



Home Office

Strengthening and simplifying the civil penalty scheme to prevent illegal working

Consultation document

9 July 2013

Foreword

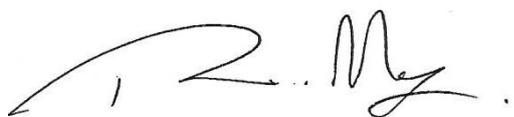
Immigration has brought benefits to the United Kingdom. Our migrant communities are a fundamental part of who we are and Britain is a far richer and stronger society because of them. We are rightly proud of our history as a diverse and welcoming society. However, whilst we have always believed in the benefits of immigration, uncontrolled immigration causes a range of problems for the United Kingdom. Without proper controls, community confidence is damaged, resources are stretched and the benefits that immigration can bring are lost or forgotten.

The Government has already made changes to our immigration policies with the aim of reducing net migration levels from the hundreds of thousands to the tens of thousands. Net migration has fallen by more than a third since June 2010 and is now at its lowest level for a decade. The UK Border Agency is being replaced with new organisations within the Home Office which will get an effective grip on the volume of casework and provide a robust enforcement response to those who break our immigration laws. IT systems will be overhauled and replaced.

However, we plan to go further in the forthcoming Immigration Bill. The Bill will make it more difficult for illegal migrants to live and work in the UK and ensure that legal migrants make a proper financial contribution to our key public services. It is vital that we work together across government so that our immigration policy is built into our benefits system, our health system, our housing system, the provision of services across government and access to employment.

This consultation seeks views on our proposals to strengthen and simplify the existing civil penalty scheme for the prevention of illegal working by migrants. Employers have an existing duty to check that their employees have the right to work in the UK and, since 2008, this duty has been underpinned by a civil penalty scheme. This has been successful in requiring employers to make 'right to work' checks and imposing a sanction on those who do not. The Government strongly supports action against illegal working. We are therefore proposing to further refine these requirements to get tougher on rogue employers who continue to exploit illegal labour and undercut legitimate businesses, and to simplify processes to make it easier for compliant employers to fulfil their responsibilities.

We will not allow the growth of a shadow economy for illegal migrants, whether it is in employment, housing or elsewhere. We want to ensure that the people who come to the UK do so for the right reasons. Even as we extend a warm welcome to those many migrants who make such an important contribution to life in the UK, we want to see tough action against those who have no right to be here and also against unscrupulous employers who exploit them. By working across government and legislating where fresh powers are needed, we will address public concerns about immigration and move to a system where we support the aspirations of hard-working people from the UK and abroad.



The Rt Hon Theresa May MP
Home Secretary

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1. Introduction

Immigration has brought significant benefits to the United Kingdom. But proper controls are needed, and the Government is determined to take a tougher approach to illegal immigration.

1. Immigration has brought benefits to the United Kingdom. The Government believes that we should continue to be an open and diverse society, which attracts and welcomes the brightest and the best to help promote economic growth and competitiveness.

2. The Government is also committed to operating proper controls on immigration, to ensure that public confidence in the system is rebuilt and pressures on communities and public services are alleviated. The Government has already overhauled the immigration rules to create a more selective system with the aim of bringing net migration down to the tens of thousands. The latest statistics show that net migration has reduced by over a third since June 2010¹.

3. The Government is also determined to get an effective grip on illegal immigration and to take a tougher approach to dealing with those who have either entered the country illegally or overstayed their visa. The availability of work encourages migrants to come to the UK illegally and legal migrants to overstay their visas. Illegal working is frequently associated with exploitative working conditions and tax evasion. Those businesses that employ illegal workers² also undercut legitimate business through their unfair and illegal cost-cutting activity. Illegal working also has an adverse impact on the employment of people who are legitimately in the UK.

4. Under the existing civil penalty scheme to prevent illegal working, which was introduced in the Immigration, Asylum and Nationality Act 2006 and came into effect in February 2008, employers have a duty to ensure that prospective employees are permitted to work in the UK by conducting right to work checks before employment starts. A maximum penalty of £10,000 per worker can be imposed for employing an illegal worker.

