

Discrimination code for employers



Home Office

Code of practice for employers

Avoiding unlawful discrimination while preventing illegal working

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1: Introduction

Employers have a legal duty to prevent illegal working by ensuring that those they employ have the requisite right to work in the UK. An employer who does not carry out proper checks before employing someone whose immigration status does not entitle them to undertake the work in question, may be liable for a civil penalty. An employer who knowingly employs someone without the correct immigration status may be committing a criminal offence.

The purpose of this code of practice is to ensure that employers do not unlawfully discriminate contrary to the Equality Act 2010 and/or relevant legislation in Northern Ireland when complying with the duty to prevent illegal working, and in particular when carrying out 'right to work' checks when recruiting or employing people. The code provides practical guidance on what employers should or should not do, to avoid unlawful discrimination when complying with your duty as an employer to conduct 'right to work' checks. The code also applies to organisations, such as employment and recruitment agencies where they are employers. Employment and recruitment agencies have additional and separate statutory obligations under the Equality Act 2010, for example those that apply to 'employment service-providers.'

This code of practice has been issued under section 23(1) of the Immigration, Asylum and Nationality Act 2006. It sets out guidance in relation to an employer's legal obligations in Great Britain under the Equality Act 2010, and in Northern Ireland, under the Race Relation (NI) Order 1997, as amended.

Although unlawful discrimination may occur in several different ways, for the purpose of this code of practice, the focus will be on the subject of avoiding race discrimination.

This is a statutory code that has been approved by the Secretary of State and laid before Parliament. As per section 23(2) of the Immigration Asylum and Nationality Act 2006, the Equality and Human Rights Commission and the Equality Commission for Northern Ireland have been consulted regarding the contents of this code. Employment Tribunals may take account of any part of this code which may be relevant to matters of discrimination.

Public authorities must also adhere to this code. In addition, they are subject to the public sector equality duty which requires public authorities to have due regard to the need to¹:

- (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the 2010 Act
- (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it ('protected characteristic' is defined below)
- (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

¹ This duty does not apply to public authorities in Northern Ireland (with the exception of some UK wide bodies whose remit extends there). The corresponding duty on designated public authorities in Northern Ireland under [section 75 of the Northern Ireland Act 1998](#) which obliges them, in relation to carrying-out their functions there, to have due regard to the need to promote equality of opportunity (amongst other things) between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation.

This code has been issued alongside guidance and the ‘Code of practice on preventing illegal working: civil penalty scheme for employers,’ available on GOV.UK at:

<https://www.gov.uk/government/publications/illegal-working-penalties-codes-of-practice-for-employers>

For further information about how to carry out a right to work check, the Home Office has published a code of practice and further guidance available on GOV.UK:

<https://www.gov.uk/government/collections/right-to-work-checks-employer-guidance>

References

Throughout this code of practice, the Equality Act 2010 is referred to as ‘the 2010 Act’, and the Race Relations (Northern Ireland) Order 1997, as amended, as ‘the 1997 Order’.

‘Civil Penalty’ means a notice given under section 15(2) of the Immigration, Asylum and Nationality Act 2006 that requires an employer to pay a penalty of a specified amount.

‘Document’ means an original document unless specified that a copy, electronic or screenshot is acceptable.

‘eVisa’ refers to a digital visa provided by the Home Office as evidence of a person’s immigration status (permission to enter or stay in the UK).

‘Home Office Employer Checking Service’ refers to the enquiry and advice service operated by the Home Office that employers are required to contact in certain circumstances to check whether a person is allowed to work in the UK and, if so, the nature of any restrictions on that person’s right to do so.

‘Home Office online right to work checking service’ means the online system allowing employers to check whether a person is allowed to work in the United Kingdom and, if so, the nature of any restrictions on that person’s right to do so. For the avoidance of doubt, this system is accessible for employers on the ‘View a job applicant’s right to work details’ page on GOV.UK. No other online portal relating to immigration status may be used instead for right to work checking purposes.

An ‘identity service provider’ (IDSP) is a provider of identity verification services using identity validation technology. In the context of this code or practice, they may be certified to provide identity verification to specific levels of confidence, specified by government standards. IDSPs are sometimes referred to as ‘identity providers’.

‘Leave to Enter’ or ‘Leave to Remain’ – see ‘Permission to Enter’ and ‘Permission to Stay’.

‘Permission to Enter’ also known as ‘Leave to Enter’. Immigration documents and guidance may refer to either term, both are acceptable. This means that a person has permission from the Home Office to enter the UK.

‘Permission to Stay’ also known as ‘Leave to Remain’. Immigration documents and guidance may refer to either term, both are acceptable. This means that a person has permission from the Home Office to be in the UK.

‘Settlement’ (previously known as Indefinite Leave to Enter / Indefinite Leave to Remain), means that a person has permission from the Home Office to be in the UK indefinitely.

