with
malpractices in companies**

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Statement concerning methods for dealing with malpractices in companies

1. Introduction

“Whistleblowing” is in the news a great deal these days. Employees who call attention to suspected malpractices that they have stumbled across within their organisation can count on plenty of media interest – and so can their employer.

Whistleblowing can be defined as *conduct by which an employee (the whistleblower) discloses suspected illegal or immoral practices for which his/her employer can be held accountable and involving major public interests to external parties who may be in a position to take action against these practices.*

Whistleblowing can have major repercussions. The company involved may be brought into discredit and suffer financial losses or other damage. The whistleblower’s relationship with his or her employer may be seriously impaired, often resulting in dismissal or some other form of disadvantage.

A study commissioned by the Ministry of Social Affairs and Employment has revealed that both employer and employees would like to see a code of conduct that will help them put the necessary reporting procedures in place. The Minister has asked the Labour Foundation to develop such a code, which can be introduced within the context of a collective agreement.¹

The Labour Foundation gladly complies with this request. In its view, it is important to lay down conditions enabling employees to bring any malpractices within their companies to light without putting themselves at risk, giving their employers an opportunity to right them. Not only is this safer for the employees involved, but it is also in the interest of companies; after all, management should be made aware of suspected malpractices as soon as possible so that it can take steps against them. In addition, it may be possible to resolve the situation before the employee is forced to resort to whistleblowing.

The Foundation’s statement is intended as an initial step towards creating company- or industry-level guidelines for reporting suspected malpractices.

2. Suspected malpractices, corporate culture, corporate social responsibility and conduct befitting a good employee

A system whereby suspected malpractices can be reported internally gives corporate management an important tool for taking charge of a situation where required. Such a tool is compatible with a corporate policy that regards business as a social activity.

¹ IVA Tilburg Institute for Policy Research and Consultancy, **De weg van de klokkenluider keuzes en dilemma's** [The Whistleblower’s Route: Choices and Dilemmas], study commissioned by the Dutch Ministry of Social Affairs and Employment, January 2002. Letter of 14 February 2002, reference AV/IR/2002/1751, sent to the Labour Foundation.

The implication is that corporate management will account for the company's actions in the light of prevailing public opinion as to appropriate and inappropriate conduct, and that it will bear the public interest in mind, for example with respect to the environment and the quality of life.²

A corporate culture, characterised by transparency, due care and integrity may make it possible to avoid and counteract practices that can bring the company into discredit or cause it to suffer financial losses or other damage. What is also important is how employees treat one another: is there scope for criticism or a tendency to repress "deviant" behaviour (peer pressure)?³ Factors such as these will play a role when an employee who suspects malpractices is deciding whether or not to expose them.

Employees who are considering whether to reveal certain items of information about their company (which in their view constitute a suspected malpractice) will find themselves dealing with various standards and principles that may well conflict with one another. Employees are generally expected to display discretion and loyalty towards their employer and to avoid any behaviour that would damage the company. Nevertheless, employees do not relinquish their constitutional right to freedom of speech just because they sign an employment contract. How they exercise that right, however, is subject to the limits arising from the employment relationship.⁴

In the light of these considerations, the Labour Foundation believes that companies must lay down clearly defined guidelines that enable employees to report possible malpractices according to a fixed procedure. The methods companies use to do this will depend in part on their size and the nature of their activities, a topic we will return to later. At this point, the Labour Foundation merely wishes to comment that some degree of formality is unavoidable. Employees, for example, must know to whom they should report suspected malpractices and what the procedure entails (what happens after they make their report, how will they be informed about the progress of the procedure). Having clearly defined guidelines is in the interests of both the employer and the employee.

3. Basic components of a reporting procedure⁵

It is important to treat reports of suspected malpractices with due care. Sloppiness can result in major losses and damage, both for the company and for the employee concerned. Due care can be encouraged by drawing up an appropriate reporting procedure.

