

CBI response: Prevention of Illegal working – Immigration, Asylum & Nationality Act 2006

1. The CBI welcomes the opportunity to respond to the Border and Immigration Agency's consultation. CBI members include 200,000 businesses based in the UK, including 80 of the FTSE 100 and about half the FTSE 350.
2. The CBI has welcomed both the points-based system for migration and the new illegal working strategy. We recognise the national importance of a managed migration system and the role it has to play in maintaining a successful, secure society with strong economic growth. As part of this, CBI members are strongly opposed to illegal employment. Illegal employment exposes legitimate firms to unfair competition on price, but it also exposes illegal workers to working conditions in which their employment rights may not be respected. Action to address this problem is therefore welcome, especially where it is properly targeted on those firms who deliberately use illegal workers. The key points which CBI members wish to make in response to this consultation are:
 - **the government must focus its effort on enforcement against knowing users of illegal workers and people traffickers**
 - **employers acknowledge the need to check their employees' right to work in the UK – but this must be done flexibly**
 - **employer support for the new regime – especially civil penalties – rests on the delivery by government of a proper support network**
 - **once such support is available, the proposed civil penalties system is an appropriate start – but more can be done**
 - **there are some unanswered questions regarding the sponsorship register on which CBI members would welcome further details**
 - **these regulations should provide a settlement on illegal working – the UK should opt-out of the European Commission package on illegal working which adds little at a high cost to business and government.**

The government must focus its effort on enforcement against knowing users of illegal workers and people traffickers

3. CBI members have always supported the creation of the new criminal offence for knowingly employing illegal workers. It has long been members' position that the major failing in the UK's approach to illegal working has been poor targeting of existing legislation on rogue employers, rather than a need for further powers. This belief is based on well-established evidence that suggests that the worst

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cases of illegal working are found among rogue employers in a few key sectors of unskilled labour shortage. Tackling this problem, rather than imposing further costs on all employers – which rogues will only seek to avoid – must remain the government's key focus. The establishment of the new criminal offence helps to target rogue employers in these key sectors, and on this basis it is a welcome development. Its enforcement should be the agency's priority.

4. For the introduction of this new power to be worthwhile, it is essential that other elements of the new system – such as the civil penalties regime – do not become distractions for enforcement. Employers expect tough targeted action against true rogues, with funding and manpower focused on these areas. Funding should flow to this area from the recent rise in visa fees – from £85 to £190 for the basic visa, with others rising 10-30%. This was presented as a way of funding the £100m increase in the enforcement budget that was necessary as part of the new enforcement strategy.
5. On the subject of director disqualification, CBI members understand the desire of the agency to target true rogues. Whether disqualification is an appropriate tool to achieve this is unclear. In many cases the business organisations that are most likely to offend in this regard are small and the status of being a “director” is one of organisation, not of management. It may be that, for this reason, disqualification is ineffective. CBI members are not opposed to the use of disqualification in extreme cases where a prosecution has been successful for the new offence of knowingly using illegal workers, and we would recommend a method similar to that used by the OFT; making a case to BERR for disqualification.

Employers acknowledge the need to check their employees' right to work in the UK – but this must be done flexibly

6. Section 8 of the 1996 Asylum and Immigration Act introduced the requirement for employers to check prospective employees' right to work before the commencement of employment. In some firms, this burden is very onerous – one smaller CBI member supplies field marketing staff and estimates that the checking regime introduced by the 1996 Act costs them £162,000 annually. While this is an extreme example – the firm needs a large number of short-term unskilled staff for promotions – the principle that identity checking is a major burden on business is shared among CBI members. In large part this cost is accepted, however, as employers recognise they should take some share of the financial and administrative responsibility for ensuring legal working.
7. The new powers introduced under the Immigration, Asylum and Nationality Act 2006 build on the existing requirement for employer checking by adding the necessity to check the status of those with time-limited permission to work periodically during employment. This additional burden is something which employers are willing to accept principle, if they can rely on greater levels of support from the Border and Immigration Agency. CBI members raised several points about ensuring this approach is both effective and cost efficient for business.
8. The first of these relates to the need for a more efficient, consistent, free service to support them in their checking activities – a subject which is dealt with in the next section. One of the key aspects of such a system should be the

development of an account management approach and specific case working by BIA.

