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Preventing Illegal Working & Establishing the Statutory Excuse

Introduction

This Brief updates and replaces Brief 50. The broad legal requirements remain unchanged from the previous Brief but there are updates to processes regarding the employment of Asylum Seekers and Refugees, the Employer Checking Service and links to new UKBA guidance documents.

[The Immigration, Asylum and Nationality Act 2006](#) strengthened the law on the prevention of illegal migrant working by replacing the previous controls under section 8 of the Asylum and Immigration Act 1996 ('the 1996 Act').

There is now a system of civil penalties for employers who employ an illegal migrant worker without having obtained a statutory excuse (section 15), and a separate criminal offence of knowingly employing an illegal migrant worker (section 21).

The liability for the civil penalty falls upon the labour provider where it supplies temporary workers to clients for temporary assignments. If the labour provider introduces workers to client employers for direct employment by those hirers i.e. "permanent recruitment" the client employer will have the liability.

How did the law change for Employers on 29 February 2008?

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

Employers may be liable for a civil penalty of up to £10,000 per illegal worker employed unless they have complied with the requirements to establish a statutory excuse. The civil penalty can be served by UK Border Agency officials on behalf of the Secretary of State. The penalty will be calculated on a sliding scale, but the final amount that the employer is required to pay will be determined on an individual basis according to the circumstances of the case.

Employers can establish the statutory excuse by checking and copying one of the original documents, or a specified combination of original documents from List A or List B (provided in this Brief), before employing that person. If the worker has limited leave to be in the UK, then the checks should be repeated at least once every twelve months.

However, employers will not be entitled to the excuse if they knew, at any time during the period of employment, that the employment was not allowed. In addition the employer could be prosecuted under section 21 of the 2006 Act for the offence of knowingly employing an illegal worker. Conviction under this offence will carry the potential of an unlimited fine and/or prison sentence of up to two years.

The new arrangements for establishing the excuse only apply to those employees who

started working on or after 29 February 2008. Employers will still be liable for prosecution under the 1996 Act where they employed illegal migrants between 27 January 1997 and 28 February 2008 and did not establish the statutory defence at the point of recruitment.

Establishing the Statutory Excuse

Employers will be able to establish the excuse by checking and copying one, or a specified combination, of original documents in accordance with the three specified steps below.

Employers are not legally required to conduct these checks, but they will establish a statutory excuse from paying the civil penalty.

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

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.

Where the individuals leave to enter or remain in the UK is time-limited, they should produce document(s) from List B before they are employed and carry out follow-up checks of the same kind at least once every 12 months. These repeat checks are required to retain the excuse. If employers do not carry out the follow-up checks, then they may be subject to a civil penalty if the employee is found to be working illegally.

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 migrant worker.

Step 1

The prospective employee must provide one of the original documents alone, or two of the original documents in the specified combinations given in List A (if they have no restrictions on their stay in the UK) or List B (if their leave to enter or remain in the UK is time-limited).

Step 2

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 checks:

- 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 prospective or current employee.
- Check that the expiry dates of any limited leave to enter or remain in the UK have not passed.
- Check any UK Government endorsements (stamps, visas, etc.) to confirm the individual is able to do the type of work offered.
- That the documents are genuine and have not been tampered with and belong to the holder.
- If the individual provides two documents which have different names, ask for a

further document 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. Employers will only be required to pay a civil penalty if:

- The falsity is reasonably apparent i.e. if an individual, who is untrained in the identification of false documents, examining it carefully, but briefly and without the use of technological aids, could reasonably be expected to realize that the document in question is not genuine.
- Where it is reasonably apparent that the person presenting the document is not the person referred to in that document, even if the document itself is genuine.

If the falsity is not reasonably apparent, or a valid document is presented by the named person, then the employer can expect not to be subject to the payment of a civil penalty.

Step 3

Employers must make a copy of the relevant page or pages of the document(s), in a format which cannot be subsequently altered, for example, a photocopy or scan (Write Once Read Many / WORM media.)

In the case of a passport or other travel document, the following parts must be copied

- The document's front cover
- Any page containing the holder's personal details - specifically any page that provides details of nationality, his or her photograph, date of birth, signature, date of expiry or biometric details.
- Any page containing UK Government endorsements, noting the date of expiry and any relevant UK immigration endorsement which allows the prospective employee to do the type of work offered.

