

# Illegal Workers - Right to Work Checks Policy Statement

## Introduction

It is a criminal offence for an employer knowingly to employ an individual who does not have permission to work in the UK, or whom it has reasonable cause to believe does not have permission to work in the UK.

The legislation has been amended over the years and workers who are subject to immigration control are subject to the rules that applied on the date their employment began.

The UK left the EU on 31 January 2020 and a new immigration system applies to people who arrived in the UK after 11pm on 31 December 2020, when the EU withdrawal transition period came to an end.

## EU Settlement scheme

Under the EU Settlement Scheme, EEA nationals who were living in the UK by 11pm on 31 December 2020 could apply to the Settlement Scheme to continue living in the UK. As freedom of movement ended at 11pm on 31 December 2020, European nationals arriving in the UK after this time must apply for a points-based visa or make an application under some alternative immigration route.

The deadline for applying under the Settlement Scheme was 30 June 2021.

An application could be made under the Settlement Scheme for:

- Settled status – this is indefinite leave to remain in the UK and was available where the individual had been continuously resident in the UK for a period of 5 years on 31 December 2020.
- Pre-Settled status – this was available if living in the UK by 31 December 2020 for less than 5 years. The individual can remain in the UK on pre-settled status for up to a further 5 years but can apply for Settled status as soon as they have 5 years' continuous residence. From September 2023, if a pre-settled status individual does not apply to switch to settled status, their pre-settled status will automatically be extended by 2 years shortly before its expiry date.

However, if the individual has indefinite leave to enter the UK; indefinite leave to remain in the UK; or British or Irish citizenship, then they did not need to apply under the EU Settlement Scheme to remain in the UK. Irish citizens can continue to use their passport or passport card to prove their right to work.

## Since 1 July 2021

Since 1 July 2021, there are various ways that employers can check a foreign national's right to work: Checking online at <https://www.gov.uk/view-right-to-work>. To do this you will need the job applicant's:

- date of birth and
- right to work share code.

Since 6 April 2022, you can **only** check the following documents online:

- a biometric residence permit;
- a biometric residence card;
- Frontier workers permit

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Further, since 6 April 2022, an Identification Document Validation Technology service is also available, which can be used where the person being checked doesn't fall into the Home Office online service and therefore includes British and Irish citizens. Employers have to be certified to use it and this can be single certification or as part of a group of companies.

Alternatively, a physical check can be made of the person's original documents.

Thirdly, in certain specific circumstances, employers can use the Home Office Employer Checking Service. This applies where an individual cannot provide the employer with any of the documents from List A or List B, but claims that:

- they have an ongoing immigration application or appeal with the Home Office, or
- their documents are with the Home Office, or
- they present other information indicating they are a long-term resident of the UK who arrived in the UK before 1988

and the employer will have a statutory excuse against liability from the expiry date of an existing worker's leave for a further period of up to 28 days to enable the employer to obtain a Positive Verification Notice from the Employer Checking Service. However, this 28-day period does not apply to checks carried out before the start of the employment and in those circumstances, the employer should delay the start of their employment until they have received a Positive Verification Notice from the Employer Checking Service. A request for verification of the right to work can be made online here - <https://www.gov.uk/employee-immigration-employment-status> (this is a different procedure from carrying out the general online check of right to work referred to above).

The Employer Checking Service aims to provide a response within five working days and it is very important that employers retain any response received to evidence their statutory excuse.

Since 5 April 2022, there is an adjusted right to work checks process in place, allowing employers to carry out right to work checks virtually (through an approved process).

From 1 October 2022, employers must carry out one of the prescribed checks before employment commences, as set out in guidance.

These checks are:

1. a manual right to work check
2. a right to work check using IDVT through the services of an identity service provider (IDSP)
3. a Home Office online right to work check

If doing the check in person, we will physically obtain documents from the Home Office's lists of acceptable options, either List A, or List B. The lists are available on the government website.

## Statutory excuse

It is a civil offence if the employer unknowingly employs someone who does not have the right to work. However, they will have a 'statutory excuse' against civil liability, if the employer (and not a third party) has checked and kept relevant photocopies of the original documents included in List A or in List B. List A documents only need to be checked and copied once, whereas List B documents are time-limited and must be re-checked and re-copied at the requisite intervals. This 'statutory excuse' is against civil liability but not criminal liability.



