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STRENGTHENING AND SIMPLIFYING THE CIVIL PENALTY SCHEME TO PREVENT ILLEGAL WORKING: CONSULTATION DOCUMENT – 9 JULY 2013

RESPONSE BY THE EMPLOYMENT LAWYERS ASSOCIATION

20 August 2013

INTRODUCTION

i. The Employment Lawyers Association (“ELA”) is an unaffiliated group of specialists in employment law, including those who represent both employers and employees. It is not our role to comment on the political merits or otherwise of proposed legislation; rather we make observations from a legal standpoint.

ii. ELA’s Legislative and Policy Committee consists of barristers and solicitors (both in private practice and in-house) who meet regularly for a number of purposes, including considering and responding to proposed new laws.

iii. Various of our members engage in advising clients on both employment and immigration matters with a day-to-day dual employment and immigration practice.

iv. Consequently a working group was set up under the Joint Chairmanship of Robert Davies of Dundas & Wilson LLP and Ilda de Sousa of Kingsley Napley LLP ("the Working Group") to consider and comment on the Home Office Consultation Document: Strengthening and simplifying the civil penalty scheme to prevent illegal working ("the Consultation Document"). A full list of the members of the Working Group is attached.

v. The Working Group considered that it would be more appropriate to provide narrative comments in order to set in context its responses and so has used the option for the format of responses summarised at the third paragraph of the **Enquiries and responses** section of **Annex B** of the Consultation Document (at page 18).

Specific 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? (Page 10 Consultation Document)

The maximum level of a civil penalty is a policy issue and as such the specific amount is not the principal focus of our response. We think it is important to highlight that it is unclear to the Working Group what is meant by the word 'occasion', as it could refer to one incident when several illegal workers are identified by Home Office staff arising out of a consistent administrative error on the part of an employer, or, on the other hand, to each illegal worker identified. For example if an employer is caught with two illegal workers at the same time, who were recruited on different dates is that a breach on one occasion or more than one occasion?

Further, if an inspection is carried out and one illegal worker is identified and then at a later date it emerges there was a second who had been overlooked during the inspection, when the second illegal worker is identified will that amount to more than one occasion? Or can an employer assume that if they have been audited they are starting with a clean slate in respect of existing workers?

The principal concern identified by the Working Group is that although the concept of 'rogue employers' who deliberately employ illegal workers for exploitation and other unlawful purposes is identified in the Home Secretary's Foreword as being the main target of the reforms, it is by no means clear from the remainder of the Consultation Document just how broad that category is intended to be. For example, Paragraph 21 appears to point to two ends of the spectrum: paraphrasing, serious repeat offenders and legitimate employers who may not realise that they are required to carry out checks or do not understand the various immigration documents presented and have made a technical error. In our view there is a risk that Question 1 could be read as automatically deeming any employer as a "rogue" employer if it does not fall within the "first offender" category.

Although as we say, the amount of the maximum penalty is a policy consideration, it appears to us that the statistics summarised at Paragraph 13 of the Consultation Document suggest that a penalty of £10k or £20k per illegal worker will not make any difference to a truly rogue employer since the rogue employer has no intention of paying the penalties and will simply close down a business.

We consider that it would be disproportionate to apply a blanket rule to the effect that if an employer breaches the right to work checks on more than one occasion, a maximum civil penalty of £20k per illegal worker should be levied. Our view is that it would be proportionate to allow the circumstances of each case to be taken into account. There clearly should be a different penalty for those employers who deliberately overlook the right to work checks and those who carry out right to work checks and simply get it wrong despite taking reasonable steps to comply. A consistently applied penalty of £20k appears disproportionate in these circumstances.

2. Should the calculation of civil penalties be simplified as proposed in the consultation? (Page 12 Consultation Document)

The experience of members of the Working Group is that employer clients would welcome a more streamlined/simplified regime, but it is important that an appropriate exercise of discretion be maintained within the process as each and every scenario may well be different. Rigidity in approach may be counter-productive as mentioned in Response 1.

One approach towards simplification which was suggested by a number of members of the Working Group was for the use of a starting point of an initial flat fine of, say, £5,000 per worker and then to implement increases for aggravating factors in the event of culpability by the employer, for example failure to actively cooperate/report the illegal working/subsequent offences. We recognise that this is a policy matter and ultimately a question of emphasis as to whether the introduction of "more robust measures … and sanctions more commensurate with the harm they cause…[Paragraph 5 of the Consultation Document]" is better achieved through the principle of identifying mitigating factors to reduce penalties as opposed to identifying aggravating factors that increase the level of fine.