‘Statutory excuse’ means the steps an employer can take to avoid liability for a civil penalty. Employers gain a statutory excuse against liability for a civil penalty when they conduct right to work checks in the manner set out in legislation and guidance.

‘We’ or ‘us’ in this guidance mean the Home Office.

‘You’ and ‘your’ in the guidance mean the employer (including employment businesses and employment agencies where they are the employer).

For whom is this code of practice relevant?

This version of the code of practice applies to all employment commencing on or after 6 April 2022. It also applies where a repeat check on an existing worker is required to be carried out on or after 6 April 2022 to retain a statutory excuse.

All employers in England, Scotland, Wales and Northern Ireland must adhere to this code. It also applies to certain organisations, such as employment businesses and employment and recruitment agencies (including online agencies) where they are employers. An employment agency or business also has responsibilities under the Equality Act 2010 and may be liable if practising unlawful discrimination, even if it is acting on the instructions of an employer, such as at the behest of one of its clients.

2: What is discrimination?

The Equality Act 2010 prohibits discrimination and other unlawful acts in employment practices on the following grounds, known as 'protected characteristics':

- age
- disability
- gender reassignment
- marriage or civil partnership
- pregnancy and maternity
- race
- religion or belief
- sex
- sexual orientation

In Northern Ireland, legislation prohibits discrimination on the grounds of:

- age
- disability
- gender reassignment
- political opinion
- pregnancy and maternity
- race
- religious or similar philosophical belief
- sex
- sexual orientation

The protected characteristic of race includes skin colour, nationality or ethnic or national origins.

Direct discrimination

This is when an individual is treated worse than another person or people because either:

- they have a protected characteristic
- someone thinks they have a protected characteristic (known as discrimination by perception)
- they are connected to someone with that protected characteristic (known as discrimination by association).

Unless there is a statutory exception, such as the actions that employers are obliged to take in order to comply with their duties under the 2006 Act, direct discrimination cannot be excused or defended.

Examples of direct discrimination where there is no statutory exception are:

- rejecting all job applicants because they do not have British nationality or another specified nationality
- refusing to consider any non-British /Irish job applicants.
- where the assumption is made that people from certain nationalities or ethnic groups cannot work as a team
- where individuals are intentionally only recruited from one nationality or ethnic group
- where it is assumed without foundation that overseas qualifications and experience are inferior

In the context of right to work checks, examples of direct discrimination might include:

- not interviewing someone from a certain nationality or ethnic group because it is assumed that they will not have the right to work in the UK
- carrying out right to work checks for a Black employee but not for his White colleague

Indirect discrimination

Indirect discrimination occurs where:

- there is a policy that applies in the same way irrespective of protected characteristics, but disadvantages a group of people who share a protected characteristic, and
- an individual is disadvantaged as part of this group.

This will be unlawful, unless the provision, criterion or practice is objectively justifiable (proportionate and necessary). It makes no difference whether anyone intended the policy to disadvantage an individual or not.

For example:

- to require that an employee has been resident in the UK for over 5 years prior to starting employment is likely to be indirectly discriminatory since some migrants who have the right to work will not have been resident in the UK for that period of time.

It is also unlawful to instruct or induce another person to discriminate, or to publish an advertisement or notice that indicates an intention to discriminate.

Unlawful race discrimination in employment

As stated in the Equality Act 2010, race can mean any individual's colour or nationality (including citizenship). It can also mean an individual's ethnic or national origins, which may not be the same as their current nationality. For example, an individual may not have been born in the UK but be living in the UK with a British passport. Race also covers ethnic and racial groups. This means a group of people who all share the same protected characteristic of ethnicity or race.

You must not discriminate because of race:

- in the arrangements you make to decide who should be offered employment
- as to the terms on which you offer to employ a person
- by refusing or deliberately failing to offer employment

It is also unlawful for you to discriminate because of race against a worker:

- in the terms of employment provided
- in the way you make opportunities for training, promotion, transfer, facilities, services or other benefits available
- by refusing access to such opportunities, benefits, facilities or services
- by dismissing the worker or subjecting him to any other detriment

Harassment is unwanted conduct related to a protected characteristic that violates someone's dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment for them.

It should also be noted that it is unlawful to victimise a person because it is believed he or she has done, intends to do, or might do, a 'protected act'. A protected act can be anything done for the purposes of or in connection with the 2010 Act, such as making or supporting a complaint of discrimination, bringing legal proceedings, providing information, evidence or statements.

Employers must also not subject job applicants or employees to harassment under the terms of the 2010 Act and the 1997 Order.

