

EXPLANATORY MEMORANDUM TO
THE IMMIGRATION (EMPLOYMENT OF ADULTS SUBJECT TO
IMMIGRATION CONTROL) (MAXIMUM PENALTY) (AMENDMENT)
ORDER 2014

2014 No. [XXXX]

1. This Explanatory Memorandum has been prepared by the Home Office and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. **Purpose of the instrument**

2.1 This Order prescribes twenty thousand pounds (£20,000) as the maximum penalty that the Secretary of State may by notice require an employer to pay for employing an illegal migrant worker.

3. **Matters of special interest to the Joint Committee on Statutory Instruments**

3.1 This Order replaces an earlier draft which was laid before Parliament and published on 29th January 2014 but was withdrawn before being debated by either House of Parliament. The effect of the earlier version was that, where a notice under section 15 of the Immigration, Asylum and Nationality Act 2006 (“the Act”) relates to a person’s employment before the date on which the draft Order came into force, the amount of the maximum penalty that may have been specified in the notice would have depended on whether or not the penalty notice was given before that date. The draft Order has been amended so that the increased maximum penalty will only apply in respect of a person’s employment which occurs on or after the date that the Order comes into force. This Order therefore replaces the earlier draft so that the basis for determining the maximum penalty is the date of any contravention of section 15(1) of the Act, rather than the date on which the penalty notice is given.

4. **Legislative Context**

4.1 Section 15 of the Act allows the Secretary of State to serve an employer with a notice requiring the payment of a penalty of a specified amount, not exceeding the prescribed maximum, where they have employed a person aged 16 or over who is subject to immigration control, unless that person has been given valid and subsisting leave to be in the United Kingdom by the Government and that leave does not restrict them from taking the job in question or the person comes into a category where the employment is also allowed.

4.2 The maximum penalty that may be levied shall be prescribed by Order after a draft of the Order has been laid before and approved by resolution of each House of Parliament.

5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

The Immigration and Security Minister, James Brokenshire MP, has made the following statement regarding Human Rights:

In my view the provisions of The Immigration (Employment of Adults Subject to Immigration Control) (Maximum Penalty) (Amendment) Order 2014 are compatible with the Convention Rights.

7. Policy background

7.1 On the 29 February 2008, a new system of civil penalties came into force which made employers who employed illegal workers liable to a civil penalty of up to £10,000 per illegal worker. Under the scheme, an employer can establish a statutory excuse against this liability by undertaking specific document checks as set out in Regulations. Where an employee subject to immigration control only possesses limited leave to be in the UK, the check must be repeated within every 12 month period in order for the excuse to be retained. This system was designed to encourage employers to comply with their legal obligations, without criminalising those who make a mistake in operating their recruitment and employment practices.

- *What is being done and why*

7.2 The Home Office is the first line of enforcement against illegal immigration and works with other agencies across government to take effective action against labour market abuse. Employers also have a role to play in ensuring that their employees have the right to work in the UK and, since 2008, this has been underpinned by the civil penalty scheme. However, these penalties have remained the same since 2008 and now the Government is concerned that they do not now provide a sufficient deterrent or reflect either the full economic advantage derived by those who profit from illegal labour or the wider costs to society. Accordingly, the Government intends to reform the scheme so that it becomes tougher on rogue employers by increasing the level of the maximum penalty to £20,000 per illegal worker. As is the case now, the maximum penalty will only be levied on an employer who breaches the right to work checks on more than one occasion. Illegal working often results in abusive and exploitative behaviour, the mistreatment of illegal immigrant workers, revenue evasion and illegal housing conditions. It can also undercut legitimate employment and have an adverse impact on the employment of people who are lawfully in the UK.

- *Consolidation*

7.3 This Order will amend The Immigration (Employment of Adults Subject to Immigration Control) (Maximum Penalty) Order 2008 (2008 No.132), an Order that set the current prescribed maximum penalty at £10,000. The amendment to increase the maximum penalty will apply to acts contrary to section 15 of the Act which occur

on or after the date that this Order comes into force. Separately, the Government has laid measures in the Immigration Bill sequencing any objection and appeal and making it easier to enforce the debt in a civil court, and also intends to bring in measures to simplify the right to work checks to make it easier for compliant employers to fulfil their responsibilities and amending the manner in which the penalty is applied and levied.

