ILPA response to consultation
Strengthening and simplifying the civil penalty regime.

The Immigration Law Practitioners' Association (ILPA) is a professional membership association the majority of whose members are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Established over 25 years ago, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on numerous government, including Home Office, and other consultative and advisory groups.

ILPA has opposed employer sanctions since their inception in 1996. They serve to encourage and promote discrimination in the workplace, affecting not only those with limited leave to be in the UK but also settled persons and British citizens, in particular from ethnic minority backgrounds[1]. Relationships in the workplace can be put under strain.

Employer sanctions have also, particularly since the introduction of the sponsor licensing schemes under the Points-Based System[2], greatly increased the regulatory burden for businesses. They have increased businesses' reliance on lawyers.

All too often illegal working is in exploitative, sometimes dangerous conditions[3]. The rhetoric around this consultation suggests that it is about increasing sanctions for the worst, most exploitative employers but we do not consider that the substance of the proposals has this effect. We recall the analysis in the report[4] of the TUC Commission on vulnerable employment[5]: "…firms that are found to be non-compliant in one area are often non-compliant in others."

Disregard for the rights of migrant workers is likely to go hand in hand with disregard for health and safety, and for more general employment law and workplace standards[6]. The Commission said:

> *… it is the weak position of migrant workers that has made them vulnerable. If you increase the supply of vulnerable workers then the unscrupulous will come along to exploit them. So the worst way to respond to concern about migration is to further*

[1] See the Migrants' Rights Network *'Papers please': The Impact of the Civil Penalty Regime on the Employment Rights of Migrants in the UK*, November 2008.
[2] 27 November 2008.
[3] See, for example, the Joseph Rowntree Foundation Programme Paper: Forced labour and UK immigration policy: status matters? Peter Dwyer, Hannah Lewis, Lisa Scullion and Louise Waite, October 2011.
[4] *Hard Work; Hidden lives, the full report of the TUC Commission on vulnerable employment*, 7 May 2008.
[5] See http://www.vulnerableworkers.org.uk/ .
[6] *Hard Work; Hidden lives, the full report of the TUC Commission on vulnerable employment, op. cit.*

reduce migrant workers' rights. That will simply cause an even greater downwards pressure on standards.

…

We have therefore concluded that there is a need for the scope of government enforcement agencies to be extended to cover a wider range of workplace rights.

This recommendation should be revisited. The current regime fails to concentrate on the worst employers or on the workers most vulnerable to exploitation. It does nothing to contribute to the general raising of employment law standards that would protect migrant workers and ethnic minorities in the labour market. Instead it creates red tape and can contribute to an atmosphere in the generality of workplaces that is at best unhappy and at worst oppressive.

1. If an employer breaches the right to work checks on more than one occasion, should a maximum civil penalty of £20,000 per illegal worker be levied?

No.

Given that the maximum penalty is already £10,000 per head, ILPA is unconvinced that increasing the maximum penalty will serve significantly to affect employer behaviour. It is difficult to see how increasing the maximum penalty will offer any more of a disincentive to the exploitative employer who intentionally employs somebody without permission to work: we suggest that the fear of detection is a far greater deterrent than the severity of the penalty. For those employers who have failed to comply with the legislation by mistake or because of error, in members' experience the level of penalty is seen of little relevance to them until it is too late. The proposed change thus appears thus to be symbolic, of style rather than substance. No statistics or other analyses have been provided in the consultation paper to suggest that the increase of the maximum civil penalty from £5,000 to £10,000 on 29 February 2008 increased compliance.

2. Should the calculation of civil penalties be simplified as proposed in the consultation?

No – what is proposed would make it a more crude, as opposed to a simpler, tool.

Mitigating factors

As to the proposed new mitigating factors, employers have statutory employment law responsibilities as well as responsibilities under their own terms and conditions of employment. We have seen too many cases where persons subsequently given leave to remain have in the meantime lost their jobs. Employers who have wrongfully and peremptorily dismissed employees on an assumption that they have lost the right to work have lost unfair dismissal cases in the employment tribunals but by that time reinstating the employee in work may no longer be possible, for example because there is no subsisting relationship of trust and confidence between employer and employee.

