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18.1 Prevention of Illegal Working - Introduction

This chapter provides operational guidance on how operations which involve the detection of illegal migrant workers must be conducted. There are several pieces of legislation that must be considered and could be relevant on all operations conducted to business premises. Officers must familiarise themselves with the legislation and associated powers to ensure that the actions that are taken whilst conducting illegal working operations are proportionate and legal.

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18.2 Legislation

Specific legislation on the prevention of illegal migrant working has been in place in the UK since 27 January 1997 and may be applied to any employer who employs an illegal migrant on, or after that date. The legislation is not retrospective and would not apply to anyone employed before that date. All references to “illegal worker” or to “illegal migrant working” refer to a person who is working without permission; this will include those who have expired conditions or those with no permission to work in the United Kingdom. The legislation to consider when to investigate a suspected case of illegal migrant working is set out in sections 18.2.1 to 18.2.6 of this guidance.

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18.2.1 Section 8 of the Asylum & Immigration Act 1996

A criminal offence under section 8 of the Asylum and Immigration Act 1996 (“the 1996 Act”) is committed if an employer employs a person, aged at least 16, who is subject to immigration control and has no right to work in the UK, **or** has no right to do the work in question. Section 8 of the 1996 Act would apply to illegal migrant workers who started work in the UK between 27 January 1997 and 28 February 2008. An employer guilty of an offence under this legislation is liable on summary conviction to a fine not exceeding the statutory maximum, currently set at £5,000 for **each illegal migrant worker found**. Following conviction on indictment, there is no upper limit to the level of fine that can be imposed.

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18.2.2 The (A8) Accession (Immigration and Worker Registration) Regulations 2004

The Accession (Immigration and Worker Registration) Regulations 2004 introduced the Workers Registration Scheme (“the A8 Regs”) covering the new countries that joined the European Union on 1 May 2004. These regulations make it a criminal offence punishable by a fine of up to £5,000 to employ a worker subject to the registration requirement who has not applied to register within 30 days of starting work. The Workers Registration Scheme applies to nationals of the following countries who started work in the UK from 1 May 2004 onwards.

- Czech Republic
- Estonia
- Hungary
- Latvia
- Lithuania
- Poland
- Slovakia
- Slovenia

A worker's failure to register is not a criminal offence and any unregistered workers encountered should be advised to register on the scheme. Officers should include details of any unregistered workers encountered including their nationality on their official record of the visit. Registered A8 nationals need not be recorded.

Information on employers' responsibilities under the Workers Registration Scheme, including details of categories of individuals who are exempt from the registration requirement can be found at <http://www.ukba.homeoffice.gov.uk/workingintheuk/eea/wrs/employers>

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18.2.3 The (A2) Accession (Immigration and Worker Authorisation) Regulations 2006

The Accession (Immigration and Worker Authorisation) Regulations 2006 (“the A2 Regs”) applies to those employing Romanians and Bulgarians who started work in the UK on, or after 1 January 2007. An employer who employs an A2 worker who is subject to worker authorisation during the accession period shall be guilty of a criminal offence under section 12 of the A2 Regs if the employee has no right to work in the UK, **or** they have no right to do the work in question. A person guilty of an offence under this regulation shall be liable on summary conviction to a fine not exceeding the statutory maximum.

The A2 Regs also introduced a criminal offence under section 13 for an employee who has no right to work in the UK, **or** no right to do the work in question. The employee may opt to discharge their liability by paying a Fixed Penalty Notice (FPN) of £1,000. If the person does not discharge their liability by payment of an FPN, then they may be liable on summary conviction to a fine currently set at £5,000, imprisonment for not more than three months or both.

An employee may also commit a criminal offence by obtaining or seeking to obtain a Worker Authorisation Document by false means including deception. This offence is specified under section 14 of the A2 Regs and **cannot** be discharged by the payment of a FPN. The employee may be liable on summary conviction to a fine not exceeding £5,000, imprisonment for not more than three months or both.

The Regulations allow certain categories of A2 nationals to be exempt from needing worker Authorisation before seeking employment in the UK. In summary these include

- Family members and extended family members of self-employed, self-sufficient and student A2 nationals will also be exempt from work authorisation
- Posted workers from the EU
- The groups listed below are entitled to the Worker Authorisation Document, granting full access to the UK labour market, but it is not mandatory for these groups to apply for this document:
 - Persons who have worked lawfully in the UK for 12 months

- A person married to a UK national
- Highly skilled persons
- Genuinely self employed

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18.2.4 Sections 15 and 21 of the Immigration, Asylum and Nationality Act 2006

Sections 15 and 21 of the 2006 Act apply to those employing illegal migrant workers from outside the EU who started work in the UK on or after 29 February 2008. Under section 15 of the Immigration, Asylum and Nationality Act 2006 (“the 2006 Act”), the Secretary of State may serve an employer with a notice of liability to pay a civil penalty. This penalty will be no more than the statutory maximum of £10,000. The liability for a civil penalty **does not constitute a criminal offence**. A penalty may be served for each circumstance where an employer is found to be employing an adult over the age of 16, who is subject to immigration control and working without the appropriate permission.

However, where it can be shown that the employer **knowingly** employed an individual who was subject to immigration control and working in the UK without permission, the offence can be treated as a criminal offence and tried summarily or, in the more serious cases, on indictment under section 21(2) of the 2006 Act. On summary conviction, the maximum penalty an employer may be given will be a fine of no more than £5,000 for **each person he/she employed illegally**, and/or imprisonment for up to 12 months in England and Wales, or 6 months imprisonment in Scotland or Northern Ireland. Following conviction on indictment, there will be no upper limit to the level of fine that can be imposed and the individual employer may also be subject to imprisonment for up to two years.

