

July 2010 in this issue

A monthly "best practices" alert for multinationals confronting the challenges of the global workplace.

This Month's Challenge

The British are coming! New UK anti-bribery law will require employers with UK operations or affiliates to implement procedures to prevent bribery, or face strict liability for acts of rogue employees or agents.

Best Practices Tip of the Month

Although formal guidance will not be issued by the UK government for several months, multinational employers would be well-advised to begin to develop their anti-bribery programs soon. Recent guidance from the OECD provides a good framework to start.

Tip of the Month

Anti-Bribery Training in the UK – A New Duty for Employers

The recent adoption in the UK of a broad anti-bribery law, which includes new, specific criminal offenses designed to prevent and punish the use of bribery of foreign public officials to obtain a competitive advantage in international trade, has once again placed public corruption in an international spotlight.

The new legislation, the Bribery Act 2010, was published in April 2010 and has received Royal Assent, so is in its final form. The legislation has attracted significant attention for its breadth. In particular, it has express extra-territorial jurisdiction, which means bribery committed abroad by persons ordinarily resident in the UK as well as UK nationals and corporate bodies will become a criminal offense in the UK.

Enacting a law against bribery of foreign officials is not in itself new or unique. In the U.S., such conduct is prohibited by the Foreign Corrupt Practices Act. In France, Article 435 of the Penal Code expressly criminalizes both giving and receiving (or offering and soliciting) such bribes. Other countries have similar statutes. The UK embarked on the recent overhaul of its century-old anti-bribery law primarily to bring its law up to the international standards set out by the 32-nation Organization for Economic Co-operation and Development (OECD).

HR practitioners need to be aware of several important aspects of the new UK regime, including the introduction of a new defense to corporate liability for bribery committed by an employee or agent of behalf of the company. Under the new law, businesses can avoid liability for unlawful acts committed by their employees if they had in place "adequate procedures designed to prevent ... such conduct."

Initially it was expected that the new law would come into force this October. However, on 20 July, the UK Government announced that it will not now come into force until April 2011. This delay has been welcomed by businesses as it will afford them more time to put "adequate procedures" in place to ensure that they have a proper defense to corporate bribery.

This begs the question as to what procedures a business ought to put in place to ensure it has a defense. The legislation states that the Government will issue guidance, but as yet none has been issued. The latest news from the Government, set out in their announcement of 20 July, is that this September, it will launch a short consultation exercise, with the intention to have guidance in place early next year. Thus, businesses

will only have a few months from the publication of the guidance to put the “adequate procedures” in place.

As such, even before the publication of any guidance, our view is that now is the time to alert those in your business of the need to have adequate procedures in place to prevent bribery. Indeed, a recent report by Transparency International UK highlighted the fact that only a small minority of UK businesses have policies in place to address corrupt practices. From an HR perspective, some critical areas for consideration and review include the following:

- > Do your contracts of employment contain any express provisions relating to corrupt practices, such as: expressly outlawing such practices, requiring employees to comply with relevant guidelines and imposing duties upon employees to raise any concerns they have?
- > Do you have policies in place dealing with bribery? If so, are they adequate? For example, are they clear, practical and accessible?
- > How do any policies you have deal with subjects such as hospitality, procurement of services, facilitation payments and donations to charity or political parties? While all of these can be a legitimate part of day-to-day business activities, their abuse can result in criminal liability.
- > Do you have systems in place to identify high-risk situations?
- > Do you have systems in place to train employees to identify and avoid situations where there is a risk of bribery?

Earlier this year, the OECD Council issued a document entitled “Good Practice Guidance on Internal Controls, Ethics and Compliance” as a guide to companies on how to prevent foreign bribery. Until the UK government issues its own guidance, it is reasonable to assume that some or all of the elements identified by the OECD Council will be reflected in the UK guidance, and companies wishing to get a head start on these requirements would do well to review the Good Practice Guidance. The key recommendations of the Good Practice Guidance include the following elements:

- 1. strong, explicit and visible support and commitment from senior management to the company's internal controls, ethics and compliance programs or measures for preventing and detecting foreign bribery;*
- 2. a clearly articulated and visible corporate policy prohibiting foreign bribery;*
- 3. compliance with this prohibition and the related internal controls, ethics, and compliance programs or measures is the duty of individuals at all levels of the company;*
- 4. oversight of ethics and compliance programs or measures regarding foreign bribery, including the authority to report matters directly to independent monitoring bodies such as internal audit committees of boards of directors or of supervisory boards, is the duty of one or more senior corporate officers, with an adequate level of autonomy from management, resources, and authority;*
- 5. ethics and compliance programs or measures designed to prevent and detect foreign bribery, applicable to all directors, officers, and employees, and applicable to all entities over which a company has effective control, including subsidiaries, on, inter alia, the following areas:*

- i) gifts;*
- ii) hospitality, entertainment and expenses;*
- iii) customer travel;*
- iv) political contributions;*
- v) charitable donations and sponsorships;*
- vi) facilitation payments; and*
- vii) solicitation and extortion;*

6. ethics and compliance programs or measures designed to prevent and detect foreign bribery applicable, where appropriate and subject to contractual arrangements, to third parties such as agents and other intermediaries, consultants, representatives, distributors, contractors and suppliers, consortia, and joint venture partners (hereinafter “business partners”), including, inter alia, the following essential elements:

- i) properly documented risk-based due diligence pertaining to the hiring, as well as the appropriate and regular oversight of business partners;*
- ii) informing business partners of the company’s commitment to abiding by laws on the prohibitions against foreign bribery, and of the company’s ethics and compliance program or measures for preventing and detecting such bribery; and*
- iii) seeking a reciprocal commitment from business partners.*

7. a system of financial and accounting procedures, including a system of internal controls, reasonably designed to ensure the maintenance of fair and accurate books, records, and accounts, to ensure that they cannot be used for the purpose of foreign bribery or hiding such bribery;

8. measures designed to ensure periodic communication, and documented training for all levels of the company, on the company’s ethics and compliance program or measures regarding foreign bribery, as well as, where appropriate, for subsidiaries;

9. appropriate measures to encourage and provide positive support for the observance of ethics and compliance programs or measures against foreign bribery, at all levels of the company;

10. appropriate disciplinary procedures to address, among other things, violations, at all levels of the company, of laws against foreign bribery, and the company’s ethics and compliance program or measures regarding foreign bribery;

11. effective measures for:

- i) providing guidance and advice to directors, officers, employees, and, where appropriate, business partners, on complying with the company’s ethics and compliance program or measures, including when they need urgent advice on difficult situations in foreign jurisdictions;*
- ii) internal and where possible confidential reporting by, and protection of, directors, officers, employees, and, where appropriate, business partners, not willing to violate professional standards or ethics under instructions or pressure from hierarchical superiors, as well as for directors, officers, employees, and, where appropriate, business partners, willing to report breaches of the law or professional standards or ethics occurring within the company, in good faith and on reasonable grounds; and*

iii) undertaking appropriate action in response to such reports;

12. periodic reviews of the ethics and compliance programs or measures, designed to evaluate and improve their effectiveness in preventing and detecting foreign bribery, taking into account relevant developments in the field, and evolving international and industry standards.

In many companies, implementation of an anti-bribery program will take time, both to develop the specific elements and to inform and consult with a works council or other labor organization. We will report on the guidance under the UK Bribery Act as it develops, but multinational companies with operations or affiliates in the UK would be well-advised to get started early.

Proskauer Rose LLP's International Labor and Employment Law Practice Group counsels companies doing business globally in connection with the employment issues they face in their workplaces around the world.

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