Where the immigration status of an employee is unclear and that employee cannot provide documents that give the employer a defence against a civil penalty, the employer will be in violation of employment law if it suspends without pay or dismisses an employee who does have the right to work.

For example, there are significant and ongoing problems with the application process for EEA residence documents and the timely obtaining of Certificates of Approval by those who have applied for such documents. These delays are leading to third country national family members being unable to access employment and can lead to problems with existing employers and have in some cases led to suspension and dismissal.

There are significant ongoing problems with the accuracy and efficiency of the Home Office's Employer Checking service. A third country national's inability to provide List B documents will not (and should not) give an employer any protection against any claim in employment law following non-recruitment, or suspension or dismissal on these grounds alone where the third country national is, in fact, exercising EU Treaty rights.

The latter point is well illustrated in the case of *Okuoimose v City Facilities Management (UK) Ltd*, UKEAT/0192/11/DA, where a third country national family member employee's claim for unlawful deduction of wages, relating to a period of suspension without wages following her inability to provide her employer with List B documents on the date her existing EEA residence document 'expired', was upheld by the Employment Appeal Tribunal. The judge, Jeremy McMullen QC said that section 15 of the Immigration, Asylum and Nationality Act 2006, s.15 'has no application here'. He emphasised the wording of Directive 2004/38/EC, Art 25:

> ' 1. Possession of a registration certificate as referred to in Article 8, of a document certifying permanent residence, of a certificate attesting submission of an application for a family member residence card, of a residence card or of a permanent residence card, may under no circumstances be made a precondition for the exercise of a right or the completion of an administrative formality, as entitlement to rights may be attested by any other means of proof.'

We consider that EU Regulation 492/2011, on the freedom of movement for workers within the Union, acts to disapply any aspect of the illegal working regime which has the practical effect of impeding access to employment by a third country national family member and prohibits unequal treatment in relation to employment, social and tax advantages. Art 3(1) of the Regulation provides:

> 'Under this Regulation, provisions laid down by law, regulation or administrative action or administrative practices of a Member State shall not apply:
>
> > (a) where they limit application for and offers of employment, or the right of foreign nationals to take up and pursue employment or subject these to conditions not applicable in respect of their own nationals; or

(b) where, though applicable irrespective of nationality, their exclusive or principal aim or effect is to keep nationals of other Member States away from the employment offered.

The first subparagraph shall not apply to conditions relating to linguistic knowledge required by reason of the nature of the post to be filled.'

Article 7 of the Regulation confirms the prohibition on unequal treatment.

Employees have been treated harshly by employers who dismiss them in circumstances where the employee does have the right to work but cannot prove this with documents that meet the requirements for a statutory defence against a civil penalty. This was the case in *Kurumuth v NHS Trust North Middlesex University Hospital* UKEAT/0524/10/CEA where the employee had been waiting for a decision on her immigration application for a number of years. The Employment Appeal Tribunal held that it was acceptable for the employer to rely upon the Home Office guidance on preventing illegal working to decide whether or not the employee should be dismissed. This was despite the employee's having the right to work in the UK, although in a way not covered in the guidance. The failure of the Home Office guidance adequately to address all the bases of a right to work in the UK results in people losing their jobs. Non-EEA nationals and ethnic minorities are more likely to be affected than British citizens and thus the shortcomings in the guidance give rise to discrimination on the grounds of race. Thus, for employers, shortcomings in the guidance can result in legal expenses.

We consider it highly unlikely that any employer would report a suspected illegal worker to the employer helpline. Either, there has been a genuine error which is being investigated in accordance with employment law or the employer is exploiting persons without permission to work and therefore highly unlikely to report this.

Guidance should identify as a mitigating factor the employer's having taken prompt action that respects employment law obligations on discovering that somebody may be working unlawfully. For example, suspension on full pay while a fair investigative procedure is followed.