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18.2.5 Facilitation – Section 25 of the Immigration Act 1971

Under section 25 of the Immigration Act 1971, employers could be imprisoned for up to 14 years and/or receive an unlimited fine - section 25 of the 1971 Act (as substituted by section 143 of the

“the 2002 Act” and amended by section 1 of the 2004 Act) states that a person commits an offence if he –

- (a) Does an act which facilitates the commission of a breach of immigration law by a person who is not a citizen of the European Union,
- (b) Knows or has reasonable cause to believe the act facilitates the commission of a breach of immigration law by the individual, and
- (c) Knows or has reasonable cause to believe the individual is not a citizen of the European Union. “Immigration law” is defined as “a law which has effect in a member State and which controls, in respect of some or all persons who are not nationals of the State, entitlement to – (a) enter the State, (b) transit across the State, or (c) be in the State”.

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18.2.6 Trafficking people for exploitation – Section 4 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004

Section 4 of the 2004 Asylum and Immigration Act introduced a new offence of trafficking people for exploitation. This is the first time that trafficking for non-sexual forms of exploitation has been made the subject of specific criminal offences.

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18.3 Employer’s obligations and how to establish an excuse

When deciding whether to pursue action against an employer for employing an illegal migrant worker, officers should have due regard to the nationality and date of employment for each individual found working, as this will determine the legislation that will be applied. The legislation described in the proceeding sections allow the employer an opportunity to establish a defence against liability/conviction (or excuse from payment of a civil penalty), through checking, copying and storing of specified original documents from the employee. The specified document, or

documents, will indicate whether the holder has an entitlement to work. Officers should note that documents that grant a defence/excuse to an employer must have been checked by the employer prior to the date of employment of the worker in question

Under section 15(3) of the 2006 Act, an employer can establish an excuse against payment of a civil penalty if they can prove that they took specified steps to check, copy and retain the copy of either a single document, or a specified combination of documents from list A or list B within the [Summary Guidance on preventing illegal working](#). These checks must be completed **before** the worker began working for the employer. Where a document(s) is produced from list B, this indicates that the employee has time-limited leave to enter or remain in the UK and the employer must repeat the checks at least once every 12 months to retain the excuse, until the employee is able to produce a document, or documents, from list A, or leaves their employment.

Under section 8(2), an employer can establish a defence against conviction if they can prove that they took specified steps to check, copy and retain the copy of either a single document from **list 1**, or a specified combination of documents from **list 2** which can be found in the [Comprehensive Guidance for United Kingdom employers on changes to the law on preventing illegal working \(April 2004\)](#). These checks must be completed **before** the worker began working for the employer. Please note that accepted documents in Lists 1 and 2 changed on 1 May 2004. The original version of the specified documents can be found in [Annex A](#) and applies for migrant workers who began employment from 27 January 1997 until 30 April 2004.

For non-EU nationals, officers should note that documents that grant a defence/excuse to an employer will depend upon the date of employment of the worker in question.

Under section 9(2) of the A8 Regs, an employer can establish a defence against conviction if they can prove that they took specified steps and retained a copy of a document that either appeared to establish that the worker had applied for a registration certificate, or that the worker was exempted from the requirement to register.¹ These checks must have been completed during the one month period starting on the date that the worker began working for the employer.

Under sections 12(2) and (3) of the A2 Regs, an employer can establish a defence against conviction if they can prove that they took specified steps and retained a copy of a document that either appeared to establish that the worker had applied for a Worker Authorisation Document, or

that the worker was exempted from the requirement to be authorised. These checks must have been completed **before** the worker began working for the employer.

In all cases, the employer is required to look at and copy a specified original document or documents and retain copies. Employers must also take specified steps to ensure that the document, or documents, produced are genuine and relate to the individual in question.

However, the defence to conviction, or excuse from payment of a civil penalty **will not** be available in cases where it can be shown that the employer knowingly employed an illegal migrant. This is stated in law under:

- ◆ section 8(3) of the 1996 Act (as amended),
- ◆ section 9(4) of the A8 Regs,
- ◆ section 12(4) of the A2 Regs, and
- ◆ section 15(4) of the 2006 Act.

It is important to note that for employers to comply with the requirements of legislation to prevent illegal migrant working, they would have to satisfy themselves of the entitlement of prospective employees to work in the UK. In most cases, the way an employer can do this is by conducting the specified checks. The Government recommends that employers undertake checks on all prospective employees as this will enable them to establish a statutory excuse against payment of a civil penalty for employing an illegal migrant worker; shows their recruitment process is open and transparent, and ensures their recruitment practices do not discriminate against individuals on racial grounds.

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18.3.1 What constitutes employment?

Generally, employment is considered to be any scenario where there is evidence that an individual is providing a service for the benefit of an employer under a direct contract of service or apprenticeship. The contract can be expressed or implied. Employment can be paid or unpaid. If unpaid, it would be a service that would otherwise need to be paid for. Both section 8 and section 15 offences can apply in respect of all employees whether they are full-time, part-time or casual.

The employer, which may be a corporate body, a limited partnership, a partnership or an individual, commits the offence. In some cases it may be that the person who appears to be employing an individual is not regarded as doing so under employment law.

