



Employing Foreign Nationals Post Brexit

Following on from Decembers [Brexit Special Newsletter](#)

The below FAQs detail everything organisations need to know regarding the employment of foreign workers as a result of Brexit. In particular, they explore the position with EU citizens (which is the label used within it to refer to EU/EEA/Swiss citizens) who are already in the UK, who arrive until 31 December 2020 and who arrive in the UK from 1 January 2021.

They will be continually checked and updated over the coming weeks and months. Useful links are provided at the end of the document.

What is Brexit?

The term 'Brexit' refers to the UK's departure from the European Union (EU). Following a referendum which took place on 23 June 2016, the majority of the UK voted to leave the EU. Following a series of delays, the exit eventually took place on 31 January 2020. A transitional period will last until 31 December 2020.

The main impact of Brexit in employment law terms will be seen in the recruitment process as immigration laws change. Employers are already under an obligation to take steps to ensure a worker's right to work in the UK and this process will be altered in light of the consequences of Brexit.

Currently, all EU citizens, as well as those from Iceland, Liechtenstein and Norway (EEA countries) and Switzerland are able to live and work in the UK under 'free movement of persons'.

Between 1 February 2020 and 31 December 2020, EU/EEA/Swiss citizens may still come to the UK to work without having to obtain permission before their arrival. From 1 January 2021, the transition period, and so free movement, will end. This means that EU/EEA/Swiss citizens arriving in the UK will need to gain permission to work in the UK, as is currently the case with non-EU/EEA/Swiss citizens.

What are the potential consequences for employing foreign nationals unlawfully?

Employers are under a legal duty to prevent illegal working and you can be subjected to penalties where you fail to do so.

There is a civil penalty in place where the employer can be fined a maximum of £20,000 per worker who does not have permission to carry out the work they are employed to do. Under the civil penalty scheme, an immigration officer who believes the organisation is employing an individual who does not have the correct permission to work can issue a notice imposing the fine.

To gain a 'statutory excuse' against the civil penalty, you need carry out right to work checks in accordance with the Home Office's checking process. You should also only make offers of employment conditional upon successful right to work checks.

A criminal offence will be committed if you employ an individual and you have 'reasonable cause to believe' they do not have the right to work in the UK.

From 29 January 2019, employers can rely on the Home Office's online right to work checking service to be granted the statutory excuse. Where the service can be used to check an individual's immigration status, no further documentary checks will be required. This is to remain in place after 1 January 2021.

Does Brexit affect EU citizens I already employ?

Yes. EU citizens who are currently working for you, or who you recruit by 31 December 2020, need to take action to gain permission to remain in the UK. This applies unless they have already been granted indefinite leave to remain (ILR) or are from Ireland. Employees must apply to the EU Settlement Scheme. Successful application guarantees the right to continue living and working in the UK indefinitely.

How does the EU Settlement Scheme work?

Applications for the EU Settlement Scheme opened in March 2019 and will close on 30 June 2021. This means that employees have until 30 June 2021 to submit an application. Individuals must be in the UK by 31 December 2020 to apply. Anyone arriving from 1 January 2021 onwards is not eligible to apply.

Successful applicants who have five years' continuous residence in the UK at the time they make the application will be granted 'settled status' meaning they will have indefinite leave to remain in the UK. Five years' continuous residence is gained when someone has lived in the UK, the Channel Islands or the Isle of Man for 6 months in any 12-month period for five years in a row, with some exceptions.

Those who are in the UK by 31 December 2020 but do not have five years' continuous residence by the date they apply will get 'pre-settled status', which allows them to stay in the UK until they have reached the five-year residence point i.e., it allows them to stay for a maximum of five years and then they can apply for settled status.

How should employees apply to the EU Settlement Scheme?

Applications for the Scheme are made from the gov.uk website. It is free to apply. <https://www.gov.uk/settled-status-eu-citizens-families>

Applicants will need to provide a valid passport or valid national identity card, alongside a digital photograph of their face. In the absence of these, alternative evidence may be provided in certain situations. Applicants can:

- scan their document and upload their photo using the 'EU Exit: ID Document Check' app using an Android phone, or an iPhone 7 or above
- send their document in the post and upload their photo using the online application.

This evidence will need to be provided again to switch from 'settled' to 'pre-settled' status.

Individuals can provide their national insurance number for an automated check of their residence based on tax and certain benefit records. If this check is successful, the individual will not need to provide any further documentation. If not, the Home Office will notify them of the further information required instantly.

There is a template letter to send out to employees on how they can apply for the scheme on the Kernow HR Toolkit. <https://www.kernowhr.uk/brexit>

Are there situations where 'settled status' may be refused?