5. We have recently examined the operation of the civil penalty scheme, and are consulting on a number of changes which we believe will strengthen and improve the operation of the scheme. Our twin aims are to introduce more robust measures against employers of illegal workers and make the sanctions more commensurate with the harm they cause, while at the same time reducing the administrative burdens imposed on legitimate employers in conducting right to work checks. The proposed changes would be delivered through a new Immigration Bill which will

¹ ONS statistics: <http://www.ons.gov.uk/ons/rel/migration1/migration-statistics-quarterly-report/may-2013/msqr-may13.html>

The Home Office statistics: <https://www.gov.uk/government/publications/immigration-statistics-january-to-march-2013>

² Illegal workers are generally considered to be those migrants who are working in the UK when they have either entered the country illegally or overstayed their permission to be here, or have permission to be in the UK but are doing work they are not permitted to undertake.

commence its passage through Parliament in autumn 2013, and secondary legislation in early 2014.

6. The consultation closes on 20 August 2013, and seeks views on the details of the proposed changes to the current civil penalty scheme set out in detail in this document. It also forms part of a wider package of proposals being take forward in the planned Bill that are intended to strengthen the operation of our immigration system.

2. The consultation process and how to respond

This consultation will last until 20 August 2013. You can respond by taking part in an online web survey at:

<http://ukba.homeoffice.gov.uk/policyandlaw/consultations/>

Topic of this consultation	Proposals to strengthen and simplify the civil penalty scheme to prevent illegal working.
Scope of this consultation	The consultation seeks views on the proposed amendments to the existing civil penalty scheme.
Geographical scope	United Kingdom.

Basic information

To	This is a public consultation and it is open to anyone to respond. We would particularly welcome views from employers and their associations.
Body responsible for the consultation	Home Office.
Duration	The consultation begins on 9 July and ends on 20 August 2013. This is a six week period.
Enquiries	homeofficeillegalworkingconsultation@homeoffice.gsi.gov.uk
How to respond	Respondents are asked to complete the online questionnaire which is available at: http://ukba.homeoffice.gov.uk/policyandlaw/consultations . For those respondents who are unable to use an online format, an alternative format can be requested by contacting the enquiries email address.

3. Background and overview of the proposals

The Government believes that it is important to prevent illegal working by migrants. It undercuts legitimate business and is often associated with other labour market abuses, including tax evasion and exploitative working conditions. The Home Office is the first line of enforcement against illegal immigration and works in partnership with other agencies across government to take effective action against labour market abuse. Employers also have an important role to play in ensuring that their employees have the right to work in the UK.

Overview of the current civil penalty scheme

7. Since 1997, all employers have been under a duty to check the immigration status of prospective employees³. Since 2008, they have faced civil penalties, and in some cases criminal prosecution⁴, for employing illegal migrants. This is now a well established requirement, which is understood by employers.

8. The primary aim of the current scheme is to prevent illegal working. It was introduced in the Immigration, Asylum and Nationality Act 2006. Employers are required to check that a person is permitted to work in the UK by checking one or two of a number of 'acceptable documents', in order to establish a statutory excuse against a civil penalty.

9. The lists of acceptable documents that can be used to establish the right to work are specified in secondary legislation. Further guidance is set out in a published Code of Practice (Home Office, February 2008)⁵. These documents include national passports with visas and a range of Home Office-issued documentation. The employer is required to take and retain a copy of these documents. Employers are expected to identify 'reasonably apparent' forgeries and satisfy themselves that the employee is not an imposter. They are not expected to be immigration or forgery experts. Where a worker is a national from outside the European Economic Area (EEA) with a time-limited immigration status, employers are required to conduct annual follow-up document checks to maintain their statutory excuse.

10. In addition to the published guidance, the Home Office has a dedicated Sponsorship and Employers' Helpline for enquiries. Employers may also contact the Employer Checking Service to verify a person's right to work in the UK in a number of circumstances:

- when an individual has an outstanding application or appeal with the Home Office;
- the employee has presented an Application Registration Card with the right to work; or

³ Section 8, Asylum and Immigration Act 1996 made it a criminal offence to employ illegal workers. A civil penalty was not introduced until 2006 and implemented in 2008.

⁴ Section 21, Immigration, Asylum and Nationality Act 2006 makes it an offence to knowingly employ an illegal worker, with liability to imprisonment for up to two years, a fine or both.