An employer would not be liable for:

- ◆ the employees of a contractor undertaking work on his behalf, such as workers provided by an independent gangmaster to pick crops. The gangmaster or contractor would normally be liable;
- ◆ a self-employed person or freelancer doing work on his behalf (unless the actual employment relationship suggested otherwise);
- ◆ workers obtained from an employment agency, who remain employees of the agency or who are regarded in law as being employed by nobody.

HMRC has produced an online tool called the Employment Status Indicator (ESI) which may be helpful to assist those who may need to determine the employment status of an individual. This can be assessed on the HMRC website at www.hmrc.gov.uk/calcs/esi.htm

A court might regard an employer as employing a person under a contract of service if that is what the employment relationship is in practice, even if the person takes care of his own tax and National Insurance contributions. The fact that the parties to an arrangement claim that a worker is self-employed do not necessarily mean that the courts would take that view.

The courts look at all relevant factors to decide the nature of the employment relationship. This may include applying the following tests:

- ◆ whether the alleged employer has the right to control not just what the worker does, but also the way in which he does it. (**the 'control' test**);
- ◆ whether the worker is an integral part of the alleged employer's organisation. (**the 'organisational' test**);
- ◆ who bears the risk of loss and the chance of profit? If it is the worker, then he is probably not

an employee, but rather an independent contractor. Similarly, if the worker is working for several different people at the same time, such that he is in effect really in business on his own, then that would suggest he is self-employed (**the 'economic reality' test**).

In addition the courts will also consider the method of payment; the method of selection and termination of the relationship; the extent to which the worker can choose his hours and his method of work and whether he can delegate; whether PAYE and NI contributions are deducted; how the parties themselves see the relationship (although, as stressed, this is not determinative); and the extent to which the parties expect to be called upon to work and to provide work. A loose arrangement whereby work is provided and done on an ad hoc basis suggests self-employment whereas if there is a genuine expectation of work being provided fairly consistently, that indicates employment.

If sufficient evidence to support the “employer-employee” relationship can be produced when the above tests are applied, and if it appears the employer has not established a defence, then action against the employer should be considered. In all cases, of course, the final decision on whether sufficient evidence exists to warrant prosecution and whether prosecution is in the public interest rests with the Crown Prosecution Service.

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18.3.2 Prescribed steps to be taken by an employer

The specified steps to be taken by an employer when checking a listed document are:

- Ensuring that any personal details, photographs, or dates of birth contained in the documentation are consistent with the appearance of the employee or potential employee; **and**
- Checking further documentation to explain any inconsistencies between documents provided (e.g. a certified copy of a marriage certificate, a divorce document, or a notarized deed poll document); **and**
- Photocopying, scanning, maintaining an electronic copy on a non-rewritable disk, such as CD-R or retaining the original document(s) which should be retained throughout the period of

employment and for at least three years after the employment has ceased (Part 2 of the P45 must also be kept for at least three years after the end of the current tax year in order to comply with HM Revenue and Customs regulations) Where the document in question is a passport or another type of travel document, a copy should be taken of the document's front cover and any page containing the holder's personal details including nationality, his or her photograph, date of birth and/or signature, biometric details, the date of expiry and any relevant UK immigration stamps. Other documents should be copied in their entirety.

- In all cases (with the exception of the A8 Regulations, which may be done within a month of employment commencing), an employer must undertake these steps **before** a person begins employment to establish the appropriate statutory defence or excuse. If an employer takes on an employee and has not made the checks, then he or she may be at risk of being prosecuted, or be required to pay a civil penalty, if that person is found to be working illegally in the UK.

Under section 15 of the 2006 Act, for repeat document checks on those with time-limited leave, on each occasion that a follow-up document check is undertaken, an employer should repeat the specified steps and record the date when each check is carried out.

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18.3.3 Types of checks conducted under section 15

A **full check** shall be considered to have been conducted where an employer can provide copies of certain documents, as described in List B, for all relevant employees and the official is satisfied that the *specified steps* were taken when checking these documents. However, the provision of such records **does not** preclude an employer from being prosecuted for other criminal offences, including the offence of knowingly employing an illegal migrant worker or facilitating a breach of UK immigration law. Action will be taken against the employer where there is sufficient evidence available and where prosecution would be in the public interest.

A **partial check** shall be considered to have been conducted where an employer has:

- ◆ checked and copied only part of an original document specified for this purpose but not the relevant page showing the individual has current permission to work in the United Kingdom or the individual's personal details; **or**
- ◆ checked and copied only one of two original documents that are required by law to be checked as part of a combination; **or**
- ◆ failed to take specified steps when checking documentation to ensure that it relates to the employee concerned; **or**
- ◆ failed to conduct a follow-up check on a worker with temporary immigration status even after having conducted a full document check at the point of recruitment.

Where only a partial check has been carried out for migrant workers who are found to be working illegally the employer may be subject to a civil penalty.

