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Preventing Illegal Working and Establishing the Statutory Excuse

Introduction

This Brief replaces ALP Brief 81 and includes the changes introduced on 16th May 2014 by [The Immigration \(Restrictions on Employment\) \(Codes of Practice and Amendment\) Order 2014](#).

[The Immigration, Asylum and Nationality Act 2006](#) introduced a system of civil penalties for employers who employ an illegal migrant worker and a separate criminal offence of knowingly employing an illegal migrant worker. The regulations place a duty on all employers to undertake specified checks prior to employment and in certain circumstances at times during employment, the correct completion of which provides a Statutory Excuse to the civil penalty.

Employment may be by way of a contract of employment, or a contract for services or an apprenticeship. The contract may be express or implied and written or verbal. Thus labour providers who engage directly with workers, other than the genuinely self-employed, to provide temporary labour or other services to their clients are liable.

Where a candidate for permanent employment by the client is introduced by a labour provider, the liability will lie with the client as the employer, however suitable due diligence will be prudent, prior to the introduction.

An employer will be committing an offence if found to be employing (or having employed in the previous 3 years) a person aged 16 or over who is subject to immigration control unless that person has/had current and valid permission to be in the United Kingdom, and to do the type of work offered.

Employers will be liable for a civil penalty of up to £20,000 per illegal worker unless they have complied with the requirements to establish the Statutory Excuse. However, if they knew, at any time during the period of employment, that the employment was not allowed, the Statutory Excuse does not apply and the employer could be prosecuted for the criminal offence of knowingly employing an illegal worker which carries an unlimited fine and /or up to 2-year imprisonment.

More detailed guidance on the Civil Penalty scheme can be found at [Code of practice on preventing illegal working; Civil penalty scheme for employers \(Home Office May 14\)](#)

GLA standard 7.2 requires all labour providers to only engage workers entitled to undertake the work in question in the UK and to make the regulatory checks leading to the Statutory Excuse. At inspection, failure to comply to this standard incurs 8 points which would lead to an Additional Licence Condition being imposed or could contribute to a revocation score of 30 points or more.

Illegal working may be accompanied by abusive and exploitative behaviour, the mistreatment of illegal migrant workers, tax evasion and illegal housing conditions. It can also undercut legitimate businesses and have an adverse impact on the employment of people who are lawfully in the UK.

Discrimination

Whilst the regulations are aimed at preventing illegal working by those not entitled to work in the UK, the checks must be applied on all applicants in a consistent, non-discriminatory, manner labour providers should apply the same checks to all potential workers without any assumptions on grounds of nationality, ethnicity, colour or period of residency, to avoid giving grounds for proceedings brought under the Equality Act 2010.

The latest guidance on avoiding discrimination in making these checks can be found at [Right to Work checks: Code of practice on avoiding discrimination \(Home Office May 14\)](#).

Applicability of the Regulations

The 2014 Amendments to the requirements for establishing the Statutory Excuse only apply to the initial checks on those employees who started working on or after 16 May 2014 and the periodic checks on exiting employees made on or after the same date.

The original Statutory Excuse provisions of the 2006 Immigration, Asylum and Nationality Act apply to all employees from 28 February 2008 to 15 May 2014. Where unlimited entitlement to work in the UK was established at the time, no further checks need be made. Where a limited entitlement was established before 16 May 2014, the Excuse will expire at the later of the 12-month anniversary of the last check, or on the expiry of the permitted time limit. Subsequent checks will be subject to the 2014 amendments.

Employers may still be liable for prosecution under the 1996 Asylum and Immigration Act where they employed illegal workers starting between 27 January 1997 and 28 February 2008 and did not establish the statutory defence at the point of recruitment.

Establishing the Statutory Excuse

Although employers are not legally required to conduct these checks, they do have a duty to prevent illegal working. They are able to establish the Statutory Excuse by checking and copying one, or a specified combination, of original documents in accordance with the three steps detailed below.

In all cases, the Excuse must be established before the employment begins. The repeat checks only enable employers to retain the original Excuse, as it cannot be established after employment has started.

The checks must always be conducted on the original documentation, not scanned, faxed or other copies, in the presence of the individual presenting the documents. This should be physically in person but live video links are permissible.