⁵ The Immigration (Restrictions on Employment) Order 2007 S.I. 2007/3290, Schedule Lists A and B: <http://www.legislation.gov.uk/uksi/2007/3290/contents/made>; Code of Practice, February 2008: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/employersandsponsors/preventingillegalworking/>

- the employee holds a Certificate of Application issued to a family member of an EEA or Swiss national with the right to work.

11. The maximum civil penalty per illegal worker is £10,000. There is a 'sliding scale' of factors that are taken into account in calculating the penalties. They include the number of previous civil penalties within the last 3 years; whether the employer has conducted partial checks, reported the illegal workers to the Home Office or co-operated with the Home Office in its investigation.

12. If an employer is served with a civil penalty he may lodge an objection with the Secretary of State and/or appeal to the civil courts. The grounds for objection and appeal are the same: that the employer is not liable for the penalty; is excused from the payment because he has complied with prescribed requirements in relation to employment, or the penalty is too high.

13. Over 8,100 civil penalty notices have been issued to employers between the start of the scheme in February 2008 and the end of 2012. This equates to a net recoverable sum of £57.5 million. More than £24 million in penalties have been paid. Penalties in the region of £16.5 million are payable and subject to recovery. Just over £17 million have been written off, and this is often because companies cease to trade at a time they have an outstanding civil penalty debt.

14. As part of the continuing reform of immigration enforcement activities, we have examined the operation of the civil penalty scheme. It was also formally reviewed by the Independent Chief Inspector of Borders and Immigration in March and April 2010⁶. While the civil penalty scheme has been successful in requiring employers to undertake right to work checks, it is clear that there is scope to improve the operation of the scheme, both to increase the impact on rogue employers, and to reduce the burdens on legitimate businesses.

15. Businesses have expressed support for the idea of simplifying right to work checks by reducing the list of acceptable documents for checking purposes, eliminating older and less secure documentation which is vulnerable to forgery, and placing greater reliance on the use of biometric residence permits for non-EEA nationals.

16. The proposals in this consultation cover:

- increasing the size of the maximum civil penalty;
- simplifying the way in which civil penalties are calculated;
- improving the recovery of unpaid civil penalties;
- reducing the range of acceptable documents for checking purposes; and
- removing annual follow-up checks on employees with time-limited permission to work in the UK.

⁶ http://icinspector.independent.gov.uk/wp-content/uploads/2010/03/An-Inspection-of-the-Civil-Penalties-Compliance-Team_Illegal-Working1.pdf

17. Proposals will be taken forward through the Immigration Bill in autumn 2013 and in secondary legislation in early 2014.

Parallel enforcement activities

18. The civil penalty scheme for the employers of illegal migrant workers is the core component of a wider strategy to address illegal working, which will be supported by an increase in Home Office enforcement activity in 2013/14. In addition, we are also developing a range of new enforcement approaches to tackle rogue employers. This includes actively working in partnership with a range of agencies, including HM Revenue and Customs (HMRC), the police, local authorities, the UK Human Trafficking Centre, Department for Work and Pensions (DWP), the Health and Safety Executive, the Gangmaster Licensing Authority and the Employment Agency Standards Inspectorate, to tackle labour market abuses. We are also improving the sharing of intelligence across public sector enforcement bodies, including with HMRC and DWP, to ensure that we deliver the most appropriate sanctions.

4. Details of the proposals

The civil penalty scheme has been in operation for more than five years. We have examined the scheme and identified proposals which will improve its effectiveness and reduce the burden on compliant businesses.

19. We believe there is an opportunity to strengthen the impact of the scheme and improve its deterrent effect, while reducing the burden on legitimate businesses. The proposed improvements are detailed below. We would welcome views on these proposals.

20. The aim is to increase the sanctions against employers of illegal workers. We want to ensure that these sanctions are more proportionate to the harm caused and that they are more regularly applied and paid, creating a stronger deterrence to the employment of illegal labour.

21. We are proposing to increase the maximum penalty in the case of the most serious repeated breaches of illegal working laws, while ensuring appropriate and proportionate penalties for employers who breach the requirement for the first time and also co-operate with the Home Office. We also want to make the calculation of penalties simpler.

22. In addition to the proposals here, we are looking to simplify significantly the operation of the civil penalty scheme, producing simpler and shorter guidance for employers and communicating the changes to the scheme to ensure that these are understood. We are also asking for further suggestions for improvements that can be made to the operation of the scheme, and will consult proactively with employers and their representative bodies.