We would also suggest that further guidance is given on what is required by “active cooperation”, as, without more, it is inevitably a subjective test and the Home Office should set out more precisely what is required in order to enable employers to show such cooperation in order to achieve a £5,000 reduction in the civil penalty. In doing so it is important to recognise that employers may on occasion face conflict between their obligations under employment law and the actions the Home Office may like them to take immediately and suggests further clarity is required about exactly what would be expected of employers. If an employee were to be dismissed for “illegality”, but were later found to have the right to work in the UK, then the employer could be liable for unfair dismissal. Similarly, even where an employer has "some other substantial reason" for a dismissal, such as a third party requirement, or a reasonable belief on reasonable grounds that an employee is working illegally, the employer still has to go through a fair procedure. This may involve suspending an employee on full pay whilst enquiries are made, rather than dismissing them immediately.

Paragraph 31(ii) refers to ‘the provision of prompt and accurate information’ by the employer, but ‘prompt’ and ‘accurate’ are also terms which are subject to interpretation. As mentioned above, employers need to take account of employment law duties/liabilities at the same time as cooperating with the Home Office and this ought to be factored in to the preparation of guidance.

The Working Group understands that the most common way that illegal working is detected is not by an inspection by the Home Office but when an employer undertakes document checks and discovers that an individual does not have the right to work in the UK. Therefore we are not persuaded by the argument in Paragraph 32 of the Consultation Document for the removal of partial checks as a mitigating factor. We consider that it may in fact be counter-productive to the overall aim of reducing instances of illegal working to do so. The Working Group considers that it would be beneficial for partial checks to be retained as a mitigating factor. In our experience not all employers are familiar with the necessary checks and many do struggle with these, particularly start-ups and small businesses.

Consequently, we think it would be helpful if guidance was issued to the effect that if an employer discovers that an individual does not, contrary to its original assessment, have the right to work in the UK, and the employer takes action to terminate their employment as soon as reasonably practicable (within the confines of UK employment law) and makes a report to the Home Office,

no civil penalty would be expected to apply in such circumstances. This is unclear at present and gives employers a great deal of concern when such matters arise.

3. Should a warning letter no longer be issued for a first time breach of the right to work checks? (Page 12 Consultation Document)

In our view the answer is no, ultimately because it is unhelpful to take a "one size fits all" approach. As mentioned above, the Consultation Document recognises that there are some rogue employers who deliberately employ illegal workers in order to evade liability for minimum wage and PAYE/national insurance contributions. However, there is likely to be a much larger category of employers who have failed to carry out the correct checks for other reasons such as a failure properly to understand the system or because of the difficulties presented by the number of possible documents that give employees the right to work in the UK.

It seems unfair and disproportionate to penalise all employers in the same way, irrespective of administrative resources and experience, by removing the possibility of a warning letter being issued for a first time breach. This is placed in particularly sharp-relief in the context of SMEs who may not have any HR personnel (or who may have a high turnover of HR personnel), and where the breach falls into the realm of the technical rather than the deliberate breach.

The current legislation does include powers to allow the Home Office (or equivalent) to pursue rogue employers for criminal liability if they are knowingly employing illegal workers.

This amendment is more likely to penalise those employers that have failed to carry out checks fully than penalise or discourage those rogue employers who are unlikely to be deterred by the removal of the option to issue a warning letter for a first offence.

Please refer to our comments in relation Paragraph 32 in our response to Question 2. The detriment that will be suffered by those employers making genuine attempts to carry out checks would, in the view of the Working Group, outweigh any potential benefit of removing this option. Doing so must surely have the effect of dissuading employers from self-reporting, for fear of risking a civil penalty for what might be a first-time offence.

It may be preferable to revisit this idea when the proposed automated verification service is introduced which will simplify the documents that the employer has to check and will mean that there are fewer reasons why the employer has failed to properly carry out 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? (Page 12 Consultation Document)**

   Yes.

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? (Page 12 Consultation Document)

- £15,000
- £12,000
- £10,000

As mentioned in our response to Question 1, the ultimate determination of such amount is a policy matter and as such it is beyond our remit to make a suggestion as to what such figure should be.

We consider that the key question is which category of employer is being focused upon for the purposes of such deterrence. Whether the penalty is £10,000, £12,000, £15,000 (or £20,000) these are significant amounts for most employers, in particular SMEs, individuals and start-up companies.

It is the experience of members of the Working Group who deal with SMEs that genuine employers will usually not be aware of the level of a civil penalty and how the sliding scale is applied, until after the event. (In our experience, most employers, if they have any awareness, think that the current penalty is £10,000 as this is the figure most commonly used by the Home Office in its press releases.)

Taking into account the statistics used in Paragraph 13 of the Consultation Document, the number of civil penalty notices issued since February 2008 relative to the number of employers within the UK would suggest that the current figure has functioned as an effective deterrent, in addition to the reputational considerations that come into play for larger employers.

