QUOTIDIANOPIÙ

Lunedì 19/10/2026 • 05:00

LAVORO ENGLISH VERSION

Whistleblowing : the key role of codes of ethics and company policies

EU and national **whistleblowing** rules require protection for **reports** but leave many relevant workplace behaviors uncovered, creating risks of hidden wrongdoing and litigation. The **code of ethics**, **internal policies** and **neutral investigations** therefore become crucial governance tools.

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One of the most significant challenges emerging in the field of Italian Labor Law (and **HR**) **Compliance** is the correct interpretation of EU legislation and its closely linked adoption into Italian national law.

The obligations to comply requires, in some cases an assessment of whether - and how - the principles established by the European Union are actually consistent with their application in Italian domestic law (within the framework of the subsidiarity principle applicable at EU Community level).

Although this is a task that Italian judges are often called upon to reflect on in the courts - it can also involve those (including employers and employees) who must apply the rules and principles in their daily work in order to avoid litigation. A principle that appears abstractly uniform at the EU level can - in the daily practice of a single Member State such as Italy (and within the companies) - take on different operational implications or lead to application conflicts with respect to the original intentions of the European Union law makers.

One of the areas that most reflects this challenge is the legislation on **whistleblowing** which requires, through EU Directive 2017/1937 and the (renewed) Italian Legislative Decree of 2023 the no. 24, companies to take into account the protection not only of the reporting of violations of national Italian or European Union laws that harm the public interest or the integrity of a private or public entity (as stated in the Directive and the Decree indicated above) - but also other interests that are not immediately regulated, aimed at protecting companies.

For example, both the EU Directive and Italian Decree address only a portion of the **offenses** - while there are a number of aspects and issues related to the normal management of business that are not officially covered by current whistleblowing regulations, either in Italy or in other EU countries. Here we can speak of instances of **mobbing**, **assault**, **discrimination**, **theft of physical or intellectual property**, **sexual harassment**, **violations of data protection laws** – to highlight just a few examples not included either by the EU Directve or the Italian Decree.

Beyond the very structured and specific whistleblowing regulations at both the EU and Italian national levels there are no obligations for companies to create protocols that allow for the anonymous reporting of situations of the nature indicated above and this also includes even more serious cases of such violations. The EU Directive focuses on the main breaches of EU regulations or those of European significance, thereby allowing companies to broaden the so-called 'scope' of offences that can be reported by employees.

The consequence is that inappropriate behavior, in the absence of a rigorous **code of ethics** or a **whistleblowing policy** that encompasses a variety of conduct not included in the EU or Italian regulation —not only just those centered on Model 231 and the offenses falling within the scope of whistleblowing— may often go unreported by members of the workforce.

The consequence (again) is that the lack of structured whistleblower protocols at the EU and Italian national level to ensure anonymity in matters specifically concerning these type of offences not included in the EU Directive or Italian Decree effectively creates an environment conducive to the emergence of negative behaviors that risk compromising a company's integrity and image in the eyes of all stakeholders (both internal and external).

On a positive note, it is precisely thanks to the whistleblowing regulations (and given the importance and specific significance of the conduct constituting the specific criminal offences relevant to the liability of employers pursuant to Italian Legislative Decree no. 231/2001) that today the **code of ethics** integrated by a company's internal policies and regulations - specifically regarding all the relevant conduct, including those not directly constituting offences attributable to the provisions of Legislative Decree no. 24/2023 and EU Directive 2017/1937—can become a true point of reference also for managing the employment relationship, in

order to govern the contractual obligations arising from an employment contract. In fact, current Italian legislation grants companies considerable discretion in determining the scope of offences that may be reported, extending even beyond the cases strictly provided for by the EU Directive and Legislative Decree no 24/2023.

The violation of these provisions - whereas included in the whistleblowing policies - can in fact become relevant from a disciplinary standpoint - leading to the possibility for the application of the law and the relevant collective bargaining agreement for the management of disciplinary measures and proceedings - and in the most serious of cases dismissal for 'just cause' of the person involved.