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“Checking” includes taking reasonable steps to be satisfied that photographs and dates of birth on documents are not inconsistent with the appearance of the potential employee, checking that expiry dates have not passed, etc. A record must be kept of the date on which the check was conducted, which must be before the employee started work, and if no date is recorded, the check cannot be used to establish a statutory excuse defence. Although there is no statutory requirement to check the immigration status of workers involved in a business where the business is not the direct employer, e.g. agency workers or sub-contracted staff, Home Office guidance on right to work checks states:

*“Even if you are not the direct employer of the workers involved in your business, there are compelling reasons why you should seek to know that your workers have a right to work. If illegal workers are removed from your business, it may disrupt your operations and result in reputational damage. There could be adverse impacts on your health and safety and safeguarding obligations, as well as the potential invalidation of your insurance if the identity and skill levels of your workers are not as claimed. Accordingly, you should check that your contractors conduct the correct right to work checks on people they employ.”*

## Manual Check:

The following shall be checked:

1. photographs are consistent with each other across documents and with the person’s appearance
2. dates of birth are consistent across documents
3. expiry dates for permission to be in the UK have not passed
4. any work restrictions to determine if they are allowed to do the type of work on offer
5. the documents are genuine, have not been tampered with and belong to the holder
6. the reasons for any difference in names across documents can be explained by providing evidence such as an original marriage certificate, divorce decree absolute, or deed poll (you will need to keep a copy of supporting documents as well).
7. A copy shall be made of each document in a format which cannot be manually altered.

For passports we will copy any page with the document expiry date, the holder’s nationality, date of birth, signature, immigration permission, expiry date, biometric details, photograph and any page containing information indicating the holder has an entitlement to enter or remain in the UK (visa or entry stamp) and undertake the work in question. For all other documents you copy the document in full.

The date of the check will also be recorded.

## Copying documents

If the document is a passport or other travel document (which is not in the form of a card), a copy must be taken of any page containing the holder’s personal details including nationality, date of birth, biometric details, any page containing the holder’s photograph, any page containing the holder’s signature, any page containing the date of expiry and any page containing information indicating the holder has an entitlement to enter or remain in the UK and undertake the work in question. A record must be kept of every document copied and for all documents other than a passport the whole of the document must be copied, including both sides of a travel document in the form of a card, an Immigration Status Document or an Application Registration Card.

## List A – Acceptable documents to establish a continuous statutory excuse

1. A passport showing the holder, or a person named in the passport as the child of the holder, is a British citizen or a citizen of the UK and Colonies having the right of abode in the UK.



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2. A passport or passport card showing the holder, or a person named in the passport as the child of the holder, is a national of the Republic of Ireland.
3. A document issued by the Bailiwick of Jersey, the Bailiwick of Guernsey or the Isle of Man, which has been verified as valid by the Home Office Employer Checking Service, showing that the holder has been granted unlimited leave to enter or remain under Appendix EU(J) to the Jersey Immigration Rules, Appendix EU to the Immigration (Bailiwick of Guernsey) Rules 2008 or Appendix EU to the Isle of Man Immigration Rules.
4. A current passport endorsed to show that the holder is exempt from immigration control, is allowed to stay indefinitely in the UK, has the right of abode in the UK, or has no time limit on their stay in the UK.
5. A current Immigration Status Document issued by the Home Office to the holder with an endorsement indicating that the named person is allowed to stay indefinitely in the UK, or has no time limit on their stay in the UK, together with an official document giving the person's permanent National Insurance number and their name issued by a Government agency or a previous employer.
6. A birth or adoption certificate issued in the UK, together with an official document giving the person's permanent National Insurance number and their name issued by a government agency or a previous employer.
7. A birth or adoption certificate issued in the Channel Islands, the Isle of Man or Republic of Ireland, together with an official document giving the person's permanent National Insurance number and their name issued by a Government agency or a previous employer.
8. A certificate of registration or naturalisation as a British citizen, together with an official document giving the person's permanent National Insurance number and their name issued by a Government agency or a previous employer.

## List B – Acceptable documents to establish a statutory excuse for a limited period of time

*Group 1 – Documents where a time-limited statutory excuse lasts until the expiry date of permission to enter or permission to stay*

1. A current passport endorsed to show that the holder is allowed to stay in the UK and is currently allowed to do the type of work in question.
2. A document issued by the Bailiwick of Jersey, the Bailiwick of Guernsey or the Isle of Man, which has been verified as valid by the Home Office Employer Checking Service, showing that the holder has been granted limited leave to enter or remain under Appendix EU(J) to the Jersey Immigration Rules, Appendix EU to the Immigration (Bailiwick of Guernsey) Rules 2008 or Appendix EU to the Isle of Man Immigration Rules.
3. A current Immigration Status Document containing a photograph issued by the Home Office to the holder with a valid endorsement indicating that the named person may stay in the UK, and is allowed to do the type of work in question, together with an official document giving the person's permanent National Insurance number and their name issued by a government agency or a previous employer

*Group 2 – Documents where a time-limited statutory excuse lasts for 6 months*

1. A document issued by the Home Office showing that the holder has made an application for leave to enter or remain under Appendix EU to the immigration rules (the EU Settlement Scheme) on or before 30 June 2021 together with a Positive Verification Notice from the Home Office Employer Checking Service.
2. A Certificate of Application (non-digital) issued by the Home Office showing that the holder has made an application for leave to enter or remain under Appendix EU to the immigration rules (EU Settlement Scheme), on or after 1<sup>st</sup> July 2021, together with a Positive Verification Notice from the Home Office Employer Checking Service.
3. A document issued by the Bailiwick of Jersey, the Bailiwick of Guernsey or the Isle of Man showing that the holder has made an application for leave to enter or remain under Appendix EU(J) to the Jersey Immigration

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Rules or Appendix EU to the Immigration (Bailiwick of Guernsey) Rules 2008, or Appendix EU to the Isle of Man Immigration Rules together with a Positive Verification Notice from the Home Office Employer Checking Service.

