

# A day is a long time in immigration law...

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The media frenzy around Brexit is a daily reality and the UK's reliance on EU workers is therefore forefront in employers' minds. With the government's defeat in the House of Lords on 1 March, there is further uncertainty about the timetable for Brexit but it is clear that until the UK actually leaves the EU, free movement of workers is guaranteed. This is regardless of the date on which the UK government actually triggers the start of the UK's exit from the EU (which is expected to take two years). Given the uncertainty in this area which is leading to a significant drop off in job applications from EU citizens we set out below what employers can do now to prepare, help stabilise their workforce and support their EU workers.

Not only have employers got to contend with the reality of labour shortages from Europe but further changes being imposed by the Home Office will result in significantly increased recruitment costs and administration for organisations that rely on Tier 2 migrants from outside the EU. This is in the form of a Skills Charge and requirement for Overseas Criminal Record Certificates. The key details of these changes are set out below.

## 1. Protecting your EU Labour Supply and supporting your Workforce

The defeat for the government in the House of Lords on 1 March has demonstrated how contentious the issue is of securing the status of and providing certainty to EU Nationals in the UK. Whilst the UK Government maintains that one of the key issues for Brexit is securing the status of and providing certainty to EU Nationals in the UK, this is contingent on a reciprocal deal for UK citizens living elsewhere in the EU which is not guaranteed.

YouGov polling conducted post referendum has found that 77% of the public support guaranteeing the rights of EU citizens already living in Britain in exchange for protection of the rights of British citizens residing in member states. Many key industries and sectors within the UK have a proportionally high demographic of EU workers, particularly the health and education sectors, distribution/logistics, hospitality and manufacturing. Many employers also actively recruit from Europe to fill skilled and unskilled roles. Roles deemed as 'unskilled' are also likely to face the greatest challenges for non UK recruitment and retention post Brexit given they are arguably seen as "unattractive". It is therefore imperative that employers assess their reliance on EU workers and consider taking steps to facilitate and encourage their EU workforce to formalise their residence rights to protect this valuable supply of labour before any possible restrictions on entry or remaining in the UK are introduced.

### Current rights of EU citizens

For as long as the UK remains a member state of the EU, it is subject to laws guaranteeing EU citizens the right to free movement. However, it is advisable that all EU citizens in the UK seek to formalise their residence status in the UK as soon as possible and employers encourage and support their EU workers with this.

EU citizens who have resided legally for a continuous period of five years in the UK automatically acquire the right to permanent residence which can be evidenced through the application for a Permanent Residence Card. The comparable provisions for non-EU citizens, including those who are family members of British citizens, are significantly more restrictive.

Whilst there is no requirement currently for EU nationals to register for documentation to confirm permanent residence status, the ongoing uncertainty means that individuals would be well advised to consider formalising their status sooner rather than later .i.e. if you qualify for a document which evidences a right, apply for it. Home Office KPIs for dealing with permanent residence applications are 6 months but in some cases applications are taking significantly longer, given the influx of applications post the referendum. The process requires completion of an 80+page form and production of evidence to meet stringent criteria. One anomaly is the requirement for students and the self-sufficient to evidence comprehensive sickness insurance for the entire five year period, yet whilst EU citizens in the UK have access to NHS care (and member states operate reciprocal arrangements), under UK law this does not satisfy the sickness insurance requirement (albeit this is being contested by the European Commission).

### What can employers do now to stabilise their workforce and help their EU workers?

It is being widely reported in the press that employers are seeing a significant drop off in job applicants from EU citizens following the referendum decision for the UK to leave the EU. Current statistics suggest that the percentage of EU workers within the UK Public Sector is around 38%. Any significant loss of EU workers is therefore likely to impact an employer's ability to fill vacancies and to meet service needs (particularly in the health and social care sectors).

We are supporting a number of employers with measures to mitigate these risks including:

- Conducting an audit of your EU workforce to establish the extent of reliance on EU labour and who may be able to consider a permanent residence application;
- Providing information to employees on residency rights and where they can seek help from;
- Advice clinics to discuss the various residency rights and applications for your EU workers;
- Drop in sessions to discuss any specific queries on eligibility requirements for permanent residence applications from employees; and
- Where EU workers are travelling in and out of the UK that you advise them to carry all EU residence documentation with them and you provide them with a letter of comfort confirming their employment status and details of their role, continuity and the reasons for travel.

## 2. Skills Charge

The Home Office has announced legislation to levy an Immigration Skills Charge ("the skills charge") from 6 April 2017. The purpose of the skills charge is to raise funds to address skill gaps in the resident labour market, although the proposals can also be seen as further step in the government's ongoing policy of discouraging employers from sourcing talent from overseas and making the UK a less attractive prospect.

