

**NATIONAL UNION OF RAIL, MARITIME
AND TRANSPORT WORKERS**

IMMIGRATION CHECKS AT WORK

A reps guide





Dear Colleague,

The number of queries being received from members and their reps about immigration matters has increased dramatically this year. Members' fears range from losing their jobs, to being deported themselves or members of their families suffering that fate. The distress caused is obvious. The reason behind this increase in queries is a change in the law that allows for more punitive penalties against employers who are found to be employing someone who does not have the legal right to live or work in this country.

We are all aware that unscrupulous employers have sought to exploit the most vulnerable of workers and the more so if the legal right to work is in question. After years of exploitation, some of our members find they are being subjected to yet more stress by having to show within a short time, their legal right to work for fear of losing their livelihood or worse.

However much we dislike this legislation, we have a duty to advise our members of their rights and what employers can legitimately request of them. This booklet aims to provide such guidance.

Bob Crow

IMMIGRATION CHECKS AT WORK

Since legislation in 1996, employers who employ someone aged 16 or over, who does not have the legal right to live or work in the United Kingdom, have potentially been liable to various penalties. The Asylum and Immigration Acts of 1996, 2004 and 2006, amongst other measures, have incrementally increased the penalties faced by employers who knowingly or negligently employ someone who is not entitled to work in accordance with the various Acts.

If an employee is found not to be entitled to work, employers who carried out certain checks prior to employing that person can claim what is now termed a statutory 'excuse' and thereby escape any penalty. Those employers who acquire staff following a TUPE Transfer have 28 days from the date of the transfer to carry out document checks in order to claim the statutory excuse.

The relevant Sections of the 2006 Asylum and Immigration Act concerning document checks, etc came into effect on 29th February 2008. Since the beginning of the year, it is evident that many of the employers we deal with have taken it upon themselves to carry out checks on existing employees as well as new recruits. This obviously can subject our members to a great deal of stress and anxiety, as often they are only given very limited time in which to produce evidence of their legal entitlement to work. It is this aspect of the Asylum and Immigration Acts that this leaflet will concentrate on.

Many questions have been posed by our reps and members, such as:-

- Is the employer entitled to carry out checks on existing employees?
- What documents are accepted as evidence of the legal right to work?
- Can the employer take away or keep the documents?
- Under what circumstances can an employer carry out repeated checks on a particular individual?
- What if the member is awaiting documents from the Border and Immigration Agency?
- Is it fair if only some people are asked to provide evidence and not others?

The purpose of this leaflet is not only to answer these questions but to provide reps with information to advise members.

IS THE EMPLOYER ENTITLED TO CARRY OUT CHECKS ON EXISTING EMPLOYEES?

The answer is yes but that the way in which they do it should not result in unlawful race discrimination. If an employee cannot provide documentary evidence of their legal entitlement to work, they could be dismissed and the employer would most likely satisfy an Employment Tribunal that the dismissal was 'fair'. The Guidance¹ accompanying this legislation for employers is clear that the onus lies with either the prospective or existing employee to demonstrate their legal entitlement to work. It is clearly stated that "Any person found to be working illegally is liable to prosecution and/or removal from the UK." Members in this situation, should be advised to contact the Immigration Advisory Service (IAS), the largest charity specialising in immigration and asylum law. The advice provided is confidential and the charity independent of Government. See below under Essential Sources of Specialist Advice and Information for more details.

WHAT DOCUMENTS ARE ACCEPTED AS EVIDENCE OF THE LEGAL RIGHT TO WORK?

The 2006 Asylum and Immigration Act details the documents admissible as evidence of the legal entitlement to work. The documents fall within two separate lists, List A and List B.

When undertaking their duty to check legal entitlement to work, employers should be asking to examine certain documents as set out in List A or List B. It may be that one document will provide evidence or a combination may be required. There have been instances of some employers only specifying a few of the documents within the lists. This has caused unnecessary anxiety for some of our members and that is why the full lists of A and B documents are reproduced in Appendix 1 of this guidance.

The documents comprising List A, show that the holder is not subject to immigration control or has no restrictions on their staying in the UK. Prospective or existing employees, who produce a document from List A, can work for an indefinite period.