There are implications of checks for relationships in the workplace between all migrant workers, whether or not they have permission to work, and their employers. Employers will not always "know" that an employee does not have the right to work; they may have a concern that this may be the case. In such cases the required documents to check status are not always available, for example when a person's leave is shortly to expire and those documents are with the Home Office, supporting an in-time application or when an EEA national of family member of an EEA national has applied for residence documentation. Employers are not always the sponsors of the migrant workers they employ. For example, an employer may employ a person who has permission to work as a family member of a British citizen, EEA national or settled person. To report an employee as a person who does not have permission to work or to share information that should be confidential under the contract of employment in the course of trying actively to cooperate with the

Home Office investigation may put the employer in breach of responsibilities under the contract of employment, employment law statutes and other statutes.

It is unclear why cooperation with an investigation is given such weight as against the underlying cause of the investigation, the conduct being investigated. Has the employer made a mistake in record keeping or have they knowingly and deliberately employed a person without permission to work, including with intent to exploit that person?

There are situations in which an employer tries to carry out checks but makes a mistake in following the guidance. In very many of the situations where persons have been found to be working unlawfully there has been an error. For example, in one case an individual applied for further leave to remain and did not include the correct fee. The application was rejected as invalid by which time his leave had expired. In another case, the individual failed to sign the cheque that accompanied the application. The application was returned as invalid but the individual's leave had in the meantime expired. Applications that employer and employee thought were in order have been refused for technical reasons such as payslips or bank statements in formats that do not meet the requirements being provided. In these cases, the employer was then employing the individual unlawfully.

Caution in cooperating with the investigation may be evidence of trying to ensure compliance with employment law and data protection responsibilities, not to mention supporting a valued employee whom the employer is aware may turn out to have been in the UK lawfully.

Partial checks

A partial check may be evidence of good faith. To refuse to continue to treat such a check as a mitigating factor in appropriate cases, risks fettering the Secretary of State's discretion to take it into account, resulting in the unreasonable and potentially unlawful imposition of a penalty. During audits members frequently identify that employers have not complied with all the requirements set out in the legislation. For example they have not copied the documents before the first day of employment and have instead taken the copies on the first day. There are also many cases where the employers have not photocopied the cover pages of a passport. We consider it wrong that employer could not rely on the partial check in circumstances such as these where the error is technical and has made very little substantive difference. The guidance should permit those who carry out checks on the first day of employment to maintain the statutory defence.

Any changes to the civil penalty regime short of abolition must improve legal certainty and mitigate the discriminatory effect of penalties, *inter alia* by:

- making provision for all documents that evidence a right to work, for example in the situations described above, to found a defence against the imposition of a civil penalty when they have been checked;
- making clear that civil penalties can only be imposed where an employee is not permitted to work, not for not making the checks on an employee who does have the right to work, save insofar as any checks have been carried out in a discriminatory manner;

- providing guidance that helps employers accurately to determine the right to work of their employees in situations where this is not clear; and
- providing for a defence against a civil penalty where an employer reasonably believes after reasonable investigation that an employee does have the right to work in the UK.

3. Should a warning letter no longer be issued for a first time breach of the right to work checks?

Yes.

We consider it essential that it continue to be possible to issue a warning letter. The consultation paper does not recognise the severity of the consequences of not doing so and these do not appear to have been appreciated.

The impact of a civil penalty on a Tier 2, 4 or 5 sponsor or an organisation that wishes to become such a sponsor goes far beyond financial sanctions. A Tier 2, 4 or 5 sponsor will lose its licence for receiving a penalty of the maximum possible amount[7]. This is mandatory. There is no right of appeal against this decision; the only challenge is by way on an application for judicial review. The sponsor cannot apply for a new licence for six months from the date of the revocation[8]. A Tier 4 sponsor cannot obtain Highly Trusted Sponsor status for three years after receiving any civil penalty. A Tier 4 sponsor that cannot renew its Highly Trusted Sponsor status will have its sponsor licence revoked. An organisation cannot obtain a Tier 4 sponsor licence within 12 months of receiving any civil penalty.

A warning letter should not be automatic: there is a difference between a person who has made a mistake or been careless and a person who is exploiting and ill-treating migrant workers. Warnings are more appropriate in the former case where the consequences of a civil penalty are disproportionate.