9. Secondly, firms have asked CBI to report their desire for a flexible application of the requirement to periodically review the right to work of time-limited staff. Larger firms with complex HR software systems have the capacity to monitor the end dates of work permits and check shortly before their expiry that renewal and subsequently approval has taken place. This should be sufficient to comply with the regulation for these firms. For smaller firms without the capacity to do this, a check on employment status at periods of no less than 12 months should be sufficient to comply with their responsibilities. All sizes of firms pointed to the fact that simplification of passport stamps could help checking. Stamps could, for instance record the right to work or not, and the number of hours if appropriate, as well as the expiry date.
10. Thirdly, firms would like to ensure that a level of flexibility is applied where checks have been carried out. In particular, many members point out that identity checking takes place in the field, often by the line manager. One member pointed out that they are well-positioned to spot false documents as they employ a large number of migrants, but this often does not take place until an internal audit by specialists after the employee has begun work. A period of “grace”, where a line manager has checked documents but forgeries are suspected a short time later by specialists in the HR team would be valuable to members, especially as enforcement officers are likely to want the firm to retain the illegal workers on their staff until enforcement officers arrive. Summary dismissal in such a situation is unattractive to employers, due to possible discrimination claims if documentation that is suspected to be fraudulent turns out to be genuine when checked by enforcement officers.
11. Fourthly, BIA should issue clear guidance on the expectations of the authorities for checking when an employer takes on new staff under TUPE regulations. This could amount to a “due diligence” approach of checking that the former employer had checked right to work and including new staff in the new employer’s regular checking regime, or a one-off check if the former employer had not checked properly. Clear guidance is required, however, as CBI members point to TUPE as a key way in which people with good checking systems can be exposed to inadvertently hiring illegal workers.

Employer support for the new regime – especially civil penalties – rests on the delivery by government of a proper support network

12. By far the most important consideration for employers in undertaking enhanced checking is that they can rely on authorities to back up their work and data collection. Members have been frustrated by the lack of consistency of advice offered by the current helpline and the fact that acting in line with advice given is not a defence. They are equally frustrated by delays in the processing system and the fact that the authorities communicate only with the applicant – which will pose problems for the new checking requirements. Employer support for the new regime – especially civil penalties – rests on the delivery by government of a proper support network that ensures good employers do not end up paying civil penalties because of the failures, or lack, of advice.

13. Foremost among areas for concern is back-up from employers for their work. CBI members would like the new enhanced verification service to be a free, broad-based service giving consistent information on individuals' right to work and the checks employers should make. In particular, they would appreciate the ability to get written confirmation of advice received to ensure that they have clear guidance, which is verifiable at a later date. Over time this service should evolve with the online PBS portal and the identity cards scheme to give employers greater ability to check specific individuals' right to work.
14. Clear and supportive response is equally important when an employer calls the authorities with a case of illegal working or the discovery of false documents. CBI members report their disappointment at response times to calls of this type.
15. Secondly, members have been frustrated by delays in renewals. At present, many employees receive a holding letter from the authorities while their renewal application is dealt with. This is sufficient to allow them to continue working. If their application is turned down, however, only the individual is told – they then have little incentive to tell their employer and can choose to continue relying on the holding letter. Under the new system this would open the employer up to liability. Employers would therefore appreciate some form of system for informing them in these circumstances to be put in place.
16. There is also a clear case for greater information to be passed to firms about how to spot forged documents. Some firms have had training from the agency in this and other areas, and are very complementary about it. For a large number however, more information is needed. CBI members recognise the need to balance telling employers about trends in forged documents and the security needed to ensure enforcement against forgers, but a better balance could be struck, offering firms more information.