Where an employer can provide no record of having conducted the prescribed document checks before recruitment, they shall be considered to have conducted **no check** for the purpose of imposing a penalty. **The onus is on the employer to demonstrate compliance with these requirements to establish an excuse under section 15.**

An employer also has a statutory duty to avoid race discrimination in their recruitment practices. Under the Race Relations Act 1976 Act and the Race Relations (Northern Ireland) Order 1997, it is unlawful to discriminate in recruitment or employment on racial grounds. **If an employer operates discriminatory recruitment processes they could face prosecution under the 1976 Act or the 1997 Order and an unlimited fine if they are found guilty.** The Home Office issued a Code of Practice for employers in February 2008 about the prevention of race discrimination in employment practice. [Anti-Discrimination Code 2008](#)

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18.4 Sanctions available to the UK Border Agency

The UK Border Agency takes the issue of migrants working in the UK with no permission to do so very seriously. There is a hierarchy of penalties set out in the Government's action plan and consultation on new measures for preventing illegal working. Employers (some steps are specific to sponsors) may face any or a combination of the sanctions below:

- **Written warning for employing an illegal migrant worker;** followed by close attention from UK Border Agency enforcement and compliance teams.
- **Downgraded on the PBS sponsorship register. The award of a lower rating** may be publicised, including to prospective migrants, and will entail a detailed action plan of measures which an employer will have to satisfy to regain a higher rating.
- **Licence cancelled and removed from the PBS sponsorship register;** meaning that an employer is unable to bring any migrant worker to the UK.
- **Served with a civil penalty;** if found to be employing an illegal migrant worker, through negligent recruitment practices, an employer could be served with a civil penalty (Notification of Liability or NOL) for each illegal worker found under section 15 of the Immigration, Asylum and Nationality Act 2006. The proposed sliding scale allows for heavier penalties for repeat offenders. A maximum penalty of £10,000 per worker exists. Liability and the extent of the penalty imposed will be determined by the Civil Penalty Compliance Team.
- **Prosecuted for the procuring/use of fraudulent identity documents;** an employer can be imprisoned for up to two years and/or receive an unlimited fine under section 25 of the Identity Cards Act 2006.
- **Prosecuted for knowingly employing an illegal migrant worker;** under section 21 of the Immigration, Asylum and Nationality Act 2006 employers can be imprisoned for up to two years and/or receive an unlimited fine.
- **Prosecuted under section 8 for employing an illegal migrant worker;** under the Asylum and Immigration Act 1996 employers can be imprisoned for up to two years and/or receive an unlimited fine (applicable to workers recruited between 27 January 1997 and 28 February 2008)

- **Fine for employing an unregistered A8 national;** Under Section 9 of the Accession (Immigration and Worker Registration) Regulations 2004, an employer can be fined a maximum of £5,000 per illegal worker
- **Service of a Fixed Penalty Notice (FPN) for employing an A2 national with no permission to work in the United Kingdom;** This would apply under the Accession (Immigration and Worker Authorisation) Regulations 2006. The A2 national faces criminal liability that can be discharged through payment of a £1,000 Fixed Penalty.
- **Prosecution of either the employer of an A2 national, or the A2 national with no permission to work in the United Kingdom;** This would apply under the Accession (Immigration and Worker Authorisation) Regulations 2006
- **Disbarred as a company director/officer as a result of prosecution;** under section 2 of the Company Directors Disqualification Act 1986, employers convicted of knowingly employing an illegal migrant worker could be disqualified from forming or managing a company;
- **Prosecution for Facilitation/Trafficking;** This would apply under Section 4 of the 2004 Asylum and immigration Act

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18.5 General Arrest Powers

An Immigration Officer or police constable has the power to arrest under section 24(1) or 24A(1) of the 1971 Act someone, for example, working in breach. Subject to certain caveats, officers may search for evidence of a possible related section 8 offence in the business premises on which the individual was arrested. This is covered by section 28FA of the 1971 Act, which provides a power to seize and retain evidence relevant to a suspected offence. However, this only arises if there has been an arrest for an illegal entry or deception offence, or under administrative powers of arrest, (or where a constable or Immigration Officer reasonably believes the person is liable to

arrest) and where a police constable or Immigration Officer encounters the items during a search for evidence relating to an illegal working offence as defined under section 8 of the 1996 Act.

Despite the repeal of section 8 of the 1996 Act on 29 February 2008, employers may continue to be prosecuted under section 8 for those migrants employed illegally between 27 January 1997 and 28 February 2008. Furthermore, the power accorded under section 28FA will continue to provide powers to Immigration Officers or police constables investigating an offence under section 8.

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18.5.1 Powers available under the A8 Regulations

The employer will be held liable for an offence committed under the A8 Regulations, under section 9 and shall be treated as:

- (a) a relevant offence for the purpose of sections 28B and 28D of the 1971 Act, which covers the powers of search (with warrant), entry and arrest; **and**
- (b) an offence under Part III of the 1971 Act (criminal proceedings) for the purposes of sections 28E, 28G and 28H, which provide for search after arrest.

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18.5.2 Powers available under the A2 Regulations

The A2 Regulations contain an employer offence, but also introduced an offence for the employee. The provisions on the employer are the same as those given for the A8 Regs, but in addition, under section 12, a police constable or Immigration Officer can arrest by virtue of section 28AA(c) of the 1971 Act (arrest with warrant).

The employee offence is specified under section 13 and enables a police constable or Immigration Officer to present a Fixed Penalty Notice (FPN) on an employee whom they suspect of committing

an offence under the A2 Regs. A police constable or Immigration Officer can arrest the individual for an offence committed under section 13 or 14 by virtue of section 15(c) of the A2 Regs, which includes the invocation of the powers allowed under section 28A of the 1971 Act. Where A2 offences are detected, current policy has restricted the exercise of this power to police seconded to UKBA. Police officers would have the power to arrest under section 24 of PACE [the Criminal Procedure (Scotland) Act 1995 applies for officers in Scotland]. Where these cases are referred to the UK Border Agency and there is suitable evidence to support a charge or prosecution, then it may be appropriate to serve a FPN, or refer the case to the Criminal Investigation Team for investigation for prosecution.