Other documents should be copied in their entirety. Copies of the documents should be kept securely for the duration of the individual's employment and for a further two years after their employment has ceased.

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.

Conducting Follow up Checks

Where the individuals leave to enter or remain in the UK is time-limited, follow-up checks of the same kind are required at least once every 12 months. If the individual's leave to remain is less than 12 months the check should be conducted before this expires to avoid the risk of this individual working illegally.

On each occasion that a follow-up document check is undertaken, repeat the specified steps given above and record the date of each subsequent check that has been carried out.

If an employer retains an employee with a List B document or documents and has not

made the required follow-up checks required in order to retain the excuse, then this exposes liability for payment of a civil penalty if that person is found to be working illegally in the UK.

Knowingly Employing an Illegal Worker

If at any stage an employer knows that a person who is working for them is not permitted to do the job in question, then the employer will lose the right to the excuse and could face prosecution.

Under section 21 of the 2006 Act, an employer may commit a criminal offence if he or she knowingly employs an illegal migrant. On summary conviction, the maximum penalty will be a fine of £5000 for each person employed illegally, and/or imprisonment for up to 6 months (rising to 12 months in England & Wales). Following conviction on indictment, there is no upper limit to the level of fine that can be imposed, and the employer may also be subject to imprisonment for up to two years. The UK Border Agency will also seek to prosecute and/or remove from the UK any person found to be working illegally in the UK.

THE CIVIL PENALTY

The system of civil penalties is designed to encourage employers to comply with their legal obligations, without criminalising those who are less than diligent in operating their recruitment and employment practices.

A **full check** shall be considered to have been conducted where an employer can provide copies of the allowable documents, for all relevant employees and the official is satisfied that the specified steps were taken when checking these documents. If a full check has been conducted, then the employer will be entitled to a statutory excuse and no penalty may be payable, even if illegal migrant workers are found to be working.

A **partial check** shall be considered to have been conducted where, for example, an employer has only checked and copied one of a specified combination of two original documents that are required to establish the statutory excuse, or failed to conduct a follow-up check on a worker with temporary immigration status, after having conducted a full document check at the point of recruitment.

If the employer cannot provide a record of having conducted the prescribed document checks prior to recruitment, or has accepted a document which clearly does not belong to the holder, or it is reasonably apparent that the document is false, or shows that the person does not have a current entitlement to work in this country, the employer shall be considered to have conducted no check for the purpose of imposing a penalty. Where no check has been conducted, the employer may be subject to the maximum level of penalty.

Reporting suspected illegal workers to the UK Border Agency - If an employer reports any suspicions about its employees' entitlement to work in the UK, or to undertake the work in question to the UK Border Agency, a sum may be deducted from the amount of penalty due for each worker. This information must have been reported to the Employers' Helpline on **0300 123 4699** before any immigration visit is made to the employer. When reporting, a call reference will be given and this must be referred to when applying a reduction in penalty.

Co-operation with the UK Border Agency in conducting an operation - The penalty due for each worker can also be reduced where the employer has co-operated with the UK Border Agency in any investigation, or in any consequent operation to detect and detain illegal migrant workers.

The sliding scale also allows for a warning letter to be issued instead of a civil penalty in cases where:

- It is the first occasion on which the employer is found with illegal migrant workers; **and**
- The employer has conducted partial checks on the workers; **and**
- The employer has reported suspected illegal workers; **and**
- There is no evidence of deliberate wrong doing by the employer; **and**
- The employer has co-operated with the UK Border Agency.

Where it can be established that the employer has conducted full checks and did not knowingly employ an illegal worker, the employer will receive no penalty or warning.

Previous Offences

When considering whether a higher level of penalty should apply to an employer who has been visited before, previous penalties or warnings will not be considered if they were issued more than three years before the date of the new visit. Where an employer is revisited, and has received a penalty or warning within three years of the current visit, those penalties and warnings will be counted.

Multiple premises

A company with multiple premises where recruitment is devolved to each site will not be liable to a cumulative penalty if illegal workers are detected at different sites, unless this can be attributed to a general failure in the company's centrally set recruitment practices.

