

EXPLANATORY MEMORANDUM TO

THE IMMIGRATION (RESTRICTIONS ON EMPLOYMENT) (CODE OF PRACTICE AND MISCELLANEOUS AMENDMENTS) ORDER 2018

2018 No. 1340

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Home Office and is laid before Parliament by the Immigration, Asylum and Nationality Act 2006.

2. Purpose of the instrument

- 2.1 The Order is concerned with the prescribed checks employers conduct to prevent illegal working, and amends the Immigration (Restrictions on Employment) Order 2007 to:
- make provision for online ‘right to work’ checks, to allow employers to rely on online checks to establish a statutory excuse, against liability for a civil penalty, in the event that they are found to be employing illegal worker;
 - amend the list of documents that are deemed acceptable under the existing, manual ‘right to work’ check to remove the requirement that a British birth or adoption certificate must be the full (long) certificate for these purposes.
- 2.2 The Order brings into force a revised Code of Practice to reflect these changes and makes consequential amendments to the Illegal Working Compliance Order Regulations 2016, to bring it into alignment with the 2007 Order as amended, with regards to the prescribed checks that employers may be required to conduct when subject to a compliance order.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.2 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is the United Kingdom.
- 4.2 The territorial application of this instrument is the United Kingdom.

5. European Convention on Human Rights

- 5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

6. Legislative Context

- 6.1 The Immigration, Asylum and Nationality Act 2006 allows the Secretary of State to serve an employer with a notice of liability requiring the payment of a penalty of a specified amount in certain circumstances. Those are when the employer has 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. An employer may establish a statutory excuse from payment of the penalty by conducting prescribed right to work checks, which (currently) involve checking, copying and retaining a copy of specific physical documents produced prior to employment commencing.
- 6.2 The Immigration (Restrictions on Employment) Order 2007 ('the 2007 Order') describes how an employer will be excused from paying a penalty. It also sets out requirements on an employer in relation to conducting right to work checks.
- 6.3 The Immigration Act 2016 supplements the controls provided in the 2006 Act by setting out a regime for illegal working closure notices and compliance orders to deal with employers that repeatedly flout the law by employing illegal workers. These powers are used in the most serious cases, where previous civil or criminal sanctions have failed to change employer behaviour. A court may make an illegal working compliance order, which may include certain provisions such as ordering the employer to perform right to work checks to ensure that illegal workers are not employed, or requiring the employer to produce evidence of right to work documentation to immigration officers.
- 6.4 The Illegal Working Compliance Orders Regulations 2016 ('the 2016 Regulations') prescribe the right to work checks which must be conducted, and the documents which must be produced to an immigration officer, where this is ordered by the court. The checks and documents specified in the 2016 Regulations are intended to be aligned with those which would give employers a statutory excuse from paying a civil penalty under the 2007 Order.

7. Policy background

- 7.1 Employers have a key role to play in preventing illegal working by conducting simple 'right to work' checks before they employ a person. The measures in the Order are intended to simplify and strengthen these checks, and make it easier for individuals to demonstrate their right to work. The ability to work illegally is a key driver of illegal migration. It is often linked to wider labour market abuse such as tax evasion, breach of the national minimum wage and exploitative working conditions that includes modern slavery, in the most serious cases. It also provides the means for non-compliant employers to undercut legitimate businesses. Tackling illegal working is a priority for the Government.
- 7.2 Legislation setting out employer responsibilities to prevent illegal working has been in place since 1997. Since 2008, a system of civil and criminal sanctions for non-compliance has been in place, set out in the Immigration, Asylum and Nationality Act 2006 (sections 15 and 21).
- 7.3 That Act provides that, if an employer is found to be employing someone prohibited from carrying out the work by reason of their immigration status, that employer may face a civil penalty of up to £20,000 per illegal worker. Employers may establish a

statutory excuse against a civil penalty by conducting right to work checks prescribed in the 2007 Order, as amended, and the statutory Code of Practice on preventing illegal working.