4. If an employer has already received one or more civil penalty notices, should these be considered an aggravating factor when determining the current penalty level?

This should depend on the circumstances of the cases. It should not be automatic.

5. **What should be the starting point for the calculation of a first civil penalty to act as an effective deterrent to employing illegal workers?**
- £15,000
- £12,000
- £10,000

None of the above.

[7] See paragraph 677 (d) of the Home Office *Tier 2 and 5 of the Points Based System Policy Guidance for Sponsors* (version 07/13)).
[8] *Op.cit.* paragraph 678.

All these are too high and, as set out in response to question 3 above, zero value civil penalties still have more severe consequences for an employer than a warning. The imposition of a penalty, with the attendant consequences for the employer, may be disproportionate and a warning letter more appropriate. Home Office press releases about those who have employed persons without permission to work in the UK usually describe small businesses, where the level of penalty is likely to significant rather than large employers. It is unclear whether this is because only small businesses are targeted, or because larger ones are not "named and shamed," all too often before the question of whether the employer is liable to a civil penalty can possibly have been resolved.[9]

It should be possible to reduce the amount of a civil penalty to zero in the circumstances of an appropriate case.

6. Would reducing the number of acceptable documents simplify the right to work checks?

No.

See the response to question 2 above. It is not suggested in the consultation that the number of documents that evidence status would be reduced, that the system of grants of leave would be simplified, that documents would be quickly and easily verified or that documents would be replaced quickly if lost or stolen or upon expiry. Thus to reduce the number of acceptable documents risks increasing what are already high levels of complexity and increasing what are already high levels of risk of leaving those with a right to work without the means to prove it.

Currently, the page of the Home Office website dealing with Preventing Illegal Working[10] provides links to some eight separate current documents, totalling some 194 pages. List A of acceptable documents[11] goes on for 12 pages and list B for 11[12]. This gives some notion of the difficulties employers face.

The problems with documents stem from the guidance's being based upon a civil penalty regime that does not include all the documents that could evidence a person's right to work. See our response to question 2 above. The circumstances that are not catered for are principally:

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[9] See for example Home Office press releases in the last Six illegal workers arrested in Glasgow, 5 August 2013; Illegal workers arrested in raids on Mull, 5 August 2013; Six illegal workers arrested in Highland raids, 5 August 2013; Seven Immigration Offenders Arrested in Essex, 31 July 2013; Cornwall Restaurants face heavy fines after immigration raids, 31 July 2013; Two arrested following raid in Kent, 25 July 2013; month "Two arrested in Immigration raids" 24 July 2013; Three arrested following raid in West London, 24 July 2013.

[10] http://www.ukba.homeoffice.gov.uk/sitecontent/documents/employersandsponsors/preventingillegalworking/ (accessed 12 August 2013).

[11] *Full guide for employers on preventing illegal working in the UK*, UK Border Agency May 2013, page 14. Available at http://www.ukba.homeoffice.gov.uk/sitecontent/documents/employersandsponsors/preventingillegalworking/currentguidanceandcodes/comprehensiveguidancefeb08.pdf?view=Binary (accessed 12 August 2013).

[12] *Full guide for employers on preventing illegal working in the UK*, UK Border Agency May 2013, page 26.

- British citizens born outside the UK (and therefore without a UK birth certificate) who do not have a UK passport;
- People with leave under sections 3C or 3D of the Immigration Act 1971;
- Family members of EEA nationals exercising Treaty rights in the UK who do not have a current family permit or residence card. As a matter of EU law, these documents are not required, although families are entitled to obtain them; and
- Individuals from EU accession states who have the right to work, e.g. where they have been working lawfully for another employer for a period of 12 months. It is often very difficult for Romanian and Bulgarian nationals to demonstrate their right to work, for example where they have been working lawfully for another employer for a period of 12 months. This is also likely to be the case for Croatian nationals who have been working lawfully in the UK for 12 months on 30 June 2013.

