

# COVERNOTES

Summer 2011

## KICKBACKS AND GREASY PALMS



**Kickbacks and greasy palms are part of doing business, particularly in some geographies, some might argue. Over the years tales of extra 'import duty' that needs to be paid to officials at airports, excessive 'corporate hospitality' and more recently alleged cash transfers designed to influence decision-makers within the sports world have made the headlines. The U.K. has just introduced The Bribery Act 2010 (the Act) but there is concern that this broad ranging act will restrict U.K. businesses.**

The Act came into force on 1 July 2011. Under the Act it is a criminal offence to give or receive a bribe. It also introduced a corporate offence of failing to prevent bribery. Under the powers granted by the new law prosecutors are able to prosecute both domestic and foreign companies, providing they have some presence in the U.K. Bribes committed in the U.K. and abroad could be prosecuted under the Act.

Individuals face up to 10 years in prison and an unlimited fine if found guilty of committing bribery. Under the corporate offence a company faces an unlimited fine if it is found to have failed to prevent a bribe taking place.

Some experts have argued the new law could put British companies at a disadvantage as it goes further than similar legislation in other jurisdictions. Under U.K. law facilitation payments, which are payments that induce officials to perform routine functions that they are obligated to perform, are prohibited by the Act. In this regard, the U.K. law differs from U.S. Foreign Corrupt Practices Act which does permit certain facilitation payments.

The Government does not believe the law will make doing business difficult, suggesting it will help reaffirm the U.K.'s place as a leader in fighting corruption. It has produced six principles to help you decide what changes, if any, you need to put in place in your business. These include ensuring anti-bribery policies are proportionate to the risks you face within the markets you operate in, that you diligently monitor and review your anti-bribery policies and that they are supported by the management and directors of the company. Businesses that can demonstrate they have adequate procedures in place to prevent bribery may be able to avail themselves of a full defence against any prosecution.

The good news is that as a general rule hospitality or promotional expenditure is not prohibited. If the hospitality or expenditure is proportionate and reasonable to the business taking place then it is unlikely to engage the Act. Tickets to sporting events, dinners and travel expenses fall within this assessment if they are reasonable and proportionate for your business.

From an insurance point of view there is nothing radically different about the new offences under the Act. Rather they add to what is already a highly complex patchwork of offences in the arena of financial crime. Your standard Directors and Officers (D&O) policy may come into effect to help with defence costs if you are charged with a bribery offence, remembering that a 'conduct' exclusion in your policy could mean that if you are found guilty of the offence cover may cease at that point and may, in some instances, allow insurers to claw back the defence costs already advanced. Careful analysis of your D&O policy with us will help determine whether you have cover for alleged infringements of the provisions of the Bribery Act.

To help protect your business, firstly educate yourself and your staff and put in place internal processes to monitor client entertaining. Secondly, consider buying or reviewing your Directors and Officers liability insurance to protect you and your business.

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# BIG LOSS - SMALL BUSINESS

This February, Cotswold Geotechnical Holdings (CGH) became the first company to be sentenced under the new offence of Corporate Manslaughter. It has been fined £385,000 after being found guilty by a jury at Winchester Crown Court; an employee died when an unsupported trench collapsed in on him while he was taking soil samples.

## ⋮ Sentences handed down by the courts demonstrate the tough stance being taken.

Companies and organisations can be found guilty of Corporate Manslaughter (or Corporate Homicide if under Scottish jurisdiction) if an employee dies as a result of management failures resulting in a gross breach of duty of care. The Corporate Manslaughter & Corporate Homicide Act 2007 was designed to make all employers accountable. Some commentators have expressed disappointment that the first case concerned such a small company which does not have the size or status of the type of corporations that the new legislation was expected to capture. CGH only had eight employees at the time of the offence.

The loss of life, a large fine and negative publicity may make a significant impact on a small company. The sentence handed down by the court demonstrates the tough stance likely to be taken against any company, regardless of size, which fails to adhere to health and safety guidance.

Employers have a duty of care to their staff whether it be on building sites, in factories or simply ensuring their company vehicles are roadworthy and the relevant safety checks and manufacturer guidelines for maintenance have been adhered to. In the event of a workplace death, courts will now look at management systems and practices across the organisation. If proven inadequate and at fault, the company can be exposed to a charge of corporate manslaughter. This can result in an unlimited fine or in some cases a fine equivalent to a percentage of the company's annual turnover.

Many employers, and public and products liability insurance policies provide cover for defence costs in respect of a prosecution under both the Corporate Manslaughter & Homicide Act and the Health & Safety at Work Act. Some insurers provide cover for prosecution costs awarded against the insured whereas others believe this forms part of the punishment and therefore it is against public policy to provide insurance cover.

Under your insurance policies you may not be covered if an act is deliberate or you have failed to take reasonable safety precautions. Please speak with us to understand the level of insurance cover you have or can obtain.

## CHANGES TO RETIREMENT LEGISLATION

The law which allows employers to retire their employees at 65, the default retirement age, without giving reason, is being removed on 1 October 2011. Employers are no longer able to dismiss staff just because they have reached the age of 65.

The move is one of a series that aims to encourage people to work longer to manage Britain's changing demographic profile and pensions shortfall.

From 6 April 2011 employers were prohibited from issuing any further notifications to retire employees under the statutory retirement process. Only employees who were notified of their retirement date before 6 April 2011 and whose retirement date is on or before 30 September 2011 can be compulsorily retired using the statutory procedure. Of course, this does not prevent you retiring yourself!