The Government has remained clear that the majority of applications for 'settled' or 'pre-settled' status under the EU Settlement Scheme will be accepted. However, the main reason they may be rejected is if the individual has committed serious or repeated crimes and/or poses a major security risk.

Applicants will be asked to declare any criminal convictions that appear in their criminal records, either in the UK or overseas. Individuals will also be checked against the UK's criminal database. If they have been to prison, they will usually need to have five years' continuous residence from the date of their release.

Individuals will not be asked to disclose spent convictions, cautions or alternatives to prosecution, such as speeding fines.

What will a successful applicant receive?

Successful applicants will be sent an email confirming their status and the date it was granted with a unique reference number rather than a physical document. It usually takes around 5 working days for complete applications to be processed if no further information is required, but it can take up to a month.

Successful applicants can obtain a 'share code' to prove their immigration status to employers through the government website. Share codes can be used for prospective employers to check online if a job applicant has the right to work in the UK.

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

How can I make sure my EU citizen employees apply to the scheme?

Employers will no doubt be keen to make sure their employees secure permission to remain in the UK. However, it is ultimately the employee's choice whether they stay or not.

Forcing employees to apply may constitute *unlawful discrimination*. Whilst it is not a legal obligation for you to inform employees about the Scheme, you may choose to encourage your employees to apply by, for example:

- providing information about the EU Settlement Scheme, what is involved and the timeframes in place
- allowing work IT equipment to be used to make the application
- offering assistance when making the application to employees who are not proficient in the English language or are not confident in using IT equipment.

It will be helpful to carry out an audit of your workforce to understand which of your employees may need to apply.

Should I check that my EU citizen employees have applied to the Settlement Scheme?

Government guidance on the Scheme states that it is the responsibility of the individual to make an application. There is no requirement for the individual to inform you, as their

employer, that they have applied or the outcome of their application. Likewise, you should not check that an employee has applied. *This does not mean that you cannot ask the employee whether they have applied.* The specific wording used by the Government – that employers should not ‘check’ – is to prevent any form of discrimination against employees who are eligible but have not yet applied.

The implications for an employee who needs to apply, but does not, are not yet clear and it is hoped that the Government will provide clarity in the not too distant future.

Can I continue to take on employees from the EU prior to 1 January 2021?

Yes. Until 31 December 2020, EU nationals are able to enter the UK to take up employment without prior Government permission. Such individuals will need to apply to the EU Settlement Scheme by 30 June 2021.

When recruiting, can I ask job applicants to provide evidence that they have obtained status under the EU Settlement Scheme?

You must continue to check the right to work of all job applicants. Government guidance states that you will continue to check a job applicant’s right to work in the UK under existing rules until 30 June 2021 i.e. there is no change to right to work checks until then. Currently, job applicants can prove the right to work with any of the following:

- their valid passport or national identity card if they’re an EU, EEA or Swiss citizen
- their valid biometric residence card if they’re a non-EU, EEA or Swiss citizen family member
- their status under the EU Settlement Scheme using the Home Office’s online right to work checking service. <https://www.gov.uk/view-right-to-work>

Whilst job applicants can use their status under the EU Settlement Scheme as evidence, you cannot require them to produce this. If they do so, you can use the share code to check status online. If an EU citizen produces their valid passport, then this is sufficient evidence of their right to work. There is no obligation to provide their status under the Settlement Scheme. Requiring this is likely to constitute discrimination. *You cannot make an offer of employment, or continued employment, dependent on an individual having made an application.*

How will I know whether an EU national arrived in the UK before or after 1 January 2021?

The reality is that you will not know this, nor are you required to find out due to guidance stating that right to work checks will not change until after 30 June 2021. The Government has not yet addressed the consequent predicament that employers are left in.

What are the rules on recruiting EU nationals under new immigration rules from 1 January 2021?

From 1 January 2021, a new points-based immigration system will come into operation which will apply to all non-British and Irish citizens. Under this system, anyone coming to the UK for work must meet a specific set of requirements for which they will score points. Visas are then awarded to those who gain enough points.

There will be various routes available for entry to the UK to work, including:

- Skilled worker
- Intra-company transfer
- Health and care visa
- Start up and innovator
- Global talent visa
- Graduate

How will the skilled worker route work?

Currently, foreign nationals from outside the EU can enter the UK under a Tier 2 visa, which involves them attaining a certain number of points, including sponsorship from an employer licensed by the government to sponsor. A similar system is set to be introduced from 1 January 2021, which has been labelled the 'skilled worker' route.

This is expected to be the route in which the vast majority of foreign nationals seek to enter the UK to work. There will be no cap on the number of individuals taken on through this route.

Applicants will need to achieve 70 points in total, made up of 50 mandatory points, and 20 tradeable.