Transferred Employees

Employers who acquire staff as a result of a Transfer of Undertakings (Protection of Employment) transfer are provided with a grace period of 28 days to undertake the appropriate document checks following the date of transfer.

Avoiding Unlawful Discrimination

Failing to carry out identity checks on potential employees is not a criminal offence, but those employers who only carry out checks on workers who they believe are not British citizens, for example, on the basis of race or ethnicity, could find that this is used against them as evidence in any proceedings brought under the Race Relations Act 1976 or Equality Act 2010.

To avoid this and obtain a statutory excuse for all potential employees carry out the checks in a consistent manner on all applicants.

Employing Nationals from the European Economic Area

The employer should ask nationals from all EEA countries (and Switzerland) to produce a document showing their nationality and conduct the checks to establish the statutory excuse.

Nationals from the 8 Accession States are subject to the Worker Registration scheme until April 2011.

Nationals from Romania and Bulgaria are free to come to the UK but are only able to work if they hold a valid accession worker authorisation document.

Nationals from other EEA countries can enter and work freely without restriction.

FRAMEWORK FOR ASSESSMENT OF LEVEL OF CIVIL PENALTY

		NATURE OF CHECKS COMPLETED				
		FULL	PARTIAL		NO	
OCCASION ON WHICH WARNING/PENALTY ISSUED	3Rd +	No penalty	Suggested maximum penalty of £10,000 per worker		Suggested maximum penalty of £10,000 per worker	
			Reduced by up to £1,250 per worker reported	Reduced by up to £1,250 per worker, with co-operation		
			Suggested minimum penalty of £7,500 per worker			
	2Nd	No penalty	Suggested maximum penalty of £7,500 per worker		Suggested maximum penalty of £10,000 per worker	
			Reduced by up to £1,250 per worker reported	Reduced by up to £1,250 per worker, with co-operation	Reduced by up to £1,250 per worker reported	Reduced by upto £1,250 per worker, with co-operation
			Suggested minimum penalty of £5,000 per worker		Suggested minimum penalty of £7,500 per worker	
	1ST	No penalty	Suggested maximum penalty of £5,000 per worker		Suggested maximum penalty of £7,500 per worker	
			Reduced by up to £2,500 per worker reported	Reduced by up to £2,500 per worker, with co-operation	Reduced by up to £2,500 per worker reported	Reduced by up to £2,500 per worker, with co-operation
			No penalty and a warning letter may be issued		Suggested minimum penalty of £2,500 per worker	

LIST A – DOCUMENTS WHICH PROVIDE AN ONGOING EXCUSE

1. A passport showing that the holder, or a person named in the passport as the child of the holder, is a British citizen or a citizen of the United Kingdom and Colonies having the right of abode in the United Kingdom.
2. A passport or national identity card showing that the holder, or a person named in the passport as the child of the holder, is a national of the European Economic Area or Switzerland.
3. A residence permit, registration certificate or document certifying or indicating permanent residence issued by the Home Office or the UK Border Agency to a national of a European Economic Area country or Switzerland. From 2nd August 2010 it is allowable to accept evidence of ILR in an expired passport in the same way as you can for British Passports. However, please be careful and ensure the passport belongs to the presenter.
4. A permanent residence card issued by the Home Office or the UK Border Agency to the family member of a national of a European Economic Area country or Switzerland.
5. A Biometric Immigration Document (ID card for Foreign Nationals) issued by the UK Border Agency to the holder which indicates that the person named in it is allowed to stay indefinitely in the United Kingdom, or has no time limit on their stay in the United Kingdom.
6. A passport or other travel document endorsed to show that the holder is exempt from immigration control, is allowed to stay indefinitely in the United Kingdom, has the right of abode in the United Kingdom, or has no time limit on their stay in the United Kingdom.
7. An Immigration Status Document issued by the Home Office or the UK Border Agency to the holder with an endorsement indicating that the person named in it is allowed to stay indefinitely in the United Kingdom or has no time limit on their stay in the United Kingdom, **when produced in combination with** an official document giving the person's permanent National Insurance Number and their name issued by a Government agency or a previous employer.
8. A full birth certificate issued in the United Kingdom which includes the name(s) of at least one of the holder's parents, **when produced in combination with** an official document giving the person's permanent National Insurance Number and their name issued by a Government agency or a previous employer.
9. A full adoption certificate issued in the United Kingdom which includes the name(s) of at least one of the holder's adoptive parents **when produced in combination with** an official document giving the person's permanent National Insurance Number and their name issued by a Government agency or a previous employer.
10. A birth certificate issued in the Channel Islands, the Isle of Man or Ireland, **when produced in combination with** an official document giving the person's permanent National Insurance Number and their name issued by a Government agency or a previous employer.
11. An adoption certificate issued in the Channel Islands, the Isle of Man or Ireland, **when produced in combination with** an official document giving the person's permanent National Insurance Number and their name issued by a Government agency or a previous employer.
12. A certificate of registration or naturalization as a British citizen, **when produced in combination with** an official document giving the person's permanent National Insurance Number and their name issued by a Government agency or a previous employer.
13. A letter issued by the Home Office or the UK Border Agency to the holder which indicates that the person named in it is allowed to stay indefinitely in the United Kingdom **when produced in combination with** an official document giving the person's permanent National Insurance Number and their name issued by a Government agency or a previous employer.