1) Obtain

If the individual is not subject to immigration control, or has no restrictions on their stay in the UK, they should produce document(s) from **List A** before they are employed and the Excuse will then be established for the duration of the individual's employment.

List A

- A passport showing the holder, or a person named in the passport as the child of the holder, is a British citizen or a citizen of the UK and Colonies having the right of abode in the UK.
- A passport or national identity card showing the holder, or a person named in the passport as the child of the holder, is a national of a European Economic Area country or Switzerland.
- A Registration Certificate or Document Certifying Permanent Residence issued by the Home

Office, to a national of a European Economic Area country or Switzerland.

- A Permanent Residence Card issued by the Home Office, to the family member of a national of a European Economic Area country or Switzerland.
- A **current** Biometric Immigration Document (Biometric Residence Permit) issued by the Home Office to the holder indicating that the person named is allowed to stay indefinitely in the UK, or has no time limit on their stay in the UK.
- A **current** passport endorsed to show that the holder is exempt from immigration control, is allowed to stay indefinitely in the UK, has the right of abode in the UK, or has no time limit on their stay in the UK.
- A **current** Immigration Status Document issued by the Home Office to the holder with an endorsement indicating that the named person is allowed to stay indefinitely in the UK or has no time limit on their stay in the UK, **together with** an official document giving the person's permanent National Insurance number and their name issued by a Government agency or a previous employer.
- A **full** birth or adoption certificate issued in the UK which includes the name(s) of at least one of the holder's parents or adoptive parents, **together with** an official document giving the person's permanent National Insurance number and their name issued by a Government agency or a previous employer.
- A birth or adoption certificate issued in the Channel Islands, the Isle of Man or Ireland, **together with** an official document giving the person's permanent National Insurance number and their name issued by a Government agency or a previous employer.
- A certificate of registration or naturalisation as a British citizen, **together with** an official document giving the person's permanent National Insurance number and their name issued by a Government agency or a previous employer.

Where the individual's leave to enter or remain in the UK is time-limited, they should produce document(s) from **List B**. Repeat checks will be required to retain the Excuse.

List B documents are divided into two groups:

Group 1 documents mean that the time-limited statutory excuse lasts until the expiry date of the worker's permission to be in the UK.

List B Group 1

- A **current** passport endorsed to show that the holder is allowed to stay in the UK and is currently allowed to do the type of work in question.
- A **current** Biometric Immigration Document (Biometric Residence Permit) issued by the Home Office to the holder which indicates that the named person can currently stay in the UK and is allowed to do the work in question.
- A **current** Residence Card (including an Accession Residence Card or a Derivative Residence Card) issued by the Home Office to a non-European Economic Area national who is a family member of a national of a European Economic Area country or Switzerland or who has a derivative right of residence.
- A **current** Immigration Status Document containing a photograph issued by the Home Office to the holder with a valid endorsement indicating that the named person may stay in the UK, and is allowed to do the type of work in question, **together with** an official document giving the person's permanent National Insurance number and their name issued by a Government agency or a previous employer.

Group 2 documents, involve obtaining a **Positive Verification Notice** from the Home Office Employer Checking Service, and the statutory excuse is time-limited for six months.

List B Group 2

- A Certificate of Application issued by the Home Office under regulation 17(3) or 18A (2) of the Immigration (European Economic Area) Regulations 2006, to a family member of a national of a European Economic Area country or Switzerland stating that the holder is permitted to take employment which is **less than 6 months old together with a Positive Verification Notice** from the Home Office Employer Checking Service.
- An Application Registration Card issued by the Home Office stating that the holder is permitted to take the employment in question, **together with a Positive Verification Notice** from the Home Office Employer Checking Service.
- A **Positive Verification Notice** issued by the Home Office Employer Checking Service to the employer or prospective employer, which indicates that the named person may stay

Full details on the required documents on each list, with illustrations, is available at [Acceptable right to work documents: an employer's guide \(Home Office May 2015\)](#)

NB no other document, even those with a photograph of the holder such as a UK Driving Licence, CIS or SIA cards will establish the Statutory Excuse.

