

Right to Work legislation

Essential actions for HR Teams in 2017



Rightcheck
work

Are you compliant with the latest Right to Work legislation?

We highlight 5 essential actions you should take now.

With Home Office inspections on the increase and recent changes to legislation, now is the time to make sure your organisation's process for managing Right to Work checks is fit for purpose. We outline 5 essential actions that will enable MD's/HRD's to gauge compliance and review with their management team.

Right to Work checks must be carried out in strict accordance with published Government guidelines. A satisfactory Right to Work check is a critical undertaking to establish a 'statutory excuse', should the organisation be subsequently found to be unwittingly employing illegal workers. This Right to Work check must be conducted for all new employees – regardless of status (full, temp, part-time etc.) and also regardless of nationality (including British citizens). Any organisation that is not paying adequate attention to this need for legislative compliance risks substantial financial penalties should they be faced with home office raids (£20,000 plus) – plus major risks to the company's reputation from which some may never recover.

The paper trail vulnerabilities that face organisations

Many organisations have de-centralised HR with line managers responsible for the recruitment, selection process and on-boarding of new recruits. In a modern, forward thinking organisation this makes complete sense. Whether it be store managers, depot managers or hotel managers these site-based individuals need to be able to make decisions and manage an efficient process to get the people on-board they need to operate the business. However, what must not be short-cut in this relentless drive for operational efficiency are Right to Work checks.

The simple fact is that in spite of the perception that all is in-order with regard to Right to Work checks, with very little probing all too often we have found



evidence of non-compliance with current legislation. Manual, paper-based processes and procedures that have been in place for some time to handle Right to Work checks that don't align to the recent changes in the process to establish a statutory excuse prescribed by the Home office AND/OR have vulnerabilities within the process. These 'vulnerabilities' mainly arising as a consequence of the heavy reliance on a chain of people within the organisation all religiously following an inefficient paper trail and certainty that information on the process they need to follow has been effectively cascaded.



Recent changes to legislation

In 2014 two new statutory codes of practice on preventing illegal working and avoiding unlawful discrimination while preventing illegal working came into effect. Introduced at the same time there were revisions to the process for conducting a satisfactory Right to Work check.

In summary, the acceptable documents for checking an employee's Right to Work were updated. For example, documents which no longer provide a statutory excuse are a UK-issued travel document which is not itself a passport, work permits, and general Home Office letters. In addition, any document which contains an expiry date must be current, unless it is a document showing that the holder is a British citizen, a citizen of the UK and colonies having the right of abode, a national of an European Economic Area (EEA) country or Switzerland or their family members with permanent residence.

In addition, the process for undertaking a satisfactory Right to Work check, in order to establish a 'statutory excuse' was refined. For example, defining the way evidence of the check undertaken and copies of ID documentation must be attested and dated.

To establish the statutory defence, the Right to Work check must be done before the person starts employment. A defence is not established if the check is done on the employee's first day or any time thereafter. Whilst not mandatory, to avoid allegations of racial discrimination, it is advisory that the initial Right to Work check should be done for all potential employees undergoing a recruitment and selection process and not just the individual(s) to which job offers are ultimately issued.

The Immigration Act 2016 introduced further changes to legislation:

- A new offence of working in the UK illegally and the current criminal offence of knowingly hiring an illegal worker extended to apply where an employer employs someone whom they have reasonable cause to believe is an illegal worker.
- The maximum custodial sentence for an employer increased from two to five years.
- Wages paid to an illegal immigrant recoverable under the Proceeds of Crime Act 2002.
- Powers for Immigration Officers to close an organisation for up to 48 hours or place it under special compliance measures where the organisation is suspected of employing an illegal worker (cancelled if the employer is able to demonstrate the appropriate employment checks have been carried out and reasonable steps have been taken to prevent illegal working – Rightcheck can help ensure this is the case).
- A new Director of Labour Market Enforcement appointed, supported by an intelligence hub that will enable data sharing across government departments and agencies.

There is also now clarity on who is at liberty to conduct the check, how long evidence must be retained for and what to do in business takeover (TUPE) situations. As the Home Office guidance states:

The employer (not a third party) must undertake the check

- A right to work check means that you check a document which is acceptable for showing permission to work. You must do this before you employ a person to ensure they are legally allowed to do the work in question for you. You are also required to conduct a follow-up check on people who have time-limited permission to work in the UK.
- If you carry out document checks as set out in this guide, you will have a statutory excuse against liability for a civil penalty. This means that if we find that you have employed someone who does not have the right to work, but you have correctly conducted document checks as required, you will not receive a civil penalty for that illegal worker.
- As the employer, you are liable for the civil penalty even if the actual check is performed by a member of your staff. You are unable to establish a statutory excuse when the check is performed by a third party, such as an independent payroll company.