- 7.4 Existing checks involve a manual check of one (or a combination) of a prescribed list of documents in the presence of the holder, making a copy of that document, noting the date on which the check was conducted, and retaining evidence of the check. Where an individual's right to work is time-limited, employers must repeat the check when that permission is due to end in order to retain a statutory excuse.

What is being done and why?

- 7.5 The intention of the new measures is to modernise right to work checks, to make it easier for individuals to demonstrate their right to work and to make checks simpler and more secure for employers. The measures also allow British citizens to demonstrate a right to work using a short birth or adoption certificate (currently only the long certificate is permitted) when provided in combination with a National Insurance number.
- 7.6 This Order amends the detailed provisions of the civil penalty scheme, set out in the 2007 Order, to allow employers to rely on online right to work checks conducted using the new Home Office online right to work checking service to establish a statutory excuse against liability for a civil penalty in the event of illegal working. Online checks are voluntary, and both the online check and the existing document-based check will establish a statutory excuse.
- 7.7 Where applicable, an employer may conduct a right to work check using this electronic service without having to inspect physical documents, and doing so will excuse them from paying a penalty (provided the employee is confirmed as being permitted to undertake the work in question). The employer must be able to demonstrate that they have done the check. For online checks, they may do this by saving electronically or keeping a printed copy of the PDF page confirming the individual's right to work.
- 7.8 This Order also amends the list of acceptable documents, for demonstrating an entitlement to work in the UK, to remove the requirement for a full British birth or adoption certificate. Short certificates will now be acceptable for right to work checking purposes, to make it easier for British nationals without a British passport to demonstrate their right to work.
- 7.9 This Order also amends articles 3 and 5 of the 2007 Order to clarify that employers must conduct right to work checks prior to employment commencing in order to be excused from paying a penalty. This is not a change in policy, as article 5 specified this clearly, but there was some ambiguity in article 3, which the Government has taken this opportunity to resolve.
- 7.10 This Order amends existing wording to require employers to retain a clear copy of the documents relied upon for the right to work check. The intention with this amendment is to align with existing working in the code of practice and to avoid issues which have arisen previously, where employers have taken copies which are difficult to read. It also makes other ancillary technical amendments including simplifying the Order to include 'prospective employees' in references to 'employees', to align the 2007 Order with the 2016 Regulations.

- 7.11 This Order amends the illegal working compliance orders regime by introducing the option for employers to conduct online right to work checks, and to provide evidence to an Immigration Officer of having done so.
- 7.12 The online right to work checking service is being developed to support immigration status notified in an online format. This includes status issued to EU citizens pursuant to a successful application to the new EU Settlement Scheme, which the Government is in the process of opening to allow EU citizens to apply for indefinite leave to remain under UK immigration legislation.
- 7.13 As agreed with the EU in the draft Withdrawal Agreement, EU citizens will continue to be able to demonstrate their entitlement to work to employers by showing a valid passport or ID card until the end of the planned implementation period. The Government will set out its plans for the future border and immigration system in due course, including any changes to checks conducted by employers in respect of EU citizens. In the future, the Government intention is that EU nationals will demonstrate their continued entitlement to work in the UK to employers using the online service.
- 7.14 Two codes of practice are required by the 2006 Act. As a consequence of this Order, the code of practice issued under section 19 of the 2006 Act has been revised, and the revised draft is laid before Parliament alongside this Order. This Order brings the revised code into effect. “The Code of practice on preventing illegal working: Civil penalty scheme for employers” issued under section 19(1) of the Act has been revised to reflect changes made by the Order, and to:-
- A. Clarify the application of the 60-day grace period, provided to employers who acquire staff in circumstances of a Transfer of Undertakings (Protection of Employment) (TUPE) transfer, to allow them to conduct fresh right to work checks. Application of the grace period includes where automatic continuation of employment, as per TUPE Regulation 4, is disengaged by reason of compulsory liquidation.
 - B. Clarify how employers should comply with an existing requirement, that they record evidence of the date on which a manual right to work check was conducted, and details of term and vacation dates in respect of students who have limited right to work in term time. For example, where they should source this information. The same requirement applies to online checks.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

- 8.1 This instrument is not being made under the European Union (Withdrawal) Act.

