

Bribery Act - Essential for Lawyers and HR Professionals

Bribery Act 2010: essentials for employment lawyers and HR Professionals

The Bribery Act 2010 (BA 2010) came into force on **1 July 2011**. It applies to any business that is incorporated or trades in the UK. It covers bribery committed by the organisation, or on its behalf, anywhere in the world.

This practice note examines the implications of the BA 2010 in the context of employment law and practice.

A bribe

A bribe is defined as:

References: BA 2010, s 1

- o a 'financial or other advantage' offered, promised, requested or given
- o to induce a person to perform a relevant function or activity improperly, or to reward them for doing so

'Financial or other advantage' is not defined, but is likely to include cash or cash equivalent, gifts, hospitality and entertainment, preferential treatment in a tendering process, etc. The timing of the bribe is irrelevant and payments made after the relevant event will still be caught, as will bribes that are given or received unknowingly. It is not necessary for the individual or organisation actually to receive any benefit as a result of the bribe for liability to arise.

Offences under the Bribery Act 2010

The Bribery Act 2010 creates four new offences:

- o bribing another person
References: BA 2010, s 1
- o soliciting or accepting a bribe
References: BA 2010, s 2
- o bribing a foreign public official
References: BA 2010, s 6
- o failure of a commercial organisation to prevent bribery by an 'associated person' for its benefit
References: BA 2010, s 7

For those advising organisations in relation to employment law, the offence of failing to prevent bribery will be a key area and is the focus of this note (see below). The elements of the other three offences are outlined below.

Bribing another person

This offence occurs when A offers or gives to B an advantage:

References: BA 2010, s 1

- o intending to bring about or reward improper performance of a relevant function or activity, or
- o where A knows or believes that B's accepting the advantage would itself constitute improper performance of a relevant function or activity

In this respect:

- o it does not matter whether the advantage is offered or given to the person performing the activity and whether it is offered directly or indirectly

- o a relevant function or activity is a public, business or employment-related activity that it is expected will be performed in good faith or in a position of trust (it need not be connected with the UK)
- o improper performance means that whoever performs such activity does so in breach of that expectation (the latter is that of a reasonable person in the UK rather than local custom, unless written)

Soliciting or accepting a bribe

This offence occurs when C requests or accepts an advantage:

References: BA 2010, s 2

- o intending that, as a result, a relevant function or activity is improperly performed
- o where request or acceptance is itself improper performance by C of a relevant function or activity
- o as a reward for the improper performance (by C or another) of a relevant function or activity, and
- o as a result a relevant function or activity is improperly performed, either by C or by another person with C's acquiescence

In this respect:

- o relevant function or activity and improper performance have the same meanings as under the offence of bribing another person
- o it does not matter whether C requests the advantage directly or indirectly
- o in most cases, whether or not C (or other person performing the activity) thinks that performance is improper is irrelevant

Bribing a foreign public official

This offence occurs when D bribes a foreign public official (FPO) F, intending to

References: BA 2010, s 6(1)-(2)

- o influence F in their capacity as a foreign public official, and
- o obtain business advantage

In this respect:

- o an FPO is a person as defined in BA 2010
References: BA 2010, s 6(5)
- o bribery means offering, promising or giving a financial or other advantage, either to an FPO or another person at the FPO's request (unless written law allows the FPO to do so)
References: BA 2010, s 6(3)

Territorial extent

The first three offences listed above are committed if they take place in the UK, or abroad when they would be offences in the UK, and the perpetrator is closely connected with the UK.

References: BA 2010, s 12

Facilitation payments

These are payments made (normally) to ensure that an official actually does what they are already bound to do are not permissible. This contrasts with similar legislation abroad, such as the US Foreign Corrupt Practices Act, where such payments are permitted in limited circumstances.

Other key points to note

Senior officers (as defined) may be jointly liable with a company for the first three offences above (but not the fourth) where they are closely connected with the UK (eg are a UK citizen or resident).

References: BA 2010, s 14

Gifts and hospitality may be subject to BA 2010 where they are lavish and/or non-routine, as that may induce the recipient to act improperly. Political donations and other payments may also be caught.

Conduct in the context of some intelligence and military operations is exempted.

References: BA 2010, s 13

Failure of commercial organisations to prevent bribery

The first three offences above apply to individuals and companies. The offence of failure to prevent bribery applies only to relevant commercial organisations (RCOs). It occurs when a person, G, associated with such an organisation, H, bribes another person, with the intention of obtaining or retaining business, or business advantage, for the commercial organisation, H.

References: BA 2010, s 7

Business advantage is not defined. However, it might include being placed on a preferred suppliers list or being given eligibility to tender for contracts.