² See also: Social and Economic Council, **De winst van waarden** [The Profitability of Values]; 15 December 2000; publication no. 00/11

³ See: Labour Foundation; **Met alle respect! Over bedrijfscultuur en omgangsvormen op de werkplek** [With all due respect! On corporate culture and manners in the workplace]; 14 December 1999; publication no. 7/99

⁴ See the provisions concerning good employment practices and conduct befitting good employees (Article 7:611 of the Dutch Civil Code [*Burgerlijk Wetboek*]), the obligation to observe confidentiality (Article 7:678(2)(i) of the Civil Code, Article 20 of the Works Councils Act [*Wet op de ondernemingsraden*]), Articles 272 and 273 of the Dutch Criminal Code [*Wetboek van Strafrecht*]), the citizenship of employees and freedom of speech (Article 10 of the European Convention for the Protection of Human Rights, Article 7 of the Dutch Constitution, and Articles 3:12 and 3:14 of the Civil Code).

⁵ An example procedure can be found in the annex.

The mere existence of such a procedure also sets certain standards: not sticking to it may have repercussions for the party that deviates from it.

By formalising a reporting procedure, corporate management can also make clear that it regards internal reports of malpractices as positive input that can help to improve the company, that it will take the report seriously, and that steps will be taken to ensure that the whistleblower (or potential whistleblower)⁶ will not suffer any detrimental effects in his or her job. A clearly defined and appropriate procedure for reporting malpractices also ensures that the employee will make his or her report to the right corporate officer, so that action can be taken where necessary.

The procedure itself should make clear that any actual or potential whistleblower acting in good faith deserves the company's protection. An employee can be said to be acting in good faith if he or she acts with due care in both the formal (procedural) and substantive sense.

The actual or potential whistleblower has acted with due care in the formal (procedural) sense when he or she:

- has first raised the relevant facts internally, if necessary up to the highest level, unless such cannot be reasonably expected of him or her or is contrary to the public interest;
- has made the facts known externally, in an appropriate manner commensurate with the situation, provided that internal reporting is not possible or does not lead to corrective action.

The actual or potential whistleblower has acted with due care in the substantive sense when he or she:

- is reasonably certain that the relevant facts are correct;
- has ascertained that reporting the malpractice (internally or otherwise) is or could be in the public interest;
- has ascertained that the public interest served by reporting the suspected malpractice externally takes precedence over the employer's interest in maintaining confidentiality.

It is important to inform employees that the procedure for reporting malpractices is not intended for them to air personal grievances about their work. Any such grievances should be dealt with via the company complaints procedure.⁷ Nor should employees use the reporting procedure to voice conscientious objections to normal business activities,⁸ or to criticise the employer's policy decisions.

⁶ As long as the report of suspected malpractices remains within the company, it is not considered a case of whistleblowing. Whistleblowing only applies when the employee takes his or her suspicions of malpractice to an external party. In this statement, the term "whistleblower" is used only in the latter sense; otherwise, the terms "employee reporting the malpractice" or "potential whistleblower" are used.

⁷ See: Labour Foundation; **Klachtrecht van individuele werknemers** [The right of complaint of individual employees]; 3 January 1990

⁸ See: Labour Foundation; **Nota over gewetensbezwaren in arbeidsrelaties; een leidraad voor ondernemingen** [Memorandum on conscientious objections in employment relationships; guidelines for companies]; 4 July 1990; publication no. 3/90. Pursuant to Article 7:681(2)(e) of the Civil Code, a case of manifestly unreasonably dismissal exists if the dismissal is based solely on the fact that the employee refused to perform the work stipulated on the grounds of serious conscientious objections.

