

ILLEGAL WORKING

Managing the sting in the tail



Illegal working has always been an important issue for retail and hospitality sector employers. However, following last month's highly publicised arrests of illegal workers at Byron Burger (following orchestrated Home Office raids on branches of the upmarket hamburger chain), the introduction via the Immigration Act 2016 of new immigration offences and expanded powers for the Home Office to tackle illegal working (and of course with the uncertainties regarding Brexit on the horizon) this issue has moved even further up the agenda.

Byron Burger's apparent enthusiastic co-operation with the Home Office surprised a number of observers. The hamburger chain was accused of duping its employees in order to assist a Home Office sting operation, and generally the press and public reaction have been unhelpful to its brand.

What was not made clear in some of the press coverage, however, is that employers are under a positive obligation to co-operate with the Home Office to prevent illegal working, and failure to do so can result in serious financial and even criminal consequences for an employer. Since the implementation in July of several of the key provisions of the Immigration Act 2016, the stakes have been raised still further.

Employers are generally well-acquainted with the need to carry out appropriate document checks and keep proper records in respect of their employees to protect themselves against a potential "civil penalty" (in case they have been unwittingly employing an illegal worker), and that there may be criminal sanctions if you knowingly employ an illegal worker. Under the new Immigration Act, however, the threshold for the criminal offence of knowingly employing illegal workers has been lowered; simply having "reasonable cause to believe" that a person is an illegal worker will suffice. On indictment, that offence may now carry up to 5 years' imprisonment (up from the previous 2 year limit). Further, immigration officers have expanded powers to close down businesses, impose compliance sanctions, search premises and seize records in relation to suspected offences.

Where illegal working is uncovered, the Home Office will take into account the timeliness of the employer's engagement with the authorities and the level of co-operation during their visits and investigations, when considering the appropriate civil and/or criminal penalty. There is, therefore, a strong incentive for employers to take active steps to assist the Home Office. In relation to the civil penalty, for example, "active co-operation" (such as providing prompt access to premises and records when requested, responding promptly and honestly to questions, and making employees available to officials during investigations) can result in the civil penalty being reduced by £5,000 per illegal worker.

An employer in a similar position to Byron will no doubt want to avoid the wave of negative publicity experienced by the burger chain, but it will need to balance its concerns about brand management and public relations (and of course the treatment of its employees) against the weighty sanctions it and its employees may now face if they fail to pro-actively engage with the Home Office during their investigations.

There is work that employers can do to protect themselves. They can introduce robust right to work checking (and re-checking) procedures; audit personnel records to ensure they are prepared in the event of a Home Office audit; train HR and recruitment teams on the punitive immigration landscape; and notify the migrant workforce about a new employee criminal offence of illegal working.

However, if faced with an intervention by the Home Office, employers should consider seeking advice from their legal advisers on the level of co-operation that will be expected. Employers could consider entering into a dialogue with the Home Office if what is being requested will be detrimental to the employer's business, and employers should engage early with their press team or a reputation management firm to limit any potential damage from a PR perspective.

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