



The Bribery Act

The Bribery Act (the Act) will come into force in April 2011. The Act will have a significant impact on employers, above all because it introduces a new criminal offence for commercial organisations of failure to prevent bribery.

This offence can attract unlimited fines. The only defence available is for organisations to demonstrate that they have 'adequate procedures' in place to prevent bribery occurring and that these procedures are adhered to.

In September the Ministry of Justice published draft guidance for consultation on commercial organisations preventing bribery (the Guidance). The Guidance refers to six principles which it claims will help businesses prevent bribery. It is not prescriptive but rather sets out issues or processes to be considered by organisations when developing their own procedures. In its draft form it is likely to disappoint those hoping for clarity on what will constitute 'adequate procedures' under the Act. However, it is hoped that the final form Guidance due to be published in January 2011 will clarify some of this uncertainty.

In this HR@Work Bribery Act special bulletin we consider each of the six principles covered by the Guidance and highlight areas where organisations need to take action before April 2011.

The six principles are:

1 Risk assessment

Organisations are expected to know and keep up-to-date with the bribery risks relevant to their business sector or market. This involves assessing the nature and extent of the risks to which they are exposed on an ongoing basis. Risk assessments are key to an effective anti-bribery policy. However, it is acknowledged that the nature and

frequency of these assessments will vary enormously depending on factors such as the size of an organisation and the markets in which it operates.

Some examples of key bribery risks are identified in the Guidance. These include both internal risks (such as deficiencies in employee knowledge of bribery) and external risks (such as risks in countries where the organisation does business).

Organisations should therefore carry out risk assessments with particular reference to:

- business activities and practices;
- the locations in which they operate eg countries and jurisdictions;
- local business conditions and customs;
- the sector within which they operate;
- employees eg untrained or large numbers of new hires;
- operational functions of the business such as marketing and sales;
- the form and nature of local business relationships with partners, agents, suppliers, public officials etc; and
- the policies they have in place on corporate hospitality and gifts.



Risk assessments should include consultation with front line employees who may be exposed to bribery. Such employees are well-placed to know of specific risks and deficiencies and to gauge exposure to any corrupt activity taking place within or on behalf of the organisation.

All organisations will need to ensure that they continue to review, monitor and repeat risk assessments as the business evolves and external circumstances change, if they are to ensure compliance with the Act.

2 Top level commitment

The Guidance focuses on senior management involvement in creating a culture within which bribery is never acceptable. It is the role of senior management to ensure that there is an effective anti-bribery policy in place, and that it has been effectively communicated at all levels of management, the workforce and external third parties. Such a policy should be a clear, written statement that the organisation will not tolerate its directors, management, employees, or third parties who deal with the organisation, being involved in bribery. It should also communicate the sanctions that would be applied in the event of a breach of its policy and state that they will be applied openly and consistently.

Senior management must ensure that all managers are aware of and accept the anti-bribery regime and that it is embedded in the organisation's corporate culture. This will include the chief executive (or equivalent) making a statement of personal support for the anti-bribery regime to show it is supported at the highest level.

3 Due diligence

All organisations should know who they do business with and why, if their risk assessment and mitigation are to be effective. This means having a thorough understanding of the risks that a particular business opportunity raises, seeking reciprocal anti-bribery agreements and being in a position to feel confident that their business relationships are transparent and ethical.

Some examples of the type of due diligence required by organisations are set out in the Guidance. The key recommendations are that all organisations should have in place procedures for identifying risk areas when entering into new business relationships. This should include a review of whether prospective business partners:

- have in place their own anti-bribery policies;
- have a reputation for bribery or corruption;
- are being investigated or prosecuted, or have been investigated, prosecuted or convicted of bribery-related offences;
- have any relationships with public office holders; and
- whether they conduct due diligence on their own business partners, sub-contractors, suppliers, agents and representatives.

Organisations should also make enquiries about the risk of bribery in any new country in which they are seeking a business relationship, the types of bribery most commonly encountered and any information available on effective preventative steps.

4 Policies and procedures

It is essential that organisations review their existing policies and procedures to ensure that they are adequate to protect them when the Act comes into force. If organisations do not already have an anti-bribery policy, they should certainly consider introducing one. This will be invaluable evidence that the organisation has 'adequate procedures' in place to prevent bribery.

What is included in an anti-bribery policy will, to a large extent, depend on the size of the organisation, the value of the transactions it carries out, the sectors and countries it operates in and the risk of corruption it faces. As a starting point, any policy should be clear, practical and accessible.

The anti-bribery policy should apply not only to the entire workforce but to third parties such as business partners, agents and consultants with whom the

organisation works. As well as expressly prohibiting all forms of corruption, the policy should set out clear guidance on what action should be taken if an employee is faced with blackmail or extortion. There should also be a clear and practical policy on matters such as giving and receiving gifts and hospitality.

Organisations should review their other policies and procedures. In particular, disciplinary policies should be amended to confirm that breaches of the anti-bribery policy will constitute gross misconduct and any whistleblowing procedure should state that it applies to employees reporting bribery or corruption.

Putting the correct policies in place is not the end of the story. Organisations must ensure that those policies are properly implemented and that employees are aware of their obligations.

5 Effective implementation

Once all relevant anti-bribery policies and procedures have been updated or introduced, organisations must then ensure effective implementation to demonstrate that there are 'adequate procedures' in place to prevent bribery; it is not enough to merely have appropriate policies in existence.