A suitable procedure for reporting suspected malpractices should consist of the following:

- a. a clearly-worded definition of what constitutes an malpractice in which the public interest is at stake;
- b. the appointment of one or more corporate officers to whom alleged malpractices should be reported;
- c. guidelines for what must then be done with the report;
- d. a facility for giving the employee concerned feedback on the case;
- e. if the employee concerned so requests, the assurance of confidentiality;
- f. a provision whereby the employee concerned can consult an advisor⁹ in confidence;
- g. a description of the situations in which the employee can report suspected malpractices externally (whistleblowing) and the methods he or she should use;
- f. the assurance of legal protection for actual or potential whistleblowers who act with due care.

Re a.

In the opinion of the Labour Foundation, malpractices should be defined as facts or circumstances that affect the public interest or have the potential to do so and that are subject to the employer's influence. Examples include health hazards, security risks and environmental damage, but equally relevant are punishable offences, infringements of the law or secondary legislation, unethical conduct, deceiving the judicial authorities, government officials or the public, or deliberately concealing, destroying or manipulating information about such facts or circumstances. The employee must have reasonable grounds to suspect that an malpractice of this kind has taken place or is about to take place.

The protection extended to whistleblowers naturally does not apply in every single case of legal transgression. Whistleblowing assumes that the public interest is at stake, but also that the fact or circumstances are serious in nature. The degree of seriousness depends in part on the nature of the case. The theft of a few pencils by a single person is not serious; what is serious is the theft of more expensive goods by employees whose job it is to watch over those goods; more serious is when the theft is tolerated by the management of the security company involved; and more serious still is when the management takes its share of the loot. Reports of malpractice must be in proportion to the seriousness of the case. The nature and seriousness of the malpractice will therefore influence the way in which the report may be made. See under g. below.

Re b.

A good employee can be expected to first report suspected malpractices internally. The company must be given the opportunity to address the problem itself, based on the internal report. Sometimes, however, employees cannot reasonably be expected to follow the internal procedure, for example if there is an acute threat, if the employee fears that evidence of the suspected malpractice will be concealed or destroyed, or if the employee has been given to understand that he or she will suffer reprisals.

⁹ An "advisor" in this sense means someone whose position obliges him or her to maintain confidentiality, for example a lawyer, union-appointed legal advisor or company medical officer.

In other situations, the employee may be required or empowered by law to immediately report alleged malpractices externally.¹⁰ Finally, it may be that an earlier internal report has not produced the necessary action.

The employee should be able to report the suspected malpractice to any superior within the company who may be held accountable in some way for the alleged malpractice. The most obvious person is the employee's direct superior, but it may be that the superior is one of the people involved in the malpractice. The employee should have the option of approaching the most senior executives of the firm, depending on the nature and scale of the suspected malpractice and those involved in it. It is important for the report to be set down in writing, for the employee making the report to sign the document to demonstrate consent, and for him or her to receive a copy. After making the report to the relevant superior, the organisation becomes responsible for the problem. It is essential for the procedure to indicate precisely to whom the report should be made and under what circumstances the employee can omit making an internal report.

The employee may also decide to approach a *counsellor* appointed by the company or the industry for such purposes. Making a counsellor available in this way can help to ensure that reports of malpractices are made in the right manner and to the proper authority. The counsellor must act autonomously from corporate management, and he or she can also be given the task of monitoring the whistleblowing procedure. The counsellor should keep quiet about the employee's report until the latter asks that it be passed on to management or senior management. The counsellor should also be able to explain to the employee the most suitable means of reporting the malpractice in question; the employee should be able to rely on this advice. See also under e.

Re c.

The manager who receives a report of a suspected malpractice must know what action to take. He or she should immediately go through the appropriate channels to inform the most senior management, which should then look into the matter.

Re d.

Senior management should notify the relevant employee that it has received his or her report and that it is investigating the matter. The employee should be informed within a reasonable period of time about what is being done with his or her report, whether action is being taken and if so, what type of action. An initial investigation should generally not take longer than two months at most. If a more serious investigation is required that cannot be completed within this period, the employee should be told. He should also be told when he or she can expect to hear the management's conclusions.