There are no specific powers to fingerprint under the A2 regulations, but regulations 13 and 14 are both recordable offences and therefore fingerprints, DNA etc. may be taken by the police after arrest through the normal custody procedures.

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18.5.3 Powers available under sections 15 & 21 of the 2006 Act

The associated powers of entry and search for those suspected of committing a criminal offence is provided under section 21(3) of the 2006 Act, as amended by section 28 of the UK Borders Act 2007. This introduced an express power to search for personnel records in connection with a criminal offence suspected/committed under section 21 of the 2006 Act. Officers should consider what their primary intention is when setting up an illegal working operation. In most cases the action will be directed to the detection and arrest of immigration offenders and this is the basis on which powers of entry should be used. If the intelligence before the visit indicates a criminal offence in relation to the employer then the case must be tasked to the crime trained officers.

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18.6 Allegation handling

Denunciations regarding illegal working received must be passed immediately to the Intel Unit for processing [Refer to Chapter 32.7 of the Enforcement Instructions and Guidance].

The exception is where the employer wishes to report suspicions of illegal working within their own workforce. Employers must report suspicions about their own workforce to the Sponsorship and Employers Helpline (0300 123 4699) if they wish to reduce their potential liability for a civil penalty. The Sponsorship and Employers Helpline will provide the employer with a unique reference number to support their case for compliance with the legislation and will refer the information to the relevant intelligence unit to make further contact with the employer

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18.7 Further contact from employers

A significant amount of referrals come direct from employers. It is important that officers encourage and support employers in these circumstances; however please bear in mind that any contact could potentially lead to enforcement action being against an employer. It is imperative that advice given to employers is consistent across the Agency. The type of advice and support that can be given will be dependent on the individual circumstances surrounding the contact made by the employer. As an employer can receive reductions in the levels of liability which would affect the amount of penalty imposed for reporting concerns about workers and complying with any subsequent actions, officers must follow the procedures set out in paras. 18.6 and 18.7.1 – 3

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18.7.1 Employer asks for general advice on preventing illegal working

- ◆ Key guidance and information is provided for UK employers on employing migrant workers on the [UKBA website](#). The website provides extensive access to resources on preventing illegal working including an interactive tool developed with Business Link to help employers check a person's entitlement to work in the UK.
- ◆ Employers can also be referred to the Sponsorship and Employers Helpline (0300 123 4699) which is a dedicated contact centre service for employers providing advice and answering general questions on preventing illegal working. The Sponsorship and Employer Helpline will issue them with a Unique Reference Number, logging their query.

18.7.2 Employer requests check on status of individuals

The Employer Checking Service - ECS - (0300 123 4699) is a developing service that offers employers the opportunity to verify the entitlement to work of individuals in certain categories. To use the Employer Checking Service the employer must complete all the relevant sections of the checking service request form. The form is available from the UKBA website. If the employer is not satisfied with the identity and work status information provided by a prospective employee, or where original documentation has not been produced, they can either:

- Request further clarification from the prospective employee, who should provide further evidence of identity and work status to the employer if the recruitment process is to continue. The applicant should contact the UK Border Agency if clarification of their status is required.

Or

- Check the right to work of all individuals who have an outstanding application or appeal with the UK Border Agency
- Check where production of a List B document requires a mandatory check through the Employer Checking Service. At present mandatory checks are required for:
 - Non EEA Dependants & spouses (Certificate of Application)
 - Validation of Application Registration Cards (ARC)

It is the responsibility of the employer to inform the applicant that checks may be made to verify information provided. Further information about the services available to an employer from the Employer Checking Service can be obtained from their [website](#)

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18.7.3 Employer requests check on documents/or referral from the Employer Checking Service to Regional IUs

For some time, employers have built up close working relationships with local offices who regularly perform checks on documents for the employer particularly when we have had previous offenders detected using forged documents through their records. Working with employers is encouraged, however officers must ensure that we maintain a transparent system that is fully auditable so that there is a consistent and fair approach to all employers. The employer should fax copies of documents for checking to the local IU who must ensure they maintain a written record of all contact and advice given. If the document is identified as a forgery then relevant enforcement action should be tasked. This action will be dependent on the offences established. Officers should remember that we should only be investigating offences which directly relate to an immigration function. **We cannot give employers employment advice or advise them to dismiss someone, we can only comment on the validity of the documents produced.**

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18.7.4 Employer liaison/Educational visits

As indicated in the previous section employers often contact units requesting an educational visit or the IU may arrange a visit when the employer has faxed over documents that have turned out to be false. It is also possible that the OIC of a visit may arrange a meeting with an employer to discuss how an enforcement visit can be set up. In all of these cases officers are looking at what might be termed a 'compliant employer'. An employer who has contacted the UK Border Agency officials may not automatically avoid liability for prosecution or civil penalty action. However, their cooperation with any subsequent UKBA action will be taken into account along with other factors in the assessment of the appropriate level of penalty to be imposed. We advise that all non-enforcement visits to employers should be conducted by a minimum of two officers for corroboration and health and safety reasons.

Educational visits are intended to provide an employer with awareness of the requirements of the illegal working legislation and guidance on how to comply with its requirements. Educational visits can be initiated for a variety of reasons, for example:

- To provide advice on how to avoid recruiting immigration offenders in the future, following the detection of illegal migrant workers;

- Following proactive activity by Immigration Officers offering the service to local employers, particularly in sectors with a history of illegal working;
- When requested by local employer organisations e.g. Chamber of Commerce.