The system is meaningless if a person who has the right to work cannot prove it. Meanwhile, checks properly carried out do not evidence a right to work. For example the documents asked for in lieu of passports at the moment do not necessarily prove that someone has the right to work. At the moment in the guidance[13] under List A someone can produce a birth certificate and an official document bearing their National Insurance number. Neither of which bears a photograph. These documents prove nothing for someone born after 31 December 1982 when birth in the UK ceased to confer British citizenship without more. Furthermore, where leave is curtailed, this is extremely unlikely to be shown on a vignette or biometric residence permit.

Other circumstances where an employee's leave will not have an expiry date are where the employee is enjoying leave under section 3C or 3D of the Immigration Act 1971. As explained elsewhere in this response, if a civil penalty is maintained, the list of documents that provide a defence against a civil penalty should be amended to allow a defence in circumstances where an employee has leave under section 3C or 3D of the Immigration Act 1971. The Home Office should issue a letter immediately upon receipt of an in-time application for leave to remain. This would state what the person's current leave is and that it continues until the application has been determined and all appeal rights have been exhausted. Such a letter would be useful to an employee with continuing leave and mention of it could also be incorporated into guidance to avail the employer of a defence against a civil penalty for a specific period.

7. Do you support working towards the biometric residence permit being the main acceptable document for right to work checks for most non-EEA nationals?

We neither support nor oppose this. It is a question of carrots not sticks. If biometric residence permits are the simplest thing to check and are adequate, it should be easy to promote their use by employers. It is unfair that the list of acceptable documents and the way in which checks are operated mean that persons with the right to work cannot evidence this and it is unfair that in general it is so

[13] *Full guide for employers on preventing illegal working in the UK*, UK Border Agency May 2013, page 14).

complicated for persons without a British citizen passport to evidence their right to work.

At the moment reliance on biometric residence permits is impossible, as most people with a right to work in the UK do not have a biometric residence permit. This will continue to be the case for a very considerable period of time. There will always be a need even for a person with a biometric residence permit to be able to rely on alternative documents to evidence their right to work, for example in cases of loss or theft of the document, or when it expires but the person has continuing leave under sections 3C or 3D of the Immigration Act 1971.

8. Would a follow-up check linked to the expiry of permission to stay in the UK reduce the burden on employers?

We are unclear how it is proposed that such a check would work and thus we are unable to determine whether it would reduce the burden on employers or not.

What would a check at the time when an employee's leave was due to expire prove? That the employee has leave, but that it will expire in two weeks? That the person may or may not then have 3C (of the Immigration Act 1971) leave for a period that is not known? It is unclear from the consultation paper what the implications of such knowledge are first for the employer's liability to the civil penalty under section 15 of the Immigration, Asylum and Nationality Act 2006 but also for their risk of prosecution for the criminal offence of knowingly employing a person without permission to work under section 21 of that Act.

In cases where an employee provides documents from List B[14], Article 4(2) of the Immigration (Restrictions on Employment) Order 2007 (SI 2007/3290) provides:

> *…an employer will be excused under this article from paying a penalty under section 15 of the 2006 Act for a period of twelve months, beginning with the date on which the employee produced the document or combination of documents.*

In the consultation paper, at paragraph 44, this is interpreted as meaning that the defence against a civil penalty will carry on for 12 months from making the document check regardless of the employee's leave expiring during this period. However, this ignores section 15(4) of the Immigration, Asylum and Nationality Act 2006, which provides:

> *...the excuse… shall not apply to an employer who knew, at any time during the period of the employment, that [the employment] was contrary to this section.*

When exactly would the checks be carried out? Would they have to be carried out prior to the expiry of the grant of leave as recorded in the biometric residence permit or certificate of entry clearance? When the check is carried out it will simply show that the person's leave is due to expire very shortly. If two months prior to expiry of that employee's leave, the employer checked the employee's leave and took and retained copies of the relevant documents, it might be argued that It would

[14] *Full guide for employers on preventing illegal working in the UK*, op. *cit.,* page 26.

appear that the employer knew, two months later, that the employee had no right to work. To deny an employer the statutory excuse, the Home Office would only need to prove the knowledge of the employer on the balance of probabilities. Were a prosecution brought the criminal threshold of beyond reasonable doubt would apply.