List B documents are evidence that the leave to enter or remain in the UK is for a limited period of time and may restrict the type of work or number of hours that can be worked. Employers must carry out follow up checks on those who rely on documents from List B, at least every 12 months. However, if the employee then provides a document from List A, no further checks are required as a List A document demonstrates the individual's right to live and work in the UK indefinitely.

¹ Comprehensive Guidance for Employers on Preventing Illegal Working is available from the Border & Immigration Agency at www.bia.homeoffice.gov.uk.

An employer has a duty to take reasonable steps to check the validity of the original documents and that the person presenting the document is the rightful holder.

CAN THE EMPLOYER TAKE AWAY OR KEEP THE DOCUMENTS?

Employers should make a copy of the relevant document/s. The copy should be made in a way that prevents any re-writing and should be held securely. The Comprehensive Guidance to Employers is that it is not appropriate to retain a person's original documents, except for the purpose of copying them. It goes on to list the only exceptions, which are:

- when an individual provides part 2 of a P45 as part of a combination of documents; or
- when someone is employed for a day or less and it is not practicable to obtain a copy of the documents. The employer must also have facilities for keeping the documents safe. A job applicant's original documents must not be kept for longer than a day. If an employer deliberately appropriates a person's passport or other original documents belonging to them, or retain these without their consent, then they may be guilty of an offence under the Theft Act 1968, or since 7 June 2006, under section 25(5) of the Identity Cards Act 2006."

UNDER WHAT CIRCUMSTANCES CAN AN EMPLOYER CARRY OUT REPEATED CHECKS ON A PARTICULAR INDIVIDUAL?

If someone provides documents from List B, this indicates that their legal right to work is time limited and they may be restricted in the type of work or the number of hours that they are permitted to work. The latter restriction would especially apply to certain categories of student. The Guidance for employers clearly states that repeated checks must be made at least every 12 months and that the date of the check to be recorded.

WHAT IF THE MEMBER'S DOCUMENTS ARE WITH THE BORDER AND IMMIGRATION AGENCY?

The Border and Immigration Agency has an Employer Checking Service which at present will:-

- * Check the validity of Application Registration Cards (ARC) and Certificates Of Application when provided by the prospective or existing employee.

- * Check someone's legal entitlement to work if their documents are with the Border and Immigration Agency because they have an outstanding application or appeal.

The checking service is for employers not individuals, as the responsibility for ensuring someone's legal right to work rests with them. The telephone helpline number is 0845 010 6677, open Monday to Friday between 9 and 5. The full details of the service and how to access the relevant form, is on the Border and Immigration Agency website at www.bia.homeoffice.gov.uk/employingmigrants. The employer should inform the individual concerned that they are using the service.

We have examples of how this service has been used to the benefit of our members. In one case the member had failed to produce the necessary documentation as he claimed it was with the Border and Immigration Agency but unfortunately for him, he had no evidence to that effect. The member was accompanied by his rep to a meeting with management at which it was expected he would be dismissed. The rep provided the manager with the details of the helpline and checking service, as a result, the member still has his job.

The checking service is what the Border and Immigration Agency calls a work in progress, with the promise of additional checks being offered in the future.

IS IT FAIR IF ONLY SOME PEOPLE ARE ASKED TO PROVIDE EVIDENCE AND NOT OTHERS? OR HOW TO AVOID RACE DISCRIMINATION

The advice from the Government is clear – all employees should be asked to provide evidence of their legal entitlement to work prior to appointment and thus avoid unlawful race discrimination. The Government has published an updated statutory Code of Practice² which gives guidance to employers on how they can carry out checks on prospective employees and avoid race discrimination.

If an employer does not follow the Code and a claim of race discrimination is made against them at an Employment Tribunal, the Tribunal must take account of this in their deliberations. The Code clearly states that whilst it only addresses race discrimination, legal protection is extended to cover the strands of discrimination legislation i.e. sex, religion or belief, disability, sexual orientation and age.

Whilst the guidance is aimed at the recruitment stage, the principles apply to existing employees. Employers who carry out checks on existing employees, must not do so in a way that discriminates unlawfully.

² Guidance for Employers on the Avoidance of Unlawful Discrimination in Employment Practice While Seeking to Prevent Illegal Working, February 2008 available from the Border & Immigration Agency at www.bia.homeoffice.gov.uk.