A rogue employer (of the type described in the Foreword) will not be deterred by the penalties since it has no intention of paying them in any event and it may therefore be disproportionate to focus on an increase if the main aim is to deter such employers if it means that less culpable employers are caught in the fall-out, so to speak.

It would be helpful to understand whether the Home Office has been able to analyse the categories of the civil penalty notices and how many of the notices which were within the category of the £24 million which have been paid were repeat offenders as that may help inform any decision to alter the starting point of the first civil penalty.

6. Would reducing the number of acceptable documents simplify the right to work checks? (Page 13 Consultation Document)

In summary the answer is a qualified yes.

The qualification is that, until such time as the Government has issued biometric resident permits (BRPs) to all migrant workers, it may be difficult materially to reduce the number of acceptable documents. Clearly, relying solely on the BRP would be prejudicial to a migrant worker who is permitted to work but does not have a BRP. The introduction of a totally automated verification service is unlikely to come into force for a number of years. There are a significant number of routes into the UK (entry clearance) which currently do not require BRPs so it is difficult to see when this will be achieved.

It would be helpful to understand how the Home Office would intend to simplify the list. For example, is it intended to prepare a basic list of the most common documents that will satisfy the right to work checks, which would be supplemented up by a comprehensive secondary list of suitable documents that the Home Office can assess, on a case by case basis?

If the Home Office does reduce the number of acceptable documents this will need to be communicated effectively to employers.

Also, given that a significant proportion of migrant workers are students, there is no way for the employer to check whether a student is working in excess of 20 hours per week if he is working for one or more employers. There is also no means for the employer to establish if the student is attending his course, even if he registered at the beginning of the term. It would therefore seem more practical for the employer to write to the educational establishment to confirm registration/attendance and for the educational establishment to notify the employer if the student ceases to attend.

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? (Page 13 Consultation Document)

In summary the answer is a qualified yes. Whilst we support work towards the biometric residence permit being the main acceptable document for Right to Work Checks, the Home Office would need to accelerate their issue to all applicable migrants.

We note that a large number of people who have the right to work in the UK are not required to have BRPs (such as family members of EEA nationals), so we do not consider that the use of BRPs will be the sole answer. For example, it does not help to deal with issues regarding students working 20 hours a week at more than one employer.

If BRPs are to be an increased focus we would anticipate that the Home Office will implement procedures to ensure that BRPs are accurate when they are issued and to reduce significantly delays in the completion of the process, as this would otherwise hold up an individual's right to start work.

It is also the experience of the Working Group generally that if BRPs are lost, the Home Office is currently taking a long time to replace them.

We would suggest that individuals are first asked for a BRP and then, if they are unable to produce this, they are permitted to provide another document from a longer list of documents.

8. Would a follow-up check linked to the expiry of permission to stay in the UK reduce the burden on employers? (Page 14 Consultation Document)

Yes, provided it is made clear that there will be no liability for the employer if prior to the expiry date, the migrant workers' circumstances change so that they are no longer entitled to work in the UK. This would apply in particular to dependants of migrant workers.

Employers are not infrequently given inaccurate information regarding expiry dates when they check with the employers' helpline. There can be very lengthy delays in updating the database, and it is the experience of members of the Working Group that this is one of the reasons that has led to Capita PLC's phoning and texting people who are allegedly in the UK without lawful leave but all too often in practice are British citizens or persons with leave. The construction and administration of an appropriate data base is clearly an important consideration in this regard

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? (Page 16 Consultation Document)

In the case of a rogue employer of the nature described in the Foreword members of the Working Group accept that there is some argument for directors and partners to be held jointly and severally liable for civil penalties in the event the business has not made payment.

However, we would be generally cautious about “piercing the corporate veil” in other, less culpable circumstances: the civil courts are generally unwilling to “pierce the corporate veil” unless fraud has taken place.

In addition we would highlight that if the company knowingly employs legal workers there are already criminal sanctions that may be applied to relevant directors and officers..In addition, there are proceedings available under UK company law to enable the disqualification of directors and this may be more effective and proportionate means of preventing directors from simply closing down one company to avoid a civil penalty and then opening up another company in its place.

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. (Page 17 Consultation Document)

The Working Group considers that there is a risk that the proposals would have a negative impact on individuals based on race (including nationality, ethnic or national origins, or colour).

We consider that certain of the proposals would have a negative impact on individuals based on the protected characteristic of race because, particularly if the proposal outlined at Question 9 for the introduction of joint and several liability of individuals, that employers may simply decide on a risk management basis not to employ any foreign nationals so as to avoid these risks, notwithstanding the potential discrimination risk.

We also consider that certain of the proposals would have a negative impact on individuals based on the protected characteristic of race, because if there is a preference for BRPs when undertaking document checks, employers may be more reluctant to employ family members of EEA nationals who do not have a BRP.

Appendix of Contributors

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