The skills charge will apply if an employer sponsors a Tier 2 worker assigned a Certificate of Sponsorship (CoS) in the 'General' or 'Intra-Company Transfer' route. Subject to a small number of exemptions, it will apply when an employer assigns a CoS for the following applications:

- out of country (entry clearance) - for applications greater than 6 months;
- in-country (for leave to remain) - this includes those switching to Tier 2 from another visa route or those extending their stay. It applies to any length of application.

Employers who sponsor Graduate Trainees (under Tier 2 Intra-Company transfers), specified PhD level occupations and those switching from Tier 4 Student visas to Tier 2 (General), are exempt from the charge.

It is proposed that the skills charge will be £1,000 per worker per year for medium or large sponsors and £364 per year for small or charitable sponsors. The Home Office will usually consider a sponsor to be "small" if their annual turnover is £10.2 million or less and they have 50 employees or fewer.

It is intended that the charge will be payable upfront and cover the whole period of the CoS, with the intention that it will be paid at the same time as the employer pays to assign the CoS.

Despite the exemptions, the skills charge represents a significant increase in the cost of sponsoring a worker under Tier 2. For example, a sponsor who sponsors a worker for a period of 3 years will have to pay £3,000 upfront in respect of the skills charge, in addition to their other recruitment and sponsorship costs.

The draft regulations specify that a refund of all or part of the charge may be given and consistent with the existing regulation on immigration fees and IHS, the circumstances for such refund will be set out in guidance. Sponsors will be eligible for a refund where a worker they are sponsoring is refused a visa or the application is withdrawn but the regulations are silent otherwise. As such we recommend that employers consider whether they wish to include or amend recoupment provisions in employee's contracts of employment to recover such costs in the event that they leave their role sooner than expected.

## 3. Overseas Criminal Record Certificates

From April 2017, the government also intends to extend the requirement to provide a criminal record certificate to Tier 2 applicants who work in the education, health and social care sectors.

The requirement will cover Tier 2 applicants who are sponsored to fill vacancies in the following SOC codes:

**1181** - Health services and public health managers and directors

**1184** - Social services managers and directors

**2217** - Medical radiographers

**2218** - Podiatrists

**2219** - Health professionals not elsewhere classified.

**2221** - Physiotherapists

**2222** - Occupational therapists

2211 - Medical practitioners

2212 - Psychologists

2213 - Pharmacists

2214 - Ophthalmic opticians

2215 - Dental practitioners

2223 - Speech and language therapists

2229 - Therapy professionals not elsewhere classified

2231 - Nurses

2232 - Midwives

2312 - Further education teaching professionals

2314 - Secondary education teaching professionals

2315 - Primary and nursery education teaching professionals

2316 - Special needs education teaching professionals

2317 - Senior professionals of educational establishments

2318 - Education advisers and school inspectors

2319 - Teaching and other educational professionals not elsewhere classified

2442 - Social workers

2443 - Probation officers

2449 - Welfare professionals not elsewhere classified

Applicants who are subject to the requirement will need to submit a criminal record certificate from each country in which they have resided continuously or cumulatively for a period of 12 months or more during the 10 years prior to their application. Their adult dependants will also be subject to the same requirement.

The Home Office have issued guidance to assist applicants and sponsors to obtain Criminal Record Checks

<https://www.gov.uk/government/publications/criminal-records-checks-for-overseas-applicants>

For applicants who have resided in a number of different countries during the relevant period, or who have resided in countries where document checking procedures may be lengthy and bureaucratic, obtaining the information required may take some time. We therefore strongly recommend that sponsors advise potential employees of the requirement as soon as possible to avoid any delays in processing their applications.

#### **4. Minimum Income Rule**

The Supreme Court has upheld the principle of the Minimum Income Rule which requires an income of at least £18,600 for British Citizens and others to sponsor a foreign spouse. However, it was not all doom and gloom for those families impacted as the rules and policies used by the Home Office to assess such cases have been criticised by the court. This criticism was on the basis that the rules and policies do not take proper account of the impact of children and other possible sources of income and support. We can therefore expect more new rules and amended guidance on these types of applications and, in particular, on how the Home Office will assess different sources of income.

Please take the opportunity to discuss the options for supporting your EU workforce or any of the other changes highlighted above with a member of our Business Immigration team.

**We will be updating our FAQs on Brexit to deal with the above, so keep an eye on our [DAC Beachcroft Employment and Pensions collection for this.](#)**

## **Authors**

