EXPLANATORY MEMORANDUM TO

THE IMMIGRATION (RESTRICTIONS ON EMPLOYMENT) (CODES OF PRACTICE AND AMENDMENT) ORDER 2014

2014 No. 1183

1. This Explanatory Memorandum has been prepared by the Home Office and is laid before Parliament by Command of Her Majesty.

1.1 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 This Order amends the Immigration (Restrictions on Employment) Order 2007 (S.I. 2007/3290) ("the 2007 Order") to implement detailed provisions of the civil penalty scheme to prevent illegal migrants working in the United Kingdom as required by the sections of the Immigration, Asylum and Nationality Act 2006 ("the Act") relating to employment. It also brings into force revised Codes of practice.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 This instrument breaches the "21-day rule". The Department apologises for this breach, which has occurred because the Department wished to avoid undue delay to the coming into force of this instrument, which could not be made until the revised codes of practice under sections 19 and 23 of the Immigration, Asylum and Nationality Act 2006 had been laid before Parliament, which in turn could not happen until both Houses of Parliament were sitting.

4. Legislative Context

4.1 The Act allows the Secretary of State to serve an employer with a notice of liability requiring the payment of a penalty of a specified amount when 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 the employment is also allowed. An employer may acquire a statutory excuse from payment of the penalty by checking, copying and retaining a copy of specific documents produced prior to the employment commencing. Whilst the employee has limited leave to be in the UK, this check must currently be repeated every 12 months in order that this excuse may be retained.

4.2 The 2007 Order describes how an employer will be excused from paying a penalty. It also sets out requirements on an employer in relation to conducting right to work checks This Order amends a number of those detailed provisions.

4.3 Section 19(1) of the Act provides that the Secretary of State shall issue a Code of practice specifying the factors to be considered by the Secretary of State in determining the amount of

the penalty. Section 23(1) of the Act provides that the Secretary of State shall issue a Code of practice specifying what an employer should or should not do in order to ensure that while avoiding the liability of a penalty or committing an offence of knowingly employing an illegal migrant worker as provided for in section 21 of the Act, the employer also avoids contravening the Equality Act 2010 or the Race Relations (Northern Ireland) Order 1997, as amended ("the Equality Code"). This Order also brings revised versions of these Codes into effect.

5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

6.1 As the instrument is subject to the negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

7.1 On 29 February 2008, a new system of civil penalties came into force which made employers who employed illegal workers liable for a civil penalty of up to £10,000 per illegal worker. Under the scheme, an employer can establish a statutory excuse against this liability by undertaking specific document checks as set out in the 2007 Order. Where an employee subject to immigration control only possesses limited leave to be in the UK, the check must be repeated within every 12 month period in order for the excuse to be retained. This system was designed to encourage employers to comply with their legal obligations, without criminalising those who make a mistake in operating their recruitment and employment practices.

- ***What is being done and why***

7.2 Illegal working often results in abusive and exploitative behaviour, the mistreatment of illegal migrant workers, tax evasion and illegal housing conditions. It can also undercut legitimate businesses and have an adverse impact on the employment of people who are lawfully in the UK. This Order amends the detailed provisions of the civil penalty scheme for employers of illegal workers by:-

A. Reducing the range of acceptable documents that demonstrate a right to work by removing travel documents, work permits and general Home Office letters. All documents which contain an expiry date must now be current i.e. must not have time expired at the point at which they are checked (with the exception of those issued to British citizens – including citizens of the United Kingdom and Colonies who have a Right of Abode in the United Kingdom, and European Economic Area or Swiss nationals and their family members with permanent residence).

B. In respect of employees with a temporary right to work in the UK, no longer requiring employers to always conduct follow-up checks every 12 months in order to retain the statutory excuse. A follow-up check will instead be required as specified by this Order. Generally, this will be when the employee's permission to be in the UK and to do the work in question expires, as evidenced by the document or combination of documents produced for

the right to work check.

C. In respect of documents issued by the Home Office which do not display an expiry date (work-permitted Application Registration Cards and Certificates of Application) the duration of a statutory excuse will be six months from the date of verification by the Home Office Employer Checking Service.

D. When an employee or prospective employee has an outstanding application with the Home Office or a pending appeal to extend or vary their period of leave to stay in the UK and do the work in question, this may also be verified by the employer through the Home Office Employer Checking Service. When this is a follow-up check, a grace period of up to 28 days will be given from the date of expiry of the previous leave in order to make this check, during which time the statutory excuse will be extended for 28 days or, if earlier, until the employer receives notification from the Employer Checking Service about the employee's continuing right to work. If the Employer Checking Service issues positive verification of an employee's right to be in the United Kingdom and undertake the work in question, the employer will be excused for a period of six months from the date of positive verification.

E. Requiring employers to retain a record of the date on which a check was made to establish or retain the statutory excuse. The front page of a passport will no longer be required to be copied or retained.

F. Requiring an employer of students with a limited right to work in term time during their studies in the United Kingdom to obtain and retain evidence of their term and vacation dates in order to establish or retain the statutory excuse. This will provide more certainty for employers in respect of the hours that their student employees are permitted to work and prevent students working in breach of their conditions.

