



Home Office

Border & Immigration Agency

PREVENTION OF ILLEGAL WORKING

IMMIGRATION, ASYLUM AND NATIONALITY ACT 2006

CIVIL PENALTY FOR EMPLOYERS
[DRAFT] CODE OF PRACTICE

MAY 2007

The information contained in this document was correct at the time of going to print, but may be subject to revision.

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1. INTRODUCTION

1.1 This Code of practice has been approved by Parliament and has been issued under section 19 of the Immigration, Asylum and Nationality Act 2006 ('the 2006 Act'). The Code has been prepared to help employers understand the factors that may be considered when determining the level of penalty to be imposed in each case.

1.2 As an employer, you have a responsibility to prevent illegal working in the United Kingdom. The illegal working provisions of the 2006 Act came into effect on [dd/mm/yyyy] and replaced the previous offence under section 8 of the Asylum and Immigration Act 1996¹ ('the 1996 Act'), which has now been repealed. Section 15 of the 2006 Act allows the Secretary of State to serve an employer with a notice requiring the payment of a penalty of a specified amount where they have employed a person aged 16 or over, who is subject to immigration control unless:

- that person has been given valid and subsisting leave to be in the United Kingdom by the Government, and that leave does not restrict them from taking the job in question; or
- the person comes into a category where employment is also allowed.

1.3 These changes will not make a major difference to the types of checks that you were required to carry out to meet your responsibilities under the previous law. The checks may however need to be repeated for those employees who have limited leave to enter or remain in the UK.

1.4 The examples in this document assume a statutory maximum of £5,000 for each illegal worker found for illustrative purposes only; the maximum level of penalty is subject to consultation. For the purposes of the 2006 Act, an 'employer' is defined as a person who employs an individual under a contract of

employment. This can be a contract of service or apprenticeship, whether express or implied. If the contract is expressed, this can be either orally or in writing. In most cases it should be clear when you are entering into such a contract of service with an employee.

¹ As amended by section 22 of the Immigration and Asylum Act 1999, section 147 of the Nationality, Immigration and Asylum Act 2002 and section 6 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004.

2. HOW THE LEVEL OF CIVIL PENALTY MAY BE DETERMINED

2.1 Table 1 is a framework designed to assist with the assessment of whether to issue a penalty notice to an employer and, if so, at what level. It provides minimum and maximum penalties, but the actual amount will be decided by the Border and Immigration Agency. As shown in the framework set out below, the level of penalty to be imposed per illegal worker may be increased or reduced according to different criteria. For example, the penalty can be increased according to the number of times you are found with illegal migrant workers in your workforce and have failed to establish a statutory excuse.

2.2 This framework has been designed for officials administering the civil penalty scheme, and is provided for guidance purposes only. (Explanatory flowcharts are also available at Appendix 1.) Where an objection is made against the imposition of a civil penalty, reference will be made to this framework, in addition to factors listed at Appendix 3. **The final level of penalty will be determined on a case by case basis.**

2.3 If you are presented with a false travel document or visa, you will be liable to a penalty

Table 1 - Framework for assessment of level of civil penalty

		NATURE OF CHECKS COMPLETED			
		FULL	PARTIAL		NO
OCCASION ON WHICH CAUTION/PENALTY ISSUED	3RD OR MORE	£0	100% of max. penalty per worker.		100% of max. penalty per worker.
			Less up to 12.5% per worker reported	Less up to 12.5% per worker, with co-operation	
			75% min. penalty per worker.		
	2ND	£0	75% of max. penalty per worker.		100% of max. penalty per worker.
			Less up to 12.5% of max. penalty per worker reported	Less up to 12.5% of max. penalty per worker, with co-operation	
			At least 50% of max. penalty per worker.		
	1ST	£0	50% of max. penalty per worker.		75% of max. penalty per worker.
			Less up to 25% of max. penalty per worker reported	Less up to 25% of max. penalty per worker, with co-operation	
			£0 (warning issued)		
				At least 25% of max. penalty per worker.	

2. HOW THE LEVEL OF CIVIL PENALTY MAY BE DETERMINED

only if the falsity is reasonably apparent. The falsity would be considered to be ‘reasonably apparent’ if an individual who is untrained in the identification of false documents, examining it carefully but briefly and without the use of technological aids, could reasonably be expected to realise that the document in question is not genuine. Equally, where an employee or potential employee presents a document, which may be genuine, if it is reasonably apparent that the person presenting the document is not the rightful owner of the document, then you may be subject to a civil penalty, even if the document itself is genuine. Therefore, you should examine the photograph and personal details in the document and compare these with the holder in order to detect any impersonation.

