

Prevention of Illegal Working

The Immigration, Asylum and Nationality Act 2006 ("the 2006 Act"), which received Royal Assent on 30 March 2006 is part of the Government's commitment to drive out illegal working. Consultation began last week on some of the new powers contained in the 2006 Act which propose civil and criminal penalties for non compliance. The perils of illegal working have been widely publicised over the past few years and the tragic events of Morecombe Bay in 2004 highlighted the immense risks to illegal workers. Illegal working also has a damaging effect on good business, undercuts legal workers and creates illegal profits.

The Proposals

The new measures which are part of the Home Office's "Illegal Working Action Plan" will take effect early next year and will be co-ordinated through the "Border and Immigration Agency" (BIA). They comprise the following:

- Civil penalties for those employers who employ illegal migrant workers as a result of negligent recruitment and employment practices;
- A new criminal offence for those employers found to be knowingly employing illegal migrant workers.

It is hoped that the introduction of civil penalties and the "knowing" offence will enable enforcement and compliance officers to deal swiftly with cases of non compliance and reserve prosecution for the more serious breaches of legislation.

Civil Penalties

It is anticipated that civil penalties will be used as a way of tackling those employers who are less than diligent in carrying out specified document checks before and/or after the point of recruitment. The proposed Regulations under the 2006 Act allow an Employer to establish an excuse from liability for a civil penalty. In order to benefit, employers are required to carry out specified document checks (by seeing, copying and retaining the copies of original specified documents that relate to the job applicant) at the time of recruitment. It is not anticipated that this will make a major difference to the checks an employer is currently required to carry out. However, where you are employing migrant workers who have limited leave to enter or remain in the UK, it may be necessary to repeat the checks. In the majority of cases an Employer will be able to establish a prospective employee's entitlement to work by performing a single check prior to commencement of employment by checking and copying one of the documents contained on "List 1" in the "Code of practice on the avoidance of unlawful racial discrimination". Any one of the documents or a combination of the documents in "List 1" will provide the Employer with a statutory excuse as long as reasonable care is taken to ensure the validity of the document. An Employer can accept documents from an Alternative "List 2" but each time a document is provided from "List 2", it is important for an Employer to conduct a follow up check no later than 12 months after the initial check.

The levels at which the fines for civil penalties will be set and how they will be imposed is the subject of the consultation process currently underway. The current maximum fine in a sheriff court is £5000 and the current proposal allows for a sliding scale with heavier penalties for repeat offenders. An alternative suggestion is that fines should be set at the

cost of removing failed asylum seekers and immigration offenders from the UK which is currently estimated to be in the region of £10,000. However, there may be discretionary reductions in the penalty imposed dependent on the circumstances, where for example an employer notifies the BIA of their suspicions about an illegal worker or co-operates with any enforcement action.

Criminal Penalties

For those employers knowingly employing an illegal migrant worker or procuring or using fraudulent identity documents the penalty is up to two years' imprisonment and/or an unlimited fine. The severity of the sanction is intended to reflect the relative illegal advantage gained by the Employer and the level of harm brought about by the breach.

Some comfort is offered to Employers as the new legislation will not operate retrospectively, so Employers will not face new duties in respect of individuals they currently employ. However, Employers will still be liable to a fine of £5,000 in respect of those already employed where they can not avail themselves of the current statutory defence which involves checking documentation set out in section 8 of Asylum and Immigration Act 1996.

Conclusion

It is important to bear in mind that when an Employer makes the checks described above that it is done so in a non-discriminatory way by applying the same checks to all applicants at the same point of the recruitment process. You should not make the assumption that because a prospective employee has provided documents from "List 2" (referred to above) that they are not suitable for the job. A person producing a document from "List 2" will have a time limit on their legal ability to stay and work in the United Kingdom but it is possible for certain categories of entrant to apply for an extension to their entitlement to remain and work in the UK.

Consultation on these proposals closes on 14 August 2007 and it is hoped that a report summarising the responses received will be published within 6 weeks.

For further information, please contact [Lizzy Kell](#) or any other member of our [Employment Unit](#).



ANDERSON STRATHERN
SOLICITORS