Individual employers will still be able to operate a compulsory retirement age providing they can 'objectively justify' it. This might apply to employees who can no longer perform the full functions of their job due to their age. However commentators have suggested that this test is likely to be a difficult one to pass and will be applied in few circumstances. Therefore, you should consider amending the retirement clauses in employment contracts and employee handbooks to reflect the changes to the law.

# QUIRKY BRITISH SUMMERS!

With British Summertime well and truly here, businesses and organisations are reminded of the importance of managing the additional liability risks associated with hosting an outdoor event.

Every year for nearly 200 years, the last Monday in May saw Gloucestershire folk – and visitors – running down Cooper’s Hill in pursuit of a 7lb Double Gloucester cheese. The hill is known for a gradient that in places is one in two and in others one in one. In 2009 the event unexpectedly swelled outstripping event capacity – this led to 18 people being injured in the Gloucestershire cheese-rolling event with several taken to hospital. They included two spinal injuries and a dislocated shoulder. One spectator was injured after falling out of a tree. This led to the official events in 2010 and 2011 being scrapped as they could not find an insurer for the now ‘high risk’ event.

**Special events should not be considered ‘business as usual’ as they pose additional liability risks to the organisers.**

So whether you are planning a village fete, or a larger event involving hundreds or even thousands of attendees, a risk assessment should always be undertaken in advance to properly assess the additional risks. If your event includes activities of a potentially dangerous nature, such as abseiling, bungee jumping, bonfires, firework displays, the use of a bouncy castle or cheese rolling, let us know so we can advise on appropriate cover. Special events should not be considered ‘business as usual’ as they may pose additional liability risks to the organisers.



The primary concern of any event should be to make it as safe as reasonably practicable for all concerned. Entertainment events may be classed as work activity so may be subject to the Health & Safety at Work Act. In addition, under the Occupiers Liability Act 1957, there is also a duty of care to ensure the safety of visitors when carrying out the activities for which they were invited or permitted at the event.

Aviva, a leading insurer, recommends the assessment should include identification of all possible hazards that could occur and also include how the risk will be controlled. Event organisers should also consider requesting risk assessments from third parties such as contractors and participants. It is important to obtain copies of public liability insurance cover from third party contractors and to check that cover is in force, the indemnity limit is not less than the organisers limit and the contractors’ insurances extend to indemnify the organiser as ‘principal’.

It is important to employ the right level of risk management to help create a happy and safe event. In addition make sure you have event insurance cover in place to ensure you and your business, organisation or charity are financially protected.

## BEFORE YOU TRAVEL...

Don’t forget to check for travel warnings on the Foreign & Commonwealth Office (FCO) website; it lists countries and regions to avoid for your own safety. Many travel insurance companies will not cover you if the area has an FCO Travel Warning issued against it, so to be certain, visit [www.fco.gov.uk](http://www.fco.gov.uk) to check.





# TRACING OLD EL INSURERS

Historically individuals who wanted to make a claim against a former employer in relation to injury or disease caused during their employment may have run into difficulties. This was largely due to the nature of industrial disease, such as asbestosis, which can take many years to show symptoms, by which time past employers may not be able to trace who was their Employers' Liability (EL) insurer at the time.

The Employers' Liability Tracing Office (ELTO) is an independent body that has been formed to aid the process of tracing the insurer for an employer by recording the details on its Employers' Liability Database (ELD). This ELD improves upon the previous tracing service, which relied on insurers checking against their own records.

The ELD will record:

- Details of new and renewed EL insurance policies that inception on or after 1 April, 2011.
- Old EL policies that have new claims recorded against them.
- Successful traces undertaken by its predecessor - the ABI.

The results from the search of the ELD are not proof of insurance, or proof of liability. The ELD will hold information against employers based on their unique Employers Reference Number (ERN) - which will be identical to the PAYE reference number under which their employers' income tax and national insurance contributions are made. Insurers may also hold this information independently if they chose.

We will be contacting all our existing EL customers over the next year to collect their ERN, in order to record sufficient information on the ELD or their insurer's database where appropriate..

## PENALTY POINT CHEATS



In the U.K. there are over 40 million people\* with a full driver's licence. Many of them drive for a living or as part of their working day. Employers have a duty of care to ensure their employees are competent to drive and this will start with simple checks on their licences. The question is though, how do you know that the licence you are checking as an employer is legal, full, accurate and up-to-date?

There is a concern that fleet operators may be misled by drivers whose paper licences aren't showing correct up-to-date endorsements and that drivers may even intentionally keep a 'clean' duplicate drivers licence in order to keep their driving job.

Historically some driving licence cheats have taken advantage of the DVLA's leniency regarding the time available to hand over their licence for point endorsements to be added. Until December 2010, drivers given points for an offence had 12 months to submit their licence to the DVLA. Therefore drivers could be driving round for up to a year with their licence showing the incorrect penalty points, or even with enough points to lose their licence! Police officers have the right to seize vehicles driven by individuals who've had their licence revoked, therefore fleet operators could potentially see their vehicles seized as an unlicensed driver is also an uninsured driver.

The good news for fleet operators is a new interpretation of the law, by the DVLA, means drivers now have only 28 days to hand over their licence or face the threat of it being revoked.

To combat the threat of drivers who keep a 'clean' duplicate licence you can now use an external checking company that has direct access to the DVLA so you can understand the true status of your employees' licences. These checks will inform you if a licence exists, that it is full, any points and in particular points for certain offences such as drink driving. They can also interpret international drivers' licences so you know the status of migrant workers' licences.

To help protect your business and your employees put in place processes to regularly check your drivers' licences.

\* Source Driver and Vehicle Licensing Agency. Contains public sector information licensed under the Open Government Licence v1.0

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