Immigration Checks at Work

The Code explains how the Race Relations Act makes it unlawful to treat either a potential or existing employee less favourably than another on the grounds of their race, colour, nationality (including citizenship), ethnic origin or national origin. This applies to the recruitment process, the terms on which employment is offered, or refusing or deliberately omitting to offer someone employment. The Act also applies to the terms of employment, access to opportunities for promotion, transfer or training, or to any other benefits, facilities or services, or by refusing or deliberately omitting to afford someone access to them.

Explanations of what amounts to discrimination, which may be direct or indirect, are also contained within the Code. The example of direct discrimination given is that of treating a person less favourably on racial grounds, by rejecting all job applicants who do not have British nationality, or by refusing to consider any non-European job applicants. Treatment based on racial or national stereotypes can also constitute direct discrimination. Again the examples cited are:-

- where the assumption is made that people from certain nationalities or ethnic groups cannot work as a team;
- where individuals are only recruited from one nationality or ethnic group;
- where all refugees are automatically rejected;
- where an employee with limited leave to remain in the UK is given a more degrading form of work to do in comparison with workers with unlimited leave;
- where it is assumed that overseas qualifications and experience are inferior to those gained in the UK³.

The Code explains indirect discrimination, which according to the Race Relations Act 1976 means imposing a condition or requirement which applies equally to everyone, but is harder for people from particular racial groups to satisfy and which cannot be justified. The example given is that it would be discriminatory to ask for a very high standard of English when the job does not require this, or to reject an applicant who has an unfamiliar accent.

The Code also draws attention to the fact that it is unlawful to victimise or harass a person because he or she has made or supported a complaint of racial

³ NARIC is the National Agency responsible for providing information and expert opinion on vocational, academic and professional skills and qualifications from over 180 countries worldwide on behalf of the Government. They provide the only official source of information on international qualifications and claim to give quick and easy access. Their website is www.naric.org.uk or the telephone number is +44 (0)871 330 7033

discrimination. It is also unlawful to instruct or induce another person to discriminate, or to publish an advertisement or notice that indicates an intention to discriminate.

The advice given in the Code and throughout the Comprehensive Guidance for Employers on Preventing Illegal Working, states quite clearly that to avoid discrimination, all applicants should be treated in the same way at every stage of the recruitment process. That means, all applicants should be asked to provide documentary evidence of their legal entitlement to work.

The Code leaves it open as to at what stage of the recruitment process, employers should ask all applicants to provide documents showing their legal entitlement to work. This could be at the first or second interview stage or only when people are shortlisted but in any event, prior to appointment. The advice is clear that making assumptions about people because of their accents, colour of their skins, nationality, the length of time they have lived in the UK, ethnic or national origins, etc can be discriminatory.

If someone requires time to produce documents, reasonable time should be allowed.

Preference should not be shown to those who can produce documents from List A over those who produce List B documents.

ADVICE TO MEMBERS AND REPS

If an employer decides to carry out a check on the legal entitlement of existing employees to work, it must be done on a basis that does not discriminate. We know that employers are required to carry out repeat checks at least every 12 months on those who have limitations on their legal entitlement to work, so it would not amount to race discrimination if only those in that category were to be subjected to checks. However, it would probably amount to race discrimination if an employer decided to carry out checks on say a certain minority ethnic group.

The Code reminds employers that the UK population is ethnically diverse, with many people of ethnic origin born and bred in the UK. To make assumptions or stereotype people because of their colour or because they were born abroad, could cause employers to discriminate unlawfully. Therefore, if an employer were to embark on checks of existing employees, to avoid allegations of race discrimination, they should seek documentary evidence from all employees who have not previously provided it. This will no doubt be unpopular but essential if employers are to be prevented from singling out certain groups. Importantly, it would be seen as fair.

Immigration Checks at Work

Employers do have a duty under the Asylum and Immigration Act not to knowingly employ someone not legally entitled to work. Therefore, a legitimate suspicion regarding an individual should, they would argue, be investigated. For example, the Comprehensive Guidance mentions invalid National Insurance Numbers, which would include any temporary number beginning with TN, or any number ending in a letter from E to Z inclusive. Should such a case come to the attention of the employer, they could justify undertaking a check. However, if the employer decided to check NI numbers of just African employees that would probably be race discrimination.

