



Chapter 18
Brexit employment
changes

18.0 Brexit employment changes

18.1	Introduction	555
18.2	Brexit – employment implications	556
18.3	Brexit – GDPR implications	562

18.1 Introduction

Following the expiry of the Brexit transition period on the 31 December 2020, the UK has now formally left the EU by virtue of the EU-UK Withdrawal Agreement that was negotiated and agreed between the UK and EU.

This section details significant changes in accordance with the UK's new relationship with the EU, particularly in respect of key employment changes, and changes in relation to GDPR.

18.2 Brexit – employment implications

18.2.1 In terms of significant employment implications and developments as a result of Brexit, there are various matters that need to be considered. These include the change to free movement of people, right to work checks, immigration, and the potential for changes to both UK employment legislation, and EU-derived domestic employment legislation.

18.2.2 Free movement of people

18.2.2.1 Following the expiry of the Brexit transition period on 31 December 2020, free movement of people came to an end. All EU nationals arriving in the UK from that time will be subject to the new ‘single’ post-Brexit immigration system (see below). Accordingly, EU citizens will no longer have the right to move to the UK to work and settle (and vice versa). The free movement rights of Irish citizens are unaffected, meaning Irish citizens are free to enter and remain in the UK without restriction.

18.2.2.2 For EU nationals currently residing in the UK, the EU Settlement Scheme has been introduced that allows EU nationals and their family members to retain their existing rights. Broadly, those who have resided in the UK for a continuous period of five years (subject to exceptions) which commenced prior to the end of the transition period will be granted indefinite leave to remain (also known as settled status). Those who have resided in the UK for less than five years by that date will be granted limited leave to remain (also known as pre-settled status) allowing them to accrue the relevant qualifying period to be granted settled status in the UK. The deadline for applying under the EU Settlement Scheme is 30 June 2021, but you are only be eligible to apply if you can prove residency in the UK prior to 31 December 2020. Importantly employers are prohibited from requiring EU nationals to produce evidence of being accepted under the settlement scheme until after 30 June 2021. See section 1.4.6 for more detail.

18.2.3 Right to work checks

18.2.3.1 Although the Brexit transition period ended on 31 December 2020, a six months’ “grace period” was agreed between the EU and UK in relation to right to work checks. This means that until 30 June 2021, right to work checks should be conducted in the same way as has been done in previous years.

18.2.3.2 Accordingly, until 30 June 2021, applicants can prove their right to work;

- › for EU, EEA and Swiss citizens, through the use of their passport or national identity cards;
- › for non-EU, EEA or Swiss citizen family members, through particular immigration status documents; and

18.2.3.3 EU, EEA and Swiss citizens (and their family members) can use the online right to work checking service.

18.2.3.4 After 30 June 2021, the application of the new points based immigration system to EU citizens coming to the UK will come into effect.

18.2.3.5 In the meantime however, if an employer has suspicions that an employee does not have the right to work in the UK (for example, they have no UK address or have just arrived in the UK), the employer would still be subject to potential breach of the right to work legislation.

18.2.3.6 Where an employer has reasonable cause to believe an EU citizen has no right to work then they should be conducting additional checks to ensure the individual in question does in fact have the right to work in the UK. For example, if email or other correspondence was to clearly indicate that an EU citizen (or indeed non-EU citizen) being recruited arrived in the UK for the first time on or after 1 January 2021, merely copying the passport or national ID card will not provide a defence against prosecution or a statutory excuse against a civil penalty in relation to the EU national; that EU national would need to have a visa or some other right to work, which they would need to show and evidence to the employer. In such circumstances the employer would need to take additional steps to try to satisfy itself that the individual was lawfully permitted to work in the UK. See section 1.4.6 for further information on right to work checks.

18.2.4 Points based immigration system

18.2.4.1 Under the new points based immigration system, anyone looking to come to the UK for the purposes of work must meet a set of specific requirements. If they meet the requirements, they will score points, with visas then awarded to those who have scored high enough.