7.3 Two Codes of practice are required by the Act. As a consequence of this Order and the Immigration (Employment of Adults Subject to Immigration Control) (Maximum Penalty) (Amendment) Order 2014, both Codes have been revised and the revised drafts have been laid before Parliament. This Order brings both these revised Codes into effect. "The Code of practice on preventing illegal working: civil penalty scheme for employers", issued under section 19(1) of the Act also:-

A. Revises the method by which civil penalties are calculated and applies increased penalty amounts where an employer has been found to employ an illegal worker on more than one occasion within a three year period. There is also provision to reduce the penalty amount when the employer has reported illegal workers to the Home Office and/or has actively cooperated with the Home Office. In respect of a first breach in any three year period, the penalty may also be reduced to a warning notice if, in addition to meeting the two mitigating factors above, the employer has demonstrated effective document checking practices.

B. Includes an option for employers to request to pay the penalty by instalments because they are unable to pay it in one lump sum. This measure takes into account the impact of the penalty on the employer, though the amount will not be reduced because of the employer's financial circumstances.

C. Includes a fast payment option where an employer may obtain a discount of thirty per cent of the penalty amount by paying it within 21 days of it becoming due.

D. Extends the grace period to sixty days for conducting checks on employees engaged as a result of the Transfer of Undertakings (Protection of Employment) ('TUPE') Regulations. This is an increase from the current grace period of 28 days.

E. Applies the increased maximum civil penalty of £20,000 per illegal worker.

- ***Consolidation***

7.4 The Government has concluded on balance that it is preferable to amend the 2007 Order rather than to revoke and replace it on this occasion, but in the event of any further amendments will give consideration to consolidation. This is anticipated later in 2014, following entry into force of the Immigration Bill.

8. Consultation outcome

8.1 The Home Office conducted a public consultation "Strengthening and simplifying the civil penalty scheme to prevent illegal working" which ran from 9 July 2013 to 20 August 2013. Respondents completed an online questionnaire or provided responses by email or post. 499 responses were received. There were also face to face meetings and two internet seminars with employers, their representative organisations and education representatives.

8.2 The consultation results were published by the Home Office on 10 October 2013. Eighty one per cent of respondents agreed that if an employer has already received one or more civil penalty notice, this should be considered an aggravating factor when determining the penalty level, sixty four per cent of respondents agreed that reducing the number of acceptable documents would simplify the right to work checks and seventy two per cent of respondents felt that a follow up check linked to the expiry of the permission to stay in the UK would reduce the burden on employers. A number of respondents also wanted greater clarity on how to establish a student's right to work and a longer period in which to establish an excuse for employees engaged through the TUPE Regulations.

8.3 The Home Office has also consulted the Equality and Human Rights Commission and the Equality Commission for Northern Ireland and a range of employers in respect of the Equality Code, as required by the Act.

9. Guidance

9.1 Revised draft Codes under section 19 and section 23 of the Act have been laid before Parliament and these will reflect the amendments made. The Government will also issue revised and simplified guidance for employers on their responsibilities under the civil penalty scheme and how to conduct right to work checks, and ensure the changes to the scheme are effectively communicated to employers. The Government will continue to consult with employers to ensure that all guidance meets their needs, clearly explains their responsibilities and is publicised effectively.

10. Impact

10.1 A Regulatory Impact Assessment was prepared for the Act and was published on 22 June 2005. This estimated that the cost to employers of familiarising themselves with new

guidance would be approximately £27.2 million, with the projected cost to business of a continuing obligation in the fifth year after its introduction being approximately £1.3 million. The potential impact of these proposals on compliant employers is anticipated to be positive as the current regulatory burden imposed by the existing scheme is being reduced.

10.2 The impact on the public sector is also anticipated to be positive and for the same reason (reducing the regulatory burden imposed by the existing scheme).

10.3 The Regulatory Policy Committee (RPC) confirmed that the proposed policy changes are deregulatory and benefit businesses through their triage process in July 2013.

10.4 The Impact Assessment relevant to this Order was attached to the explanatory memorandum for the Immigration (Employment of Adults Subject to Immigration Control) (Maximum Penalty) (Amendment) Order 2014 **[SI 2014/1262]** at http://www.legislation.gov.uk/uksi/2014/1262/resources and no separate assessment has been prepared for this instrument. The Impact Assessment is subject to validation by the RPC and the Home Office is working with the RPC to confirm the scale of these benefits.

11. Regulating small business

11.1 The legislation applies to small businesses.

11.2 To minimise the impact of the requirements on firms employing up to 20 people, the approach taken has been to reduce the regulatory burden on all businesses.

11.3 The basis for the final decision on what action to take to assist small businesses followed an assessment of the consultation responses and an internal assessment of the effectiveness of the current civil penalty scheme.

11.4 Through this Order the Government will reduce the regulatory burden on all businesses by gradually reducing the wide range of documents that can demonstrate a right to work and for most temporary migrants replacing annual checks to retain the statutory excuse with a requirement to generally check again when the permission to be in the UK and to do the work in question expires, as evidenced by the document, or combination of documents, produced for the right to work check.

12. Monitoring & review

12.1 The outcomes will be subject to internal review after 12 months and the legislation may be amended accordingly.

13. Contact

13.1 Vincent Doran at the Home Office at Vincent.Doran1@homeoffice.gsi.gov.uk can answer any queries regarding this instrument.