The perils for employers who employ illegal workers

In May 2014, the government increased the civil penalty levied against employers that are found to be employing illegal workers from £10,000 to £20,000 for each employee found to be working illegally. This and the other changes indicate that illegal working continues to be firmly on the government's radar and that it is focusing its efforts on businesses that knowingly or negligently employ illegal workers, rather than on the workers themselves. ***Natalie Razeen*** *looks at the key changes to the rules and the process for obtaining a statutory excuse.*

Introduction

It has been unlawful to employ individuals who are without the right to work in the UK since 1997. The civil penalty scheme has been in place since 29 February 2008. Under s 19 of the Immigration, Asylum and Nationality Act 2006 (IANA 2006), a code of practice was published – "The Prevention of Illegal Working".

This sets out the factors which will be considered when deciding on the level of the penalty which should apply. The system is administered by the Civil Penaltiy Compliance Team (CPCT). The code was updated following the changes implemented on 16 May 2014.

The prevention of illegal working regime forms part of the government's strategy to reduce net migration and the recent changes appear to have been made because of the perceived inefficiencies of the previous regime. The CPCT was examined by the independent chief inspector of the (then) UK Border Agency in March and April 2010.

The inspector found that, overall, "the system did not create the hostile environment for those who benefit from illegal working that the government has intended". (UK Border Agency's operations in the North West of England – an inspection of the CPCT – illegal working). He also did not find the scheme to be either "swift or effective". The inspector was rather critical of the (then) UK Border Agency in his findings. He said it was "disappointing to note that the UK Border Agency has a largely passive approach towards the civil penalties scheme".

He found that 23% of penalties had been reduced or cancelled as a result of objections and/or appeals. According to the BBC, "a freedom of information request found the Home Office had issued almost £80m in fines, but collected £25m" (www.bbc.co.uk/news/uk-23535938).

A consultation was held on the proposed changes to the civil penalty in July and August 2013, which was published in October 2013 following the inspector's report. Some 62% of respondents agreed that the maximum civil penalty should be increased to £20,000 per worker when an employer breached the prohibition on employing illegal workers more than once, although a minority questioned the "deterrent value of doubling the civil penalties scheme with the existing conversion rates for enforcing and recovering fines".

Clearly encouraged by the support for the proposal, the government implemented the penalty. The Immigration and Security Minister said: "Illegal working is not a victimless crime. It defrauds the taxpayer, undercuts honest employers and cheats legitimate jobseekers out of employment opportunities" (www.gov.uk/government/news/tougher-penalties-to-combat-illegal-working).

This clearly underlines the government's determination to be tough on those that employ illegal migrant workers. It is notable that some high profile Home Office "crackdowns" have taken place in the past two years, most notably the £115,000 fine levied against Tesco in November 2012, following the arrest of 20 foreign students who had been working up to 3.5 times more than their visas allowed. (*Evening Standard*, "Tesco fined for employing illegal foreign workers").

Recent changes

Among the changes which have recently been implemented are measures allowing the penalty per illegal worker to be reduced. These include changes to the mitigating factors which, if applied, can reduce the penalty by £5,000 for each factor and could result in an employer only receiving a warning notice for a first breach. In addition, the reduction for fast payment of the penalty has been increased from 20% to 30%.

Changes have also been implemented in an attempt to make the scheme administratively easier for businesses, by reducing the number of acceptable documents that can be used to establish the right to work and only requiring employers to carry out follow-up checks when the worker's right to stay in the UK expires, instead of every year. These proposals were well received in the consultation. However, a minority, including some in the legal sector, expressed concern that this would place a greater burden on employers to determine with precision the expiry date of the employee's visa and could create uncertainty in cases where the employee had applied for a visa renewal (para

3.59, p 16, Strengthening and simplifying the civil penalty to prevent illegal working – Results of the public consultation, October 2013).

Seemingly in response to the concerns which had been raised over enforcement, the Immigration Act 2014, which came into effect in July 2014, brought in measures to allow the secretary of state to register a debt, rather than be required to issue a substantive claim in the civil courts. This means that enforcement action can be taken immediately which, in theory, will make it easier to enforce a penalty once it has been issued.

Statutory excuse

Section 15(3) of IANA 2006 provides that an employer can avoid liability for a civil penalty, if it can show that it has complied with the prescribed requirements in relation to the employment. Employers will comply with these requirements by carrying out prescribed document checks on an employee before the employee commences work, to ensure that the employee is allowed to carry out the relevant work lawfully in the UK. This is known as establishing a statutory excuse.

Carrying out prescribed right to work checks

The updated guidance on right to work checks applies to employees who began working on or after 16 May 2014 (see "An employers guide to right to work checks", December 2014). Where employment commenced between 29 February 2008 and before 16 May 2014, different guidance applies (see "Full guide for employers on preventing illegal working in the UK", October 2013), including the requirement to carry out follow up checks every 12 months.

The guidance sets out the three basics steps for employers to carry out when checking whether an employee has the right to work in the UK:

Step 1

The first step is to obtain the necessary original documentation. There are two different lists setting out applicable documentation, depending on the immigration status of the prospective employee (List A and List B).

Step 2

The next step is to check the documentation in the presence of the prospective employee. Employers are required to carefully consider whether the document is genuine and check that the person presenting the document appears to be the person to whom the document relates. Employers are not expected to be experts in spotting counterfeit documents. The other key considerations will be when the employee's right to work in the UK expires, if follow up checks are required and if there are any restrictions on the employees' carrying out the relevant work. Additional information must be obtained when hiring students who are subject to immigration control, including academic term dates.

Step 3

Finally, employers should retain copies of the acceptable documentation and record the date on which the check was carried out.

If the prospective employee has a permanent right to work in the UK, then the employer should obtain the relevant original document to establish a continuous statutory excuse. If a prospective employee has a time limited right to work in the UK, for example if s/he has been granted a visa for two years, then the employer will only be able to obtain a time limited statutory excuse and is required to carry out a follow up check at a later date. Depending on the documentation provided, the check will either need to be done again at the point when the employee's leave to remain expires or, in cases where the employer has been provided with documentation indicating that the employee has an application pending in the Home Office, it will be required to contact the Home Office to obtain a Positive Verification Notice stating that the employee can commence work. An employer should also do this if it does not receive any original acceptable documentation from the prospective employee, but is confident that the employee has an outstanding application with the Home Office. The Positive Verification Notice will state that a follow up check must be carried out in six months.

When the time limited excuse expires, the employer needs to obtain certain specified documents to ensure that it still has a statutory excuse.

Employers should remember that right to work checks need to be carried out on all prospective employees to avoid unlawful discrimination. These checks must be carried out before an employee commences work. Therefore, it is essential that employers delay start dates where necessary, to allow time for these checks to take place.

Employers should seek legal advice on how to carry out right to work checks.

Conclusion

Changes to the means of recovering penalties may not make a great difference to the number of penalties that are recovered. Nonetheless, these signal an increased determination on the part of the UKVI (UK Visas and Immigration) to engage in effective enforcement action. The attempts to make the civil penalty scheme administratively less complicated are likely to be of benefit to businesses, but it is anticipated that there may be some confusion about the follow up checks which need to be carried out, particularly in larger organisations, as a different code applies depending on a given employee's commencement date. A civil penalty of £20,000 per worker will be a very high price to pay for businesses which are found to be flouting the prevention of illegal working regime. These changes, taken together, clearly signal the importance of ensuring that correct right to work checks are carried out at the outset and that the necessary steps are taken thereafter.

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