We need also to bear in mind that employers, who have any suspicions about their employees' entitlement to work in the UK or their entitlement to undertake the work in question, may report their suspicions to the Employers' Helpline. If this is done before an inspection is carried out by the Border and Immigration Agency, the employer may then use this in mitigation and apply for a reduction in penalty.

For members needing advice on immigration matters, ranging from applying to have their leave to remain extended to disputes about their entitlement to work, there are a number of organisations who are specialists in this field and are listed under Essential Contact Information below. The Immigration Advisory Service for example gives free advice and has specialist lawyers who can represent people. It is best to urge members to seek specialist assistance as quickly as possible.

PROGRESSING CLAIMS OF RACE DISCRIMINATION

Should any member believe they have been subjected to race discrimination, they must be advised to lodge a grievance in writing with the employer, clearly stating what their complaint is, i.e. they have been treated less favourably than others on the grounds of their race in that they were subjected to certain treatment (e.g. providing evidence of their legal entitlement to work). They should also state how this unfavourable treatment has affected them. A grievance hearing should be held and the member will be entitled to be accompanied by their rep or RMT official. If the grievance is not upheld, the member should appeal.

The member must also be informed by the rep that if they believe they have been subjected to race discrimination, they have the right to register a complaint at an Employment Tribunal.

Generally, the time limit within which to lodge a Tribunal claim is three months minus one day and this will be the case from April 2009. However, until then, to comply with the Dispute Resolution Procedures⁴ in discrimination and harassment cases, where the member is still employed, this time limit can be

⁴ The Dispute Resolution Procedures are to be repealed probably as of 6th April 2009. The significance of this being that the time limit to register a complaint with an Employment Tribunal will revert to three months minus one day but complainants will still be expected to lodge a grievance with their employer. More details will be circulated once the Employment Bill 2008 has gone through the legislative process.

extended to six months minus one day if the following steps are taken:-

- 1 The member must submit a written grievance to the employer within three months of the act or incident complained of.
- 2 28 days must elapse before a claim is lodged with the Tribunal, irrespective of whether or not the grievance has been dealt with.
- 3 Having submitted a written grievance, this automatically extends the time limit from three months to six months.
- 4 If the incident occurred on 6th June, the three months minus one day would expire on 5th September. To this, add a further three months and the extended limitation date would be 5th December, totalling six months. Remember, the grievance must be submitted to the employer within the first three months if the extended time limit is to apply.
- 5 It is important to note that the time does not run from when the grievance was lodged, heard or decided upon for example. Nor does it run from a particular stage of the grievance procedure but from the date of the last incident complained of.
- 6 If this procedure is not followed, individuals will probably lose their right to take their claim to an Employment Tribunal. It is very rare that a Tribunal will exercise its discretion and allow a case to be heard if a member has been advised wrongly. It has been known for Tribunals to advise those who have been advised wrongly (or not at all) to sue the particular Union involved.

EXCEPTIONS

To complicate matters until the Dispute Resolution Regulations are repealed, there is an important exception to the time limits as set out above. This is where a member claims that their dismissal is discriminatory (i.e. it is on the grounds of race, sex, disability, sexual orientation, age, or religion or belief). In such cases, there is no need to lodge a grievance, as the complaint of discrimination should be raised during the disciplinary hearings. In such cases, the time limit within which to submit an Employment Tribunal claim will be three months minus one day from the effective date of dismissal. The extension of three months for discrimination and harassment cases where no dismissal has taken place does not apply in this situation. If in doubt, please seek guidance from the Regional Organiser or Head Office.

ESSENTIAL SOURCES OF SPECIALIST ADVICE AND INFORMATION

Immigration Advisory Service (IAS) - Community Legal Advice & Representation for immigrants & asylum seekers. This is a charity, independent of government. Members may be eligible for free help, if not a non-profit fee may be applicable.

IAS has many local offices throughout the country, the majority of which offer surgeries. For those with access to the internet, the IAS website, www.iasuk.org has a wealth of information and gives details of their local office network. The Head Office number is 020 7967 1200.

The IAS provides legal advice to those who are in immigration detention. The IAS Detention Line is 020 7967 1299. People will need to leave your name, place of detention and a contact telephone number and one of their advisors will call the detainee back.