LIST B – DOCUMENTS WHICH PROVIDE AN EXCUSE FOR UP TO 12 MONTHS

1. A passport or travel document endorsed to show that the holder is allowed to stay in the United Kingdom and is allowed to do the type of work in question, provided that it does not require the issue of a work permit.
2. A Biometric Immigration Document (an ID Card for Foreign Nationals) issued by the UK Border Agency to the holder which indicates that the person named in it can stay in the United Kingdom and is allowed to do the work in question.
3. A work permit or other approval to take employment issued by the Home Office or the UK Border Agency **when produced in combination with** either a passport or an other travel document endorsed to show the holder is allowed to stay in the United Kingdom and is allowed to do the work in question, or a letter issued by the Home Office or the UK Border Agency to the holder or the employer or prospective employer confirming the same.
4. A certificate of application issued by the Home Office or the UK Border Agency to or for 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 **when produced in combination with** evidence of verification by the UK Border Agency Employer Checking Service.
5. A residence card or document issued by the Home Office or the UK Border Agency to a family member of a national of a European Economic Area country or Switzerland.
6. An Application Registration Card issued by the Home Office or the UK Border Agency stating that the holder is permitted to take employment, **when produced in combination with** evidence of verification by the UK Border Agency Employer Checking Service.
7. An Immigration Status Document issued by the Home Office or the UK Border Agency to the holder with an endorsement indicating that the person named in it can stay in the United Kingdom, and is allowed to do the type of work in question, **when produced in combination with** an official document giving the person's permanent National Insurance Number and their name issued by a Government agency or a previous employer.
8. A letter issued by the Home Office or the UK Border Agency to the holder or the employer or prospective employer, which indicates that the person named in it can stay in the United Kingdom and is allowed to do the work in question **when produced in combination with** an official document giving the person's permanent National Insurance Number and their name issued by a Government agency or a previous employer.

DOCUMENTS THAT DO NOT PROVIDE THE EMPLOYER WITH AN EXCUSE

The following documents will not provide a statutory excuse under section 15 of the 2006 Act:

- A Home Office Standard Acknowledgement Letter or Immigration Service Letter (IS96W) which states that an asylum seeker can work in the UK.

If presented with these documents then should advise the applicant to call the UK Border Agency on **0151 237 6375** for information about how they can apply for an

- Application Registration Card;
- A temporary National Insurance Number beginning with TN, or any number which ends with the letters from E to Z inclusive;
- A permanent National Insurance number when presented in isolation;
- A driving licence issued by the Driver and Vehicle Licensing Agency;
- A bill issued by a financial institution or a utility company;
- A passport describing the holder as a British Dependent Territories Citizen which states that the holder has a connection with Gibraltar;
- A short (abbreviated) birth certificate issued in the UK which does not have details of at least one of the holder's parents;
- A licence provided by the Security Industry Authority;
- A document check by the Criminal Records Bureau;
- A card or certificate issued by the Inland Revenue under the Construction Industry Scheme.

Employment of Asylum Seekers, Refugees and those who have been given Humanitarian Protection

There is a difference between the entitlement of asylum seekers, refugees and those with Humanitarian Protection to work in the UK.