Internal investigations is another much more sensitive example of an area where both EU and Italian law are completely silent. Current EU and Italian whistleblowing legislation does not specify how to handle internal investigations once a report has been filed giving companies a great deal of operational autonomy, which is certainly to be welcomed. Anyway, this internal process, which is usually left to the company's initiative and not subject to regulation, can generate litigation if not handled properly given the many sensitive issues involved.

In some cases, Italian companies appoint either their Board of Directors, a member of the Board, or a specific committee such as an **ethics committee** or a committee responsible for preventing misconduct in the workplace as the **Supervisory Body** provided for by Legislative Decree 231/2001, to manage internal investigations relating to whistleblower claims.

Multinationals otherwise can sometimes prefer to manage whistleblower reports of wrongdoing through internal investigations conducted through their international headquarters often in accordance with the group's general principles or based on the rules of the relevant country.

It must be noted though that in these scenarios, in the absence of defined rules and with investigations handled solely internally by an employer, there can be a risk of bias leaning towards solely at protecting the company's position at the expense of the target(s) of a whistleblower claim. In addition, there is also a high risk of litigation arising from the findings of internal investigations conducted solely on the basis of the original whisteblower report when disciplinary proceedings or dismissals are subsequently found to be null and void also in the case of incomplete evidence gathering. Indeed, it is one thing to gather evidence for the purposes of an internal investigation (aimed at establishing whether any offences have been committed); it is quite another to gather **evidence** (witness statements, recordings and video calls for future reference) intended to defend the company in court in the event of legal proceedings subsequently brought by the dismissed employee.

On the other hand, the importance of the whistleblower's confidentiality (which is directly protected by EU and Italian national legislation), as well as the **impartiality of investigations** to protect the individual(s) involved in the misconduct claim, cannot be underestimated when it comes to reporting wrongdoing and the potential consequences for the management of the employment relationship(s). In such situations, the involvement of an **external consultant**—an impartial third party as a lawyer expert in these type of procedures —is an element that should be seriously considered in the filed of internal investigations.

We have to consider that the **burden of proof** falls on the **employer**, who must demonstrate in court not only that a whistleblower's allegations are well-founded, but also that the disciplinary action initiated following a misconduct claim which was followed by an impartial and thorough internal investigation is well-founded. This process involves several parties: not only the individual(s) potentially "informed of the facts," whose veracity must be verified, but also the individual(s) reported.

It is precisely the need to protect the target (s) of a whistleblower claim that companies must pay particular attention to. The law expressly protects the position of the whistleblower and all those within their "sphere of interest" within the organization (this includes colleagues and the reporting person's work environment) - but noteably it tends to neglect the individuals reported.

For example, it is necessary to ensure that any complaint of wrongdoing made by a whistleblower against another person or persons is legitimate and not motivated by ulterior motives - such as retaliation. Employers must ensure that the person targeted by a complaint of wrongdoing is able to adequately defend themselves and protect their position. This person is sometimes in a weak position, facing allegations from an unknown source and, at times, may not be aware of the exact terms of a specific allegation. Defending oneself against allegations whose source is effectively unknown already puts anyone, innocent or otherwise, at a disadvantage position.

In situations like this, it may be advisable to consider using external (impartial) consultants capable of managing the various phases of internal investigations. This also allows for an objective assessment of the facts while protecting the confidentiality of any witness disclosures during their hearings.

The rigorous procedural management of investigative activities relating to human resource matters conducted by a third party can have the positive consequence of being able to draft a final report that is truely impartial - after evaluating the complaints—whether founded or not - the findings of the investigation.
An impartial thrid party could also identify the most appropriate measures to be adopted for managing the whistleblower case

(ranging from a **disciplinary action** to a **dismissal** in the most serious case if "just cause" is established and proven) without bias and could also highlight any critical issues related to litigation that could arise from the matter under investigation as a result of any potential decisions made.

Whisteblowing investigative reports can have significant consequences for the employment relationship, particularly where they involve managers, disciplinary issues or workplace conduct. This requires closer coordination between **Compliance**, **HR** and **Legal**, with clear protocols for handling reports and managing potential conflicts of interest. This integration between whistleblowing and the person targeted by a complaint of wrongdoing in accordance with the employment law is something employers increasingly need to take into account.
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