

Brexit – the implications for employment

This document has been prepared following the recent publication by the Home Office of the new immigration rules for the UK's points-based system (to also be used for new EU entrants to the UK wishing to work in the UK from 1st January 2021) and aims to provide practical guidance for employers on what they should be doing now and in the coming months if they wish to continue to employ employees who are EU citizens or hire EU citizens who are already resident in the UK.

1. Background

Under the EU Settlement Scheme, EU citizens **residing** in the UK by 31st December 2020 can apply for status to continue residing in the UK after 30th June 2021.

EU citizens should have lodged their application to remain in the UK by 30th June 2021.

Under the EU Settlement Scheme, where the EU citizen has been a resident in the UK for five years (as at 31st December 2020), they will normally be allowed to stay indefinitely by being granted “**Settled Status**”, also referred to as “indefinite leave to remain”.

EU citizens who at the 31st December 2020 are already living in the UK but have not been resident in the UK for five years at 31st December 2020 will be eligible for “**Pre-Settled Status**”, also referred to as “limited leave to remain” enabling them to stay in the UK until they have resided in the UK for five years at which point they can apply for “**Settled Status**”.

If an EU citizen chooses to apply for settled status, it is significant to note that they do not have to demonstrate that they have been working, studying or economically self sufficient for five years as is currently the case for an EU citizen to acquire “Permanent Residence” status. They will just have to show that they have been resident in the UK for a continuous five year period.

EU citizens with settled status or pre-settled status will have the same rights to work in the UK as they currently do as well as access to public services such as health care, schools, public funds and pensions.

Subject to identity and criminal record checks, EU citizens who have been granted pre-settled status will be given five years pre-settled status but will be eligible to apply for settled status on completion of five years continuous residence in the UK.

The following individuals need to apply for either settled or pre-settled status...

- EU and EFTA citizens
- Family members of EU and EFTA citizens who are not themselves EU and EFTA citizens

The above should apply even if they...

- Were born in the UK but are not a British citizen
- Have a UK “Permanent Residence” document (referred to above)
- Are a family member of an EU or EFTA citizen who does not need to apply
- Have a British citizen family member

Brexit – the implications for employment

Those with “Indefinite Leave to Enter the UK” or “Indefinite Leave to Remain in the UK” or British or Irish citizenship do not need to apply under the Settlement Scheme.

To obtain settled or pre-settled status, the EU citizen will need to...

- Prove their identity (normally using their passport)
- Complete a short on line application
- Confirm their residency in the UK by providing their National Insurance Number (or alternative prescribed documents)
- Declare any criminal convictions

EU citizens who have been granted “Settled Status” will be able to apply for British citizenship immediately if they have lived in the UK for a continuous period of three years and are the spouse or civil partner of a British citizen.

2. Employing EU Nationals NOT already living in the UK, from 1st January 2021

An EU citizen who is entering the UK on or after 1st January 2021 will need to be sponsored by their employer under the UK’s points-based system. The current points based system (for employing non EU nationals) has been adapted and a summary of the key changes is provided below.

For UK employers wishing to employ EU citizens who have not been resident in the UK prior to 31st December 2020, employers will need to have gained Home Office approval to hold a sponsorship licence, paid the relevant fees and will be subject to the existing stringent audits by the UKVI to maintain their sponsorship licence.

3. The modifications made to the UK points-based system – a summary

It is important to remember that the UK points-based system will **not** apply to EU citizens who are already resident in the UK prior to the 31st December 2020. However, they will only be able to continue residing and working in the UK if they have been granted either “settled status” or “pre-settled status” by 30th June 2021.

The key changes to the UK points system are as follows...

- The new scheme is an adaption of the existing Tier 2 points -based system. Employers who do not already have a sponsorship licence are advised, (if they wish to sponsor new entrant EU citizens) to apply for their licence now. Employers who already hold a Tier 2 (General) sponsor licence will automatically be granted a new “Skilled Worker” licence when the system launches.

The employer’s cost to obtain a sponsorship licence is as follows...

Type of licence	Fee for small or charitable sponsors	Fee for medium or large sponsors
Tier 2	£536	£1,476

The cost to sponsor a single candidate is made up of the following three components...

a) Immigration Skills Charge (effective 1st January 2021)

Period	Small or charitable sponsors	Medium or large sponsors
First 12 months	£364	£1,000
Each additional 6 months	£182	£500

b) Health Surcharge (effective 27th October 2020)

The Immigration Health Surcharge increased from £400 a year to £624 a year per sponsored employee.

c) Certificate of Sponsorship Fee

The certificate of sponsorship fee is £199 per applicant.