9. Consolidation

- 9.1 When making changes to the 2007 Order in 2014, the Government considered consolidating this legislation but concluded on balance that it was preferable to amend the 2007 Order rather than to revoke and replace it. The Government has again concluded that it is not necessary to consolidate the legislation on this occasion.

10. Consultation outcome

- 10.1 There was no public consultation on these changes. In developing the service, the Home Office has carried out extensive user research amongst UK employers. From project initiation to September 2018, developers of the service have engaged over 80

employer users and over 40 job seeking migrants as part of their research and testing. UK employers have made clear that they welcome the new service and wish to be able to rely on it when conducting statutory right to work checks.

- 10.2 The changes contribute to the strengthening and simplifying of right to work checks, on which the Government carried out a public consultation in 2013 and employers indicated significant support.

11. Guidance

- 11.1 The Order issues the revised code of practice for preventing illegal working under section 19 of the 2006 Act and this is laid before Parliament on 10 December. Published guidance to employers on conducting right to work checks will be updated to reflect these changes. It will be published in line with the measures coming into force.

12. Impact

- 12.1 These measures are beneficial to business. There is not expected to be any adverse direct impact on business, charities or voluntary bodies. There may be minor, indirect familiarisation costs for employers that are not already using the Home Office online right to work checking service, as an added level of security alongside the existing check, and who choose to use the service. This is expected to be offset by benefits to employers from offering a more secure and simpler check, which will reduce the likelihood they will inadvertently employ someone who does not have the right to work, since the online service will protect against using a forged or expired document. However, employers do not have to alter their current practices if they do not want to because use of the online service is not being mandated at this stage.
- 12.2 Consequential amendments are being made to statutory application forms for alcohol and late-night refreshment licences, to reflect changes to introduce online checks, and to allow British citizens to demonstrate their right to work using a short birth or adoption certificate. The Licensing Act 2003 (Personal and Premises Licences) (Forms) (Amendment) Regulations 2018 are not expected to cause any significant impact on the public sector. Demonstrating a right to work via an online check will not be available in all circumstances, and the option to demonstrate a right to work by presenting copies of documents, as applicants do now, remains available in all cases. There may be minor indirect familiarisation costs for licensing authorities in the event that they receive applications from individuals who wish to demonstrate their right to work via the Home Office online right to work checking service.
- 12.3 An Impact Assessment has not been prepared for this instrument because the costs and benefits are expected to be negligible, and the changes are not mandating any change in employer practice.

13. Regulating small business

- 13.1 The legislation applies to activities that are undertaken by small businesses. The intention is to make checks simpler and more secure for employers. The civil penalty scheme in place to prevent illegal working applies to all employers. It would not be appropriate to apply the scheme only to businesses of a certain size as this would likely lead to illegal working simply moving to take place in those businesses exempt from the measures.

14. Monitoring & review

- 14.1 The approach to monitoring of this legislation is that an internal review will be carried out after 12 months and the legislation may be amended accordingly.
- 14.2 The regulation does not include a statutory review clause. The measures in question have negligible costs to business and there are no other reasons to consider a statutory review clause to be appropriate.

15. Contact

- 15.1 Fiona Cameron at the Home Office Telephone: 0207 035 8599 or email: Fiona.cameron@homeoffice.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Alison Samedi at the Home Office can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 The Minister for Immigration, the Rt Hon Caroline Nokes MP, at the Home Office can confirm that this Explanatory Memorandum meets the required standard.