Asylum Seekers - An asylum seeker does not have an automatic right to work and may only be lawfully employed if the UK Border Agency has lifted restrictions on their taking employment.

Only a small number of asylum seekers are permitted to work here whilst they await a decision. If the asylum seeker is permitted to work they will hold a Home Office issued Application Registration Card (ARC). The ARC will state 'allowed to work' or 'employment permitted' on both sides of their card.

(Please note that new ARCs (from late 2010) are to be issued in the near future with the wording 'UKBA APPLICATION REGISTRATION CARD' instead of 'IND APPLICATION REGISTRATION CARD', both are acceptable).

The guidance on checking a card has not changed – you must confirm its authenticity with the employer checking service on 0300 123 4699.

Individuals with Refugee Status or Humanitarian Protection - An asylum seeker whose claim is successful is granted refugee status. Refugees are foreign nationals whom the UK Border Agency has permitted to remain in the UK because they have demonstrated a well-founded fear of persecution for one of the reasons listed in the 1951 Geneva Convention. Where a person does not qualify for protection under the 1951 Geneva Convention but there are substantial grounds for believing that there is a real risk that if they were removed to their country of origin they would face serious harm, Humanitarian Protection is granted instead.

Most refugees or people with Humanitarian Protection can demonstrate their status and therefore right to work with a combination of documents from List B.

Since August 2005, people granted refugee status or Humanitarian Protection (HP) have been given five years limited leave to enter or remain in the UK. After five years an individual with refugee status or HP who wishes to extend their leave should apply to the UK Border Agency and may, on application, be granted Indefinite Leave to Remain (ILR) in the UK – this is also known as settlement.

If your employee or prospective employee applies to the UK Border Agency for settlement, they will surrender their original status document (they are encouraged to keep a photocopy of the original). The UK Border Agency will provide an acknowledgement letter to confirm receipt of their application. As your employee or prospective employee will no longer have their original status document(s) available for checking, you are advised to contact the Employer Checking Service (ECS) to verify formally that an application is being considered.

Upon formal verification of the application by the ECS, the UK Border Agency will provide a document to the employer which will confirm that the person named has an entitlement to work in the UK.

The Employer Checking Service

The Employer Checking Service is operated by the UK Border Agency and is described by them as a developing service that offers employers the opportunity to check the status of individuals to work in the United Kingdom in the following specific circumstances:

- where the individual has an outstanding application or appeal with the UK Border Agency;
- where the individual has presented an application registration card (ARC) which requires validation; or
- where the individual has presented a certificate of application which requires validation.

Where the individual does not meet the above criteria, the Employer Checking Service will not be able to confirm entitlement to work in the UK.

Full details are at

www.ukba.homeoffice.gov.uk/employers/preventingillegalworking/support/ecs/ and clicking on each of the steps on the website as listed below will provide further detail:

- Step 1: The employer checks the documents presented by the new job applicant
- Step 2: The employer requires further verification of the individual's work status
- Step 3: The employer checking service undertakes a check
- Step 4: The employer is informed of the check result
- Step 5: If recruited, the employer manages the individual's period of employment

To use the employer checking service the employer must complete all the relevant sections of the checking service request form which can be downloaded from <http://www.ukba.homeoffice.gov.uk/sitecontent/applicationforms/ecs/ecs-form.doc> . The form should be emailed to Employerchecking@ukba.gsi.gov.uk.

Further Information

UKBA guidance documents and codes of practice for United Kingdom employers who want to know how to prevent illegal working are available at:

<http://www.UKBA.homeoffice.gov.uk/sitecontent/documents/employersandsponsors/preventingillegalworking/>.

The UK Border Agency Sponsorship and employers' helpline can be reached on **0300 123 4699** and can provide:

- information for employers and education providers about sponsorship under the points-based system;
- a service to employers who want to verify the entitlement to work for people who are awaiting the outcome of an application made to the Home Office; and
- advice to employers about preventing illegal working, and particularly about carrying out the document checks necessary to attain a defence against conviction

Whilst reasonable care has been taken in compiling this guidance, the ALP or its officers cannot be held responsible for any errors or omissions; the guidance is not intended to be a substitute for specific legal advice.