2) Check

In order to acquire the Excuse employers are required to check the validity of the document and be satisfied that the individual is the person named in the documents presented and is entitled to do the work in question by carrying out the following:

- Check any photographs in the documentation are consistent with the appearance of the individual.
- Check the dates of birth listed to ensure that these are consistent across documents and that these correspond with the appearance of the individual.
- Check that the expiry dates of any limited leave to enter or remain in the UK have not passed.
- Check for any restrictions to on the individual's entitlement to do the type of work offered.
- Check that the documents are genuine and have not been tampered with and belong to the individual.
- If the individual provides two documents which have different names, obtain further documentation to explain the reason for this - a marriage certificate, divorce decree, deed poll document or statutory declaration.

Employers are not expected to be experts on forged documents and will only be required to pay a civil penalty if it would be reasonably apparent to a person, untrained in the identification of false documents, having examining it carefully, but briefly and without the use of technological aids, could reasonably be expected to realise that the document in question is not genuine, or if it would be reasonably apparent to the same person that the individual presenting the document is not the person referred to in that document, even if the document itself is genuine.

3) Record

In order to provide evidence that the appropriate checks have been made, employers must make a copy, and retain for the duration of the employment and at least 2 years after, of the relevant page or pages of the document(s) presented, in a format which cannot be subsequently altered, for example, a photocopy or un-editable scan.

Copies should be endorsed, at least, with the date of the check to which they apply. Larger Labour Providers might find it prudent for the purposes of internal control, to identify the person conducting the check as well.

Dates of checks and diary notes for future checks can be held separately.

In the case of a passport or other travel document; take a copy of any page containing the holder's personal details - specifically any page that provides details of nationality, photograph, date of birth, signature, date of expiry or biometric details and any page containing UK Government endorsements and any relevant UK Immigration endorsements which allows the individual to do the type of work offered, noting the date of expiry

Other documents should be copied in their entirety.

Where an employer can demonstrate that it has complied with these requirements, it will have established the Statutory Excuse even if it transpires that the employee was working illegally as long as the employer did not knowingly employ an illegal worker.

The Statutory Excuse is not established if the employer:

- cannot provide a record of having carried out the document checks before recruitment; or
- has accepted a document which clearly does not belong to the person presenting the document; or
- has conducted a check and it is reasonably apparent that the document is false; or
- has accepted a document which clearly shows that the person does not have permission to work in the UK and/or carry out the type of work being offered.

Positive Verification Notices and the Home Office Employer Checking Service

In order to satisfy the requirements of List B, Part 2 for a prospective employee who presents a Certificate of Application or an Application Registration Card or who claims they can't show their documents, because they have an outstanding appeal or application with the Home Office, an employer must obtain a Positive Verification Notice from the Home Office Employer Checking Service via the [Employee immigration employment status check \(Home Office June 2015\)](#). It is the employer's responsibility to inform the individual that this check is being made on them.

Checks relating to outstanding applications with the Home Office or appeals against a Home Office decision should be made after 14 days after the date of the application or appeal in order for that application or appeal to be registered with the Home Office.

The Employer Checking Service will endeavour to respond with either a Positive Verification Notice or a Negative Verification Notice within 5 working days of requesting the check.

Employers who receive a **Negative Verification Notice** will not have an Excuse and may be liable for a civil penalty if they continue with the employment.

Eligibility to Work in UK

Citizens of EEA countries may work without restriction:

Austria	France	Latvia	Portugal
Belgium	Germany	Liechtenstein	Romania
Bulgaria	Greece	Lithuania	Slovakia
Cyprus	Hungary	Luxembourg	Slovenia
Czech Republic	Iceland	Malta	Spain
Denmark	Ireland	Netherlands	Sweden
Estonia	Italy	Norway	And nationals of
Finland	France	Poland	Switzerland

Under the Accession of Croatia (Immigration and Worker Authorisation) Regulations 2013 special conditions attach to the employment of Croatian nationals apply from July 2013 to at least June 2018. Details can be found at ['Code of practice for the employment of Croatian Nationals.](#)

International students

Students from outside the European Economic Area (EEA) may be entitled take limited employment in the UK, subject to the conditions of their permission to study in the UK.

The working hours that they may undertake depend on when they applied for permission to come to or stay in the UK, the type of course they are studying and the type of educational provider with whom they are studying. Student visitors and extended student visitors are not permitted to work either in the term time or the vacation or to do a work placement.

