



Stop press



Everyone is talking about the Bribery Act 2010... What does it really mean for employers?

When this act comes into force on 1 July 2011 it will create wide-ranging new criminal offences which will affect not only individuals, but also their employers. Employers therefore need to be aware of these potential liabilities and act now to ensure that they do not fall foul of the new laws.

What are the offences?

The Act creates four main offences:

- i) making bribes;
- ii) receiving bribes;
- iii) bribing a foreign public official; and
- iv) the failure of a commercial organisation to prevent bribery by an “associated person” for its benefit.

“Bribery” is “a financial or other advantage” offered, promised or given with the intention of inducing a person to perform a relevant function or activity improperly or to reward them for doing so. To put this into context, the guidance is very clear that its intention is not to criminalise bona fide, proportionate and reasonable hospitality and other business expenditure aimed at better public relations. Taking a client to a sporting event or hosting an annual dinner, for example, is highly unlikely to fall foul of the new regulations, but disproportionately lavish, costly hospitality might lead to a breach of the Act.

The main danger area for employers is clearly the offence of failing to prevent bribery by an “associated person”, which is defined very widely to include all employees, consultants, agency workers, franchisees, suppliers and volunteers of a company. Employers will therefore be responsible for the actions of a wide range of individuals, some of whom they may have minimal control over.

The Act also has wide jurisdictional scope as it covers any offence committed in the UK as well as offences committed outside the UK by a person who has a close connection with the country, such as British citizens, bodies incorporated in the UK or those which conduct part of their business within the jurisdiction.

Is there a defence for employers?

Thankfully there is a defence for those employers who can show that they had in place “adequate procedures” designed to prevent bribery. The burden of proof will be on them to demonstrate this. So what do employers need to do to ensure that they are covered? The guidance produced by the Ministry of Justice sets out six recommended principles which should be followed to ensure that “adequate procedures” are in place:

1. Proportionate Procedures

Employers should have in place clear anti-corruption and anti-bribery policies accessible to all those working for them who will fall within the definition of “associated person”. It is important to remember that procedures need only be proportionate to the size of the organisation and the risks it faces. There is no “one size fits all” approach. Employers should review policies on gifts and hospitality to ensure that they adequately address any potential bribery risks.



2. Top Level Commitment

Senior members of the company such as the board of directors, the owners and senior management need to be openly committed to preventing bribery. They should ensure that this stance is communicated to all workers.

3. Risk Assessment

Employers must assess the nature and extent of the bribery risk for their organisation, taking into account the sector and countries in which they operate. They should also consider whether any issues are raised by remuneration structures or commission or bonus policies:

for example, whether employees will pay less attention to anti-bribery procedures where commission targets are very hard to achieve.

4. Due Diligence

Employers should take steps to ensure they know who they are doing business with and should therefore make reasonable investigations into suppliers, agents, joint venture partners etc. Again, the extent of the due diligence required need only be proportionate to the risks faced by the organisation.

5. Communication (including training)

Anti-bribery policies should be implemented effectively – mere paper compliance is not sufficient. Employers should therefore consider how to communicate their procedures both internally and externally, what training to provide, to whom and when, internal reporting procedures, how to monitor processes and the internal penalties for breach of procedures.

6. Monitoring and review

Organisations should decide who will be responsible for monitoring and reviewing their anti-bribery policies and procedures and at what intervals the reviews will be undertaken.

How to get prepared...

Although these principles are quite general in their terms it is important to remember that any actions need only be proportionate to the potential risks faced by the employer. Small domestic companies doing business in a low-risk sector will not therefore need to take as much action to ensure an “adequate procedures” defence as a large multinational operating with public bodies in high-risk countries will. However, employers of all types and sizes should bear the following in mind:

Gifts and hospitality – Hospitality policies should be reviewed to ensure that they include clear guidance on the giving and receiving of gifts, such as an upper limit on their value or a complete prohibition, depending on the custom and practice of the business. Most importantly, all gifts, hospitality and expenses, whether given, received or refused, should be fully documented as transparency is the key to avoiding suspicion.

Disciplinary procedure and contracts – Employers should amend their disciplinary procedure and contracts of employment to make it clear that a breach of their anti-corruption and anti-bribery policy may amount to gross misconduct.

Management involvement – All workers of the company should be made aware of the anti-bribery procedure and its implementation should be overseen by top level management. Employers may feel it worth reminding managers of the severity of the consequences of a breach of the new regulations – individuals who commit an offence or senior officers who consent to or connive with those individuals face up to ten years’ imprisonment and commercial organisations can be fined an unlimited amount and prevented indefinitely from tendering for public contracts. Directors could also be disqualified for up to 15 years and there is the obvious ramification of negative publicity and reputational damage.

Whistleblowing procedure – All employers should have a comprehensive whistleblowing procedure in place and ensure that it is made available to all those who come under the definition of an “associated person”. It should make clear that reports of suspected breaches of the Act are protected under this policy and set out clearly how such reports would be dealt with.

Recruitment – Employers should carefully document all appointment decisions to ensure that they are clear, transparent and independent. This will be particularly important where the appointee is related to or is somehow otherwise connected with a client or business contact. It may also be convenient for employers to include training on their anti-bribery procedures within any internal induction of employees, agency staff, voluntary workers and independent consultants.

This stop press is a brief summary of the subject matter. It does not purport to be in any way comprehensive or a substitute for specialist legal advice in individual circumstances.