

Employing Overseas Workers



This year has seen the introduction of tough new legislation placing significant obligations upon employers in relation to the employment of overseas nationals which affect not only the recruitment process but also have implications for TUPE transfers, the employment of other types of 'workers' and new considerations in relation to discrimination in the workplace on grounds of race.

Recruitment

Of immediate concern to employers are the provisions in relation to the recruitment process. Employers who knowingly employ an illegal migrant worker have no defence to criminal charges available to them and face the possibility of an unlimited fine or even imprisonment. However, those who are found to be simply negligent can avoid the newly imposed civil penalty (up to £10,000 per illegal worker) if they are able to rely on the statutory 'excuse' which they will avail themselves of as long as they have ensured that certain safeguards are in place. Home Office Guidance in this regard advises employers to undertake fairly extensive pre-employment checks. This involves potential employees providing certain prescribed documentation to the employer, those documents being checked, copies taken and retained. If the employee's right to

remain or work in the UK is restricted then, until they can provide you with evidence that the restriction no longer applies, these document checks must be carried out and recorded every twelve months, otherwise the statutory defence will be lost. The Government have anticipated that this could potentially lead to allegations of discrimination in the workplace and have published a separate Code of Practice in relation to that. Essentially, that suggests that all individuals recruited by employers irrespective of their nationality or status should be subject to identity checks in order that there can be no inference of discrimination on the grounds of race or ethnicity.

TUPE

The previous Home Office Guidance in relation to employers inheriting employees under a TUPE transfer expressly stated that employers were not expected to make checks on employees inherited under a TUPE transfer and that employers would not be prosecuted if they could demonstrate that any staff working illegally were acquired under TUPE. As the only potential liability was criminal, employers who inherited employees under TUPE had the comfort of knowing that they were not inheriting liability for illegal working as criminal liabilities would not transfer under TUPE.

The Guidance in relation to the new regime states that employers who acquire staff as a result of a TUPE transfer are provided with a grace period of 28 days in which to undertake the appropriate document checks and thereby establish a statutory excuse following the date of transfer. As civil liabilities may potentially be imposed and carry over under TUPE for breaches of the new rules, consideration should be given to ensuring indemnity cover in respect of such liabilities and that the relevant checks are carried out within 28 days of the date of transfer. This 'inherited illegality' raises some fundamental legal issues which are the subject of debate between practitioners and the Home Office but as at the time of writing the Guidance remains as stated above.

Agency/Contract Workers

Many agency workers or contract workers are engaged on a self employed basis and employers should therefore not necessarily expect that the relevant checks have been undertaken prior to workers being supplied. Accordingly employers are advised to ensure that their commercial contracts provide for pre-

employment checks by the suppliers of personnel and in particular that indemnities are written in where appropriate.

Work Permits

The current arrangements for Work Permits are being replaced by a points based system under which employers wishing to employ skilled workers and intra company transferees must do so under a licence under which they are able to sponsor migrants and which is anticipated to be fully operational by late autumn 2008. Once a licence has been granted, an employer will then be able to issue Certificates of Sponsorship to those migrants they wish to engage, although migrants will then, as is the case now, have to seek entry clearance before being allowed to enter the UK. It is proposed that Biometric Identity Cards will be issued to all migrants who come to the UK under the new system. Licences last for a period of four years and are likely to cost in the region of £1,000. Separate licences will be required for those employers who require intra-company transfers as well as new recruits from non-EEA states. Licenced sponsors will be required to undertake record keeping and reporting duties and it is important that prospective sponsors are fully aware of the requirements for obtaining a licence and those with a licence are aware of the duties they are required to undertake in order to retain it!

Around 7,500 Immigration Officers within the United Kingdom will be reorganised into 70 to 80 local immigration teams who will be given responsibility for enforcing the new regime and will work closely with other agencies, including the Police and Her Majesty's Revenue & Customs. The agency will name and shame employers who hire illegal immigrants and part of the arrangements are likely to involve spot checks on employers across the board.

If you would like to discuss any aspect of this update further, please contact Linda Beedie on 01224 621621 or one of our employment law team members who will be happy to help:-

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