In this respect:

- o a commercial organisation is an incorporated body or partnership formed under UK law or carrying on business (including a trade or profession) in the UK; it will thus include foreign businesses trading in the UK
References: BA 2010, s 7(5)
- o G is an associated person if they perform services for, or on behalf of, H (the test is not one of control):
References: BA 2010, s 8
 - o such a person may be natural or corporate
 - o the capacity in which the service is performed is irrelevant
 - o the person may be, for example, an agent, distributor, joint venture partner, employee or subsidiary
 - o employees are presumed to be performing services for employer RCOs, and
 - o in other cases, whether persons perform services will be determined in all the circumstances and not just the nature of the relationship
- o bribe has the meaning above
References: BA 2010, ss 1, 6, 7(3)
- o the bribery may occur anywhere in the world; it does not have to take place in the UK
References: BA 2010, s 12(5)
- o the bribe need not be paid by a UK-registered company or a person having a close connection with the UK
- o G's intention need not be dishonest; it is enough that a payment was made
- o H does not have to know of the bribery; it is enough that it failed to prevent it
- o it is a defence for H to prove it had adequate procedures in place against bribery (see The 'adequate procedures' defence below)

Duty to report bribery offences

BA 2010 does not impose a specific duty on a RCO to report actual or suspected bribery. However, RCOs will, in that event, wish to consider whether they should do so; the designated organisation for such reports is the Serious Fraud Office (SFO). RCOs should also consider whether particular cases require reporting separately under the Money Laundering Regulations 2007.

References: Money Laundering Regulations 2007, SI 2007/2157

Self-reporting may mean that an organisation is able to negotiate a civil settlement, rather than suffer a criminal prosecution. In relation to overseas corruption, this has the additional benefit that, where appropriate, the mandatory debarment provisions under Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, would not apply. References: Directive 2004/18/EC

The SFO, on receiving a report, will enquire immediately into an organisation's anti-bribery policies and procedures.

Employers will therefore wish to ensure that all associated persons are aware of their obligations to report actual or suspected bribery using a designated procedure. Employers may wish to consider including a contractual obligation to report actual or suspected bribery, although defining the scope of the duty and when it arises may be difficult, as may enforcing such an obligation in practice. Most employers are therefore likely to rely on voluntary reporting under a whistleblowing procedure (see Whistleblowing policies below).

Penalties

The penalties for breach of BA 2010 are severe:

- o individuals may be subject to unlimited fines, and/or up to ten years' imprisonment
References: BA 2010, s 11
- o companies may be subject to unlimited fines and may be disbarred from public procurement in the UK
References: BA 2010, s 11
- o directors may also be disqualified from acting as a director for between two and 15 years
References: CDDA 1986, s 2

The 'adequate procedures' defence and MoJ guidance

It is a defence for RCO to prove that it had in place adequate procedures designed to prevent persons associated with the RCO committing bribery.
References: BA 2010, s 7(2)

The Ministry of Justice has provided guidance on procedures commercial organisations can put in place to prevent bribery. The guidance is not prescriptive and departing from the guidance will not give rise to the assumption that an RCO does not have adequate procedures.
References: BA 2010, s 9

MoJ: Guidance on procedures commercial organisations can put in place to prevent bribery (PDF)

The MoJ guidance accepts that circumstances will vary from business to business and recommends a risk-based approach. Any specific industry guidance should also be considered. The guidance envisages that, in certain sectors, compliance guidance will be promulgated by the sector itself.

The guidance does not state expressly (as is the case, for example, in relation to money laundering) that following the guidance will equate to a defence. However, the guidance states:
References: MoJ guidance, paras 11-12

- o the objective of the Act is not to bring the full force of the criminal law to bear upon well run commercial organisations that experience an isolated incident of bribery on their behalf
- o section 7 of the Act provides a full defence, in order to achieve an appropriate balance. This is in recognition of the fact that no bribery prevention regime will be capable of preventing bribery at all times
References: BA 2010, s 7
- o however, the defence is also included in order to encourage commercial organisations to put procedures in place to prevent bribery by persons associated with them

- o the application of bribery prevention procedures by commercial organisations is of significant interest to those investigating bribery

The six principles for preventing bribery contained in the guidance are outlined below.

Principle 1: proportionate procedures

A commercial organisation's procedures to prevent bribery by persons associated with it are proportionate to the bribery risks it faces and to the nature, scale and complexity of the commercial organisation's activities. They are also clear, practical, accessible, effectively implemented and enforced.