All applicants will be able to trade characteristics, such as their qualifications, against a lower salary to get the required number of points. If the job offer is less than the minimum salary requirement, but no less than £20,480, an applicant may still be eligible if they have:

- a job offer in a specific shortage occupation
- a PhD relevant to the job
- a PhD in a STEM subject relevant to the job.

Mandatory points

- Job offer from an approved sponsor - 20 points
- Job at the required skill level (RQF 3 or above (A Level and equivalent)) - 20 points
- English language to a required level (this will need to be evidenced by completing a test or having a degree in English language similar to an English bachelors) - 10 points

In addition to this, the job offer must meet the applicable minimum salary threshold. This is the higher of either:

- the general salary threshold set by the Government on advice of the independent Migration Advisory Committee at £25,600, or
- the specific salary requirement for their occupation, known as the "going rate".

It is expected that only the applicant's basic salary will count towards the tradeable points criteria.

Tradable points

- Salary of £20,480 to £23,039 or at least 80% of the going rate for the profession (whichever is higher) - 0 points

- Salary of £23,040 to £25,599 or at least 90% of the going rate for the profession (whichever is higher) - 10 points
- Salary of £25,600 or above or at least the going rate for the profession (whichever is higher) - 20 points
- Job in a shortage occupation as designated by the Migrant Advisory Committee (MAC) - 20 points
- Education qualification: PhD in a subject relevant to the job - 10 points
- Education qualification: PhD in a STEM subject relevant to the job - 20 points

All jobs have a corresponding Standard Occupational Classification (SOC) code. Each SOC code has a designated skill level. This determines whether the job meets the requirements of the skilled worker route.

Examples of point attainment

1. Lab technician with a STEM PhD coming to the UK with salary offer of £21,000. The general salary threshold applies.

- General salary threshold: £25,600
- Job offer - 20 points
- RQF 3 or above - 20 points
- English language - 10 points
- Salary - 0 points
- Education qualification: STEM PhD – 20 points
- Total - 70 points

2. Mechanical engineer coming to the UK with salary offer of £26,750. The “going rate” salary threshold for the profession applies.

- General salary threshold: £33,400
- Job offer - 20 points
- RQF 3 or above - 20 points
- English language - 10 points
- Salary - 0 points
- Job offer in a shortage occupation - 20 points
- Total - 70 points

A highly skilled worker route is likely to be implemented in 2022.

How will the health and care visa work?

A Health and Care Worker visa is part of the skilled worker route. It allows medical professionals to come to or stay in the UK to do an eligible job with the NHS, an NHS supplier or in adult social care.

To qualify for a Health and Care Worker visa, individuals must:

- be a qualified doctor, nurse, health professional or adult social care professional
- work in an eligible health or social care job
- work for a UK employer that’s been approved by the Home Office
- have a ‘certificate of sponsorship’ from their employer with information about the role they’ve been offered in the UK
- be paid a minimum salary - how much depends on the type of work they do.

How will the global talent visa work?

This route is already in use for non-EU nationals, having been introduced in February 2020 to replace the previous Tier 1 system. It allows talented and promising individuals in the fields of science, engineering, medicine, humanities, digital technology, and arts and culture (including film and television, fashion design and architecture) to live and work in the UK.

In order to apply under this category, individuals will require an endorsement from an approved endorsing body. The endorsing bodies include:

- The Royal Society
- The British Academy
- The Royal Academy of Engineering
- Tech Nation
- Arts Council England
- UK Research and Innovation (UKRI).

Once endorsed, foreign nationals will be given 'highly flexible permission' to work for organisations or be self-employed.

How will the start up and innovator route work?

This route has also been in place for non-EU nationals since March 2019. It is available to individuals who are setting up a business for the first time or have industry experience and at least £50,000 to fund their venture.

Foreign nationals looking to use this route must have support from an approved endorsing body alongside the appropriate government department. Endorsing bodies can be a higher education provider or a business with a track record of supporting UK-based entrepreneurs.

How will intra-company transfers work?

To qualify, the applicant must:

- be performing a role skilled to RQF level 6 (as opposed to RQF level 3, permitted under the Skilled Worker category).
- be paid at least £41,500 a year or the going rate for the job, if higher, compared to £20,480 under the Skilled Worker route.
- have been employed by the sending business for at least 12 months prior to the transfer.

Do I need to apply for a sponsorship license?

Currently, employers that wish to employ foreign nationals who are not covered by free movement of persons must have a sponsorship license to do so. From 1 January 2021, you must have a sponsorship license to employ a foreign national through some, though not all, of the immigration routes. The skilled worker route requires sponsorship. Sponsorship licences are not needed to employ an individual who has status under the EU Settlement Scheme.