The Refugee Legal Centre - provides a comprehensive service to asylum seekers and refugees in the United Kingdom, on a similar basis to IAS. Telephone 0800 592398 or 0207 780 3333 and an emergency line on 07831 598057 (weekdays and all weekend: 6pm - 8 am).

The Refugee Council - Advice lines are as follows:-

London: 020 7346 6777

Yorkshire and Humberside: 0113 386 2210

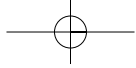
East of England: 01473 297 900

West Midlands: 0121 234 1950

Community Legal Advice (CLS) - Community Legal Advice is a free and confidential service paid for by legal aid. It assists people on a wide range of legal problems including housing and benefits and importantly within this context, immigration and nationality issues. They assist with problems through a telephone helpline (0845 345 4 345), website, digital TV service, centres and networks and a call back service.

CLS is funded by the Legal Services Commission and delivered in partnership with independent advice agencies and solicitors. It offers free, confidential and impartial advice paid for by legal aid and a full casework service available from Monday to Friday 9am - 6:30pm. For more details visit their website at www.clsdirect.org.uk.

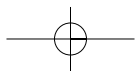
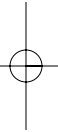
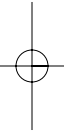
Border and Immigration Agency - The Employer Helpline run by the Border and Immigration Agency is on 0845 010 6677. The lines are open Monday to Friday between 9 and 5.



Immigration Checks at Work

The Border and Immigration Agency also has an employer checking service, details of which can be obtained via the Employer Helpline or from their website at www.bia.homeoffice.gov.uk.

The Code of Practice to avoid Racial Discrimination and the Comprehensive Guidance for Employers on Preventing Illegal Working can be downloaded from the Agency's website at www.bia.homeoffice.gov.uk/employingmigrants.



LIST A- DOCUMENTS

1. A passport showing that the holder, or a person named in the passport as the child of the holder, is a British citizen or a citizen of the United Kingdom and Colonies having the right of abode in the United Kingdom; or
2. A passport or national identity card showing that the holder, or a person named in the passport as the child of the holder, is a national of a European Economic Area⁵ country or Switzerland; or
3. A residence permit, registration certificate or document certifying or indicating permanent residence issued by the Home Office or the Border and Immigration Agency to a national of a European Economic Area country or Switzerland; or
4. A permanent residence card issued by the Home Office or the Border and Immigration Agency to the family member of a national of a European Economic Area country or Switzerland; or
5. A Biometric Immigration Document issued by the Border and Immigration Agency to the holder which indicates that the person named in it is allowed to stay indefinitely in the United Kingdom, or has no time limit on their stay in the United Kingdom; or
6. A passport or other travel document endorsed to show that the holder is exempt from immigration control, is allowed to stay indefinitely in the United Kingdom, has the right of abode in the United Kingdom, or has no time limit on their stay in the United Kingdom; or
7. An Immigration Status Document issued by the Home Office or the Border and Immigration Agency to the holder with an endorsement indicating that the person named in it is allowed to stay indefinitely in the United Kingdom, or has no time limit on their stay in the United Kingdom, when produced in combination with an official document giving the person's permanent National Insurance Number and their name issued by a Government agency or a previous employer (e.g. P45, P60, National Insurance Card); or

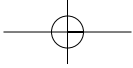
⁵ Countries within the European Economic Area (EEA) are Austria*, Belgium*, Cyprus*, Denmark*, Finland*, France*, Germany*, Greece*, Iceland, Ireland*, Italy*, Liechtenstein, Luxembourg*, Malta*, Netherlands*, Norway, Portugal*, Spain*, Sweden* and the UK*. The asterisk denotes those also members of the European Union (EU).

