

Employment and immigration enforcement: The legal limits of what can be required from employers

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1. What legal obligations are employers under in terms of immigration checks and enforcement methods?

There are potential criminal and civil implications for employers employing migrants who have no right to work in the UK. However where employers perform the correct 'right to work' checks they will not be held liable under either civil or criminal law.

There is no legal obligation upon employers to collaborate with Home Office officials in terms of immigration enforcement. Employers are not therefore obliged to give permission of entry, to hand over the personal details of employees, or to collude with immigration officials in setting traps for workers.

Criminal violation

- Under s21 of the Immigration, Asylum and Nationality Act 2006 (amended by s35 of the Immigration Act 2016), an employer commits an offence where they employ another person knowing, or where they have reasonable cause to believe, that the worker is disqualified from employment by reason of their immigration status.
- The penalty for committing such an offence is either imprisonment (for a term not exceeding five years) or a fine, or both.

Civil penalty

- Under section 15 of the Immigration, Asylum and Nationality Act 2006 a civil penalty may be imposed on employers who employ an adult that does not have a legal right to

work in the UK. This differs from a criminal charge as civil penalties can be issued by Immigration Enforcement without having to bring the matter before a court or prove that the employer knew or had reasonable cause to believe that the individual had no right to work.

- The maximum civil penalty that the Secretary of State can impose is £20,000 per worker which is issued by way of notice.

The statutory excuse

- Under s15(3) of the Act an employer is excused from paying the penalty where they can show that they complied with the statutory requirements contained within the Act, namely that they carried out 'right to work' checks. Guidance for employers can be found on the gov.uk website in the '*an employer's guide to right to work checks*' https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/536953/An_Employer_s_guide_to_right_to_work_checks_-_July_16.pdf
- Accordingly, if a penalty notice is issued by the Secretary of State, an employer can object on grounds that the s15(3) requirements were complied with (s16).
- In order to engage the statutory excuse, the employer must take copies of the required documentation (listed in the guidance) and ensure that the correct part of the document is copied or that the document is copied in full. The date on which the check was made should also be clearly recorded. (see the Home Office 'statutory excuse check sheet' given to immigration officers in determining whether the excuse is valid).

The consequences of cooperation and non-cooperation with Immigration enforcement

Non-cooperation

- There is no obligation upon employers to cooperate with immigration enforcement outside of the duty to perform the right to work checks. Indeed para 31.8. of the Home Office's enforcement instructions and guidance states that Immigration Enforcement Officers should '*try to enlist the co-operation of employers in identifying employees who may be immigration offenders...If unsuccessful, only undertake a visit where there is apparently reliable information that immigration offender's will be found*'. Cooperation is therefore voluntary rather than mandatory.
- Where employers refuse to cooperate, Home Office officials will have to obtain a warrant to gain legal entry or use an AD letter which enables immigration officer to legally enter a business without a search warrant (s28CA Immigration Act 1971). Once the immigration officer is lawfully on the premises they can seize documentation that might be of assistance in determining whether to issue the penalty (s47 Immigration Act 2016).

- Consequently employers cannot be prosecuted for refusing to cooperate with immigration enforcement.

The benefits of cooperation

- If an employer has failed to perform the correct right to work checks and is faced with a penalty, penalty reductions can be made for cooperating with immigration enforcement. The level of discount is detailed in p.11 of the Home Office guidance '*Code of practice on preventing illegal working Civil penalty scheme for employers*'.

2. What legal duties does the employer owe to migrant workers?

The duties owed by employer to worker are complicated by a number of matters. The first consideration is the employment status of the individuals in question as greater duties are owed to employees as opposed to workers. Secondly, the legal status of the individuals is relevant as the contractual rights and duties owed to employees are nullified where the contract is illegal from inception for reasons of immigration status (*Hall v Woolston Hall Leisure Ltd* [2001] ICR 99).

The implied duty of mutual trust and confidence

This duty is owed to employees only. Because it is a contractual right, the duty is also nullified by the illegality of an employment contract where the worker has no right to work in the UK.

Employers should still act with caution however as colluding with Home Office officials might damage the employment relationship with employees who have a legal right to work in the UK. This may occur, for example, where employers set up 'arrest by appointment' meetings embroiling those with a right to work, or where employers wrongly target staff for investigation. As discussed below however, it is unlikely that a claim for breach of mutual trust and confidence would succeed in respect of immigration enforcement.

Employers owe a duty of mutual trust and confidence to employees. This means that employers should not engage in conduct likely to undermine the employment relationship without reasonable or proper cause (*Malik v BCCI* [1998] AC 20 (HL)). It is the impact of the conduct rather than the employer's intentions that are relevant in determining whether a breach has occurred. Only conduct that is likely to destroy or seriously damage trust and confidence will give rise to a breach. This indicates that actions must be fairly extreme in order to breach this duty.