After senior management has received a report of suspected malpractice, it – or persons acting on its behalf – must determine whether the report is justified and, if so, what steps must be taken to right the malpractice or prevent it from recurring. This information should be passed on to the employee who made the initial report.

¹⁰ For example, Article 160 of the Dutch Code of Criminal Procedure [*Wetboek van Strafvordering*] obliges anyone who witnesses a serious crime to report it to the judicial authorities.

Re e.

It was already mentioned under b. that the employee should have the option of making his or her suspicions known to a designated counsellor. Even if the malpractice is reported to a superior, however, the employee can ask for the matter to be treated confidentially. Generally speaking, and certainly in such cases, an employee making a report in accordance with established procedure must be able to rely on the person he or she approaches to not inform others in the company unnecessarily. The same applies to the employee making the report. Divulging such suspicions may, after all, have serious repercussions for the employee making the report or for the company, depending on the nature and scale of the suspected malpractice and those involved in it.

Re f.

The procedure should allow the employee to select his or her own confidential advisor. Like the designated counsellor, the employee's chosen advisor may advise the employee on the most suitable means of reporting a suspected malpractice. The advisor can also make the employee aware of the risks involved in making such a report. The advisor referred to here should be someone whose position obliges him or her to maintain confidentiality. When an employee acting in good faith divulges a suspected malpractice to a person not bound by professional or official secrecy and that person then exposes the malpractice to the public, the employee could be held accountable for the consequences.

Re g.

The employee's suspicions should always be based on reasonable grounds, regardless of the case. The greater the risk that whistleblowing will cause serious loss or damage to the employer, the stronger the employee's suspicions must be. In addition, the public interest served by reporting the suspected malpractice must take precedence over the employer's interest in maintaining confidentiality. See also under a. The potential whistleblower should therefore consider carefully whether he or she has sufficient evidence demonstrating the existence and seriousness of the malpractice before actually blowing the whistle. In other words, he or she must be reasonably certain that the public interest requires the malpractice to be exposed.

There are some cases in which the employee is permitted to report his or her suspicions externally:

- in one of the cases listed under b., which constitute exceptions to the rule that suspected malpractices must first be reported internally;
- if senior management or its representatives have concluded, on the basis of an investigation into the suspected malpractice, that the employee's suspicions are entirely or partly groundless and the employee believes that some of all of his or her suspicions have been wrongly dismissed;
- if senior management (see under d.)
 - does not report back to the employee making the report;
 - does not announce its conclusions within the reasonable period of time set by the procedure;
 - informs the employee making the report that it will not be able to reach a conclusion within the period of time allowed without indicating how long it will take to do so;

- informs the employee making the report that it will not be able to reach a conclusion within the period of time allowed, indicates how long it expects that will take, but does not do so within that period, or;
- informs the employee making the report that it will not be able to reach a conclusion within the period of time allowed and indicates how long it expects that will take but cites an unreasonably long period of time given the circumstances of the case.

If reporting a malpractice externally, the employee should approach the most relevant external party. He or she should consider how effectively that party can intervene and right or help to right the malpractice. The employee should also attempt to limit the loss or damage suffered by his or her employer as a result of such intervention. In other words, when an employee decides to report an malpractice outside the company, he or she should first approach the competent authorities and not the media.

The more serious the malpractice is, the more certain population groups are at risk and/or the more the malpractice persists despite repeated reports, the more justified the employee is in contacting the media. It will clearly not be easy for the whistleblower to argue plausibly that he or she was forced to call in the media to right the malpractice or prevent its recurrence.

Re h.

As indicated earlier, the Labour Foundation believes that an actual or potential whistleblower who acts with due care deserves to be protected. The substantive and formal requirements of due care are inherent in the basic components of the reporting procedure. This means that actual or potential whistleblowers who follow a reporting procedure based on these basic components will be acting as befits a good employee and will therefore merit protection. Such protection means that he or she should not suffer any form of disadvantage within the company as a result of reporting a suspected malpractice.