Immigration Checks at Work

8. A full birth certificate issued in the United Kingdom which includes the name(s) of at least one of the holder's parents, when produced in combination with an official document giving the person's permanent National Insurance Number and their name issued by a Government agency or a previous employer (e.g. P45, P60, National Insurance Card); or
9. A full adoption certificate issued in the United Kingdom which includes the name(s) of at least one of the holder's adoptive parents, when produced in combination with an official document giving the person's permanent National Insurance Number and their name issued by a Government agency or a previous employer (e.g. P45, P60, National Insurance Card); or
10. A birth certificate issued in the Channel Islands, the Isle of Man, or Ireland, when produced in combination with an official document giving the person's permanent National Insurance Number and their name issued by a Government agency or a previous employer (e.g. P45, P60, National Insurance Card); or
11. An adoption certificate issued in the Channel Islands, the Isle of Man, or Ireland, when produced in combination with an official document giving the person's permanent National Insurance Number and their name issued by a Government agency or a previous employer (e.g. P45, P60, National Insurance Card); or
12. A certificate of registration or naturalisation as a British citizen, when produced in combination with an official document giving the person's permanent National Insurance Number and their name issued by a Government agency or a previous employer (e.g. P45, P60, National Insurance Card); or
13. A letter issued by the Home Office or the Border and Immigration Agency to the holder which indicates that the person named in it is allowed to stay indefinitely in the United Kingdom, or has no time limit on their stay, when produced in combination with an official document giving the person's permanent National Insurance Number and their name issued by a Government agency or a previous employer (e.g. P45, P60, National Insurance Card).

LIST B - DOCUMENTS

1. A passport or other travel document endorsed to show that the holder is allowed to stay in the United Kingdom and is allowed to do the work in question, provided that it does not require the issue of a work permit; or
2. A Biometric Immigration Document, issued by the Border and Immigration Agency to the holder which indicates that the person named in it can stay in the United Kingdom and is allowed to do the work in question; or
3. A work permit or other approval to take employment issued by the Home Office or the Border and Immigration Agency, when produced in combination with either a passport or another travel document endorsed to show that the holder is allowed to stay in the United Kingdom and is allowed to do the work in question, or a letter issued by the Home Office or the Border and Immigration Agency to the holder, or the employer or prospective employer confirming the same; or
4. A certificate of application issued by the Home Office or the Border and Immigration Agency to or for a family member of a national of a European Economic Area country or Switzerland, stating that the holder is permitted to take employment, which is less than 6 months old, when produced in combination with evidence of verification by the Border and Immigration Agency Employer Checking Service; or
5. A residence card or document issued by the Home Office or the Border and Immigration Agency to a family member of a national of a European Economic Area country or Switzerland; or
6. An Application Registration Card (ARC) issued by the Home Office or the Border and Immigration Agency stating that the holder is permitted to take employment, when produced in combination with evidence of verification by the Border and Immigration Agency Employer Checking Service; or
7. An Immigration Status Document issued by the Home Office or the Border and Immigration Agency to the holder with an endorsement indicating that the person named in it can stay in the United Kingdom, and is allowed to do the work in question, when produced in combination with an official document giving the person's permanent National Insurance Number and their name issued by a Government agency or previous employer (e.g. P45, P60, National Insurance Card); or



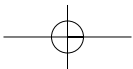
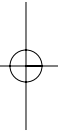
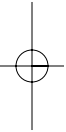
Immigration Checks at Work

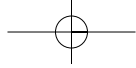
8. A letter issued by the Home Office or the Border and Immigration Agency to the holder or the employer or prospective employer, which indicates that the person named in it can stay in the United Kingdom and is allowed to do the work in question, when produced in combination with an official document giving the person's permanent National Insurance Number and their name issued by a Government agency or previous employer (e.g. P45, P60, National Insurance Card).

NOTE

The guidance to employers makes it clear that a National Insurance number can only be accepted for this purpose when presented in combination with one of the documents, as appropriate, specified in Lists A and B.

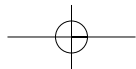
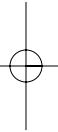
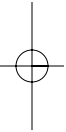
All references to the documents issued by the Home Office in Lists A and B, also include documents issued by the former Immigration and Nationality Directorate (IND) and Work Permits (UK).





Immigration Checks at Work

NOTES



PROBLEMS AT WORK? CALL THE HELPLINE

(now with two operators and the facilities to translate into 170 languages)

MEMBERS FREEPHONE HELPLINE

0800 376 3706

e-mail: info@rmt.org.uk

**for non-work related legal queries,
phone our Legal helpline**

0800 587 7516

Seven days a week

*National Union of Rail, Maritime & Transport Workers
Unity House, 39 Chalton Street, London, NW1 1JD.*

Tel: 020 7387 4771

Fax: 020 7387 4123

e-mail: info@rmt.org.uk