An educational visit must be carried out by at least two officers who are familiar with the illegal migrant working regulations and are able to provide an employer with advice on how to comply with the legislation. Officers conducting such a visit should set clear objectives for each visit from the onset, and must agree these with the employer from the start. It is advisable that an accurate local record of the outcomes achieved from each visit, including any recommended follow up actions must be kept.

An educational visit must cover the following areas:

- Explain an employer's responsibility to prevent illegal migrant working;
- Provide guidance on how an employer might establish a statutory excuse against liability to pay a civil penalty or face prosecution;
- Explain the specified checks and point employers to the available sources of information via the UKBA website which provides access to the comprehensive guidance and other publications, and
- Advise an employer on the next steps if they are concerned about the status of particular individuals within their workforce.

If officers on an educational visit suspect potential illegal migrant working, any evidence available should be documented and referred to the appropriate Intelligence Unit to consider. If further intelligence is obtained to develop this into a full referral, an enforcement visit with the appropriate powers of entry may be conducted.

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18.8 Intelligence Unit (IU) Actions

In addition to the standard practices recommended prior to conducting an enforcement operation, where illegal working is suspected, the IU must identify who the owner of the business is and undertake reasonable checks to establish if the employer is someone different. Where this information cannot be established in advance, then details of the owner of the business should be

entered in the employer field on NOD. This action is necessary in ALL visits where an immigration offender is encountered and/or arrested during a visit to a business premises where a 'Notification of Potential Liability' (NOPL) is served at the premises. In a significant number of small and medium sized businesses the employer will be the owner of the business rather than a manager, unless the responsibility for employment has been delegated to another party.

Information to identify the owner/employer can be obtained from a variety of sources including:

- ◆ Fire Service records – fire safety legislation
- ◆ Companies House checks
- ◆ HMRC – who is registered for paying VAT/NI/etc?
- ◆ Who is registered for paying business rates?
- ◆ Licensing
- ◆ Food safety/Trading standards records
- ◆ Land Registry – identifying owner of land/premises; see who they rent to?
- ◆ 192.com
- ◆ PNC records showing call outs attended by police – who called in/owner/ managers name
- ◆ Intel from previous visits
- ◆ Where the business includes the running of one or more catering establishments, (Restaurants/Café)/(Pubs/Bars)/(Hot Food/Takeaways), a Planning Certificate issued by a local authority.
- ◆ UKBA Intel checks – WPUK, WI, CRS, CID (including warehouse), GLOBE, IU databases,

This list is not exhaustive and officers should exercise common sense and draw on their experience to inform their decisions about relevant lines of enquiry to establish business ownership and responsibility for the employment of staff.

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18.9 Pre-visit actions – powers of entry

For information on the powers of entry to a business premise refer to Chapter 31 of the Enforcement Instructions and Guidance

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18.10 Actions to be completed during an illegal working operation

In addition to the existing policy that officers must comply with when conducting an arrest visit there are additional considerations for operations involving illegal working. Officers should also note that UKBA has no powers to force employers to terminate the contracts of workers. Where illegal workers are detected, who are not arrested, officers should advise the employer that they may be liable to prosecution if those workers are encountered during further immigration activity.

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18.10.1 Implementation of the A2 Regs

A2 Minors

FPNs should not be served on those under 16. If A2 nationals who are under 16 are encountered working, their employment should be referred to Social Services in relation to child employment laws. An arrest under immigration powers therefore is inappropriate. 16 and 17 year olds can be served with FPNs however care of those under 18 is always an issue in deciding whether to take action or not. One reason is the fact that potential prosecution procedures will be complicated by the differing juvenile court process.

Sandwich Course with industrial placements

Officers should ensure that sandwich courses are being offered by bona fide educational establishments. For example, a college course is currently being run by at least three different colleges which is being targeted at primarily Bulgarian nationals. The courses vary in length and are aimed at English Language students. The courses consist of an initial two weeks of English instruction which is classroom based, followed by a number of months 'practical experience' of

using the English language through employment. The employment is principally in the tourist and hospitality industry. It is then followed by a further two weeks of classroom instruction. These courses are currently within current migration rules. Those undertaking such courses will be given a yellow Worker Authorisation student card permitting their student course which then gives them access to the employment.

Limited Liability Partnerships (LLP)

The Limited Liability Partnerships Act 2000 came into effect on 6 April 2001. It introduced a new corporate business entity to Great Britain – the LLP. It was designed to help businesses combine the flexibility of a partnership with the benefit of a limited liability for its members. LLPs are, in commercial law, regarded as corporate entities with legal personalities separate from their members and will be subject to aspects of company law. For example, it is anticipated that a third party will usually contract with the LLP itself rather than with an individual member of the LLP. The liability of a member to the LLP's debts is generally restricted to the amount of capital they have contributed to the LLP.

The problem is that some LLPs are working within the existing legislation, but essentially exploiting a legal loophole. HMRC have confirmed to us that in theory, it is legally possible for someone to be a member of an LLP and be employed by the LLP at the same time. This is in contrast to a general partnership, where a person is either a partner in, or an employee of, a partnership but cannot be both at the same time – because being both would amount to the person employing himself. Unlike a general partnership, an LLP is a legal entity separate and distinct from its members and can therefore engage its members as employees if it wishes to. Members of a LLP are taxed as self employed but HMRC have confirmed this should not be equated to conferring self employed status.

HMRC currently have a couple of test cases running on companies that have changed overnight into LLPs.

If there are any employees who were working in breach of the A2 Regs, prior to their registration as LLP members, they may be dealt with retrospectively, as long as we have supporting evidence confirming this breach.