Total Cost for Five Year Sponsorship

Going forwards, the employers cost for employing an EU citizen who does not have “Settled Status” or “Pre-Settled Status” (for a medium or large employer) excluding any contribution the employer may wish to make to the “application fee”, for the five year period (assuming the EU citizen continues to work for the employer until they can obtain British citizenship) will be at least £8,300 based on the current rates above.

- The current resident labour market test (RLMT) will be removed. Positions will no longer need to be advertised first to show that there are no suitable candidates already living in the UK who have applied and are capable of fulfilling the role.
- The general salary threshold under the new Skilled Worker route will be reduced from £30,000 to £25,600. However, if the role is on the skilled shortage list, the salary threshold level will be a lower limit of £20,480.
- The £35,800 salary threshold for “Indefinite Leave to Remain” will be removed
- The skills threshold under the new Skilled Worker route will be reduced from RQF 6 (graduate and above) to RFQ3 (A level/equivalent and above)
- Applicants will need to demonstrate that they have a job offer from an approved sponsor; that the skills threshold is at least RFQ3 and they speak English
- The 12 month “cooling off period” and six-year maximum length of stay will be removed
- The cap on the number of Tier 2 (General) visas granted each year (currently 20,700) will be suspended
- There will be no general low-skilled or temporary work route. Assuming the minimum salary threshold of £25,700 and skills level are not met, this will have a significant impact on businesses heavily reliant on low paid, low skilled labour.
- It is expected that the new online points-based system will be available from 1st December 2020. Further guidance is awaited.

4. What we need to be doing now ...

To prepare for the changes we suggest the following steps are taken for employers who have EU citizens working within their organisation...

If you are considering employing EU citizens direct from the EU, from 1st January 2021...

- Where possible, ensure that any new EU citizen employed by you is resident in the UK before 31st December 2020
- Decide whether it will be strategically necessary for your organisation to apply for a Sponsorship Management Licence and to have it in place prior to 31st December 2020, if the roles you are likely to need to resource meet the minimum requirements (in particular salary and skill levels). Consider the financial as well as operational impacts.
- Obtaining a Sponsorship Management Licence requires in depth information to be provided and can take four to six weeks to obtain. This is likely to become extended if a large number of employers submit applications.

If you wish to ensure existing EU citizens working for you who are already residing in the UK have the right to work after 30th June 2021...

- Continue to communicate with existing EU citizens about the need to apply for pre settled or settled status. Whilst the deadline to apply is 30th June 2021, EU citizens are strongly advised to submit their applications as soon as possible.
- Employers must not require EU citizens to prove they have obtained either settled status or pre-settled status

If you wish to continue to employ EU citizens who are already residing in the UK but working elsewhere, from 1st January 2021...

- Employers are advised by the Home Office to continue to undertake from 1st January 2021 the existing right to work checks until 30th June 2021.
- Whilst employers will from **1st July 2021** need to ask applicants for roles if they have settled status or pre-settled status (or be prepared to sponsor them if they do not), the current advice is that they must not carry out retrospective checks on existing employees. This therefore raises a question whether employers will be required to check (leading up to the 30th June 2021) if applicants arrived in the UK before or after 31st December 2020. We await formal guidance on this point, but our understanding from the Home Office is that where an EU citizen starts work **before 30th June 2021**, employers will not be fined, **providing the current right to work checks are completed by the employer.**

Whilst we await further guidance on this point, our advice, where an employer **knowingly** employs someone who arrived in the UK from 1st January 2021 and does not have the right to work under the points scheme or under the EU Settlement Scheme, employers should not offer employment, to avoid financial penalties or risking the suspension of their Sponsorship Licence if they have one.

5. Next steps

Employers should consider undertaking an audit of their existing workforce and issuing communications to staff reminding them of the need to apply under the EU Settlement Scheme. Where EU citizens voluntarily offer confirmation of their settlement status under the EU Settlement Scheme this can be recorded but not actively sought.

A copy of our **HR Made Simple Guidance for Managers** should be shared with line managers reminding them of the EU Settlement Scheme; the restrictions on employing EU nationals going forwards; key dates and what they should/should not be asking at interviews (or of existing employees) to avoid potential discrimination claims. Care should be taken in rejecting EU citizen applicants purely on the grounds associated with their nationality to avoid discrimination claims as the “high cost of sponsorship only” argument has not been tested at employment tribunal.

This guidance document will be updated in the light of any further guidance issued by the Home Office.