Actual or potential whistleblowers who do not stick to the reporting procedure will have to present plausible arguments for their having deviated from it.

4. What the works council can do

Given the works council's role in ensuring the smooth operation of the company in general and its position with respect to the company's social policy in particular, corporate management should involve the works council in developing, implementing and evaluating a reporting procedure. Doing so will also ensure the necessary support for any guidelines for reporting malpractices or suspected malpractices and make the subject open to discussion within the company.

5. What industry can do

The procedure described above can also be set at industry level (by the parties to a collective agreement). It is also possible to appoint an independent counsellor at industry level to advise potential whistleblowers, for example in order to ensure that any external report of malpractices is made to the proper authorities or parties.

Appointing a counsellor at industry level becomes an option when it is difficult to appoint one at company level, for example due to the size of the companies involved.

Recommendation

The Labour Foundation recommends that companies and industries make provisions based on the foregoing that will enable employees¹¹ to report suspected malpractices within their companies by the appropriate means and without putting themselves at risk.

¹¹ "Employee" is taken to include persons working for the company who do not have an employment contract with the relevant employer.

Example procedure

Procedural rules for dealing with suspected malpractices

The Labour Foundation believes it is important for employees to be able to report suspected malpractices within their companies by the most suitable means without putting themselves at risk. That requires a proper procedure to be put in place. The methods companies use to do this will depend in part on their size and the nature of their activities.

This annex presents a possible set of rules for dealing with suspected malpractices, based on the basic components of the “Statement concerning methods for dealing with malpractices in companies”. It is up to local parties to decide which of the following articles should be included – either as is or in amended form – in any procedural rules, given the size and nature of the company or companies concerned.

Section 1. Definitions

Article 1.

In these rules, the following terms shall have the definitions assigned to them below:

- *employee*: person working for the employer, whether or not under an employment contract;
- *external third party*: an external third party as referred to in Article 6.1;
- *advisor*: the person referred to in Article 4;
- *senior corporate officer*: the person who, either alone or in consultation with others, represents the highest level of authority in the employer’s organisation;
- *accountable party*: manager who is accountable, either directly or indirectly, for the unit of the organisation in which the employee works and/or in which suspected malpractices are taking place;
- *superior*: the employee’s direct superior;
- *counsellor*: person appointed to act in that capacity for the employer’s organisation;
- *suspected malpractice*: a reasonable suspicion regarding facts or circumstances within the organisation in which the employee works that affect the public interest and involve:
 - a. a criminal offence (or the threat of a criminal offence being committed);
 - b. an infringement of rules (or the threat of an infringement taking place);
 - c. a hazard to public health, safety or the environment;
 - d. the deliberate misleading of public bodies (or the threat of such occurring);
 - e. a waste of public monies (or the threat of such waste); or
 - f. the deliberate concealment, destruction or manipulation of information concerning these facts (or the threat of such taking place).

Section 2. Internal procedure

Article 2. Internal report made to a superior, accountable party or counsellor

1. Save in the exceptions referred to in Article 5.2, employees shall report suspected malpractices to their superiors or, if doing so is not considered desirable, to an accountable party or, if doing so is not considered desirable, to the counsellor. Employees may also report suspected malpractices to the counsellor in addition to their superior or an accountable party.
2. On request, the superior or the accountable party shall document the report in writing, recording the date on which it was received, and shall submit the document to the employee for him/her to sign. The employee shall receive a true copy of the document. The superior or the accountable party shall see that the senior corporate officer is notified immediately of the suspected malpractice and the date on which the report was received and ensure that the senior corporate officer receives a copy of the document. If the employee has reported his/her suspicions to the counsellor, the counsellor will also notify the senior corporate officer of the report and the date on which it was received, but doing so only at a time and in a manner agreed with the employee.
3. An investigation into the suspected malpractice shall commence without delay.
4. The senior corporate officer shall send confirmation to the employee who has reported a suspected malpractice, referring to the original report made. Confirmation shall be sent even if the employee has told a counsellor of his/her suspicions rather than the superior or an accountable party.
5. The senior corporate officer shall decide whether an external third party as referred to in Article 6.1 should be notified of the internal report of a suspected malpractice.