If they have registered as members of a LLP they have abided by the regulations under the LLP Act but officers are advised to handle them as ordinary self employed A2 nationals i.e. the officer should be satisfied that the A2 national is genuinely self employed or is in a form of disguised employment either within the LLP or on behalf of a third party engager.

The relevant issue (in determining whether a worker is an employee or not) depends on the terms under which they do their work for the LLP. For example, an LLP member who works in the business carried on by the LLP (not all members will) may do so by providing their services:

- under a contract of employment (written or oral) – in which case they will be employees of the LLP as well as being members of the LLP; or
- in the course of running the business (in the same way as the proprietors of a business, such as partners in a partnership, would) – in which case they will be self-employed.

Posted Workers

Article 49 of the EC Treaty allows workers to transfer from one Member State to another as 'posted workers'. In broad terms, a 'posted worker' is one who, for a limited period, carries out his work in the territory of a European Community Member State other than the State in which he normally works. Where illegal working is suspected and the employer claims that the worker has been employed on the grounds as a posted worker, officers are reminded to issue a NOPL unless the employer provides a record of having conducted the specified checks. Any evidence submitted by employers that do not appear on the specified list of acceptable documents should be noted and included in the referral pack to the Civil Penalty Compliance Team who will consider whether the employer faces liability.

Big Issue Sellers/ Street Vendors

Unless an Immigration Officer can prove that an A2 national Big Issue seller is directly employed by the Big Issue Company, no action can be taken.

HMRC has previously investigated the Big Issue and they found that sellers are not employed by the Big Issue Company. The relationship is very similar to that of a newsagent and its supplier, whereby copies are purchased in advance and unsold copies are returned. There is no income earned for unsold copies. Selling of the Big Issue is restricted to licensed vendors and these vendors are usually limited to a two year association with the Big Issue; the aim of the Big Issue is to help sellers get back on their feet and eventually find employment elsewhere. These licences are controlled and distributed by the Big Issue Company. Apart from a brief training period during which the novice sellers are paid by the Big Issue Company, HMRC is of the opinion that these sellers are self employed.

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18.10.2 Service of a Notification of Potential Liability (NOPL)

In all illegal working operations where officers are successful in encountering illegal migrant workers, action must be taken against the employer. In all such cases, a 'Notification of Potential Liability' (NOPL) must be completed and issued to the employer or representative of the company. Forms are numbered and printed in triplicate. A copy must be retained for local records and a further copy sent to the Civil Penalty Compliance Team (CPCT) for consideration of liability. Each NOPL form has a unique serial number and is issued to operational units as a printed self carbonating form.

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18.10.3 Recording of Evidence

It is important to remember that most evidence which will allow for a conviction or a successful civil penalty will come from the observations and evidence of such by the officers on the operation. This is particularly relevant in cases where a smaller business may have no records relating to staff working at the business. Officers need also to be mindful of what constitutes "relevant evidence" for the offences that they are investigating or for which they have made an arrest and

subsequent seizure. **Where illegal working is identified, every effort should be made to ensure that sufficient information about the employer is collected.** An “employer” is defined as a person who employs an individual under a contract of employment. This may be a contract of service or apprenticeship, whether express or implied. If the contract is expressed, this can be either orally or in writing. Officers issuing NOPLs should try to identify the person who sets and/or operates the recruitment processes on behalf of a company to ensure the notice is served on the correct person responsible for employment rather than an agent of the business.

If officers issuing NOPLs are unable to identify the employer during an operation, the NOPL should be served on the most appropriate responsible person present on behalf of the company and efforts should be made to gather sufficient evidence to establish the employer i.e. questioning the people encountered on site about employment, checking for contacts of employment and checking the premises insurance certificate and other documents that should be displayed on site.

Where possible, answers to the following questions should be included in the debrief report sent to CPCT for each illegal worker encountered -

- Who is your employer
- What is your job
- How long have you been working here
- Who pays you
- How are you paid
- Did you provide any documentation when you started work
- How many hours do you work

Due to the variety of employer sanctions available, officers must ensure that operations, including seizure of evidence and interviews with subjects, employers and witnesses, are fully compliant with the relevant provisions of PACE or the Criminal Procedure (Scotland) Act 1995 i.e. to a criminal standard. It could be that an employer is liable to criminal and civil sanctions and this may not be determined until after the visit itself. This is particularly relevant, as any offences relating to persons employed before 29 February 2008 will fall under the 1996 Act which provides only for a criminal sanction against employers. Reference to any documentation or interview must be labelled as exhibits and referred to in witness statements.

- ◆ The Premise Search Book (101) must be completed for ALL illegal working operations
- ◆ Officers must record all notes made at scene in a Visit Record Book (VRB) or an issued pocket notebook (PNB)
- ◆ As the primary evidence for illegal working will usually be officers' observations during the visit, statements should set the scene and be descriptive.

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18.10.4 Seizure of evidence

The power to seize records must only be exercised where the Immigration Officer or police constable believes the material to be of substantial value in the investigation of an immigration offence. The disclosure of the information will also be subject to the exemption in section 29(1) of the Data Protection Act 1998, which provides that disclosures necessary for the investigation of crime and apprehension of offenders are exempt from the requirement that data be processed fairly and lawfully. Consequently, there will be no obligation on the employer to tell his employee that his records have been seized and no obligation on the UK Border Agency to tell the employee we have his data. Any personal data we seize will be protected under the Data Protection Act but may be shared if necessary with the police, other Government Departments and local authorities, for the performance of their functions. The employer may be permitted to take a photocopy of any documents before they are taken from the site by officers. Where other parts of UKBA have an interest in these documents, the officers are permitted to share information. Original documents must be retained until all investigations are complete. We are unable to give a timescale for returning files and documents as some will be needed as evidence in the prosecution case and we could not rely on our own photocopies for this - when the case goes to the Crown Prosecution Service (CPS) [or Procurator Fiscal (PF) in Scotland] we cannot say when the documents will be returned.