It is also unlawful to instruct or induce another person to discriminate, or to publish an advertisement or notice that indicates an intention to discriminate. Under the 2010 Act and the 1997 Order, discrimination committed by an employee in the course of their employment, is treated as having been committed by you as their employer, as well as by the individual employee, whether or not you knew or approved the acts of discrimination. It may be a defence to this liability if you can prove that you took all reasonable steps to prevent such discrimination. For example, in the context of your duties to prevent illegal working, you might provide training to employees on how to carry out right to work checks in accordance with this code both before and during employment.

Employers should be mindful of all forms of discrimination when applying the provisions of the Immigration and Asylum Act 2006 (the 2006 Act). If for example, people affected by religious discrimination are from a particular racial group, the discrimination might also amount to indirect race discrimination – for example, case law has established that Sikhs and Jews can be described as having an 'ethnic origin'. It should also be noted that in Northern Ireland, the 1997 Order also expressly covers the Irish Traveller Community, which is also a racial group for the purposes of the Act.

Action against you

Anyone who believes that they have been discriminated against, either directly or indirectly, by you, as an employer, a prospective employer or an employment agency, may issue a claim in an Employment Tribunal, or an Industrial Tribunal in Northern Ireland. If the claim is

upheld, the Tribunal will normally order you to pay compensation, for which there is no upper limit.

The content of this code of practice can be taken into account by a Tribunal in determining whether you have discriminated against an employee or prospective employee. The Equality and Human Rights Commission and the Northern Ireland Equality Commission can also take regulatory action against you if you publish a discriminatory advertisement or instruct or induce another person (including an employment or recruitment agency) to discriminate.

Where you are found to have committed an act of unlawful race discrimination, the Public Procurement Regulations 2015 provide that public authorities may disqualify your organisation from entering into public procurement contracts.

3: How to avoid discrimination

Employers should:

- be consistent in how they conduct right to work checks on all prospective employees, including British citizens.
- ensure job selections are made on the basis of suitability for the post.
- Ensure that no prospective job applicants are discouraged or excluded, either directly or indirectly, because of known or perceived protected characteristics.

Employers should not:

- discriminate when conducting right to work checks.
- only check the status of those who appear to the employer likely to be migrants
- Make assumptions about a person's right to work in the UK or their immigration status on the basis of their colour, nationality, ethnic or national origins, accent, surname or the length of time they have been resident in the UK.

Otherwise, you may be acting in a discriminatory manner and it could be used as evidence against you in proceedings under the Equality Act 2010 or the Race Relations (Northern Ireland) Order 1997, as amended.

All employers should take steps to ensure that discrimination including racial harassment and victimisation does not happen in the workplace. Employers should aim for a culture of zero tolerance of race discrimination. As a matter of good employment practice, employers should have clear written procedures for the recruitment and selection of all workers based on equal and fair treatment for all applicants. Copies of these procedures should be made available to all relevant staff.

The best way to ensure that you do not discriminate is to treat all applicants fairly at each stage of the recruitment process.

For further information, employers may refer to the fair recruitment recommendations made by the Equality Human Rights Commission and the Equality Commission for Northern Ireland these can be found at:

[Employment: Statutory Code of Practice | Equality and Human Rights Commission \(equalityhumanrights.com\)](https://www.equalityhumanrights.com/employment-statutory-code-of-practice)

[ECNI - Fair employment code of practice, Employers and Service Providers, Equality Commission, Northern Ireland \(equalityni.org\)](https://www.equalityni.org/ECNI-Fair-employment-code-of-practice-Employers-and-Service-Providers)

These recommendations are designed to help employers avoid unlawful discrimination on all of the protected equality grounds and in all aspects of the recruitment process and employment relationship. This code of practice offers guidance in addition to these recommendations on the employer's specific task of preventing illegal working when conducting right to work checks.

Fair recruitment processes for those with an entitlement to work in the UK

Employers must be satisfied that an applicant has the right to undertake the work in question in the UK.

You should conduct a right to work check before you employ a person to ensure their immigration status allows them to carry out the work in question. If an individual's right to work is time-limited, you should conduct a follow-up check shortly before it is due to come to an end.

There are three types of right to work checks: a manual document-based check, the use of the services of an Identity Service Provider (IDSP) or to carry out a Home Office online check. Conducting any of these checks as set out in this guidance and in the [code of practice](#) will provide you with a statutory excuse.

You can also use the [Employer Checking Service](#) where an individual has an outstanding application, administrative review or appeal, or if their immigration status requires verification by the Home Office, for example in the case of Crown Dependencies.

You should refer to the employer's guidance for full details on how to carry out a right to work check.

<https://www.gov.uk/government/publications/right-to-work-checks-employers-guide>

If you are carrying out a right to work check on one applicant, you should make sure you check all applicants being considered at that stage.