Evidence must be retained for 2 years after employee leave

- You must keep a record of every document you have checked. This can be a hardcopy or a scanned and unalterable copy, such as a jpeg or pdf document. You should keep the copies securely for the duration of the person's employment and for a further two years after they stop working for you.
- You should also be able to produce these document copies quickly in the event that you are requested to show them to demonstrate that you have performed a right to work check and retain a statutory excuse. By doing this, we will be able to check whether you have complied with the law if we find that someone is, or has been working for you illegally.

- You must also make a record of the date on which you conducted your check. This can be by either making a dated declaration on the copy or by holding a separate record, securely, which can be shown to us upon request to establish your statutory excuse. This date may be written on the document copy as follows: 'the date on which this right to work check was made: [insert date]' or a manual or digital record may be made at the time you conduct and copy the documents which includes this information. You must be able to show this evidence if requested to do so in order to establish a statutory excuse. You may be liable for a civil penalty if you do not record the date when the check was performed. Simply inserting a date on to the copy document does not, in itself, confirm that this is the actual date when the check was undertaken. If you insert a date onto the copy document itself, you must also record the fact that this is the date upon which you conducted the check.

Employers should repeat Right to Work checks in TUPE situations

- Transfer of undertakings Transfer of Undertakings (Protection of Employment) (TUPE) regulations provide that right to work checks carried out by the transferor (the seller) are deemed to have been carried out by the transferee (the buyer). As such, the buyer will obtain the benefit of any statutory excuse acquired by the seller.
- However, if the seller did not conduct the checks correctly, the buyer would be liable for a penalty if an employee is later found to be working illegally. Also, a check by the buyer would be necessary to determine when any follow-up check should be carried out. For these reasons, employers who acquire staff through TUPE regulations should undertake a right to work check on all new TUPE members of staff.



Rise in Home Office enforcement activity

Civil penalties issued by the Home Office to UK businesses are now running at a rate in excess of £2m per month; in the SE alone the levels of fines and the number of illegal workers found during raids in 2016 has risen by 72% when compared with 2015. Immigration Officers would appear to be continuing to prioritise raids on sectors where there is generally a higher proportion of migrant temporary or casual workers – including the catering, hotels, retail, logistics, waste management & construction sectors:

- Dozens of workers at burger chain Byron arrested in raids by immigration officials; the raids were “intelligence-led” and were carried out with Byron’s “full co-operation” (July)
- Two illegal immigrants were arrested at the Baltic Village Triangle construction site in Liverpool during a raid by Immigration Enforcement officers (August)
- Three Indian restaurants in Cheltenham are having their licences reviewed after illegal workers were found in each business during home office raids (August)
- Five illegal workers found at a Yodel distribution centre in Farnborough (August)
- A West Midlands plastics recycling firm was raided by immigration officers, in which seven of its workers were arrested, facing fines of up to £140,000 if it cannot prove correct Right to Work check procedures were followed (October)

Regardless of the size of the organisation, it can be a disaster for a company that finds itself in the news for issues of this nature. The old adage that ‘no publicity is bad publicity’ simply does not apply and

the reputational damage for an organisation seen to be connected to the issue of illegal working will be substantial. In the case of Byron Burgers, beyond the initial high profile news coverage there has been ongoing media coverage and social media chatter – both pro and anti the actions of the company. Consequently, it is taking time for the story to become ‘yesterday’s news’, which for a consumer facing organisation such as Byron’s is a real issue that it will be very difficult to overcome.

Illegal working civil penalties - anonymous regional report

This report shows the number of penalties, the number of illegal workers found, and the value of the penalties issued between 1 January and 31 March 2016

	No. of Penalties	No. of ilegal workers found	Value of penalty (£)*
ME	440	662	£7,780,000
NEYH	132	167	£1,935,000
NW	47	55	£650,000
SNI	109	155	£1,850,000
WSW	40	66	£800,000
LSE	70	90	£1,070,000

LSE - London & South East England, **ME** - Midlands & Eastern England, **NEYH** - North East England, Yorkshire & Humberside, **NW** - North West England, **SNI** - Scotland & Northern Ireland, **WSW** - Wales & South West England

* This figure is the gross value of penalties issued. The recoverable value will be reduced due to adjustments made following objections and/or appeals.