Some examples of evidence that determine any liability faced by the employer include:

- ◆ Personal details of the offenders working without permission
- ◆ Dates of employment
- ◆ Photographs taken at the scene
- ◆ Contemporaneous notes

- ◆ CCTV footage may be seized where there are reasonable grounds to believe that a criminal offence has been committed on the CCTV camera

This is not an exhaustive list.

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18.11 Post Visit actions

Officers must update existing databases with information relating to the outcome of the visit, the offenders detected and input the NOPL Unique Reference Number onto the debrief screen of NOD.

The Officer in Command (OIC) must complete a written debrief which should include the names and personal details of all the offenders encountered, potential offences, the evidence available, the level of cooperation provided by the employer etc; this must be signed off by a senior officer before referring the case against the employer to either a CIT or CPCT.

Only Immigration Officers who are considered to have been active or directly involved in the operation are required to provide witness statements. Some examples of possible instances where an officer may not have been actively involved in the operation include:

- ◆ Officer has not served any immigration notices on any persons on the site
- ◆ Officer has not interviewed any persons on the site
- ◆ Officer has not searched or found evidence
- ◆ Officer has not witnessed the illegal working activity

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18.11.1 Determination of liability for a civil penalty

The Civil Penalty Compliance Team (CPCT) are responsible for considering the evidence submitted by regional officers to determine whether or not an employer faces any liability for employing individuals without permission to work in the United Kingdom.

The address for the CPCT in Manchester is:

Civil Penalty Compliance Team

PO Box 99

Manchester

M90 3WW

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18.11.2 Service of a Notification of Liability (NOL) and related actions

Where liability for a civil penalty is established, CPCT will serve a Notification of Liability (NOL) on the employer. This will inform the employer of the monetary value of the penalty and details of the illegal migrant workers detected for whom the employer has been found liability for. An employer would also be provided with details of how to pay the penalty, or raise an object or appeal against the civil penalty. The employer has 28 calendar days from the service of the NOL to pay the penalty or raise an objection for consideration by the CPCT .

Should an employer wish to object to the level of the penalty, the NOL states that they can submit any additional evidence for consideration to CPCT. The NOL also states that the employer has an entitlement to appeal through the courts. Where an employer does not pay their penalty, the Secretary of State has recourse to recover the outstanding debt.

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18.11.3 No liability is determined

Where no liability is determined, CPCT will send a Notification of No Liability (NONL) to the employer within 14 calendar days of the service of the NOPL

Where no Liability is determined but individuals were found to be working without appropriate permission to do so, a warning letter will be sent advising the employer that they may face liability further action from UKBA if the individuals remain in their employment.

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Annex A

Original list of specified documents that constitute a statutory defence under s8 for workers employed after 27 January 1997 but before 1 May 2004

The original list of specified documents included:

1. A document issued by a previous employer, the Inland Revenue, the Department for Work and Pensions (or their Northern Ireland equivalents) which states the National Insurance number (NINO) of the person named. This could be a P45, a pay slip, a NINO card or a letter issued by one of the Government bodies concerned. **Note: A temporary NI number (made up of the letters TN, the employee's date of birth and F or M to indicate gender) would not be sufficient.**
2. A passport describing the holder as a British citizen or as having the right of abode in, or an entitlement to readmission to, the UK.
3. A passport containing a Certificate of Entitlement issued by or on behalf of the Government of the UK certifying that the holder has the right of abode in the UK.
4. A certificate of registration or naturalisation as a British citizen.
5. A birth certificate issued in the UK or in the Republic of Ireland. (For these purposes, the UK includes England, Wales, Scotland, N. Ireland, the Channel Islands and the Isle of Man.) A birth certificate, including a certified copy issued some time after birth, will provide a defence under section 8 if it appears to relate to an applicant for a job. This includes both short and standard certificates.
6. A passport or national identity card issued by a state which is a member of the EEA and which describes the holder as a national of that state.
7. A passport or other travel document endorsed to show that the person named is exempt from immigration control, has indefinite leave to enter or remain in the UK or has no time limit on his stay, or a letter issued by the Home Office confirming that the person has such status.

8. A passport or other travel document endorsed to show that the person named has current leave to enter or remain in the UK and is not precluded from taking the employment in question, or a letter issued by the Home Office confirming that this is the case.
9. An UK residence permit issued to a national of an EEA Member State.
10. A passport or other travel document endorsed to show that the holder has a current right of residence in the UK as the family member of a named national of an EEA Member State who is resident in the UK.
11. A letter issued by the IND of the Home Office indicating that the person named in the letter is a British citizen or has permission to take employment.
12. A work permit or other approval to take employment issued by the Department for Education and Employment or, in Northern Ireland, by the Training and Employment Agency.
13. A passport describing the holder as a British Dependent Territories Citizen and which indicates that the status derives from a connection with Gibraltar.
14. The information leaflet about students published by the IND when produced in conjunction with a passport containing a code 2 leave to enter/remain endorsement.

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