The current system of having a defence for one year once documents have been checked applies where List B documents that avail the employer of a defence against a civil penalty do not have an expiry date. These are the following:

- a certificate of application (List B, paragraph 4)
- an Application Registration Card combined with confirmation by the employer (List B, paragraph 6)
- an Immigration Status Document combined with an official document giving the individual's NI number (List B, paragraph 7)
- a letter from the Home Office combined with an official document giving the individual's NI number (List B, paragraph 8)

It is not clear how the Home Office intends to the situations of persons whose documents with no expiry date.

Even if these problems were addressed there would remain practical problems. It is at the time when the leave expires that the employee is least likely to have the necessary documents to prove to their employer that they have current leave because they have submitted their personal documents to the Home Office. Establishing when a person's leave expires is not always easy. It can be particularly difficult at the time when it is close to expiring: establishing that a person has lawful leave under section 3C or, 3D of the Immigration Act 1971 is not straightforward. The consultation paper does not make clear what the employer would have to do and how frequently checks would have to be carried out where the employee had section 3C or section 3D leave. Would checking really be less frequent under the new proposals?

The employer getting in touch with the Employers' helpline receives either confirmation that there is an application with the Home Office or is told that the Home Office cannot confirm that it has received such an application. The Home Office never confirms that it has not received an application. Where the Home Office cannot confirm that it has received an application, the employer is left having to investigate the employee's immigration status on its own, for example by taking evidence of the employee having posted their application.

Employers are not infrequently given inaccurate information when they check with the Employers' helpline. Even if the helpline accurately reports what is on the Home Office database, what is on that database may be inaccurate because an application has not been entered on the database. We have seen for example situations where the Home Office computer only has records of the main applicant's name and application and perhaps 'plus one dependant' without the name of that dependant or perhaps no record of the family member at all. The Employers Checking Service will then say there is no record of the person who has made a valid in-time application. Examples include where there is no record of a spouse or partner. The employer needs confirmation from the Employer Checking Service to establish a defence and,

given inaccurate or incomplete advice, may dismiss or suspend a worker, including on terms not compatible with employment law.

There were a lot of delays in getting settlement applications in protection cases entered on to the computer for a long time, resulting in employees being sacked, or not being considered for jobs. Many employers will not take the trouble to get in touch with the Employers Checking Service, with the result that people do not get jobs, or risk losing their jobs. One member gives the example of a woman who applied in December for settlement after six years' discretionary leave as a wife and has no answer. She reports that every time sees see the administrative staff in the school where she works, those staff ask why she has not heard from the Home Office but they will not undertake the check themselves.

There can be very lengthy delays in updating the database, this is one of the causes of the problems with Capita PLC's phoning and texting people allegedly in the UK without lawful leave but all too often in practice British citizens or persons with leave. Capita is consulting a database that is both difficult to understand and not up to date.

Capita case December 2012

A client of mine received a text message on his phone from Capita Plc. and messages say they need to leave the UK and a phone number to call them on. He has also been getting phone calls from them - quite a few on a daily basis. Needless to say that our client is actually waiting for his application to be reviewed and we have a letter to confirm this, but obviously Capita have not been informed of this and he was extremely concerned.

I called them and asked if we could have a letter and I was told they only send it to the individual immigrants not to their legal representatives ... Interestingly enough they phoned my client again straight after my call.

Capita case December 2012

… one of my clients who informs me that she received the following message: " Message from UK Border Agency. You are required to leave the UK as you no longer have the right to remain. Please contact us on 08443751636 to discuss".
She received the message at 11:08AM yesterday and then, this morning at 09:32AM, received a missed call from the number 08452930035, which is possibly related.
Our client is currently on a Tier 1 (General) visa valid until 02 March 2013.

Capita case December 2013

I attach "statement of intention to depart"(!) sent to my client by Capita. …He's a new client so I don't know much about him but he does appear to have a SET (O) application outstanding and his wife's case is in the C[ase] A[udit] and A[ssurance] U[nit].