References: MoJ: Guidance (PDF), p 21

The procedure should therefore:

- o apply and be made available to all 'associated persons', ie, employees, group companies and business partners under the RCO's effective control, and
- o cover all relevant risks, such as political and charitable contributions, gifts and hospitality, promotional expenses, and responding to demands for facilitation demands and action to take when an allegation of bribery comes to light

The body of the guidance includes suggested procedures depending on the size and nature of the organisation. The aim should be an outcome of robust and effective anti-bribery systems and controls.

The guidance recognises that applying these procedures retrospectively to existing associated persons is more difficult, but this should be done over time, adopting a risk-based approach and with due allowance for what is practicable and the level of control over existing arrangements.

Principle 2: top-level commitment

The top-level management of a commercial organisation (be it a board of directors, the owners or any other equivalent body or person) are committed to preventing bribery by persons associated with it. They foster a culture within the organisation in which bribery is never acceptable.

References: MoJ: Guidance (PDF), p 23

If the RCO is small or medium-sized, this may not require much sophistication but the need is to make the message clear, unambiguous and communicated regularly to all staff and business partners.

This is likely to require internal and external communication of the organisation's commitment to zero tolerance of bribery, which could take a variety of forms, such as a formal statement.

Principle 3: risk assessment

The commercial organisation assesses the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by persons associated with it. The assessment is periodic, informed and documented.

References: MoJ: Guidance (PDF), p 25

Commonly encountered external risks can be categorised into five broad groups:

- o country risk
- o sectoral risk
- o transaction risk
- o business opportunity risk
- o business partnership risk

Principle 4: due diligence

The commercial organisation applies due diligence procedures, taking a proportionate and risk based approach, in respect of persons who perform or will perform services for or on behalf of the organisation, in order to mitigate identified bribery risks.

References: MoJ: Guidance (PDF), p 27

This involves the RCO knowing with whom it does business and why, when and to whom it releases funds and seeks reciprocal anti-bribery agreements; it should be able to feel confident that its business relationships are transparent and ethical.

The purpose of this principle is to encourage commercial organisations to put in place due diligence procedures that adequately inform the application of proportionate measures designed to prevent persons associated with them from bribing on their behalf.

This is likely to involve considerable care in entering into certain business relationships, eg an organisation that is selecting an intermediary to assist in establishing a business in foreign markets will typically require a much higher level of due diligence to mitigate the risks of bribery on its behalf.

Principle 5: communication (including training)

The commercial organisation seeks to ensure that its bribery prevention policies and procedures are embedded and understood throughout the organisation through internal and external communication, including training, that is proportionate to the risks it faces.

References: MoJ: Guidance (PDF), p 29

The guidance recommends that an important aspect of communications is the establishment of a secure, confidential and accessible means for internal or external parties to raise concerns about bribery on the part of associated persons, to provide suggestions for improvement of bribery prevention procedures and controls and for requesting advice.

Principle 6: monitoring and review

The commercial organisation monitors and reviews procedures designed to prevent bribery by persons associated with it and makes improvements where necessary.

References: MoJ: Guidance (PDF), p 31

The monitoring and review process should include transparent, bribery-sensitive auditing and financial controls, checking how regularly policies and procedures are reviewed and updated, and assessing whether external verification would help.

Using anti-bribery and corruption statements and policies

An anti-bribery and corruption statement is identified by the guidance as a crucial element of compliance with Principle 2: top-level commitment (see above).

References: MoJ: Guidance (PDF), p 23, para 2.3

The guidance suggests that commercial organisations' bribery prevention policies are likely to include certain common elements. As an indicative and not exhaustive list, an organisation may wish to cover the following topics, depending on the particular risks faced:

References: Bribery Act 2010, s 9

MoJ guidance (PDF), p 22, para 1.6

- o the involvement of the organisation's top-level management (see Principle 2: top-level commitment, above)
- o risk assessment procedures (see Principle 3 above)
- o due diligence of existing or prospective associated persons (see Principle 4: due diligence, above)
- o the provision of gifts, hospitality and promotional expenditure (see Gifts and hospitality policies below), charitable and political donations; or demands for facilitation payments

- o direct and indirect employment, including recruitment, terms and conditions, disciplinary action and remuneration
- o governance of business relationships with all other associated persons including pre- and post-contractual agreements
- o financial and commercial controls such as adequate bookkeeping, auditing and approval of expenditure
- o transparency of transactions and disclosure of information
- o decision-making, such as delegation of authority procedures, separation of functions and the avoidance of conflicts of interest
- o enforcement, detailing discipline processes and sanctions for breaches of the organisation's anti-bribery rules
- o the reporting of bribery including 'speak up' or 'whistleblowing' procedures (see Whistleblowing policies below)
- o the detail of the process by which the organisation plans to implement its bribery prevention procedures, for example, how its policy will be applied to individual projects and to different parts of the organisation
- o the communication of the organisation's policies and procedures, and training in their application (see Principle 5: communication (including training) above)
- o the monitoring, review and evaluation of bribery prevention procedures (see Principle 6: monitoring and review, above)

Whistleblowing policies

The MoJ guidance views 'speak up' or whistleblowing procedures as a very helpful management tool for commercial organisations with diverse operations that may be in many countries but recommends that if these procedures are to be effective there must be adequate protection for those reporting concerns (see Principle 5: communication (including training) above).

