

Proving the right to work – the employer's duty

It is illegal to employ someone who has not been granted leave to enter or remain in the UK, who has no right to work in the UK, or no right to do the work being offered. With effect from 29 February 2008, the Immigration, Asylum and Nationality Act 2006 has introduced a new system whereby an on-the-spot civil penalty can be imposed for employers who have negligently employed an illegal worker. The maximum civil penalty for the employer is now £10,000 for each person illegally employed. It is also a criminal offence for an employer (including its directors, managers or company secretary) to **knowingly** employ illegal workers, punishable by up to two years' imprisonment and/or an unlimited fine. Directors convicted of this offence may be disqualified from forming or managing a company.

The only defence (referred to as the 'statutory excuse') to prevent a penalty being imposed is for the employer to show that, prior to the employee starting his or her employment, the employer checked and retained copies of certain original documentation which was evidence of the individual's nationality and immigration status. However, the defence that the correct checks were made is not available where someone with responsibility within the employer's organisation **knew** that the employee did not have the right to enter, remain, or work in the UK; or do the type of work offered.

The 2006 Act has effect for employees whose employment starts on or after 29 February 2008. It is expected that the new civil penalty will be easier to enforce against employers than the criminal penalty under the previous legislation (which still applies to any employment that started before 29 February 2008).

However, care needs to be taken to ensure that whilst the regulations are followed, employers do not end up facing claims of racial discrimination.

The regulations will not be contravened by employing individuals who do have the right to live and work in the UK, such as British citizens or Commonwealth citizens with the right of abode in the UK, and citizens of most countries in the European Economic Area (EEA) (there are exceptions so this should be checked – see below – "Employing Nationals from EEA Accession States"), but employers who fail to carry out checks may inadvertently fall foul of the regulations.

Relevant documentation

The Immigration (Restrictions on Employment) Order 2007 (SI 2007/3290) (the Order) sets out which documents an employer must request to see, and how they are to check and make copies of them, in order to establish the statutory excuse.

The Order is very specific about the types of documents that are acceptable in order to establish the statutory excuse and employers should ensure that they see and take full copies of original documents. Seeing copies is not acceptable. Details of the documents or combinations of documents that are acceptable can be found on the Border and Immigration Agency website (www.bia.homeoffice.gov.uk).

Employing nationals from EEA Accession States

In addition to the above, employers intending to employ individuals from the newer EEA accession states of Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia must ensure that the individuals from these states register themselves with the Home Office within 30 days of starting work (unless they are exempt – special conditions apply). Employers should keep copies of their application to register and their registration certificate when it is received. If they have not applied within 30 days or their application is refused, their employment should not continue and advice should be taken about terminating their employment. However, once the individual has been continuously employed legally for 12 months, he or she will have the right to remain and work in the UK without restriction.

Separate rules currently apply for individuals from Bulgaria and Romania, which joined the European Union on 1 January 2007. Nationals of these two countries have the right to travel throughout the European Union, but in the UK there are restrictions on undertaking employed work. They will need to obtain authorisation **before** starting work from the Border and Immigration Agency unless they are exempt from authorisation.

Further guidance on the requirements for nationals of EEA Accession States and relevant exemptions can be obtained from the Border and Immigration Agency website.

What to do with the documentation

Having been provided with the relevant documentation, the onus is on the employer to check and satisfy itself that:

- the document is valid (including ensuring that it has not been tampered with)
- the photographs are consistent with the appearance of the individual
- if names given on the documents differ, a further document is produced to the employer to explain the difference
- the date of birth listed is consistent with the appearance of the individual
- any expiry dates have not lapsed
- the immigration stamps allow the individual to do the employment in question

The employer must also:

- take all other reasonable steps to check that the person is the rightful owner of the document, and
- retain copies securely for a period of not less than two years after the employment has come to an end (although care should be taken not to keep the records longer than is necessary)

If the employer has any concerns then it should contact the Home Office to discuss these prior to engaging the individual.

Follow-up checks

In some cases follow-up checks are also required in order to retain the statutory excuse. There are two lists of documents, List A and List B. List A contains details of documents (such as a UK passport), or combinations of documents, which are sufficient to prove a person's entitlement to work for the duration of the employment relationship providing the employer has complied with the checking and copying requirements. List B contains documents such as birth certificates, work permits, etc. which in certain combinations would be sufficient to prove a person's entitlement to work.

However, where documents from List B are produced, the employer must carry out follow-up checks **every 12 months** in order to ensure ongoing entitlement to work, since List B documents indicate that the entitlement to work or remain in the UK is limited.

Failure to carry out the follow-up checks annually could still expose the employer to the civil penalty and possibly even the criminal sanction including imprisonment and/or a fine.

Internal procedures

Employers should make sure that managers or those responsible for recruiting are appropriately trained on the checks that must be made, what the documents ought to look like, keeping records and copies of the documentation, how to avoid race discrimination (see below), and the importance of follow-up checks where necessary.

It should be made clear that failure to make the required checks on a person commencing employment with the employer will be regarded as a disciplinary offence. Larger employers in particular should consider having an appropriate policy on this issue.

Code of Practice

In addition to the above legislation and procedures, employers must also take account the Code of Practice which aims to help avoid inadvertent race discrimination in recruitment practices. Race discrimination legislation is applicable to all aspects of the employment process – from advertising for a position, to interviewing and employing an individual, and employers must ensure that procedures adopted to comply with the regulations are not discriminatory in practice.

Although the Code does not impose legal obligations, it does set out some best practice guidelines and failure to follow its recommendations can be admissible as evidence at any relevant hearing. The Code of Practice was updated in February 2008 in conjunction with the new regime under the 2006 Act.

It is suggested that employers adopt a uniform policy for use in relation to all new members of staff, regardless of origin, which can be applied consistently and objectively at each stage of the recruitment process. Employers should not assume, for example, that some individuals have a right to reside and work in the UK based on their appearance and accent. By requesting evidence of an individual's nationality and immigration status as a matter of course in the recruitment process employers will avoid stereotyping, which could lead to racial discrimination.

In particular, employers should not discriminate against individuals who produce documents from List B on the basis that follow-up checks will have to be carried out. Nor should employers automatically assume that an individual is working illegally if he or she cannot produce the documentation straight away.

In addition, as a matter of good practice, employers are advised to monitor the outcomes of recruitment and selection by the ethnicity of job applicants. This will help to determine whether racism is occurring within the workplace and to allow action to be taken to resolve the situation.

Further information and guidance on the type of documents which should be requested, along with copies of the Code of Practice can be found at the Border and Immigration Agency section of the Home Office website at: www.bia.homeoffice.gov.uk.

Contacts

For further information or guidance on this subject, please contact the Employment Law team at employmentinfo@bllaw.co.uk or call us:

Southampton

023 8090 8090

Oxford

01865 248607

London

020 7405 2000

This publication is not a substitute for detailed advice on specific transactions and problems and should not be taken as providing legal advice on any of the topics discussed.

Blake Laphorn uses the information it holds about you to contact you where necessary if (for instance) you have registered to attend a seminar that we are hosting or have requested information regarding the services that we provide. We will also use it to administer, support, improve and develop our business and to contact you for your views on our services, as well as to let you know about other products and services which we offer which may be of interest to you. We may send them by post, telephone or fax, email or SMS. If you would rather NOT receive further information by any particular format, or at all, or if your details need updating, please contact Kay Hogg on 01865 258010 or email her at kay.hogg@bllaw.co.uk

We will not disclose any of your personal identifiable information to any third parties without your express permission to do so, unless we believe that we should do so to comply with the law.