Once such support is available, the proposed civil penalties system is an appropriate start – but more can be done

17. The CBI opposed the civil penalties regime at the time of the Immigration, Asylum and Nationality Bill because we believed civil penalties would be a distraction from the main challenge of dealing with true rogues, might raise the cost of compliance and create a retreat from employing migrants. At that time we asked the Home Office to ensure that a yellow card system was put in place to ensure that the system took account of genuine mistakes by firms.
18. In light of the proposal for a yellow card system, and the undertakings given by the BIA to develop enhanced employer support and to focus on true rogue employers, CBI members accept the introduction of civil penalties. We also welcome the inclusion of a “written warning” in the hierarchy of enforcement. Members' support for the system continues to rest, however, on the fact that enforcement officers will not standardly take the “easy option” of going after the mistake by a law-abiding firm over tackling the rogue. They also point to the new enhanced employer support system significantly reducing the potential for firms to be unclear about their obligations as a key condition for employer support.

19. CBI members support the tiering of the civil penalty set out in the consultation document as an appropriate way to target repeat offenders progressively. Members recommend that this is the system employed.
20. As regards the level of the penalty per worker, members did not have a strong opinion. Some noted that both the proposed levels of £5,000 or £10,000 are somewhat higher than the proposals at the time of the Bill. Many commented that, while a fine level of £10,000 was not necessarily problematic, they did not agree that the full cost of removal should be used to decide the fine, not least because in many cases a failure of entry control has taken place.
21. Members' main concern regarding the level of the penalty was the total penalty that might be levied rather than the per worker fine. As the CBI emphasised at the time of the Bill, the civil penalty regime is for firms who employ an illegal worker through negligence or ignorance, and should be designed to help those firms comply with the law. It is in no-one's interest for the civil penalty to be set at a level that significantly affects that business in terms of ongoing viability. For that reason, it is appropriate that a cap is set on the total level of the fine. This may be a total cap on number of employees charged for (for instance 2 at the £5000 level, or 1 at the £10,000 level) or an overall cap calculated on the ability of the business to pay. CBI is happy to engage with BIA on how to make this work most efficiently.

There are some unanswered questions regarding the sponsorship register on which CBI members would welcome further details

22. CBI members have been enthusiastic supporters of the points-based scheme and therefore of the sponsorship approach. As yet, however, there is little clarity about the rules under which membership and grading on the register will be established. CBI members would appreciate further clarity in this area. One key point is that it is important for the register to remain a migration tool, with ratings decided by the *bona fide* nature of employers and their record on migrant employment.
23. The CBI has been concerned by proposals to reduce the rating or remove firms from the sponsorship register for other reasons, for instance infractions of employment law. While information sharing on transgressions should be passed between enforcement agencies to aid risk-based regulation, a system which punishes employers for (often accidental) transgressions in areas unrelated to migration by denying them the ability to recruit a migrant is completely inappropriate, and would lead to a situation where migrant workers were treated preferentially to the domestic labour force. The CBI would appreciate further clarification on how the system will work and is happy to engage with BIA on this subject.

These regulations should provide a settlement on illegal working – the UK should opt-out of the European Commission package on illegal working which adds little at a high cost to business and government

24. Employers are concerned by the implications of the recent European Commission package on sanctions for illegal working, which is designed to ensure all Member States are taking action to combat illegal working. In the United Kingdom, the Directive is largely unnecessary as the 1996 and 2006 Acts

will put in place a comprehensive system. Coupled with the advent of the points based system, UK firms have taken on significant additional burdens in this area recently and would not welcome further action. CBI members feel strongly that the government should not opt-in to this package, which would impose further burdens on business for no additional gain. Furthermore, the wording of some parts of the Directive, around reporting, inspection, the definition of employment, and joint and several liability would impose unnecessary costs and unsuitable regulation on business and government, tie the hands of enforcement officers and damage the UK labour market. CBI members regard an opt-out as essential and call on Home Office and BIA to support this position.

**Human Resources Policy Directorate
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