Capita case December 2012

The student has ...only been given until the 1 Jan 2013 to respond… (I'm assuming most institutions will not be operating an Independent Student Advisor service until term starts…).

…the student previously had a Tier 1 visa that was due to expire in 2011. … in 2010 the student obtained Tier 4 entry clearance to study a PhD. This leave is valid from 1 May 2010 until August 2014 and was stamped on entry on 10 May 2010. .. the Capita case ID has been logged on the UKBA system against this student but she could not see any record of the student's Tier 4 leave. It therefore looks like the UKBA (and Capita) think that the student has been an overstayer since his Tier 1 leave expired in 2011 – very alarming since as far as X knows the student doesn't in fact have any irregularities on his history to prompt this kind of confusion / action.

Capita January 2013

…some of my clients are still receiving letters directly from Capita despite the fact that they have outstanding applications and also the UKBA has our details on records as the legal representatives. One of the family's Human Rights application was lodged in November 2009, the UKBA acknowledge receipt of the application and my client has been reporting monthly since 2008.

There is no consensus among ILPA members as to whether a workable system, could one be found, of checks when leave is due to expire is preferable to a system of annual checks. This is in part because we struggle, as described, to understand how checks on the expiry of permission to stay would work but is also because we consider it likely that the answer will be different for different employers. Our tentative suggestion is that employers be allowed to choose whether they evidence annual checks or checks on the expiry of leave.

For some those employing large numbers of migrant workers it may be easier to do a check once a year. However, some large employers have sophisticated systems (often installed at very great expense) that would enable them to identify the date of expiry of leave for an individual worker.

In members' experience, many employers are failing to carry out the annual checks even though they may be aware of the need to do so. The reasons given for this are most often that it administratively inconvenient for those who employ large numbers of migrant workers. Employers question why they need to carry out repeat checks when the first check identified that the employee had leave to remain for a number of years and they cannot see that anything has changed.

Some legal representatives already advise all corporate clients to undertake checks before work commences, annual checks and checks on expiry of leave. These are clients who retain legal advisors to advise them on sponsor licensing and on workplace checks are thus have experts to whom they can turn if an employee's leave is due to expire.

9. Should directors and partners of limited liability businesses be held jointly and severally liable for civil penalties to allow recovery action to be taken against them if the business does not make payment?

No.

Civil penalties are strict liability offences. The proposed approach is at odds with the notion of limited liability. It equates a strict liability offence with negligent action, for which directors of a limited liability company can be liable. It is not made clear in consultation paper whether the Home Office thinks that amendments to company law would be required. It appears to us that amendments, for example to the Limited Liability Partnerships Act 2000, would be required.

10. Do you think the proposals would have any positive or negative impacts on individuals based on the following protected characteristics?
- Age
- Disability
- Marriage / civil partnership
- Pregnancy
- Race (including nationality, ethnic or national origins, or colour);
- Religion or belief
- Gender
- Gender reassignment
- Sexual orientation

All of the above. These are protected characteristics because of the recognised risks of discrimination on the basis of these characteristics. A person unfairly dismissed because of a workplace check may find it more difficult to obtain another job because of such discrimination.

The proposals will affect individuals differentially because of their race, in particular their nationality, and may affect them because other protected characteristics may decrease the likelihood that they hold passports.

If you answered yes to any of these, please include any suggestions as to how these impacts might be managed or mitigated.

See comments above. Employment law responsibilities and data protection responsibilities must be given primacy and the civil penalty regime must respect these responsibilities.

Race – People who have the right to work but are unable to produce documents that meet the requirements of providing their employer/prospective employer with a defence against a civil penalty are more likely to be of non-EEA nationality than EEA nationality. The existing scheme places such individuals at a disadvantage. Reducing the range of documents that can provide a defence against a civil penalty will increase the occurrence of such denials of employment. There is already a risk of employers trying to avoid the risk of penalties by being selective about who they hire, for

example opting for people who are white, thereby increasing the risk of discrimination based on ethnic or national originals or colour[15].