Employers can sponsor an employee only if the role meets the minimum requirements. An employer who is sponsor can issue sponsorship certificates to foreign nationals who will then use it as part of their visa application.

How do I get a sponsorship license?

Sponsorship carries certain eligibility requirements. You must not have any unspent convictions for immigration offences or certain other crimes, such as fraud or money laundering. You must not have had a sponsorship licence revoked in the previous 12 months.

You should decide what licence you wish to apply for; currently, they differ depending on whether you are taking on staff temporarily or more long-term. This will need to be specified when you make your application. The longest you can sponsor a worker for is 5 years.

You will need to pay a fee to apply for a licence, which varies depending on the size of your organisation. Small companies will pay £536 for each application. Larger organisations will pay £1,467 for a licence to take on long-term staff, and £536 for temporary staff. You are likely to be considered a large company if your annual turnover is over at least £10.2 million and you have at least 50 employees.

It takes an average of eight weeks to process applications. You can seek a decision from the Government within 10 days, however this offer is limited to the first 10 applications in a day and costs an extra £500.

Licences are applied for via gov.uk. <https://www.gov.uk/uk-visa-sponsorship-employers/apply-for-your-licence>

What is involved in being a sponsor?

You need to appoint people within your business to manage the sponsorship process when you apply for a licence, and they will use the Government's sponsorship management system (SMS).

The roles are:

- authorising officer – a senior and competent person responsible for the actions of staff and representatives who use the SMS
- key contact – your main point of contact with UK Visas and Immigration (UKVI)
- level 1 user – responsible for all day-to-day management of your licence using the SMS

These roles can be filled by the same person or different people. They must be based in the UK most of the time and not be a contractor or consultant contracted for a specific project. Other criteria also apply. <https://www.gov.uk/uk-visa-sponsorship-employers/sponsorship-management-roles>

You can also appoint an optional level 2 user once you have your licence. This is an SMS user with more restricted access than a level 1 user, for example they cannot withdraw a certificate of sponsorship.

Suitability checks will be carried out on you and your employees. You may not get your licence in certain circumstances, including if anyone involved in sponsorship has:

- an unspent criminal conviction
- been fined by UKVI in the past 12 months
- been reported to UKVI.

Employers who are approved for a sponsorship licence will be added to the register of sponsors and will be able to issue certificates of sponsorship. You'll get an A-rated licence if your application is approved but your rating can be downgraded, suspended or withdrawn if you do not keep up with the employer responsibilities. These are:

- checking that your foreign workers have the necessary skills, qualifications or professional accreditations to do their jobs, and keeping copies of documents showing this
- only assigning certificates of sponsorship to workers when the job is suitable for sponsorship
- telling UK Visas and Immigration (UKVI) if your sponsored workers are not complying with the conditions of their visa.

You must also:

- monitor your employees' immigration status
- keep copies of relevant documents for each employee, including passport and right to work information
- track and record employees' attendance
- keep employee contact details up to date
- report to UKVI if there is a problem, for example if your employee stops coming to work
- report any significant changes in your own circumstances within 20 working days, for example if you:
 - stop trading or become insolvent
 - substantially change the nature of your business
 - are involved in a merger or take-over
- tell UKVI if you're changing your details, like your address or allocated roles
- make sure that foreign workers under 18 have suitable care arrangements for their:
 - travel to the UK
 - arrival in the UK
 - living arrangements in the UK
- get a letter from the parents of someone under 18 giving consent to the care arrangements.
- get a Disclosure and Barring Service check on any of your workers who need it.

You may have to pay an additional charge when you assign a certificate of sponsorship to someone applying for a Skilled Worker or Intra-company Transfer visa. This is called the 'immigration skills charge'.

You must pay the immigration skills charge if they're applying for a visa from:

- outside the UK to work in the UK for 6 months or more
- inside the UK for any length of time.

The amount you need to pay is based on:

- the size of your organisation
- how long the worker will work for you, using the start and end dates on their sponsorship certificate

Small or charitable sponsors must pay £364 for the first 12 months, followed by £182 for each additional 6 months. Medium or large sponsors will pay £1,000 for the first 12 months and £500 for each additional 6 months.

Useful links:

Apply for EU Settlement Status <https://www.gov.uk/settled-status-eu-citizens-families>

Online Prove your Right to Work <https://www.gov.uk/prove-right-to-work>

Online Right to Work Check <https://www.gov.uk/view-right-to-work>

Apply for Sponsor Licence <https://www.gov.uk/uk-visa-sponsorship-employers/apply-for-your-licence>

Sponsorship Management Roles <https://www.gov.uk/uk-visa-sponsorship-employers/sponsorship-management-roles>