Detailed options

(i) Increasing the size of the civil penalty

23. The maximum civil penalty is currently £10,000 per illegal worker. This sum has not changed since the scheme was introduced in February 2008. We are proposing to double the maximum available civil penalty to £20,000 for each illegal worker.

24. The significant increase in the maximum penalty is intended to better reflect the benefits accruing to, and the harm caused by employers of illegal workers. Rogue employers illegally secure an unfair advantage as they are able to operate at a lower cost than their legitimate competitors through the non-payment of taxes and national insurance contributions, statutory payments to employees and national minimum wages, as well as the breach of other workplace regulations. They may also cause harm to employees as a result of exploitative working conditions. These costs are difficult to quantify.

25. There are also costs to the taxpayer in enforcing action against rogue employers and removing illegal workers⁷ who have no basis to be in the UK. There are a number of wider costs imposed by illegal working, including costs to legitimate businesses and the displacement of legitimate workers that are also difficult to

⁷ <http://www.nao.org.uk/report/management-of-asylum-applications-by-the-uk-border-agency>

quantify. In addition, the possibility of illegal working encourages migrants to enter and stay in the UK illegally. This has negative impacts for the UK economy, including increased expenditure on public services and increased demands by illegal migrants on housing and transport. The Government considers it is important to apply a sanction that more effectively addresses and reflects these adverse impacts.

Question:

1. If an employer breaches the right to work checks on more than one occasion, should a maximum civil penalty of £20,000 per illegal worker be levied?

(ii) Simplifying the calculation of civil penalties

26. We currently use a sliding scale to calculate the civil penalty in each case. The approach can be unclear for employers. We are proposing to simplify the formula we currently use and clarify the mitigating factors we will take into account in calculating the size of penalty. The current mitigating factors are: co-operation by an employer, the reporting of illegal working and whether a check has been partially completed.

27. For second and more serious breaches we would also want to see higher penalties being applied more often.

The size of the penalties

28. A previous illegal working civil penalty is deemed to be an aggravating factor that should lead to a higher penalty, as is currently the case. The proposal is that £20,000 will therefore be the starting point for calculating penalties in these more serious cases.

29. For a first civil penalty, we propose to set the maximum at £15,000. We would welcome views on where to set this level, to ensure this acts as a sufficient deterrent.

Mitigating factors

30. The proposal is to retain two mitigating factors when calculating the final penalty; each one leading to a reduction of £5,000 in the civil penalty.

31. The proposed mitigating factors are:

- (i) **reporting** the suspected illegal workers to the Employer Helpline, for which the employer would receive a reference number (as now); and
- (ii) **active co-operation** with the Home Office's investigation. This is an existing expectation, but in practice is little more than an absence of obstruction. We want to incentivise active co-operation during the course of the Home Office's enforcement action, making this a positive requirement, and including the provision of prompt and accurate information. The absence of obstruction should no longer be sufficient to qualify for this mitigation.

32. **A partial check** also currently counts as a mitigating factor. A partial check covers the circumstances where an employer has only checked and copied one of a specified combination of documents, or failed to carry out a follow-up check when a full check had been undertaken at the start of employment. We propose to stop using a partial check as a mitigating factor. Our view is that it undermines the full check. The scheme has also been running for five years and we believe employers should by now be familiar with the necessary checks. In addition, we propose to make changes to the scheme which will make it easier to undertake a full right to work check. These will include reducing the number of follow-up checks required and the number of acceptable documents. This will make it more straightforward and quicker for employers to fulfil their duties.

Fast payment option

33. Since June 2012, employers who have been served a civil penalty notice, and have no previous breaches, may obtain a 20 per cent reduction in the penalty if full payment is made within 21 days of the penalty being levied. This reduction cannot currently be claimed by an employer who has been served with a first penalty notice for more than two illegal workers, or for any second or subsequent penalty notices. In the first nine months of operation, just over £1 million in civil penalties has been paid by 231 employers using the fast payment option.

34. In view of the proposed increase in penalty levels, and to promote effective and early recovery of penalties owed, we are proposing to increase the reduction available under the fast payment option to 30 per cent and to extend its availability to all employers who have been served with a civil penalty for the first time, irrespective of the number of illegal workers covered by the civil penalty notice. However, the option will not to be made available to employers who have received an earlier civil penalty.