4. An Application Registration Card issued by the Home Office stating that the holder is permitted to take the employment in question, together with a Positive Verification Notice from the Home Office Employer Checking Service.

5. A Positive Verification Notice issued by the Home Office Employer Checking Service to the employer or prospective employer which indicates that the named person may stay in the UK and is permitted to do the work in question.

## Transfer of undertakings

Employers who acquire employees as a result of a Transfer of Undertakings (Protection of Employment) Regulations transfer are required to carry out their own document checks on each of their new employees and are given a period of 60 days grace to undertake these checks.

## Students

For students who have limited permission to work during term-times, you must obtain, copy and retain details of their academic term and vacation times from their education sponsor covering the duration of their period of study in the UK for which they will be employed.

## Penalties

Employers are not meant to be experts on immigration and those who are diligent and check and copy the original documents as detailed above will have a statutory excuse against prosecution if they employ an illegal worker. For those employers who do not have a statutory excuse, from 22 January 2024 the maximum civil penalty that UK Border Force can impose is £60,000 for each person employed illegally.

The most recent Home Office guidance sets out certain mitigating factors that may be taken into account to reduce the applicable civil penalty:

- If the employer can demonstrate that they have used the UK Visas & Immigration Helpline (0300 790 6268 / 0203 080 0010 / 0808 801 0503) to report their suspicions about the right to work of one or more illegal workers, before the Home Office identifies those illegal workers, and received a Unique Reference Number, the penalty amount for each illegal worker will be reduced by £5,000.
- If the employer can demonstrate they have actively co-operated with the Home Office during any investigation of their compliance with the law, the penalty amount for each illegal worker will be reduced by £5,000. Active co-operation includes the following:
  - Providing access to premises, recruitment and employment records and right to work checking systems, when requested.
  - Responding promptly, honestly and accurately to questions asked during enforcement visits, and responding to further requests for information by the deadline set.
  - Being available to officials during the course of investigations.
  - Full and prompt disclosure of evidence which may assist in the investigations.
  - Responding to the Home Office's initial Information Request within 10 days
- If the employer has not been found to have committed any breaches within the last 3 years, the maximum penalty will be £45,000 per illegal worker. The employer may also be able to avoid the imposition of a civil penalty for such a first breach and instead receive a Warning Notice, if they satisfy both of the above mitigating factors and can also show evidence of having effective right to work checking practices in place.

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- However, the Warning Notice will be taken into account if the employer is then found to commit further breaches within 3 years, and the higher maximum of £60,000 will apply instead.
- A further 30% reduction on the penalty amount may also be available for first breaches if the employer is willing and able to pay the penalty in one lump sum within 21 days.

The penalty on conviction in a criminal court is an unlimited fine and up to five years imprisonment. In addition, UK Border Force will seek to extradite any person found to be working illegally in the UK.

## Avoiding race discrimination

It is illegal for employers to racially discriminate in its enquiry methods and evidence required to show an entitlement to live and work in the UK. This means that employers must not carry out checks only on applicants who they perceive to be foreign nationals – the same checks and requests must be made of all applicants in the same circumstances. Employers do not need to make enquiries of job applicants at the beginning of the process and may choose to ask for documents only as part of the job offer to the successful candidate.

Employers should also exercise a high degree of caution if contemplating reporting suspected illegal workers to the Home Office, whether for the purposes of potential mitigation of a civil penalty (as above) or more generally. The worker may perceive this is being used as a tool to remove an individual the employer no longer wishes to employ or subject them to a detriment on unfair or discriminatory grounds, and could also support a claim of constructive dismissal. A finding that the individual was indeed employed illegally may not always provide a full defence against claims of race discrimination. The employer should give the employee a reasonable opportunity to demonstrate their ongoing right to remain and work in the UK and satisfy themselves that there is a lack of reliable evidence or other strong grounds to suspect illegality. A worker should not be reported simply on the basis of unsubstantiated suspicion, hearsay or potential errors in admin or record-keeping.

Advice should always be sought if you are considering dismissing an employee and/or reporting them to the Home Office on the basis that they no longer have the right to work in the UK.

## Work permits, asylum seekers, refugees, etc.

Guidance on work permits and on employing asylum seekers, refugees or those with humanitarian or settlement protection can be obtained from the Home Office website at:


[www.gov.uk/government/organisations/uk-visas-and-immigration](http://www.gov.uk/government/organisations/uk-visas-and-immigration)

Forms below to be completed by all staff before commencement of employment and all relevant documents are to be kept as a minimum 2 years after their employment status has ceased.

- Employers Right to Work Checklist
- VIPL Right to Work Check Form

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