

Attachment D

Summary of employer sanctions in other countries

Summary of the situation in the UK

The offence

It is a criminal offence to employ a person aged 16 or over who is subject to immigration control unless:

- that person has current and valid permission to be in the UK and that permission does not prevent him or her from taking the job in question; or
- the person comes into a category where such employment is otherwise allowed.

Penalty

Prosecutions are dealt with in the local magistrates' court. The maximum penalty is currently £5,000. An employer can be charged in respect of *each* person being employed illegally. When setting the fine, the court takes into account the seriousness of a particular offence and the financial circumstances of the employer. It may also take into account any previous convictions, particularly any for the same offence.

The defence

If the employer can establish a defence he or she will not be convicted even if it turns out that a person was employed without permission to work. The defence is valid unless it can be shown that the employer knew that the person was not entitled to work at the time they were recruited.

In order to establish the defence the employer needs to ensure that, before the person started work, he or she:

- saw a document which appeared to be a document from the 12 types listed and which appeared to relate to the person intending to be employed; and
- either retained the document or make a copy or record of it.

The only **exception to the defence** is where the prosecution can show that the employer *knew*, when the person started work, that the employment would constitute an offence (ie actual knowledge).

Enforcement efforts

The legislation imposing employer sanctions was introduced in 1996 by the previous government and was opposed by the present government, when they were in opposition. At the time of the passage of the legislation assurances had been sought that:

- it would be used only to punish major offenders in cases of serious abuse;
- it would not be used to penalise the small employer who had made a genuine mistake; and
- before any prosecution took place, written warnings would be issued to the offenders, to ensure that employers are aware of the law and can take steps to remedy their recruitment practices where these had been shown to be effective.

Non-government and welfare agencies also expressed their concerns that the imposition of sanctions and the measures employers are obliged to take in order to establish their defence from prosecution are likely to impact disproportionately upon, and be offensive to, ethnic minorities. Their concerns have been countered by assurances that immigration and prosecution officers deal with cases in a sensitive way and with warnings being issued to first-time offenders, prior to prosecution being considered.

The principal offenders have included employment agencies, particularly those supplying labour to cleaners to factories, hotels and officers, and “gang-masters” supplying labour to farmers, nurseries and market gardens. Immigration officials have served numerous written warnings on employers.

Only one company has been prosecuted under the provisions, since they came into effect, and three other cases are in progress. The company prosecuted pleaded guilty to each of the nine charges (one for each offender) and was fined £500 on each count (a total of £4,500) and ordered to pay the costs of prosecution. Although more cases are being considered for prosecution, a senior officer needs to approve the decision to prosecute and is charged with keeping Ministers informed.

Advice to employers

Information is provided to employers in the publication “Prevention of illegal working: Guidance for employers”. A “help-line” service is also provided. Employers are advised that original documents should only be retained in limited circumstances and for very short periods. Copies may include photocopies or scanned copies. While for most documents a full copy should be made, in the case of passports, only the front page(s) containing personal details and any page(s) showing the endorsement which confirms the holder is permitted to work. Copies are to be retained for at least six months after the person has left employment.

Employers are advised that if they use a recruitment agency, the employer - not the agency - will be liable, and hence the employer should undertake the checks themselves.

Employers are also advised that they are not liable for:

- the employees of a contractor undertaking work on his or her behalf, such as workers provided by an independent “gang-master” to pick crops;
- self-employed people or freelancers (unless the actual employment relationship suggests otherwise); or
- employees obtained from an employment agency, who remain employees of the agency.

Employers include an individual, partnerships or a company. Where the employer is an organisation any director, manager, secretary or other office holder; or person purporting to act in such a position, may be guilty of the offence. These individuals are guilty of the offence if it is proved that the offence was committed with their consent or connivance or can be attributed to any neglect on their part.