35. Our approach is intended to achieve two objectives: first, to reinforce differentiated responses to employers who are served with their first civil penalty and employers who have previously been in breach of their duties and second, to increase the payment of civil penalties. The fast payment option would be set out in the amended Code of Practice.

Warning letters

36. Under the current system an employer may be served with a warning letter rather than a penalty for a first time breach of their duties where they have reported their suspicion of illegal working and co-operated with the Home Office. We are proposing to remove this option. Our view is that the scheme has been operating long enough for employers to be aware of their responsibility to undertake checks and that the possibility of a warning letter disincentives up-front compliance with the checking requirement. In addition, proposals to simplify the right to work checks will make compliance easier.

37. These amendments would be made through secondary legislation.

Table1: proposed calculation of civil penalties

First civil penalty notice						
Maximum penalty amount per worker £15,000	Mitigating Factor 1		Mitigating Factor 2		Minimum penalty amount per worker £5,000	Fast Payment plus two mitigating factors
	Has suspected illegal working been reported?	Yes: Penalty decreased by £5,000	Has the employer actively co-operated?	Yes: Penalty decreased by £5,000		Minimum penalty per worker £3,500
	No: No penalty decrease		No: No penalty decrease			
Second/subsequent civil penalty notice						
Maximum penalty amount per worker £20,000	Mitigating Factor 1		Mitigating Factor 2		Minimum penalty amount per worker £10,000	Fast Payment Option
	Has suspected illegal working been reported?	Yes: Penalty decreased by £5,000	Has the employer actively co-operated?	Yes: Penalty decreased by £5,000		Not applicable. Minimum penalty £10,000
	No: No penalty decrease		No: No penalty decrease			

Questions:

2. Should the calculation of civil penalties be simplified as proposed in the consultation?
3. Should a warning letter no longer be issued for a first time breach of the right to work checks?
4. If an employer has already received one or more civil penalty notices, should these be considered an aggravating factor when determining the current penalty level?
5. What should be the starting point for the calculation of a first civil penalty to act as an effective deterrent to employing illegal workers?
 - £15,000
 - £12,000
 - £10,000

(iii) Reducing the range of documents to evidence the right to work

38. Employers are provided with two lists of acceptable documents for the purposes of completing the required right to work check. These are set out in secondary legislation and can also be found in lists A and B at annex 1 of the Code of Practice (Home Office, February 2008)⁸. Employers have said that the number of potential documents they may be presented with makes it difficult and time consuming to make these checks.

39. Non-EEA nationals living in the UK possess a wide range of complex, sometimes old and insecure immigration documentation. This adds to the burden on employers in conducting entitlement checks.

40. Biometric residence permits (BRPs⁹) offer a simple and secure alternative which will simplify checks for non-EEA nationals; and we are proposing to base future checks around the BRP. The BRP is a secure credit card sized immigration document containing the holder's facial image, biographic data, immigration status, date of expiry and entitlements or restrictions, including to benefits and work. An embedded chip contains the holder's facial image and fingerprints. Over one million BRPs have been issued since November 2008 to non-EEA nationals who have been granted permission to extend their stay in the UK. The Home Office is taking forward plans to provide the BRP to all non-EEA overseas applicants coming to the UK for more than six months (who currently receive a visa in their passport).

41. The BRP also supports the development of automated verification services which will provide support to employers to check that BRPs are genuine. The Home Office is currently running a 6 month pilot of an automated BRP verification service with selected employers, which will inform the wider development of support services.

42. We are proposing to reduce the number of acceptable documents over time, starting in April 2014, with the aim of largely basing the checking system for non-EEA nationals around BRPs in the next 2-3 years.

Questions:

6. Would reducing the number of acceptable documents simplify the right to work checks?
7. Do you support working towards the biometric residence permit being the main acceptable document for right to work checks for most non-EEA nationals?