The Home Office should examine whether the likelihood of a British citizen's having a passport is affected by any of the protected characteristics. For example, severely disabled persons may be unable or find it difficult and costly to travel and may therefore be less likely to hold a passport than other British citizens.

Further comments on these questions and/or have suggestions for improvements that can be made to the operation of the Civil Penalty Scheme, including the published guidance.

ILPA considers that the proposal to require students to provide evidence of term dates is problematic given the range of ways in which people study. A postgraduate may have different dates from an undergraduate at the same institution for example. We do not think that the proposal is workable. Attempts at enforcement are likely to be costly and involve a high level of error.

ILPA opposes the proposal to change the rules on enforcement of a penalty to allow enforcement as though the penalty were a debt due under a court order. In other cases where debts accrue under a statutory scheme, such as child support or council tax debts, there is a prior stage where a liability order is made. Here, efforts are being made to avoid such a stage (at which it is possible to contest the making of the order), or the equivalent stage of seeking a civil judgment that a debt is owing, and move directly to the equivalent of the post-making-of the-liability-order stage, where all that remains is for the debt to be enforced as if under court order.

As to the proposal that an objection must be exercised before any appeal - if this is implemented there should be an option to waive the objection and move straight to an appeal. There is no point in spending time and money on an objection in circumstances where the Home Office disagrees with the analysis of law or fact and will not change its mind. Nor should a person be obliged to incur the costs associated with an objection.

In the event of an appeal, where the respondent concedes the appellant is right (e.g. because a civil penalty was wrongly imposed), an order has to be drawn up that addresses costs. The Civil Procedure Rules Practice Direction 52 and Costs Practice Direction are in point. The former provides that where a settlement has been reached disposing of the application or appeal, the parties may make a joint request to the court for the application or appeal to be dismissed by consent. If the request is granted the application or appeal will be dismissed. Where the Home Secretary has conceded the issue, she has no basis to resist a costs order. When the appeal is settled so that it is withdrawn as the underlying decision is accepted to be wrong, the default position that costs follow the event applies.

It is very difficult for family members of EEA nationals to demonstrate they have the right to work in the UK without applying to the Home Office and potentially being without their passport for lengthy periods of time. The guidance on the documents that must be produced by the family members of EEA nationals is in ILPA's view in breach of EU law and should be changed. See comments in response to questions 2

[15] See *Papers please! Op.cit.*

and 6. Paragraph 4 of List B in the Home Office guidance[16] specifies the documents that can provide a statutory excuse for a third country national family member of an EEA national whose application for an EEA residence card is outstanding. These are:

> *A certificate of application issued by the Home Office or the Border and Immigration Agency to or for [a person who has applied under regulation 18A(1) of the Immigration (European Economic Area) Regulations 2006, or 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.*

It is presumed that these, and other EEA residence documents, were included in List B as an attempt to provide appropriate protection to employers in relation to the employment of third country national family members. However, the current regime is significantly deficient both for prospective/current employees and employer.

List B should be supplemented with such documents as would adequately evidence to an employer:

(i) the relationship between the family member and their third country national family member; and

(ii) that the EEA national is a 'qualified person' (in the terminology of the Immigration (European Economic Area) Regulations 2006 (SI 2006/1003)). This would apply only to family members listed at Article 2(2) of Directive 2004/38/EC.

We highlight a need for better guidance in transfer of undertakings (TUPE) cases about a transferee's position. Normally under TUPE, all terms and conditions affecting the employee are considered as if prior to the transfer, for example, health and safety checks are deemed valid post transfer, even if done by the Transferor prior to the transfer date. It would be helpful if the Home Office followed this approach and respected checks undertaken by Transferor, instead of requiring Transferee to carry out fresh checks. The Home Office's 28 day grace period post transfer is inadequate and needs to be lengthened to at least six months to allow Transferee adequate opportunity to do right to work checks. Many large scale employers bring across thousands of employees under one transfer, and it is impractical and onerous to expect them to undertake comprehensive right to work checks within 28 days of the transfer date.

See comments above for further suggestions.

Adrian Berry
Chair, ILPA
20 August 2013

[16] *Op.cit.*