UK list of specified documents

The list of specified documents includes:

- a **passport** or travel document:
 - describing the holder as a British citizen or having a right of abode in or readmission to the UK or the holder as a British Dependent Territories citizen;
 - endorsed to show that the person named is exempt from immigration control, or has current or indefinite leave to enter or remain in the UK, or has no time limit on his or her stay and is not precluded from taking the employment in question; or a letter issued by the Home Office confirming that the person named has such status; or that holder has a current right of residence in the UK as the family member of a name national of a State which is a party to the European Economic Area Agreement and who is a resident in the UK;
 - **national identity card** issued by a State which is a party to the European Economic Area Agreement;
- a **certificate of registration or naturalisation** as a British citizen;
- a **birth certificate** issued in the UK or Republic of Ireland;
- a UK **residence permit** issued to a national of a State which is a party to the European Economic Area Agreement;
- a **letter** issued by the Immigration and Nationality Directorate of the Home Office indicating that the person named in the letter is a British citizen or has permission to take employment;
- **documentation** from Inland Revenue, the Benefits Agency, the Contributions Agency or Employment Service **stating a national insurance number**; or
- a **work permit** issued by the Department for Education and Employment or, in Northern Ireland, by the Training and Employment Agency.

Summary of the situation in Canada

The temporary and permanent employment of most foreign worker requires validation by a Human Resources Canada Centre (HRCC). The HRCC considers the effect on the labour market of hiring a foreign worker, the conditions of employment and the transfer of knowledge to and training of Canadians, as well as the competitiveness of the employer in the international market place. The assessment focuses on whether any Canadians are willing or able to do a particular job, not whether there are any Canadians with the skills to do the job. This approach allows Canadians to sponsor relatively low skilled workers from overseas. Canada also has reciprocal agreements with other countries (eg Mexico) which allows large scale entry of low paid agricultural workers. As the conditions of their employment are unpalatable to most Canadians, the employment of illegal workers in this sector is largely unnecessary.

A small number of foreign workers are admitted to work on approved projects that do not require validation of their offers of employment. All workers must quote their Social Insurance Number (SIN). The SIN allocated to a foreign worker has a discrete prefix identifying the worker as such.

The offence

Every person who knowingly employs any person, other than a Canadian citizen or permanent resident, who is not authorised to be employed is guilty of an offence.

Penalty

For the employer: An employer guilty of this offence is liable:

- on conviction on indictment, to a fine not exceeding \$C5,000 or to a term of imprisonment not exceeding two years; or
- on summary conviction, to a fine not exceeding \$C1,000 or to a term of imprisonment not exceeding six months or both.

A person *knowingly* employs a person who is not authorised to work, where by the exercise of reasonable diligence, he or she would have known the person was not so authorised.

For the employee: Employment is defined as “any activity which a person receives or might reasonably be expected to receive valuable consideration”. A person ceases to be a visitor if they engage in work without authorisation and become subject to a departure order or deportation. A person who has ceased to be a visitor, and who remains without written consent is guilty of an offence and may be fined up to \$C5,000 or a term of imprisonment not exceeding two years, or both. The penalties are significantly lower where there is a summary conviction, rather than a conviction on an indictment (ie prosecution before a court) with a maximum fine of \$C1,000 and/or six months imprisonment.

The defence

The exercise of reasonable diligence by an employer is a defence. The sighting of a SIN card does not discharge the employer's duty because there is no guarantee that the bearer of the card is the person specified on the card. Counterfeit, duplicate and "loaned" SIN cards are common. If there is reason to suspect the authenticity of the SIN card the employer should check with the Canadian Employment Centre (CEC).

The SIN cards of all non-citizens and non-permanent residents of Canada start with the number "9", which is intended to flag to the employer that further checks are needed (ie the employer needs to ask the employee to provide a copy of their employment authorisation letter). It should be noted that there is no photograph on the SIN card, so in practice the potential employee need only be able to produce another document with the same name on it, if asked by an employer.

Enforcement efforts

The legislative sanctions have not proved a useful weapon in discouraging employers from employing workers who do not have authority to work. This is not because the legislation is unenforceable but can be attributed to the low priority attached to the issue in recent years and the lack of resources for almost all forms of enforcement activities.

There are no outreach programs to educate employers and no systematic follow-up with employers who are flouting the law. There is not a toll-free number for employers to phone to check the SIN. The question of whether less serious offences should be prescribed is being explored so that field staff could issue on the spot fines, which is less time consuming than prosecuting offenders.

It should be noted that those entering Canada and claiming refugee status are entitled to health care and other benefits, including authority to work, while their claims are being assessed. Seeking refugee status is an attractive alternative to working without authority and risking fines and removal.