⁸ Code of Practice, February 2008:

<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/employersandsponsors/preventingillegalworking/>

⁹ Biometric residence permits are currently listed as one of the acceptable documents for right to work checks. Further information is at: <http://www.ukba.homeoffice.gov.uk/visas-immigration/while-in-uk/do-i-need-brp/>

(iv) Providing evidence of a student's right to work

43. Overseas students are often able to work part-time during term time and full time during the holiday periods. We propose to require students to present acceptable evidence of their term dates as part of the right to work checks. This is in order to:

- prevent students from working in breach of their visa conditions;
- make it easier for employers to understand the limits on students' ability to work; and
- support students in demonstrating their ability to work.

(v) Removing annual checks on employees with time-limited status

44. An employer must conduct right to work checks at the start of employment. For non-EEA nationals with a time-limited immigration status, these checks must be repeated every 12 months in order to maintain a statutory excuse against a civil penalty. An annual check gives an employer a statutory excuse which lasts for 12 months, even if an employee only has, for example, 2 months unexpired permission to be in the UK. In this scenario, the employee could work for an additional 10 months without risk of sanction for the employer. Conversely, an employer would still be required to conduct an annual right to work check even when presented with evidence that an employee had valid permission for three years.

45. We are proposing to reduce the burden on employers by no longer requiring them to perform unnecessary annual checks on an employee with time-limited permission to be in the UK. Instead, an employer would be required to conduct a follow-up check to coincide with the expected expiry of their employee's permission to be in the UK.

46. These amendments would be made through secondary legislation, beginning in early 2014.

Question:

8. Would a follow-up check linked to the expiry of permission to stay in the UK reduce the burden on employers?

(vi) Objections and appeals

47. The Immigration, Asylum and Nationality Act 2006 provides an employer with the right to make representations against a penalty to the Secretary of State, called an 'objection'. It also provides a separate right of appeal to the civil courts. Currently, the objection and appeal can be exercised simultaneously, consecutively or alternatively, and on the following grounds: that the employer is not liable for the penalty; the employer has established a statutory excuse; or the amount of the penalty is too high.

48. The objection and appeal will be retained in the reformed system. However, our proposal is to require an employer to always exercise their right to object to a civil penalty before they can pursue an appeal. This would allow an effective and

timely review of decisions administratively, which may negate the need for appeal to the civil court and reduce costs both for the Home Office and the employer. By way of example, in the first six months of 2013, in those cases where an objection was raised and further evidence presented by the employer, the initial decision was changed in almost one quarter of cases. This amendment would be made through the Immigration Bill.

49. We also intend to amend the Code of Practice to provide further clarification on the available grounds for objection and appeal on the basis that 'the penalty is too high'. The employer will be able to object and appeal on this basis where they believe that they should have qualified for a reduction in the civil penalty for meeting one or both mitigating factors. We would make it clear that the penalty will not be reduced on the grounds that the employer contends he is unable to pay. This amendment will ensure that the application of civil penalties is simple, transparent and fairly applied.

50. However, the Home Office will consider the impact of the penalty on the employer insofar as the employer cannot pay it in one lump sum. In such circumstances, we may agree that payment may be made in instalments using an existing instalment option. Payments can be made monthly up to 24 months and, in exceptional cases, 36 months. Employers may request these arrangements at any point in the repayment process. In the event that an instalment is not paid on the due date the remaining outstanding debt will become immediately due and payable. These clarifications would be delivered through a change to the Code of Practice.

(vii) Improving the enforcement of unpaid civil penalty debts

Enforcement of the debt through the civil court

51. The aim is to ensure that unpaid penalties can be recovered more easily. We propose to change the way in which we enforce unpaid debts through section 18 of the Immigration, Asylum and Nationality Act 2006, to allow enforcement of the penalty as if it were a debt due under a court order. This would allow a penalty notice to be registered with the court, after which enforcement action could be commenced immediately.

52. There are three main advantages to the enforcement of civil penalties in this way:

- (i) the process is greatly accelerated. The Secretary of State would not have to first make an application to the court for a substantive order for payment, but could move straight to enforcement proceedings;
- (ii) the process would reduce costs. No court fee for the substantive order will be required. This will also be in the employer's interest, as it will prevent the debt increasing with additional court costs; and
- (iii) there is greater clarity for the defendant (employer). The process will make it clear to the employer that he does not have a right to file a defence when the debt is being enforced, and dispute the debt. This process would not impact on the rights of an employer to challenge the penalty: they would still enjoy the right to an administrative review (objection) and an appeal to the courts before this stage.