Employers should only ask questions about an applicant's or worker's immigration status where it is necessary to determine whether their status imposes limitations on the number of hours they may work each week, the type of work they may carry out. You should ensure that applicants or employees are not asked about their immigration status because of their race, nationality or ethnic or national origins.

Job applicants and employees with a time-limited right to work

Job applicants should not be treated less favourably if they produce acceptable documents showing a time-limited right to work in the UK. Once a person who has time-limited permission to stay in the UK has established their initial and ongoing entitlement to work, they should not be treated less favourably during their employment, including as to the terms of their employment, opportunities for training, promotion or transfer, benefits, facilities or services, or by dismissing the worker or subjecting them to some other detriment, other than further right to work checks as prescribed in the guidance and ['Code of practice on preventing illegal working: civil penalty scheme for employers'](#), available on GOV.UK at:

<https://www.gov.uk/government/publications/illegal-working-penalties-codes-of-practice-for-employers>

It is possible for a migrant to apply to extend their leave to remain. If they do so before their previous status expires, they continue to have any right to work that they previously had while their application and any associated administrative review or appeal is outstanding.

You must not discriminate against any individual based upon the type of right to work check carried out. For instance, an individual may decide that they do not want to use an IDSP for digital identity document verification and choose to demonstrate their right to work using a physical document instead. Furthermore, some individuals who hold immigration leave will be able to demonstrate a right to work using the Home Office online service, and others will not. Neither group should be discriminated against or treated less favourably.

Conducting a right to work check

Job applicants should not be treated more or less favourably if they have an eVisa. This means employers cannot, for example, only employ individuals who have digital evidence and refuse to carry out manual checks on those who do not have access to the Home Office online checking service.

Where a right to work check has been conducted using the online service, the information is provided in real-time directly from Home Office systems and there is no requirement to carry out a manual document-based check. Employees should be invited to provide their share code in their application which, along with the applicant's date of birth, will allow the employer to check their immigration status via the online service available on gov.uk at:

<https://www.gov.uk/view-right-to-work>

Job applicants who cannot evidence their right to work

Employers may encourage use of the online checking service and may support employees in doing so (for example by providing access to hardware and the internet). However, employers are not permitted to mandate online checks, except for those employees who have been provided with an eVisa.

You can also use the [Employer Checking Service](#) where an individual has an outstanding application, administrative review or appeal, or if their immigration status requires verification by the Home Office, for example in the case of Crown Dependencies.

Employers should try to keep the job open for as long as possible in order to provide an individual with the opportunity to demonstrate their right to work but are not obliged to do so where the need to recruit someone is urgent. It is ultimately the decision of the employer whether or not to employ an individual.

4: If you need more information

The Equality and Human Rights Commission (EHRC) and the Equality Commission for Northern Ireland provide further information on matters relating to the law on discrimination. Information and contact details are available at

- <http://www.equalityhumanrights.com/>
- <http://www.equalityni.org>

The EHRC has produced a Statutory Code of Practice on Employment which contains detailed and practical guidance to help employers to comply with the Equality Act 2010, together with guidance and good practice for small businesses. These publications are available on its website.

Home Office guidance and the separate 'Code of practice on the prevention of illegal working: civil penalty scheme for employers' are available at:

<http://www.gov.uk/government/collections/employers-illegal-working-penalties>

Home Office advice for employers about complying with the law on preventing unlawful migrants working is available from the Sponsorship, Employer and Education Helpline on 0300 123 4699. The Helpline is open Monday to Thursday, between 9am and 5pm; Friday, 9am to 4.30 pm, and not bank holidays.

Information for employees

You should not be offended if an employer asks you to evidence your right to work. Employers are expected to conduct right to work checks on all job applicants. By performing the checks and keeping records of checks they have made, employers will protect themselves from a civil penalty should it turn out they have inadvertently employed someone who is here unlawfully. The checks are not intended to do anything other than restrict illegal working practices.

The way you can evidence your right to work may vary depending on your nationality or immigration status. If you are in possession of a UK or Irish passport or you have access to the Home Office online checking service, the employer is unlikely to need to see any further documents. For documents that are encountered less frequently, the employer might need to make further checks, by consulting guidance or possibly by contacting the Home Office to verify your immigration status directly with us. You can assist employers and speed up the process for yourself by making sure your documents are ready for checking when the employer needs to see them.

Anyone who believes that they have been discriminated against, either directly or indirectly, by an employer or prospective employer on the basis of one or more protected characteristic may bring a complaint before a Tribunal.

It is unlawful to victimise a person because he or she has made or supported a complaint of race discrimination.

If you need expert advice and support on discrimination, you can call the Equality Advisory Support Service (EASS) on 0808 800 0082

<https://www.gov.uk/discrimination-your-rights>.

In Northern Ireland the advisory service is provided by the Equality Commission for Northern Ireland. The telephone helpline number is 028 90 500600

www.equalityni.org

