

Time to get legal

UNDER THE NEW SANCTIONS SCHEME, PARKING OPERATORS BREAKING THE RULES COULD FACE EXPULSION UNDER A BPA POINTS-BASED SYSTEM. BILL BLAKEMORE LOOKS AT THE NEW SCHEME AND ANALYSES WHAT OPERATORS NEED TO DO TO GET AND STAY 'LEGAL'

Everyone who works in the industry knows that off-street parking companies have come in for a lot of criticism in recent months. The House of Commons debate about off-street parking in June last year was a notable example: Labour MP Anne McGuire told the House: 'The behaviour and attitudes of a significant minority of private parking firms are at best questionable; at worst, they are rude, aggressive, manipulative and potentially threatening.'

Conjuring up a picture of operators hunting for their prey, she described some parking staff as being 'ready to pounce as soon as someone comes out of their car' and of companies making 'rude, patronising and threatening calls' to collect parking charges. Ms McGuire said she was describing, although she did not name, a member of the BPA's Approved Operator Scheme.

With criticisms like this, along with a catalogue of other comments in the press, on high-profile websites such as MoneySavingExpert.com and elsewhere, the BPA and government have been forced to state their case.

The BPA and government have responded

The publication of a revised Code of Practice in November was big step forward, and the recent launch of a scheme of sanctions for non-compliance – which came into effect at the beginning of April 2010 – is the next step. The DVLA has also tightened up its approach by extending its rules. Anyone who wants access to vehicle keeper data

on a commercial basis (not just those who want it electronically) must now be a member of an Accredited Trade Association (ATA). There is only one ATA in parking – the BPA – giving it more clout over the off-street parking sector. In addition, the Crime and Security Bill (if passed) will introduce new regulations for companies and individuals involved in vehicle clamping.

How does the new points scheme for the Approved Operator Code work?

The BPA has highlighted thirty-seven different examples of 'bad behaviour', categorised into one of five levels, and each level attracts a different number of points. Level 1 contraventions are mainly administrative, such as failing to pay membership fees on time, and receive one point. Further up the scale at Level 5, up to 10 points can be given and immediate remedial action will be required. If an operator receives 12 points it will automatically be fast-tracked to the BPA Council for a disciplinary hearing, which could result in expulsion from the AOS.

The points are deemed to be spent after 12 months and operators will be given the opportunity to take timely remedial action to remedy the contravention.

Some breaches are clear-cut, such as a failure to ensure that all the vehicles are liveried. This is treated as a level 2 code contravention: paragraph eight of the Code of Practice is explicit in requiring operators to mark up clearly with their livery or their business name any vehicles used to undertake enforcement activity, subject to the exception that allows staff to remove it in circumstances where there is a serious risk of personal injury to them from having the identification in place.

What should operators do? The four-step solution

Operators need to put in place a four-step approach in order to ensure they are meeting the increasingly complex new rules.

- 1 Learn:** Learn the new rules. Read the Code of practice; find out what is in the new points-based compliance regime. Keep up to date with legal change.
- 2 Analyse:** How do the new rules apply to our business? Where are we at most risk of breaking the Code of Practice or the law? Are there any new areas of our business that we have not checked for compliance?
- 3 Plan:** What action do we need to take, by when, to make sure we fix any problems? For example, are our signs, our notices and our website saying the things they should be saying?
- 4 Implement:** Take action to fix the problems that have been highlighted in previous steps. Change the signage, revise standard letters, and change procedures.



Operators have a duty to abide by the Code.

However other breaches of the Code of Practice are more open to interpretation.

For example, there are three different kinds of 'failure in communication with customers': a *minor* failure in communication is a level 2 contravention, a *major* failure is a level 3 contravention and a *significant* failure is a level 4 contravention. Incorrect signs and notices can also fit into one of three different levels. So it may be difficult for an operator to know, in advance of being challenged, how serious his alleged breach of the Code is.

The contraventions scheme is at its most explicit when dealing with very serious code breaches – level 5 contraventions. Level 5 contraventions are where the operator is likely to have broken the law 'or similar'. It carries a maximum of 10 points, requires immediate remedial action and the operator is likely to be suspended pending further investigation. The DVLA and/or the SIA will also be advised of that suspension.

There are 15 examples of Level 5 contraventions – the largest list among the five levels:

1. Failure to register with the SIA where required;
2. Abuse and/or misuse of DVLA data;
3. Failure to comply with the requirements of the Data Protection Acts;
4. Failure to register with the Information Commissioner;
5. Misrepresentation;
6. Failure to keep correct information when removing or immobilising vehicles;
7. Failure to comply with the Consumer Protection from Unfair Trading Regulations 2008 and other consumer protection law;
8. Unlawful application of the VAT charges;
9. Failure to produce an SIA identification card;

10. Failure to maintain a fair and professional operation;
11. Imposition of a penalty charge where the law does not allow this;
12. Charging for both a clamping action and a removal action within a specified timescale;
13. Failure to include the name of the place where the payment was made and of the operator involved in any receipt;
14. Unauthorised enforcement against a vehicle; and
15. Repeated and frequent contraventions of the Code of Practice.

How easy will it be for operators to comply with the Code and the law?

Operators are now subject to the increasingly complex requirements of new legislation, the application of common law rules on trespass and contract law, new codes of practice from outside the world of parking as well as the new stricter and tougher requirements of the AOS Code itself. Almost inevitably, some operators will find themselves in breach of the law, as well as in breach of the AOS Code, because they may have been relying on out-of-date custom and practice.

It may be difficult for an operator to know in advance of being challenged how serious his alleged breach is

It is easy to break the law inadvertently. On a recent snapshot survey of eight approved operator websites, I found four operators stating they provided services relating to the issue or collection of "penalty charges". The AOS Code prohibits the use of the term "penalty" or "penalty charge" for off-street enforcement. Penalties within a contract (which is the basis of the business of many operators) are not enforceable.

Operators now have a heavy burden to keep up to date with all relevant rules. For example: 'Operators need to consider if they are complying with the disability discrimination legislation, which particularly applies to hospital and university parking.'

There are many ways in which operators may be risking either exclusion from accessing the DVLA register after a BPA code breach, prosecution by trading standards for ignoring consumer law, or being unsuccessful in court because their parking tickets are thrown out as unenforceable penalties.

With new legislation regulating vehicle immobilisation heading towards the statute book, there will be even more ways in which operators could break the law without knowing they are doing so.



ABOUT THE AUTHOR: Bill Blakemore, LLB, MSc is a barrister and was the advisor to the BPA throughout its 2009 review and re-issue of the Approved Operator Scheme Code of Practice. He recently launched the 'Get-Legal' consultancy service. For advice on any of the issues raised, he can be contacted by email on bill@get-legal.co.uk