Personal liability in the event of non-payment of civil penalty debts

53. The Immigration, Asylum and Nationality Act 2006 provides that in certain circumstances, named officers of a body corporate may be treated as personally responsible for the commission of the criminal offence of knowingly employing someone who is not permitted to work (sections 21 and 22).

54. During the first five years' operation of the civil penalty regime, a significant number of businesses with limited liability have ceased to trade when they have outstanding civil penalty debts. During this period, penalties to a total of just over £17 million have been written off, often for this reason. In the years March 2011 – 2013, for example, 180 companies dissolved, as a result of which more than £2 million pounds in debts had to be written off.

55. Our intention is to ensure that effective sanctions are taken against the employers of illegal labour. This includes the effective enforcement of civil penalty debts. The aim is to have the necessary means to respond to employers who dissolve and restart businesses (also termed 'phoenixism') or otherwise behave in a manner with the intention of evading penalties levied against them. We are therefore seeking views on introducing a provision which would allow a civil penalty to be issued against both the business and, where the business has limited liability, its directors or partners, on a joint and several basis.

56. In the event that a civil penalty was not paid by the business, we may look to pursue the debt against the director or partner personally. In all cases, the Home Office would first seek to recover the penalty from the business and, only if this were unsuccessful, would directors or partners be pursued on a personal basis. We would welcome views on this proposal.

57. This measure would be taken forward in the Immigration Bill.

Question:

9. Should directors and partners of limited liability businesses be held jointly and severally liable for civil penalties to allow recovery action to be taken against them if the business does not make payment?

Annex A: Equality impacts of the policy

A full Equality Impact Assessment was completed when the prevention of illegal working and civil penalty arrangements were introduced in the Immigration, Asylum and Nationality Act 2006¹⁰.

We have reviewed this document and consider that its findings remain relevant. While the civil penalty scheme is being reformed - its reach in terms of those on whom it will impact, will be unchanged.

The Equality Impact Assessment noted that:

“where correctly applied, this policy will not lead to unlawful direct or indirect discrimination. Individuals will be excluded from employment as a result of their legal entitlement to take the employment in question and not as a result of unlawful discrimination.”

At this time, a statutory Code of Practice was published containing “guidance for employers on the avoidance of unlawful discrimination in employment practice while seeking to prevent illegal working”.¹¹

However, the equality impacts will be considered further, including in light of responses to the question below, and another equality statement completed before the introduction of revisions to the civil penalty scheme. The policy will also be subject to further review.

Question:

10. If the proposals were to be implemented, do you think they would have any positive or negative impacts on individuals based on the following protected characteristics?

- Age
- Disability
- Marriage or civil partnership
- Pregnancy
- Race (including nationality, ethnic or national origins, or colour)
- Religion or belief
- Gender
- Gender reassignment
- Sexual orientation

If you answered yes to any of these, please include any suggestions as to how these impacts might be managed or mitigated.

¹⁰ UK Government Web archive:

<http://www.ukba.homeoffice.gov.uk/policyandlaw/consultations/closed/>

¹¹

<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/employersandsponsors/preventingillegalworking/>

Annex B: Consultation procedures and questions

About this consultation

This consultation seeks views on the Government's proposals to strengthen and simplify the existing civil penalty scheme to prevent illegal working.

Duration

This consultation was published on 9 July 2013 and will close on 20 August 2013.

Enquiries and responses

We would welcome your responses to the questions posed in this consultation document. It is available on the Home Office website - <http://www.ukba.homeoffice.gov.uk/policyandlaw/consultations/>

We would request that, wherever possible, you respond via the online survey, which can be accessed via the website.

This will be the most efficient and reliable way of ensuring that your responses are reflected in our analysis of consultation responses. Where you wish to offer further, narrative comments, you may email or write to the contacts given below.

By post:

Attn: Enforcement Partnership Team
Consultation Responses (Civil Penalty Scheme)
Home Office
2nd Floor, Fry
2 Marsham Street
London
SW1P 4DF

By email:

homeofficeillegalworkingconsultation@homeoffice.gsi.gov.uk

If you require a copy of this consultation document in any other format, e.g. braille, large font, or audio, please contact the Home Office at the address given above.

