

Bribery can be expensive business

The Bribery Act, due to come into force later this year, codifies legislation and case law not least to combat increasingly sophisticated bribery schemes.

The legislation applies to all companies, partnerships and individuals based in England, Scotland, Wales and Northern Ireland, as well as foreign companies and individuals doing business in the UK. It has a global reach, applying to acts or omissions taking place anywhere in the world.

The updated legislation includes new offences, so employers should prepare now for its implementation.

With increasing regulatory enforcement action against bribery and other forms of corruption, the impact of the Act is already being felt as companies assess and tighten up their internal compliance programmes to mitigate as much as possible the risk of non-compliance and the severity of any sanctions should they fall foul of the law.

Offences

The Act provides for four bribery offences:

- Bribing – the offering, promising or giving of an advantage.
- Being bribed – requesting, agreeing to receive or accepting an advantage.
- Bribing a foreign public official.
- The “corporate offence”, where a commercial organisation fails to prevent persons performing services on its behalf from committing bribery.

There are two critical aspects to the Bribery Act that companies must consider.

One is the liability created for companies by their third parties and agents. The Act makes it clear that it is immaterial whether a bribe is paid by a company itself or by a third party acting on its behalf. The company, not the third party, is ultimately accountable.

To avoid this, companies must carry out risk-based due diligence and monitoring of their third parties. They should also incorporate anti-bribery and corruption provisions in their contracts with those third parties, including audit rights. And, crucially, they must actively exercise these audit rights to prove that this is more than simply box-ticking.

The other is the new corporate offence of

failing to prevent bribery which represents the most significant departure from the old law on bribery and places the onus on companies to ensure their anti-corruption procedures are robust. Where previously a company was guilty of an offence only if very senior management are involved, the company may now be guilty even if no-one within the company knew of the bribery. The company's defence is limited to showing it had adequate procedures to prevent bribery. The burden is on the company to ensure its procedures stop any employees, agents or other third parties acting on the company's behalf from committing bribery.

Penalties

If a company is found guilty of corporate bribery both the company and its directors could be subject to criminal sanctions, including fines. The maximum jail term for an individual for bribery will be raised by the Act from 7 years to 10 years and a company convicted of failing to prevent bribery could receive an unlimited fine.

Adequate Procedures Defence

There is some light at the end of the tunnel for businesses, as the Act contains a defence under which the company could escape liability if it can show that it had in place “adequate procedures” designed to prevent those persons performing services on its behalf from committing bribery.

Guidance

What constitutes adequate procedures to prevent bribery is not currently clear. The government is obliged to issue guidance “about procedures that relevant commercial organisations can put in place to prevent persons associated with them from bribing”. Such guidance may not be issued far enough in advance for companies to digest it, review policies and make necessary changes.

The guidance will be designed to be flexible and to ensure companies can adopt the compliance approach best suited to their business.

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Preparation

Employers can still take steps to prepare for the Act coming into force. They can review their existing procedures, decision-making processes and financial controls. If these are not already in place, they should ensure they are brought in, and provide any necessary training.

Most companies do not have an effective anti-bribery and corruption compliance programme in place. Those that do tend to be in high risk industries such as construction, engineering and defence where there have been a number of high profile Serious Fraud Office cases. As the Bribery Act approaches that is likely to change.

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