References: MoJ: Guidance (PDF), p 29

An offence under the Bribery Act 2010 (and related foreign legislation) will constitute a potential qualifying disclosure under the legislation offering protection to whistleblowers. However, the definition of associated person in the BA 2010 is wider than the definition of 'workers' to whom protection under the whistleblowing legislation applies. An employer may not wish to extend the scope of their whistleblowing policy to cover all 'associated persons' and so it will usually therefore be appropriate for an employer simply to direct that all reporting of bribery and corruption concerns be made under the procedures set out in its whistleblowing policy. A copy of the whistleblowing policy should therefore be available to all associated persons to whom the anti-bribery and corruption policy applies.

References: ERA 1996, ss 43B, 43K

BA 2010, s 8

Gifts and hospitality policies

The employer should have a clear policy prescribing what is acceptable. Such a policy may:

- o forbid the solicitation of gifts of hospitality
- o forbid the acceptance of gifts or hospitality in excess of prescribed financial limits
- o also cover political and charitable donations
- o require all gifts and hospitality given or received to be appropriately recorded and authorised

Other employment issues

The BA 2010 also has implications in the areas outlined below.

Recruitment

A commercial organisation's employees are presumed to be persons 'associated' with the organisation for the purposes of the Bribery Act 2010. The organisation may wish, therefore, to incorporate in its recruitment and human resources procedures an appropriate level of due diligence (see Principle 4 above) to mitigate the risks of bribery being undertaken by employees, which is proportionate to the risk associated with the post in question. Due diligence is unlikely to be needed in relation to lower risk posts.

Due diligence should include additional background checks and vetting as appropriate to the post, such as bankruptcy checks, criminal records checks and additional references.

Organisations should ensure that appointment decisions are carefully documented to ensure transparency and independence. This will be of particular concern where the person appointed has a relationship with a client/customer or business contact. Some organisations may decide to prohibit appointments where such relationships exist.

Appropriate training on the organisation's anti-bribery and corruption policies and procedures should be incorporated in the induction process for all new joiners. Given the wide definition of associated person in this context, such training should extend not only to employees but should include agency workers, volunteers and contractors.

Agents and intermediaries

Agents and intermediaries will usually fall within the definition of associated persons and so their actions will have the potential to incur liability for the organisation for the offence of failure to prevent bribery (see above). Organisations should therefore ensure that:

- o relevant organisations and individuals receive a copy of the anti-bribery and corruption policy and related policies and procedures, such as the whistleblowing procedure
- o contractual documentation requires compliance with anti-bribery and corruption policies and procedures
- o training is given where required

Bonus and commission schemes

Bonus and commission schemes are another risk area. If these make up a significant part of the employee's overall remuneration package, where targets are high and difficult to reach, or if such schemes reward excessive risk-taking, they will add to the level of internal risk of bribery and corruption, as employees may, even unintentionally, be less attentive to bribery and corruption risks.

Employers should consider their arrangements to ensure that they do not unintentionally encourage employees to act improperly. One option may be to ensure that credit is given where employees refuse potential business opportunities where bribery is offered or suspected.

Expenses

Organisations should ensure that expenses processes are subject to regular scrutiny and audit. Expenses payments should be appropriately authorised and properly documented, including details of the reasons they were incurred.

Disciplinary procedures

Disciplinary policies and procedures should refer to anti-bribery and corruption policies and procedures and clearly state that breach of them may amount to gross misconduct.

Discrimination

Organisations must ensure that their policies and procedures in relation to bribery and corruption are not based on stereotyping of particular nationalities, which may be an issue when their business operates overseas. Policies and guidance should be based on proper risk assessment (see Principle 3: risk assessment above) of issues in the relevant countries.

Transparency International publishes a corruption perceptions index , which ranks countries according to the perceived level of public sector corruption. This may assist in identifying higher risk areas. The index published in October 2010 identified countries such as:

References: Transparency International: corruption perceptions index

- o Myanmar
- o Somalia
- o Iraq
- o Afghanistan, and
- o Sudan

as being highly corrupt.