- 2.4 We don’t expect employers to act as Immigration Officers. Responsibility for immigration control lies firmly with the Border and Immigration Agency. If you believe that a document you have been shown is a forgery or does not relate to the holder, you do not have to employ that person.

NATURE OF CHECKS

- 2.5 In all cases, you must undertake the specified checks **before** a person begins employment to establish the statutory excuse and, where required, make subsequent checks on your migrant staff to retain the statutory excuse.
- 2.6 A **full check** shall be considered to have been conducted where you can provide copies of certain specified documents for all relevant employees and the official is satisfied that the specified steps were taken when checking these documents. However, the provision of such records does not prevent you from being prosecuted for a criminal offence, including the offence of knowingly employing an illegal migrant worker or facilitating a breach of UK immigration law. Action will be taken against any employer where there is sufficient evidence available and where prosecution would be in the public interest.
- 2.7 A **partial check** shall be considered to have been conducted where, for example, you have

only checked and copied one of two original documents that are required by law to be checked as part of a combination, or failed to conduct a follow-up check on a worker with temporary immigration status after having conducted a full document check at the point of recruitment.

- 2.8 If you cannot provide a record of having conducted the prescribed document checks prior to recruitment, or you have accepted a document which clearly shows the person does not have a current entitlement to work in this country, you shall be considered to have conducted no check for the purpose of imposing a penalty. In each case, it is for you to show that you have complied with the requirements to establish a statutory excuse.

REPORTING SUSPECTED ILLEGAL WORKERS TO THE BORDER AND IMMIGRATION AGENCY

- 2.9 A sum may be deducted from the amount of penalty due for each worker when an employer has reported any suspicions about their employees’ entitlement to work in the UK, or to undertake the work in question. This information must have been reported **before** any immigration visit is made to the employer. As shown in Table 1, the civil penalty may be reduced at the discretion of the Border and Immigration Agency within the given minimum and maximum penalties. If more employees are found working illegally than suspected, you may be penalised for each worker found, but any reduction made may be applied proportionately for each illegal worker detected.

CO-OPERATION WITH THE BORDER AND IMMIGRATION AGENCY IN CONDUCTING AN OPERATION

- 2.10 The penalty due for each worker can also be reduced where you have co-operated with the Border and Immigration Agency in any investigation, or in any consequent operation to detect and detain illegal migrant workers within your workforce. The level of reduction made will depend on whether you have been found to be employing illegal migrant workers within the previous two years. When illegal workers are detected, where it can be shown that you have

2. HOW THE LEVEL OF CIVIL PENALTY MAY BE DETERMINED

conducted full checks and did not knowingly employ an illegal worker, you will receive no penalty or warning.

PENALTY EXPIRY

2.11 When considering whether a higher level of penalty should apply to an employer who has been visited before, previous penalties or warnings will not be considered if they were issued more than two years before the date of the new visit. Where an employer is revisited and has received a penalty or warning in the previous two year period, all previous penalties and cautions will be counted.