There is no case law concerning claims that immigration enforcement actions have resulted in a breach of mutual trust and confidence. However it is likely that employers would argue that their actions were based on a reasonable or proper cause, meaning that no breach of the duty would occur. Employees would also face the problem of demonstrating loss as no loss would occur unless the employee resigned in response to the breach and claimed constructive or unfair dismissal. An employee with a right to work would also be highly unlikely to succeed on these grounds.

The duty of care in tort

This duty is owed to employees and workers. Depending on the nature of the claim, tortious claims can also be barred on grounds of illegality/immigration status, though such a conclusion is fact dependent.

If claims from those without the right to work are barred, the question then rests on whether employers can breach the duty of care by embroiling employees (with a right to work in the UK) in immigration enforcement proceedings.

Employers owe a duty of care to employees in respect of a safe working environment, adequate equipment and competent colleagues (*Wilson and Clyde Coal Ltd v English* [1938] AC 57 (HL)). This duty also extends beyond the physical health and safety of employees to psychiatric injury caused by stress, long hours, harassment or bullying (*Walker v Northumberland CC* [1995] ICR 702). The question is whether or not such injuries are reasonably foreseeable i.e. would the actions taken trigger any type of injury.

Where employers collude with immigration enforcement officers by setting up ‘arrest by appointment’, for example, it is unlikely that such actions would constitute a breach of the duty of care. This is because employers could easily claim that the injury:

- was not reasonably foreseeable,
- that causation is too remote,
- or that the worker has not suffered an injury (absent an identifiable psychiatric injury, no claim can be brought).
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Non-discrimination

Though all workers are protected from discrimination under the Equality Act 2010, the ruling in *Taiwo v Olaigbe* [2016] UKSC 31 confirmed that immigration status does not fall within the protected characteristic of nationality. Individuals who are targeted for reason of their immigration status are not therefore protected under the Equality Act 2010.

Essentially what this means is that it is easier for employers to justify their actions, such as setting up ‘arrest by appointment’ meetings, where the reason behind their behaviour relates to immigration status.

Employers should however proceed with caution in targeting particular members of staff as if there is any pattern which shows that workers of a particular nationality or racial or ethnic background are being targeted then this could lead to a discrimination claim.

Data protection

In the 2016 report by Corporate Watch concerning ‘Operation Centurian’ it was revealed that employers commonly hand over staff records to immigration officers including detailed personal information such as home addresses. This raises concerns regarding compliance with the Data Protection Act 1996.

Under the Data Protection Act personal data is defined as any recorded information about a living individual that can be identified from that data and other information which is in the possession of the data controller. Accordingly this would include staff records and employment files. Staff files may also contain ‘sensitive personal data’, as defined in s2, which includes, for example, information concerning the racial or ethnic origin of the data subject or the commission or alleged commission by them of an offence (such as an immigration offence). Note however that nationality is not included in the remit of racial or ethnic origin and thus falls in the general personal data category rather than that of sensitive personal data (Lord Williams of Mostyn, [Hansard, HL Grand Committee Vol.586, c.17GC \(February 23, 1998\)](#)).

The majority of employers will have to register as data controllers where they hold personal data concerning staff. Under s4(4) of the Act, data controllers must comply with the data protection rules in relation to all data held.

Under section 55 of the Act it is a criminal offence to knowingly or recklessly, without the consent of the data controller disclose personal data or information. This may apply where general managers disclose staff files without the consent of the data controller. There are a number of exceptions to this offence as set out in s55(2). This includes disclosing information for the purpose of preventing or detecting a crime s55(2)(a)(ii) or where the disclosing of information is in the public interest s55(2)(d). It is likely that disclosure for the purpose of immigration enforcement would fall under one of these two exemptions.

However where sensitive data is involved extra caution must be taken as the disclosure must conform with the requirements of Schedule 2 of the Act meaning that explicit consent must be gained prior to disclosure. Explicit consent involves knowledge of the specific processing details and the purposes for which the information is being processed.

Consequently, employers should act with caution before handing over employee or worker files to immigration enforcement officials, particularly where such files contain sensitive personal data.

3. Summary and elements of best practice for employers

As outlined above, there is unlikely to be any good legal claim for individuals with no right to work in the UK, though there is the possibility of a discrimination claim (depending on the facts) or a claim under data protection law (depending on what information is given to the immigration services).

In most circumstances, it is also unlikely that claims arising from existing employees with a right to work would succeed concerning immigration enforcement and employer collusion.

Despite this, to ensure compliance with the law, elements of best practice for employers should include the following.

1. Employers must conduct the correct right to work checks in line with government guidance.
2. Once these checks are in place, and conducted properly, employers cannot be held liable under civil or criminal law if it is found that certain workers do not have the right to work.
3. Employers are under no obligation to collude with immigration officials in terms of enforcement as cooperation is voluntary. This might involve handing over documents or information, or setting up ‘arrest by appointment’ meetings to trap workers.
4. Employers should be aware that immigration enforcement actions risk damaging the employment relationship with employees who have a right to work in the UK.
5. Employers should act with caution in colluding with Home Office Officials as claims might arise over personal data and discriminatory behaviour.

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