Article 3. Conclusions

1. The employee shall be notified in writing by or on behalf of the senior corporate officer of the latter's conclusions regarding the suspected malpractice, such notification being received within a period of eight weeks of the internal report being made. The notification shall also indicate the steps taken following the employee's report.
2. If the senior corporate officer is unable to report his/her conclusions within eight weeks, he/she or his/her representative will so notify the employee and indicate when the latter can expect to be informed about the conclusions.

Article 4. Advisor

1. The employee may report a suspected malpractice to an advisor and request his/her advice in confidence.
2. An advisor may be any person whom the employee trusts and who is bound by professional or official secrecy.

Section 3. Reporting suspected malpractices to an external third party

Article 5.

1. Subject to the provisions of Article 6, the employee may report a suspected malpractice to an external third party as referred to in Article 6.1 in the event that:
 - a. he/she does not agree with the conclusions referred to in Article 3;
 - b. he/she has not received such conclusions within the required period of time referred to in Articles 3.1 and 3.2;
 - c. the period referred to in Article 3.2 is unreasonably long given the circumstances involved and the employee has voiced his/her objections to the senior corporate officer;or
 - d. an exception applies as referred to in the following paragraph.
2. An exception as referred to in Article 5.1.d. shall apply in the event that
 - a. an acute threat involving a serious and urgent public interest requires an immediate external report to be made;
 - b. the employee has good reason to fear reprisals if he/she reports the matter internally;
 - c. there is a clear risk that evidence will be concealed or destroyed;
 - d. a prior internal report of, essentially, the same malpractice made in accordance with the procedure has not led to the desired effect;
 - e. the employee is obliged or empowered by law to immediately report the matter externally.

Article 6.

1. Within the meaning of these rules, an external third party shall be any organisation or organisational representative, not including the counsellor or an advisor, to which the employee reports a suspected malpractice because, in his/her considered opinion and given the circumstances of the case, the public interest being served by reporting the malpractice takes precedence over the employer's interest in maintaining confidentiality, and which, in the employee's considered opinion, can be regarded as capable of righting the malpractice or of having it righted, either directly or indirectly.
2. Subject to the provisions of Article 6.3, the employee may report a suspected malpractice to an external third party as referred to in the preceding paragraph in one of the cases described in Article 5.
3. The employee shall report the suspected malpractice to the external third party that he/she deems most appropriate given the circumstances of the case, while duly considering how effectively that party can intervene as well as the employer's interest in minimising the loss or damage suffered as a result of such intervention, insofar as such loss or damage is not necessarily the result of measures taken to oppose the malpractice.
4. The greater the risk that reporting a suspected malpractice to an external party will cause serious loss or damage to the employer, the stronger the employee's suspicions must be before doing so.

Section 4. Legal protection

Article 7.

1. An employee who has reported a suspected malpractice in accordance with the provisions set out in these rules shall not suffer any detrimental effects in his/her job as a result.
2. An advisor as referred to in Article 4 or a counsellor as referred to in Article 1 who works under contract to the employer shall not suffer any detrimental effects in his/her job as a result of acting in such a capacity in accordance with these rules.

Section 5. Effective date

Article 8.

These rules shall take effect on 1 (month) (year).

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10 september 2003 **8/03**
- **Herziene uitgave** Verklaring inzake het arbeidsvoorwaardenoverleg 2004-2005
(met Engelse, Franse en Duitse vertaling)
18 november 2003 **9A/03**