MULTIPLE PREMISES

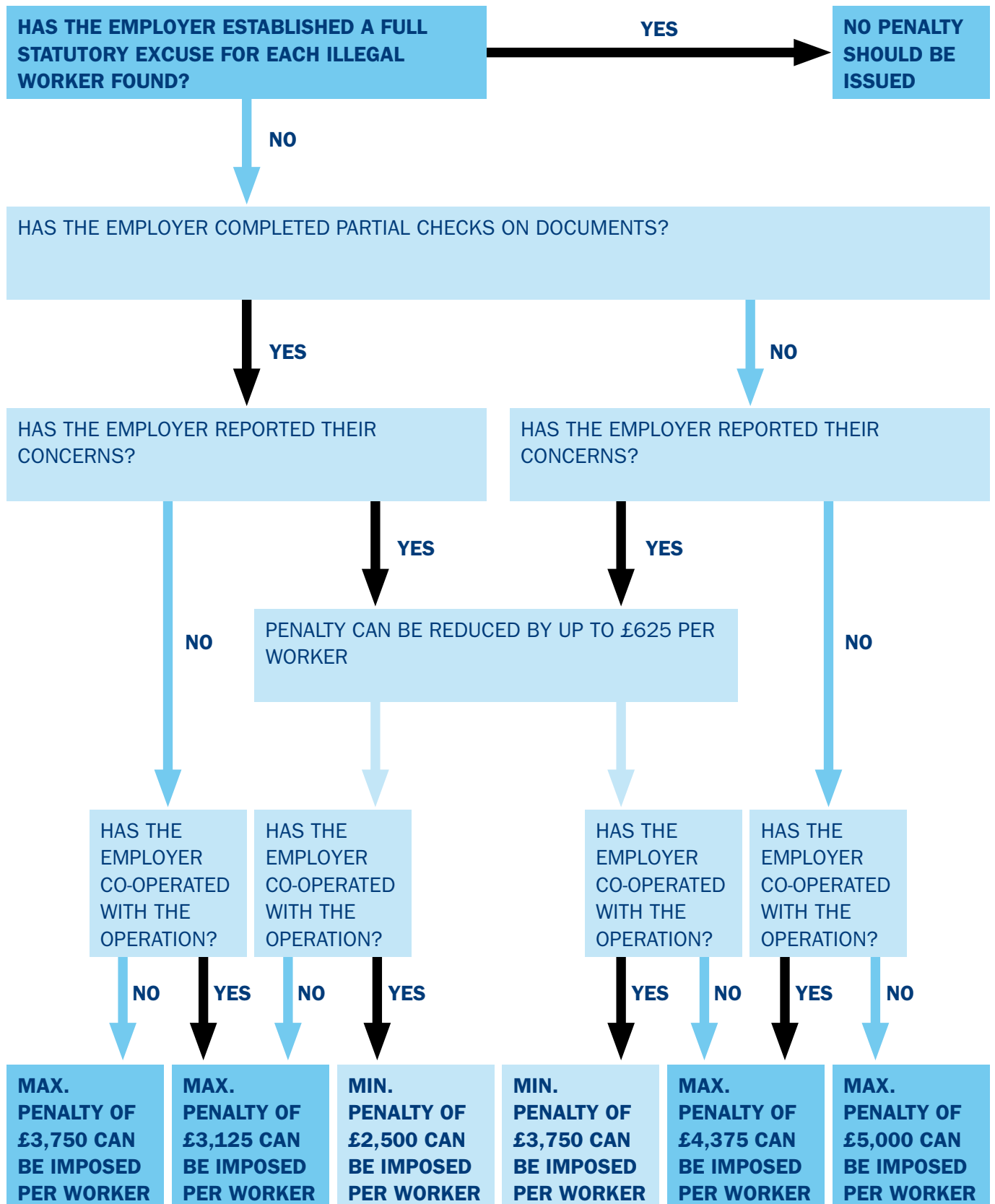
2.12 A company with multiple premises, where recruitment is devolved to each site, will not be liable to a cumulative penalty if illegal workers are detected at different sites, unless this can be attributed to a general failure in the company's centrally set recruitment practices.

DISBARRING DIRECTORS

2.13 We may use our existing powers to apply to the courts to disbar company directors convicted of an offence, such as knowingly employing illegal migrant workers, in connection with the management of a company.

