

E-ALERT | Anti-Corruption

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THE BRIBERY ACT 2010: IMPLEMENTING ADEQUATE PROCEDURES - WHAT EMPLOYERS NEED TO KNOW

The Bribery Act 2010 (the “Act”), which came into force on 1 July 2011, makes companies that carry on all or part of their business in the United Kingdom liable for failing to prevent bribes from being paid by “associated persons” – those performing services for or on behalf of the company – unless they can demonstrate that they have developed and implemented “adequate procedures” to prevent bribery. [Guidance](#) published by the UK Ministry of Justice in March 2011 sets out [six principles](#) that are intended to help organizations develop and implement such procedures.

An “associated person” is defined broadly in the Act, with the result that directors, employees, consultants, agents and contractors will in most cases be captured, whether such persons are acting within or outside the UK.

PRACTICAL STEPS FOR EMPLOYERS

Employers should consider the extent to which measures currently being taken by their organizations are adequate to prevent bribery and corruption by associated persons. There is no “one size fits all” approach; the types of measures that are necessary will vary depending on the organization’s size, the nature of its business and the work carried out by its staff. When implementing anti-bribery policies and procedures, employers should bear in mind the impact of any measure on other employment requirements, including data privacy obligations, individual contractual rights and the duty not to discriminate against certain protected groups.

We set out below some areas where employers will need to pay particular attention:

- **Recruitment:** Consider whether the organization has a standardized process for carrying out due diligence on employees, contractors and agents. It may be necessary to carry out more in-depth background checks for certain roles (e.g., additional references and criminal records checks). Such checks should be carried out with due regard to the requirements of the UK Data Protection Act 1998. The Information Commissioner (the independent authority that regulates data privacy law in the UK) publishes an [Employment Practices Code](#) that contains guidance on the data privacy aspects of verification and vetting.
- **Policies and Procedures:** Review existing non-contractual policies and procedures to ensure that adequate anti-bribery measures are in place. Any changes should be communicated clearly to all staff to ensure full awareness across the organization.
 - **Anti-bribery policy/Code of conduct:** Companies should ensure that they have a specific anti-bribery/anti-corruption policy or code of conduct. The content and form of these policies will depend on the size, nature and risk-profile of an organization. Companies should ensure that such policies do not make any negative assumptions based on racial stereotyping of certain nationalities since that could constitute unlawful discrimination.
 - **Disciplinary policy:** It is a legal requirement for UK employers to have a disciplinary policy. If an organization already has such a policy, it should be reviewed to ensure that disciplinary action can be taken in respect of acts of bribery by employees.

- **Whistleblowing policy:** A whistleblowing policy will be essential to ensure that staff can report bribery-related concerns confidentially and without fear of retaliation. Larger organizations should consider implementing an internal whistleblowing “hotline” through which complaints can be made confidentially. However, companies should be aware that such hotlines may fall foul of European data privacy laws, unless they meet the requirements set out in the EU Data Privacy Directive 95/46/EC, and the local guidance adopted by several member states, for example France, Germany, Spain and Sweden.

It is also important that companies address the implications of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 for their internal reporting mechanisms. The Dodd-Frank Act provides a generous financial incentive for whistleblowers to report their concerns to the US Securities & Exchange Commission (the “SEC”).

Whistleblowers who voluntarily provide the SEC with original information concerning companies within the SEC’s broad jurisdictional ambit will be eligible for between 10 - 30% of any pursuant penalty levied above 1 million USD. The final [SEC rules](#) were published in May 2011 and make clear that employees are not obliged to report concerns internally before going to the SEC. There are, however, various incentives in the rules designed to make internal reporting more appealing to employees.

In addition, the US Sarbanes-Oxley Act of 2002 requires publicly held US companies and their EU-based affiliates (as well as non-US companies listed on one of the US stock markets) to maintain procedures for the receipt of anonymous and confidential reports regarding questionable accounting or auditing matters, which generally take the form of hotlines.

- **Expenses policy:** Policies and procedures dealing with expenses should be reviewed and reinforced. Potential loopholes that might assist staff in disguising the real purpose of an expense should be removed – for example, a “miscellaneous” category in an expenses reporting system or a relaxed stance toward accepting copies of receipts / invoices rather than requiring the submission of the originals.
- **Hospitality policy:** Guidance issued by the UK Ministry of Justice states that the Act is not intended to criminalize reasonable and proportionate hospitality such as taking clients to a major sporting event to cement good relations. But there is clear potential for hospitality and gifts to be used as a bribe and any hospitality and gifts policy should contain clear and cogent guidance on acceptable and unacceptable practices.
- **Training and education:** Consider implementing targeted anti-bribery and anti-corruption training for staff – this reflects one of the six principles in the guidance issued by the UK Ministry of Justice – namely, “Communication (including training)”. According to the UK Ministry of Justice, organizations should take a proportionate, risk-based approach to training, depending on their size, nature and activities. It may therefore be appropriate for some organizations to provide the most in depth training only to senior managers or to employees whose job duties could potentially expose them to a greater risk of bribery – for example, due to the particular sector in which they operate. Training should extend to how to use the organization’s reporting procedures (e.g., whistleblowing hotline).
- **Contractual changes:** Consider amending employment, supplier and agency contracts to make compliance with the organization’s anti-bribery policies and procedures a contractual requirement. It also may be advisable to include an express clause in the contracts of some staff to report any knowledge or suspicion of bribery. In addition, while directors have a fiduciary duty to report their own wrongdoing (as well as the wrongdoing of others), the extent to which this duty extends to other senior employees is unclear and organizations therefore may wish to include an express duty to that effect. It is important to remember that any changes to existing contracts will generally require the employee’s consent.

- **Remuneration:** Review payment and incentive arrangements to ensure they do not have the unintended effect of incentivizing staff to engage in activities that might breach anti-corruption laws. Contracts with suppliers and agents should not “back load” payments so that there is a strong financial incentive to secure certain contracts or reach contract milestones - particularly if cooperation by one or more local government officials is required. Likewise, bonus or commission schemes should not inadvertently encourage staff either to engage in bribery or ignore bribery risks.
- **Ongoing compliance:** Appoint a member (or members) of senior management to be responsible for implementing the organization’s anti-bribery policies and procedures, carrying out regular risk assessments and reviewing/revising policies and monitoring systems for effectiveness. The appointed person(s) also should be given responsibility for putting in place guidelines for investigating circumstances where bribery is alleged.

THE SIX PRINCIPLES [\[back\]](#)

1. **Proportionate procedures:** Employers should have in place bribery prevention policies and procedures that are clear, practical, accessible, effectively implemented and enforced. The type of policies and procedures should be proportionate to the bribery risk faced by a commercial organization and its nature, size and activities.
2. **Top level commitment:** Top-level management (for example, the board of directors or equivalent) should be committed to preventing bribery by associated persons. Effective leadership will take a variety of forms depending on the organization’s size and nature, but may involve top-level managers setting and monitoring bribery prevention policies or issuing a formal statement expressing zero tolerance towards bribery.
3. **Risk assessment:** The organization should carry out periodic, documented assessments of the nature and extent of its exposure to internal and external risks of bribery on its behalf by associated persons.
4. **Due diligence:** Due diligence should be carried out in respect of persons who perform services on the organization’s behalf in order to mitigate the risk of bribery.
5. **Communication (including training):** Internal and external communication, including training, should ensure that the organization’s anti-bribery policies and procedures are embedded and understood by all associated persons.
6. **Monitoring and review:** Anti-bribery policies and procedures should be monitored and reviewed to ensure ongoing effectiveness and improvements made wherever necessary.

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