Additional ways to become involved

The Home Office will be contacting a range of employers and their representative associations affected by these proposals during the course of the consultation to bring this consultation to their attention and to invite them to submit their views. If you are a member of a representative association with an interest in the issues covered by this consultation, you may wish to find out if the body is planning to respond to this consultation and ask how you can be involved this process.

After the consultation

A summary of responses will be published as early as possible, subject to comments received in response to this consultation and the views of Ministers.

Responses: confidentiality & disclaimer

The information you send us may be passed to colleagues within the Home Office, other Government departments and related agencies for use in connection with this consultation.

Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with applicable access to information frameworks (primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want certain information you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence.

In view of this, you should explain to us why you regard any information you have provided as confidential. If we receive a request for disclosure of the information we will take due account of your explanation, but we cannot give an assurance that confidentiality will be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

The Department will process your personal data in accordance with the DPA and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

Consultation criteria

The consultation follows the Consultation Principles published by the Cabinet Office in July 2012. The Government believes that a six week consultation period is appropriate in this case.

Consultation co-ordinator

If you have a complaint or comment about the Home Office's approach to the consultation, you should contact the Home Office Consultation Co-ordinator, Adam McArdle, who can be contacted at: adam.mcardle2@homeoffice.gsi.gov.uk

Consultation questions

1. If an employer breaches the right to work checks on more than one occasion, should a maximum civil penalty of £20,000 per illegal worker be levied?
2. Should the calculation of civil penalties be simplified as proposed in the consultation?
3. Should a warning letter no longer be issued for a first time breach of the right to work checks?
4. If an employer has already received one or more civil penalty notices, should these be considered an aggravating factor when determining the current penalty level?
5. What should be the starting point for the calculation of a first civil penalty to act as an effective deterrent to employing illegal workers?
 - £15,000
 - £12,000
 - £10,000
6. Would reducing the number of acceptable documents simplify the right to work checks?
7. Do you support working towards the biometric residence permit being the main acceptable document for right to work checks for most non-EEA nationals?
8. Would a follow-up check linked to the expiry of permission to stay in the UK reduce the burden on employers?
9. Should directors and partners of limited liability businesses be held jointly and severally liable for civil penalties to allow recovery action to be taken against them if the business does not make payment?
10. Do you think the proposals would have any positive or negative impacts on individuals based on the following protected characteristics?
 - Age
 - Disability
 - Marriage / civil partnership
 - Pregnancy
 - Race (including nationality, ethnic or national origins, or colour);
 - Religion or belief
 - Gender
 - Gender reassignment
 - Sexual orientation

If you answered yes to any of these, please include any suggestions as to how these impacts might be managed or mitigated.

Submission of additional information:

If you have any further comments on these questions and/or have suggestions for improvements that can be made to the operation of the Civil Penalty Scheme, including the published guidance, please send this additional information to:

homeofficeillegalworkingconsultation@homeoffice.gsi.gov.uk

About you:

Are you responding as:

- (a) An employer or representative of an employers' association?
- (b) A private individual?

If you are responding as a private individual, are you:

- (a) A UK citizen
- (b) A citizen of the other European Union countries, Iceland, Lichtenstein, Norway or Switzerland
- (c) Other

If other, do you have a time limit on your stay in the UK?

- (a) Yes
- (b) No
- (c) Prefer not to say

Equality questions:

1. Please indicate your age:

- (a) Up to 17 years
- (b) 18 to 24 years
- (c) 25 to 44 years
- (d) 45 to 64 years
- (e) 65 years and over
- (f) Prefer not to say

2. Please indicate your ethnic group:

(a) White

- (i) English / Welsh / Scottish / Northern Irish / British
- (ii) White other (please specify)

(b) Mixed / multiple ethnic groups

- (i) White and Black Caribbean
- (ii) White and Black African
- (iii) White and Asian
- (iv) Any other mixed / multiple ethnic background (please specify)

(c) Asian

- (i) Indian
- (ii) Pakistani
- (iii) Bangladeshi
- (iv) Chinese
- (v) Any other Asian background (please specify)

(d) Black / African / Caribbean / Black British

(i) African

(ii) Caribbean

(iii) Any other Black / African / Caribbean background (please specify)

(e) Other ethnic group

(i) Arab

(ii) Any other ethnic group (please specify)

3. Please indicate your sex

(a) Male

(b) Female

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