Advice to employers

No Guide has been made available to employers, there is no outreach program or toll-free numbers. The prosecutions are initiated by the Royal Canadian Mounted Police (RCMP) - Immigration and Passport area and are not given a high priority.

Canadian documents

The documents that an employer may need to check include:

- a SIN card; and
- where the SIN starts with the number "9" (which is the case for all non-citizens and non-permanent residents of Canada), a copy of an employment authorisation letter (which is issued by a Canadian Employment Centre).

Summary of the situation in the US

The offence

Since 1986, it has been illegal for employers to knowingly employ, or continue to employ, unauthorised aliens.

Penalty

- Fines for doing so range between \$USD250 and \$USD10,000. Criminal penalties, consisting of fines up to \$US3,000 per employee and/or 6 months imprisonment, can be imposed for repeat offenders.
- Employers are required to comply with identity and employment eligibility verification process intended to provide employers with a means of avoiding employment of unauthorised aliens.
- Fines for not abiding by processing requirements range from \$USD100 to \$USD1,000, depending on whether it is a first or subsequent offence.

The defence

Employers are required to sign a document certifying that they have reviewed the documents and that they appear genuine and relate to the individual (ie that they are not “obviously” illegally manufactured or another person’s genuine documents).

Enforcement efforts

- 83% of the Immigration and Naturalization Service (INS) “dob-in” driven workplace investigations resulted in no employer sanctions and the INS collected only about one-half of the fines levied on employers.
- Despite focussing on investigating employers who intentionally hired illegal workers, fines were proposed in less than 20% of completed investigations. About one-half of the fines were for paperwork violations and one-half for substantive violations.
- The INS initiated criminal proceedings against employers in only about 2% of cases, however, with a refocus on serious offenders this figure is set to increase.
- Whether or not unauthorised aliens were replaced with authorised workers in employment is unknown, as there is no follow-up to determine who is hired to fill jobs vacated by enforcement action.

Advice to employers

Seminars are held for those employers who unknowingly employ unauthorised aliens, to educate them on how to complete the required paper work and on how to detect fraudulent documents.

The widespread availability of inexpensive fraudulent documents makes it easy for unauthorised aliens to obtain jobs.

US list of specified documents:

INS rules allow employees to present twenty-seven different documents:

- eight that establish both identity and employment eligibility (eg a US or foreign passport, permanent residence card or range of INS issued authorisations);
- twelve that establish identity (eg a driver's license, military, voter or school ID card); and
- seven that establish eligibility to work (eg a social security card, birth or citizenship certificate, or one of several INS issued authorisations).

Summary of the situation in New Zealand

The offence

- Every employer commits an offence if they allow, or continue to allow, any person to undertake employment in that employer's service knowing that the person is not entitled to undertake that employment.
- An employer is considered to know that the employee is not entitled to undertake any particular employment if, any time in the preceding 12 months, the employer has been informed in writing of that fact, by an immigration officer.
- In addition to the above offence, there are a range of other offences which include aiding, inciting, counselling or procuring a person to be in or remain in NZ unlawfully or to breach any condition of a permit or to commit an offence under the Act. The maximum penalties available under the Act are \$NZ5,000 or 10 years imprisonment.

Penalty

An employer who commits the offence may be liable upon conviction to a fine not exceeding \$NZ2,000. In practice penalties handed down by the courts have generally ranged between \$NZ200 and \$NZ750.

The defence

Employers need to show that they did not knowingly employ a person not authorised to work. The NZ Immigration Service has successfully argued in the courts that as many of the employers are migrants themselves, they should know the system. In any case, it is considered to be recklessness on the part of an employer not to check the employment status of an employee with the Immigration Service.

Enforcement efforts

Obviously there are employers who make a genuine mistake about the status of their employees and where no intentional or serious breach has occurred, the employer receives a written warning and is informed of the provisions of the Immigration Act. A second or subsequent offence is prosecuted, as are intentional breaches or recklessness on the part of an employer.

Most employers will be aware whether or not an employee holds the proper permit, as the majority of work permits are issued only on the grounds that the person has been made a formal job offer (for over 30 hours per week) by a particular employer. The offer is market tested, and if appropriate, a work permit is granted by the Immigration Service. While "open" work permits are issued, these are less common, as they are not market tested and allow the holder to work wherever they wish.

Notes
