

New legal issues all firms must know

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The government is coming down harder than ever on businesses that break the law, writes Aziz Rahman of Rahman Ravelli solicitors.

It looks like 2010 is the year that small to medium businesses' behaviour becomes subject to closer inspection. The Serious Fraud Office's dismal prosecution record for offences like fraud and price fixing has led to the government wanting to improve the success rate in the courts. As a result, new legislation is either in place or on its way this year to ensure small and medium businesses follow the straight and narrow. The Fraud Act now makes fraud, generally speaking, a single offence that can be committed in three ways:

1. by false representation
2. by failure to disclose information
3. by abuse of position

The Fraud Act also extends the fraudulent trading provisions of the Companies Act 2006 so that sole traders, trusts and partnerships can now all be prosecuted for fraudulent trading. Previously, there had to be a limited company for fraudulent trading. Now, the smaller guys can be just as liable.

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The current Bribery Bill, which the government wants to become law as soon as possible, will make it a criminal offence for businesses to give or offer a bribe in the UK or abroad. The maximum prison term will be ten years. For the first time, there will be an offence of negligent failure to prevent bribery on behalf of a business.

In short, when the Bill becomes law, a company's directors will be squarely in the frame for any corrupt activity committed by anyone working on its behalf. This could be particularly burdensome, as the Ministry of Justice has recently changed legal aid rules so that companies and directors can no longer reclaim their costs in criminal trials - even if acquitted of all charges. This could result in small companies being landed with massive legal bills, regardless of their guilt or innocence.

Added to that, the Office of Fair Trading wants to disqualify directors for anti-competitive practices that "they ought to have known about". The changes, if made, will raise the bar considerably from the current position, where directors are only likely to be prosecuted if they are personally involved. The consultation period for this ended last November and the OFT is expected to issue guidance on it any time soon.

The government is stacking the chips in its favour to raise its prosecution record. The last two years have seen the wide-ranging provisions of the Enterprise Act being used by the authorities to prevent companies using anti-competitive measures.

As a result, strict legal compliance, a firm adherence to industry best practice and greater risk awareness must be a priority for all companies and directors. Failing in any of this could prove costly. So the year 2010 leaves small to medium-sized businesses facing the prospect that if they are going to make it into the big league then they face having to do it more scrupulously than ever before.

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Ideally, companies should carry out a wide-ranging review of their operating procedures and the work and conduct of their suppliers. Secondly, the board needs to make sure that any ethical code of conduct drawn up is communicated throughout the organisation. Thirdly, there needs to be an internal, confidential way for incidents of malpractice to be reported and escalated to board level so necessary action can be taken swiftly.

If a company uncovers wrongdoing it should consult with lawyers immediately. Lawyers can assess whether the company could receive leniency for cooperating with any pending investigation and whether a plea-bargaining deal can be negotiated. Both of these are avenues that the Serious Fraud Office (SFO) views as a way of avoiding unnecessarily expensive prosecutions. Companies and their directors are often not best placed to deal with the agencies that may end up prosecuting them.

Under the new plea bargaining arrangements, for example, the Attorney General has made a move towards US-style litigation where confidential discussions on the subject of plea can take place, but only where the company involved is legally represented. Specialist lawyers like Rahman Ravelli can help companies steer through these tough decisions while preserving their reputation and corporate integrity.

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