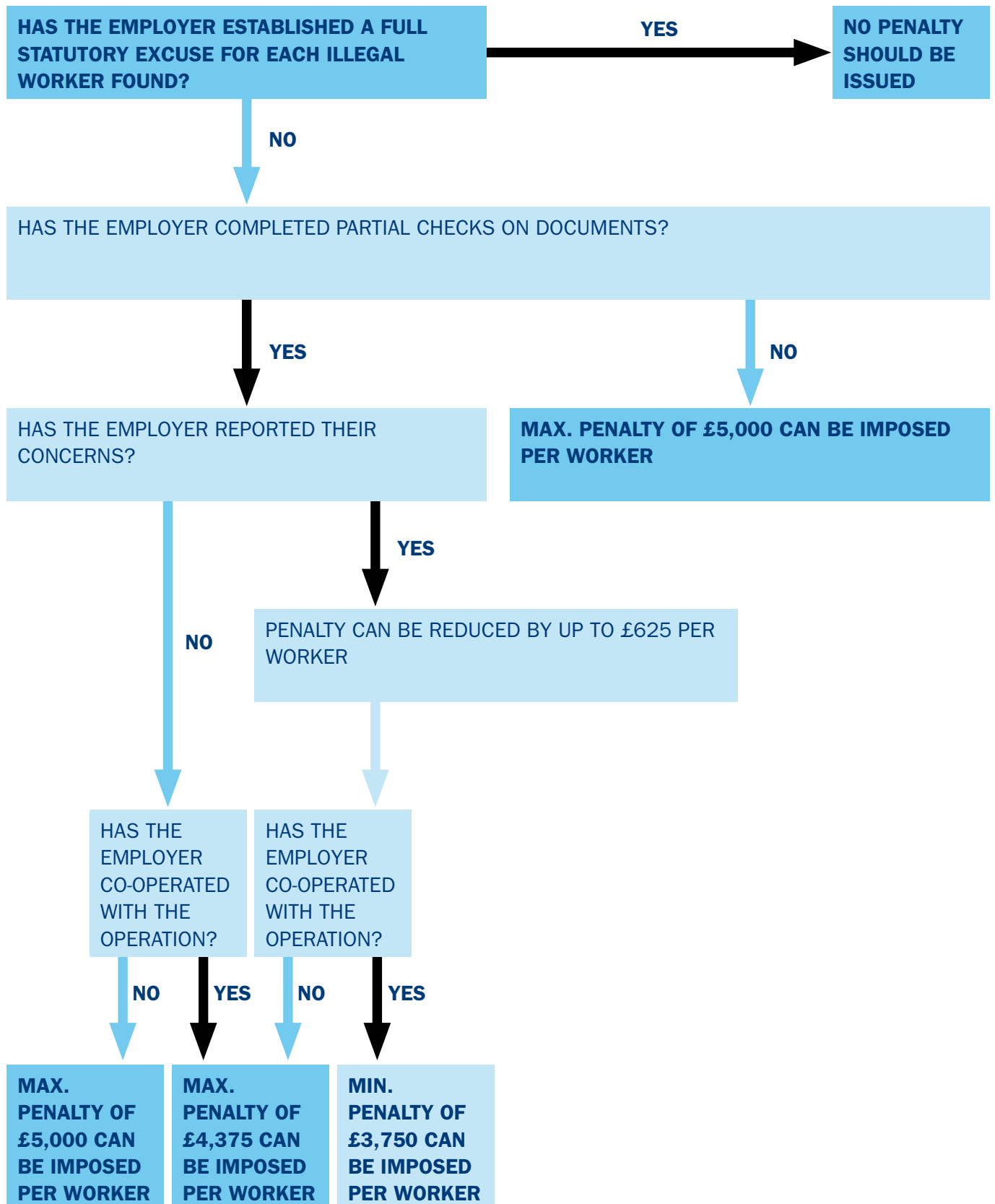
APPENDIX 1: FLOWCHARTS FOR THE DETERMINATION OF THE LEVEL OF CIVIL PENALTY

SECOND VISIT TO EMPLOYER



APPENDIX 1: FLOWCHARTS FOR THE DETERMINATION OF THE LEVEL OF CIVIL PENALTY

THIRD AND EACH SUBSEQUENT VISIT TO EMPLOYER



APPENDIX 2: CASE SCENARIOS

In any scenario where the full checks have been completed and the employer did not knowingly employ an illegal migrant worker, the employer will not be liable to a civil penalty. The following scenarios provide examples of potential penalty amounts, however, the penalties set out in these scenarios are only intended as guidelines and each case will be considered on its merits.

CASE A

A company approaches the Border and Immigration Agency with concerns that a number of its employees may be working illegally. In co-operation with the employer, the Border and Immigration Agency find that 10 workers on the staff lists are illegal migrant workers and mounts an operation to collect these individuals for removal. The company had not been visited previously by the Border and Immigration Agency. All these employees were taken on after 1 May 2004,² and the company had accepted letters issued by the Home Office from these employees as evidence of their entitlement to work in each case, rather than as part of a specified combination.

Case A Result: No penalty, caution issued, advice provided

Number of previous visits – 0
How many illegal migrant workers detected had a statutory excuse? – 0
How many illegal workers detected had a partial statutory excuse? – 10
How many illegal workers detected did not have a full statutory excuse? – 0
Did the company approach the Border and Immigration Agency? – Yes
Did the company co-operate with the operation? – Yes
The potential maximum penalty was therefore reduced from £25,000 (10 x £2,500) to no penalty, but a warning was issued.

CASE B

A company is visited by the Border and Immigration Agency but had not approached them beforehand and they had no prior cautions or penalties. The company co-operates with the investigation and the

consequent enforcement operation. 10 illegal workers are detected. The company had carried out checks, but had been deceived by high quality forgeries in 6 cases. However, in the other 4 cases, the follow-up checks had not been made, indicating that only partial checks had been completed in those cases.