Communication of all anti-bribery policies is key to successful implementation. Organisations must identify who is responsible for implementing the policies and consider how these policies will be communicated to employers. It is also advisable to communicate these policies externally, such as publicising them on the company's website.

Organisations are advised to provide mandatory training on anti-bribery policies and procedures to new and existing staff of all levels to ensure that employees are aware of not only their obligations and responsibilities under the Act, but also the consequences of breaching those policies. This will send a clear message that bribery within the organisation is unacceptable.

As the Act also applies to 'associated persons' such as suppliers and contractors, it is advisable, in addition to the points referred to at 3 above, that during the due diligence process checks are made to establish whether

external organisations have any equivalent anti-bribery policies or training in place and to consider including them in any training offered to internal staff.

6 Monitoring and review

Policies and procedures are likely to need to be adapted to changing circumstances in order to remain effective. Monitoring and reviewing anti-bribery policies is therefore vital, in particular to ensure that they take into account any changes in the way the organisation does business or the risks it faces. The Guidance makes various suggestions as to how this might be done including both internal and external monitoring and review procedures.

Practical tips

The Guidance does not prescribe what will amount to 'adequate procedures' but instead is focused on broad principles. The advantage of this is that organisations have some flexibility in how they deal with the Act and can develop procedures that are appropriate to their particular size, markets and other factors relevant to the way they operate. The disadvantage is that it is difficult for any business to achieve certainty over what might constitute 'adequate procedures' and therefore provide them with a defence to the new offence of failing to prevent bribery referred to above.

The Guidance will act as a useful guide as to what is expected of organisations in terms of compliance. It is hoped that any amendments to the Guidance following the consultation exercise will address some of the detail that is currently missing – especially with respect to an organisation's relationships with intermediaries and other third parties.

Organisations should immediately review their internal procedures, with any changes that are necessary being finalised once the Government publishes its response to the consultation exercise and the final version of the Guidance in early 2011.

The Guidance acknowledges that the procedures put in place by small businesses may be very different from those for large organisations. However, the following



steps should be considered by all employers large and small:

- 1 Ensure that senior managers are aware of the new law and understand its implications. Consider forming an internal committee which should include top level management to develop, oversee and monitor your anti-bribery policy and practices, and ensure it has the resources to carry out its responsibilities.
- 2 Put in place an anti-bribery policy (or update any existing policy), which covers bribery generally as well as concerns that relate to your own organisation (including rules on corporate hospitality, sponsorship and charitable donations).
- 3 Ensure your anti-bribery policy is communicated and accessible to employees at all levels of your organisation (eg by e-mail, in your staff handbook and/or on your intranet) and that it is approved and promoted from the top level of management within your organisation.
- 4 Consider prevention of bribery during the recruitment process. In some organisations it may be appropriate for pre-employment checks to include specific enquiries about bribery such as whether an individual has been disciplined for or suspected of bribery.
- 5 New and existing contracts with employees and consultants should, where possible, impose a general obligation to comply with your anti-bribery policy and to report wrongdoing including the employee's own wrongdoing.
- 6 Review remuneration and commission arrangements to minimise the risk of any such arrangements being seen as incentivising bribery by, for example, cross-referring to your anti-bribery policy.
- 7 Ensure that your anti-bribery policy is an integral part of any induction process and training. Training should be given to all employees where appropriate, not just new joiners.
- 8 Ensure employees are aware that breach of the policy may give rise to disciplinary action (including possible summary dismissal). The policy must also be communicated to all others who perform services for or on behalf of your organisation, including consultants, contractors and agency staff.
- 9 Ensure there is an adequate whistleblowing procedure in place and that it is accessible to all, so that employees can report bribery or suspected bribery safely and confidentially. It is important that employees are encouraged to report bribery by others. Consider extending the scope of your whistleblowing procedure to include third parties such as contractors, sub-contractors and agency staff and to specifically mention reporting bribery.

Training

We have designed a training programme specifically to assist organisations in raising awareness of and compliance with the Act. If you are interested in this service please contact us.

DAVIES ARNOLD COOPER LLP

LONDON

6-8 Bouverie Street
London EC4Y 8DD

T +44 (0)20 7936 2222

F +44 (0)20 7936 2020

DX 172 London

E daclon@dac.co.uk

LONDON MARKET

85 Gracechurch Street
London EC3V 0AA

T +44 (0)20 7936 2222

F +44 (0)20 7936 2020

E daclon@dac.co.uk

MANCHESTER

60 Fountain Street
Manchester M2 2FE

T +44 (0)161 839 8396

F +44 (0)161 839 8309

DX 14363 Manchester

E dacman@dac.co.uk

MADRID

Serrano, 37
28001 Madrid

T +34 91 781 6300

F +34 91 576 8669

E dacmadrid@dacspain.com

MEXICO CITY

Monte Pelvoux 210 PB-A
Colonia Lomas de Chapultepec
Delegación Miguel Hidalgo
11000 México, D.F.

T +52 551 107 6056

F +52 555 202 9385

E dacmexico@dacmexico.com

www.dac.co.uk/employment

Contact: Chris Syder

E csyder@dac.co.uk

T: +44(0)20 7293 4620

F: +44(0)20 7293 2020

London office: 6-8 Bouverie Street,
London, EC4Y 8DD

www.dac.co.uk