8. Consultation outcome

8.1 The Home Office conducted a public consultation “Strengthening and simplifying the civil penalty scheme to prevent illegal working” which ran from 9 July 2013 to 20 August 2013. Respondents completed an online questionnaire or provided responses by email or post. 499 responses were received. There were also face to face meetings and two internet seminars with employers, their representative organisations and education representatives. The consultation results were published by the Home Office on 10 October 2013. The consultation asked whether the maximum civil penalty should be raised to £20,000. 62% of respondents agreed with this suggestion.

9. Guidance

9.1 Section 19 of the Act provides for a Code of Practice to specify the factors to be considered by the Secretary of State in determining the amount of the penalty to be imposed on the employer. Section 23 of the Act provides for a Code of Practice to specify what an employer should or should not do in order to ensure that, while avoiding the liability of a penalty or committing an offence of knowingly employing an illegal migrant worker as provided for in section 21 of the Act, the employer also avoids contravening the Equality Act 2010, so far as it relates to race, or the Race Relations (Northern Ireland) Order 1997. These Codes have been laid before Parliament.

9.2 The Government will update these statutory Codes of Practice, following appropriate consultations, in accordance with sections 19 and 23 of the Act. It will also issue revised and simplified guidance for employers on their responsibilities under the civil penalty scheme and how to conduct right to work checks. The Government will continue to consult with employers to ensure that all guidance meets their needs, clearly explains their responsibilities and is publicised effectively.

9.3 There is also an existing Employer Checking Service and helpline for employers to support them in conducting right to work checks. The Home Office is considering how these services may be enhanced as part of the Department’s wider consideration of support for employers and providers of public services. The implementation of Biometric Residence Permits will significantly simplify the checks employers perform by replacing the complex range of documents held by non EEA workers.

10. Impact

10.1 A Regulatory Impact Assessment was prepared for the Act and published on 22 June 2005. This estimated that the cost to employers of familiarising themselves

with new guidance would be approximately £27.2 million, with the projected cost to business of a continuing obligation in the fifth year after its introduction being approximately £1.3 million. The potential impact of these proposals on compliant employers is anticipated to be positive as the current regulatory burden imposed by the existing regulations is being reduced.

10.2 The impact on the public sector is also anticipated to be positive and for the same reason (reducing the regulatory burden imposed by the existing regulations).

10.3 An Impact Assessment is attached to this memorandum.

11. Regulating small business

11.1 The legislation applies to small businesses.

11.2 To minimise the impact of the requirements on firms employing up to 20 people, the approach taken has been to reduce the regulatory burden on all businesses.

11.3 The basis for the final decision on what action to take to assist small businesses followed an assessment of the consultation responses and an internal assessment of the effectiveness of the current civil penalty scheme.

11.4 The Government intends to reduce the regulatory burden on all businesses through a separate negative resolution procedure Order which will:

- A. simplify the right to work checks in respect of those migrants with limited leave to be in the UK; reducing the number of acceptable documents for right to work checks over time as we increase the rollout of biometric residence permits and replacing the obligation on employers of repeating the check within every 12 month period in order to retain the excuse with a requirement of only repeating the check at the point of expiry of the leave;
- B. require students who wish to work to provide evidence of their term and holiday times. This will assist employers who are currently confused about students' right to work and as a result may not employ them or employ them in breach of conditions; and
- C. bring into force amended Codes of Practices under section 19 of the Act (calculation of the penalty) and section 23 (Race Relations). This will provide more succinct guidance available in various formats. The section 19 Code will also simplify the calculation of the civil penalty and extend the grace period for checks following a Transfer of Undertakings (Protection of Undertakings) transfer from 28 days to 60 days.

11.5 The legislative changes to civil penalties are part of a wider package of reforms to the way in which we prevent illegal working. This includes significantly increasing operational enforcement activity, within the Home Office and through working with other agencies across government, and reforming the way in which the civil penalties scheme is administered and communicated to employers from beginning to end.

12. Monitoring & review

12.1 The outcomes will be subject to internal review after 12 months and the legislation may be amended accordingly.

13. Contact

Vincent Doran at the Home Office at Vincent.Doran1@homeoffice.gsi.gov.uk can answer any queries regarding the instrument.