Case B Result: £5,000 penalty

Number of previous visits – 0
How many illegal migrant workers detected had a statutory excuse? – 6
How many illegal workers detected had a partial statutory excuse? – 4
How many illegal workers detected did not have a full statutory excuse? – 0
Did the company approach the Border and Immigration Agency? – No
Did the company co-operate with the operation? – Yes
The potential maximum penalty was therefore reduced from £10,000 (4 x £2,500) to a £5,000 penalty (4 x £1,250).

CASE C

An employer is visited by the Border and Immigration Agency and co-operates with the operation. The employer had not been visited previously. 6 illegal migrant workers were detected, for whom the employer had conducted no checks.

Case C Result: £15,000 penalty

Number of previous visits – 0
How many illegal migrant workers detected had a statutory excuse? – 0
How many illegal workers detected had a partial statutory excuse? – 0
How many illegal workers detected did not have a full statutory excuse? – 6
Did the company approach the Border and Immigration Agency? – No
Did the company co-operate with the operation? – Yes
The potential maximum penalty was therefore reduced from £22,500 (6 x £3,750) to a £15,000 penalty (6 x £2,500).

² Prior to 1st May 2004, different criteria applied for the establishment of a statutory defence and evidence of a short, or long, birth certificate would have been acceptable as a single document.

APPENDIX 2: CASE SCENARIOS

CASE D

The same employer as case C contacts the Border and Immigration Agency 6 months later to report suspicions about some members of staff. The employer co-operates with the subsequent operation, which results in the detection of 3 illegal migrant workers. The employer provides evidence of checks for these workers, having improved their processes, but the checks had only been partial.

Case D Result: £7,500 penalty

Number of previous visits – 1

How many illegal migrant workers detected had a statutory excuse? – 0

How many illegal workers detected had a partial statutory excuse? – 3

How many illegal workers detected did not have a full statutory excuse? – 0

Did the company approach the Border and Immigration Agency? – Yes

Did the company co-operate with the operation? – Yes

The potential maximum penalty was therefore reduced from £11,250 (3 x £3,750) to a £7,500 penalty (3 x £2,500).

CASE E

The same employer as in cases C and D is visited again 6 months later. The employer did not approach the Border and Immigration Agency this time, but co-operates with the enforcement operation. 2 illegal workers are detected and the checks made were only partial.

Case E Result: £8,750 penalty

Number of previous visits – 2

How many illegal migrant workers detected had a statutory excuse? – 0

How many illegal workers detected had a partial statutory excuse? – 2

How many illegal workers detected did not have a full statutory excuse? – 0

Did the company approach the Border and Immigration Agency? – No

Did the company co-operate with the operation? – Yes

The potential maximum penalty was therefore reduced from £10,000 (2 x £5,000) to a £8,750 penalty (2 x £4,375).

CASE F

An employer is visited by the Border and Immigration Agency and co-operates. 2 illegal migrant workers are detected whose leave expired over a year ago and were employed after the [insert name of the relevant order made under section 15(7) of the 2006 Act] came into force. The employer can provide evidence of full checks at the point of recruitment, but has carried out no follow-up checks within the past [12 months]. The employer has not been visited previously.

Case F Result: £2,500 penalty

Number of previous visits – 0

How many illegal migrant workers detected had a statutory excuse? – 0

How many illegal workers detected had a partial statutory excuse? – 2

How many illegal workers detected did not have a full statutory excuse? – 0

Did the company approach the Border and Immigration Agency? – No

Did the company co-operate with the operation? – Yes

The potential maximum penalty was therefore reduced from £5,000 (2 x £2,500) to a £2,500 penalty (2 x £1,250).

APPENDIX 3: ADDITIONAL FACTORS TO BE CONSIDERED WHEN DETERMINING THE LEVEL OF A CIVIL PENALTY

Each case will be examined in context and consideration must be given to the fairness of the financial penalty to be imposed on the employer. Therefore, the following factors may be considered by an official when determining the level of penalty appropriate for each illegal migrant worker detected:

- whether full or partial document checks have been completed by the employer;
- whether any previous penalties or warnings have been issued to the employer and if there has been any subsequent improvement in their procedures;
- whether the Civil Penalty Code of practice has been adhered to;
- if the employer reported any suspected illegal workers;
- if the employer has not obstructed the Border and Immigration Agency in conducting any operation to apprehend the illegal workers in question;
- whether the migrant worker is living and working in the UK illegally; or
- whether the migrant worker is legally resident in the UK but has been found to be working in breach of their employment restrictions;
- the proportionality of the level of penalty given;
- the ability of the employer to pay; and
- the thoroughness and/or consistency of the employer's existing employment processes.