For students with permission to study under Tier 4 of the Points Based System, the condition permitting a student to work is linked to that person following a course of study at the appropriate academic level; and with a sponsor of the specified academic status that permits them to work up to the number of hours that they are working.

International students who are permitted to work will have a clear endorsement in their passport or Biometric Residence Permit stating they are permitted to work and the number of hours of work permitted during the term time e.g. 10 hours or 20 hours.

Their entitlement to work full time during vacations and during the period of permission that is granted before a course begins and after the course ends only applies if they are following, or have completed, the required course of study.

To establish a Statutory Excuse, the employer must have on record evidence of the academic term and vacation dates applicable to the course being followed, from the educational establishment sponsoring the student.

If a Tier 4 student has ceased studying before they complete their course, they will normally have no right to undertake employment because they are no longer following a course of study.

Other changes in their circumstances (e.g. changing course, switching to another sponsor, stopping studying or have their permission to study curtailed) can impact on their right to work.

Some courses contain Work Placements as an integral part of the studies. This is entirely separate to any entitlement to work. An employer offering Work Placement to international students are strongly advised to retain a written agreement with the student's education institution about the work placement as evidence that the student's work placement does not exceed the time permitted for them.

Employers may be liable to prosecution or a civil penalty if they knowingly employ a student who no longer has the right to work because that student is no longer studying.

Conducting Follow up Checks

The Statutory Excuse relating to an individual may be time-limited, either until the expiry date of their permission to enter or remain in the UK (List B, Group 1) or to six months from the date of the last Positive Verification Notice from the Home Office Employer Checking Service check (List B, Group 2).

Repeat follow up checks must be made before the expiry of the time limit to maintain the Excuse.

Transfer of Undertakings

The Transfer of Undertakings (Protection of Employment) (TUPE) regulations provide that right to work checks carried out by the seller are deemed to have been carried out by the buyer enabling the buyer to obtain the benefit of any statutory excuse acquired by the seller. However, if the seller had not conducted the checks, the buyer would be liable for a penalty if an employee is later found to be working illegally.

Also, a check by the buyer will be necessary to determine when any follow up check should be carried out. For these reasons, employers who acquire staff through TUPE regulations should undertake a right to work check on all new TUPE members of staff.

A 60 day "period of grace" from the date of the transfer of the business is allowed under the 2014 Amendments, to allow the buyer to correctly carry out their first statutory document checks in respect of these new TUPE employees. There is no such grace period for any subsequent follow-up checks.

Persons not entitled to work

If, having carried out these checks it is established that the prospective employee is not permitted to work, then the employer is entitled to refuse employment to that person. It is up to the prospective employee to demonstrate that he or she is permitted to do the work offered.

If a false document, or one falsely claimed to refer to an individual, is presented it can be reported to the Home Office on line [via the Report Immigration Crime link](#) or by calling the dedicated Helpline on 0300 123 4699 9 Monday to Thursday 0900 to 1700, Friday 0990 to 1630).

Further Information

A useful Right to Work checklist is available at the [Right to work checklist \(Home Office Nov 2014\)](#) and the full Guidance at [Right to work checks: Employers Guide \(Home Office May 2015\)](#).

Please contact the ALP if you would like to discuss any of the points raised in this Brief or the full Guidance as above.

NSL Checking support the ALP and their members with the provision of immigration compliance advice and access to a range of Identity Document checking systems and right to work compliance programmes. NSL Checking is able to guide and support ALP members with general queries relating to complying with immigration rules and right to work processes. See <http://labourproviders.org.uk/services/nsl-group-validation-solutions/> for further details and please contact NSL Checking at: kenneth.hanslip@nsl.co.uk for further information.

Disclaimer - Please note that this document is not exhaustive and provides a general overview concerning issues relating to the Right to Work regulations. It is not intended to be used as a substitute for legal advice. To the fullest extent permissible by law, ALP and its advisors hereby exclude all liability for any claim, loss, demands or damages of any kind whatsoever (whether such claim, loss, demands or damages were foreseeable, known or otherwise) arising out of or in connection with the use of any of these documents and/or the information, content and/or advice included within these documents.
