



Human Resources & Health and Safety



Do you employ staff?

Checking the Right to Work;

An Employer's Responsibility

Checking the Right to Work

Before a prospective employee can begin working, the employer has a legal responsibility to check the person has the right to work in the UK. This legal responsibility is set out in sections 15 – 25 of the Immigration, Asylum and Nationality Act 2006 (known as the 2006 Act) and forms part of the Government's attempt to prevent illegal working. It is a criminal offence to knowingly employ someone who does not have the right to work in the UK. If an employer chooses to ignore the 2006 Act, and employs someone without performing all the necessary checks, or employs someone in the knowledge that they cannot legally work, they may be subject to either a significant fine (the current maximum penalty for this offence is set at £10,000), a prison sentence of two years or less, or both.

As well as checking whether a person has the right to work in the UK, an employer is also responsible for checking the person does not have any working restrictions against them. Some people only have the right to work in certain roles or industries, and therefore they cannot be employed in breach of these restrictions. Employing someone in breach of these restrictions would be considered a breach of the 2006 Act and would be considered illegal, holding the same penalties as stated in the above paragraph.

As well as checking the documents before a prospective employee can begin work, it is also recommended that employers annually re-check their employees' rights to work when the employee has a time limited immigration status. Some people are only granted the right to work in the UK for a certain period of time. Once their time runs out, they can either apply for an extension, or they can no longer legally work in the UK. An employer cannot rely on the employee to inform them of when their eligibility will run out, and will not be excused from penalty if they fail to re-check the employee's documents. If, at the time of the checks, the employee has an outstanding application, or

is awaiting the outcome of an appeal or an extension, the employer should contact the Employer Checking Service. This service can inform an employer of the persons status, and will allow the employee to continue in their role until the outcome is clarified.

In the event of TUPE

When a TUPE transfer occurs, the new employer inherits all rights, liabilities and obligations towards the transferring employees. To help the new employer with this, the old employer must provide the new employer with prescribed "employee liability information" about the transferred employees, no later than 14 days before the date of the transfer. However, this does not include information on any immigration checks which may or may not have happened on the transferring employees. It is a very common mistake to assume that pre-employment checks, such as checking the employees' right to work, will have taken place before a TUPE transfer. If those checks have not taken place, it is the new employer who may find themselves liable for this breach of immigration law, not the old employer.

Therefore, checking the status of transferring employees should be a high priority after any TUPE transfer. Luckily, the new employer has a 28 days grace period following a TUPE transfer that enables them to conduct any necessary checks, and therefore it is recommended that pre-employment checks such as checking the right to work are always undertaken during this time. An employer will not be able to use the TUPE process as an explanation or an excuse of why an employee was illegally employed.

The Three Step Process

There are three steps that must be taken when checking an employee's right to work in the UK.

Step One: The employer must ask for and be given an acceptable document, or a combination of acceptable documents, by the employee. The employer can only accept original documents, and cannot accept a photocopy, even one of good quality. Information on acceptable documents can be found at: <https://www.gov.uk/government/publications/acceptable-right-to-work-documents-an-employers-guide>

Step Two: The employer must take all reasonable steps to check the documents provided are genuine, and to satisfy themselves that the employee is the person named in the documents. This is also where the employer must check the employee is permitted to carry out the work in question. If the employer is given two documents that contradict one another, further documents must be requested to explain this e.g. an employee may provide documents with two different surnames, and they may also provide a marriage certificate or divorce decree by way of explanation.

Step Three: The employer must retain a copy of the document in a format that cannot be altered. In most cases, a photocopy or a scan will be sufficient. Where an electronic copy is made, it must be made using a non-rewritable format, to prevent contamination. Employers only need to retain a copy of the section of the document that is informative e.g. an entire passport wouldn't need to be photocopied, but the ID page would be. Other documents, like a Biometric Residents Permit, would need to be copied in full because all the information would be relevant. It is recommended that employers make a note of the date on which copies

are made, should this ever need to be relied upon in the future. It is also recommended that, for unsuccessful applicants, or for ex-employees, employers keep these copies and notes for at least two years, in case it is ever in question that the person did not have the right to work in the UK.

Statutory Excuses

In some rare occasions, an employer will have done everything correctly, but due to extremely talented forgeries, etc. they will have employed someone who does not have the right to work in the UK. To be protected in this instance, the employer needs to make sure they have a "statutory excuse". In other words, they need to be able to prove that they have done everything in their power to ensure that their information is correct, to protect them from blame.

An employer will not have a statutory excuse if:

- They can't provide a record of conducting recruitment checks; or
- They have accepted a document that clearly doesn't belong to the holder; or
- They have conducted a check and it is reasonably apparent that the document is false; or
- They have accepted a document which clearly shows that the person does not have permission to work in the UK/carry out the type of work being offered to them.

Examples of a genuine statutory excuse would be:

- The potential employee providing forged documents undetectable to the average employer; or
- The employer checked the status of an application and was informed the application was under renewal and that a decision had not yet been made.

How We Can Help

If you have any queries relating to any of the contents of this newsletter, or any other HR related subject, please don't hesitate to contact us at hradvice@hasslefreehr.co.uk