

- Individuals should not be permitted to commence employment until after the employer has seen and copied the documents required and established the statutory excuse. If the individual has not worked for the employer, the employer cannot be liable for employing an illegal worker.
- If an employer's Sponsor's Licence is withdrawn, all sponsored employees will become illegal workers.
- If an existing employee is found to be an illegal worker, it should be possible to dismiss them fairly on the basis that it would be illegal for them to remain in employment. Specific advice should be obtained before taking any steps to dismiss.

## TUPE implications

The Act also has an impact on corporate transactions, particularly those to which the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") apply. The new employer is best advised to carry out the required document checks for all employees who will transfer to their employment under TUPE or at least to ascertain that checks have been carried out by the seller. The Act allows the checks to be carried out after the transfer provided that they are completed within 28 days. Acquiring employers should deal in the business sale agreement with the possibility that any transferring employees could be illegal workers.

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**Disclaimer:**

*Please note that this summary should not be applied to any particular set of facts without seeking legal advice.*



# employing illegal workers

Sanctions under the Immigration Asylum  
and Nationality Act 2006

Fact Card

# The Act

The Immigration, Asylum and Nationality Act 2006 (“the Act”) came into force on 29 February 2008. The “old” regime under the Asylum and Immigration Act 1996 (“the 1996 Act”) still applies in relation to employees who commenced employment on or before 28 February 2008. This Guide relates to employees who commenced employment on or after 29 February 2008.

It is unlawful to employ an individual who is not entitled to work in the UK (an “illegal worker”). Employers are required to carry out checks of certain prescribed documents to ensure that all new employees are entitled to work in the UK. In addition, further periodic checks must be carried out in certain circumstances.

# The Offences

Employers may commit a civil offence if they negligently employ an illegal worker. If found liable, a fine of up to £10,000 per illegal worker may be imposed. In addition, employers holding Sponsor’s Licences under the Points Based System may have their licence downgraded or withdrawn.

Employers may also commit a criminal offence if they knowingly employ an illegal worker. If convicted, employers may be sentenced to up to two years in prison and/or required to pay an unlimited fine. Further comment on the criminal aspects of the Act is outside the scope of this Guide.

# The Statutory Excuse

Employers may escape liability for the civil offence if they can establish a “statutory excuse” by checking certain original documents before an individual starts work for them. There are two prescribed lists of acceptable documents, rather uninspiringly called “List A” and “List B”. Which list applies and which documents from that list need to be checked will depend on the individual’s circumstances.

List A applies to individuals who are not subject to immigration control or have no restrictions on their stay in the UK. List A documents include:

- A passport showing that the individual is a British Citizen or has the right of abode in the UK; or
- A permanent residence permit or other document indicating permanent residence issued by the Home Office or the UK Border Agency (“UKBA”); or
- A birth certificate issued in the UK, giving the name of at least one parent provided that the individual can also produce an official document showing their National Insurance number and name.

List B applies to individuals who are subject to immigration control or whose right to stay in the UK is limited. List B documents include:

- A passport endorsed to show that the holder is allowed to stay in the UK and do the work in question, provided that it does not require the issue of a work permit or sponsorship under the Points Based System; or
- A work permit or other approval to take up employment issued by the Home Office or the UKBA, if produced in combination with a passport or similar document endorsed to show that the holder is allowed to stay in the UK and is allowed to do the work in question.

# The required document checks

Employers must check original documents and keep photocopies on the individual’s personnel file. If the individual is only able to produce documents from List B, the employer must make further periodic checks of up to date original documents from List B at least every 12 months during employment, or until the individual can produce documents from List A. Copies of all documents obtained must be retained for at least two years after employment has ended.

Although employers are not expected to make a judgment as to whether the documents produced are forgeries, they must take reasonable steps to check the validity of the documents. For instance, employers should check that the documents have not expired and that any photograph matches the individual’s appearance.

If the individual produces documents that are in different names, employers should request further documents to support the reason for the difference, such as a marriage certificate or decree absolute. Without further supporting or explanatory documents, employers would not have the benefit of the statutory excuse.

# The employment issues

- To minimise the risk of race discrimination, employers should carry out document checks on all new employees, regardless of origin, to ensure that no employees are treated differently.
- Offers of employment may be made conditional upon satisfactory document checks under the Act. If an individual fails to provide documents that establish that they are entitled to work in the UK, they would not be able to commence employment. The offer could then be withdrawn or the individual’s start date postponed to allow further time to produce satisfactory documentation or investigate the individual’s entitlement to work or remain in the UK.