5 essential actions to review your compliance

1 Know the law – make sure everyone involved in the front line of recruitment is familiar with the law.

The Immigration laws are frequently subject to change; you need to be on top of these changes as they can have implications for your recruitment policy and the way you conduct Right to Work checks. We would recommend you monitor the following for updates to Right to Work legislation on a routine basis:

You should also be aware that checks must be conducted by the employer organisation. As Home Office states: 'As the employer, you are liable for the civil penalty even if the actual check is performed by a member of your staff. You are unable to establish a statutory excuse when the check is performed by a third party, such as an independent payroll company.'



[UK Visas and Immigration](#)

2 Document a process – make sure you have a documented process that is aligned to the guidance provided by the government.

A clear process needs to be followed to conduct a compliant check in line with Right to Work legislation to a high standard every time. We would recommend that you document a process and make sure it is cascaded to anyone within your organisation that maybe undertaking these checks. A useful reference guide to develop this process can be found here:

There is also a further guide that provides information on acceptable documents – once again you should digest this information and ensure it is embedded within your process:



[Right to work checks: an employer's guide](#)



[Acceptable right to work documents: an employer's guide](#)

3. Follow a process – make sure all recruitment personnel rigorously adhere to your organisational process without exception.

There is no leeway with Right to Work legislation, the implications of a slip-up can be major. A check that is inadvertently completed wrongly has implications beyond just penalties to include potential reputational damage. Anyone involved in Right to Work checks should have a clear checklist to follow, access to reference materials for queries and access to an

‘internal expert’ where there is any uncertainty. There is an FAQ guide to assist:



Preventing illegal working: frequently asked questions

4 Store the check – make sure you have a secure, reliable method to store checks (and the associated copies of relevant ID documentation) that is immediately accessible and searchable for inspection purposes.

Sensitive ID is captured when undertaking a Right to Work check and it is vital to store this safely and securely, with restricted access to those individuals. It is important to also review policies in relation leavers

from the organisation where there is a requirement to retain all the check documents for 2 years following departure.

5 Check the process – make sure you routinely conduct audits or spot checks to ensure that checks are being conducted correctly.

Failure can result in a £20,000 civil penalty and potentially a criminal conviction. With increased powers for immigration enforcement officers, including the power to shut down a business for 48 hours whilst an investigation is conducted, the pressure on organisations to ensure they comply to Right to Work legislation is ever increasing. To mitigate against this risk, it is vital that you frequently undertake audits and spot checks to check the procedures your organisation has in place, with a mechanism to support and train

any recruiting manager who is not adhering to your process rigorously.

This article only represents a summary; in total we have identified 32 aspects that would characterise a fully compliant Right to Work check organisational procedure. If you would like a copy of this checklist, or would like to discuss any of the points above then please [contact us](#).

Concluding remarks

– a smart solution



It is clear the government's legislative agenda in relation to immigration aims to apply ever increasing pressure on UK employers to check the working status of their new recruits.

Organisations have a statutory obligation to check on their employees' working status in the UK. Failure can result in a £20,000 civil penalty and potentially a criminal conviction. This year's new Immigration Bill introduced additional powers for immigration enforcement officers, including the power to issue an illegal working closure notice, effectively shutting down a business for 48 hours.

Most employers who receive a civil penalty only do so due to poor practices – all of which can be avoided with Rightcheck, ensuring the common mistakes made by employers regarding the working status of an individual are avoided. Those include failing to:

- Record the date on which a check was carried out
- Set reminders of when to make follow-up checks at the correct time
- Conduct additional checks required if the employee is a student with working status restrictions
- Maintain records of copies of documents that are clear and complete

All businesses are urged to review their recruitment and on boarding processes now. In particular organisations with devolved responsibility for recruitment to local line managers and companies that have a high proportion of low-skilled workers. For

example retailers, catering, hospitality, manufacturing and construction companies - where there is a significant risk of inadvertent simple mistakes with major repercussions.

Rightcheck enables you to perform Right to Work checks through your mobile device at any time in any location. Rightcheck has a built-in logic and process flow that caters for all categories of employment and nationality – no longer is it necessary to research the process to follow and documentation required every time you need to conduct a Right to Work check to check the working status of an individual.

The Rightcheck app guides the recruiting manager simply and swiftly through the correct right to work process, regardless of the candidate's nationality, or what ID documentation they have presented, each and every time with full compliance, ensuring their working status is identified in the process. Via an integrated management portal, you are able to review, approve and download checks in a matter of seconds ready for any audit. You can also set-up management user roles and assign checks to employees where more information is needed.

To ensure you stay compliant with Right to Work legislation and avoid the prospect of any civil penalties visit rightcheck.io

Contact us at sales@rightcheck.io or call **02475 091046** for a product demonstration.

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