- 18.2.4.2 Accordingly, under the new “Skilled Worker” system (which replaces the Tier 2 (General) system), a skilled worker will need to demonstrate that:
- › they have a job offer from a Home Office licensed sponsor (i.e. the employer holds a sponsor license);
 - › they speak English at the required level;
 - › the job offer is at the required skill level of RQF3 or above (equivalent to Highers);
 - › they’ll be paid at least £25,600 or the ‘going rate’ for the job offer, whichever is higher; this is a lowering of the previous threshold of £30,000.
- 18.2.4.3 If the job will pay less than £25,600 – but no less than £20,480 – the applicant may still be able to apply by ‘trading’ points on specific characteristics against their salary.

18.2.5 Intra-company transfers

- 18.2.5.1 If an employer wants to transfer a worker from a part of their business overseas to work for in the UK, they can apply for the Intra-Company Transfer route. Applicants will need to be existing workers who will undertake roles that meet the skills and salary thresholds.
- 18.2.5.2 From 1 January 2021, workers transferring to the UK will need to:
- › be sponsored as an Intra-Company Transfer by a Home Office licensed sponsor;
 - › have 12 months’ experience working for a business overseas linked by ownership to the UK business they will work for;
 - › be undertaking a role at the required skill level of RQF6 or above (graduate level equivalent);
 - › be paid at least £41,500 or the ‘going rate’ for the job, whichever is higher.
- 18.2.5.3 Permission for workers transferred to the UK on the Intra-Company Transfer route is temporary. Workers can be assigned to the UK multiple times, but they cannot stay in the UK for more than five years in any six-year period.
- 18.2.5.4 Workers paid over £73,900 do not need to have worked overseas for 12 months and can stay for up to nine years in any ten-year period.

- 18.2.5.5 Other routes, such as the Start-up and Innovator routes (designed to attract entrepreneurial talent and business ideas to the UK), don’t require sponsorship. However, for employers wanting to recruit from outside the UK, including EU nationals, must hold a sponsor license to do so (from 1 January 2021).

18.2.6 Global Talent Route

The current Global Talent route which is open to non-EU citizens will become available to EU citizens on an equal basis from 1 January 2021. What this means is that those considered the most highly skilled, who can achieve the required level of points and who are endorsed by a recognised UK body, will be free to enter the UK without a job offer. For those considering recruiting highly skilled engineering employees, the following body is considered as an approved endorsing body;

- › The Royal Academy of Engineering, for engineering;

18.2.7 The Graduate Route

There will be an unsponsored route in the form of a Graduate Visa available to any international students who complete degrees in the UK from summer 2021, which will enable them to remain in the UK and work at any skill level for a period of two years following completion of their studies.

18.2.8 Other Routes

In addition to the potential routes mentioned above, there are a number of other visas available but limited to specific sectors such as sport and healthcare.

18.2.9 Becoming a Licensed Sponsor

- 18.2.9.1 If employers anticipate recruiting talent from overseas in the future (with exception of Irish citizens), you will need to apply to become a licensed sponsor – if you have not already done so. If you already have a sponsor licence, you will automatically be granted a new skilled worker or ICT license. This would have the same expiry date as your current licence.

18.2.9.2 It should be noted that you do not need a sponsor licence to recruit EU citizens that have attained either “settled” or “pre-settled” status (see below), or non-EU citizens with indefinite leave to remain in the UK, or anyone who has unrestricted permission to work in the UK. In the event you do not have a licence yet, and anticipate that you are going to need one, various points need to be considered;

- › the application process usually takes 8 weeks from receipt of application;
- › the eligibility status of your business (those with unspent criminal convictions for immigration offences and certain other crimes will not be able to obtain a licence);
- › the type of skilled worker licence you want to apply for;
- › the person(s) responsible for managing the sponsorship within your business (there will be various roles needed for managing the sponsorship – which can be carried out by the same person if desired).

18.2.9.3 There will also be a fee that needs to be paid which may be subject to change.

18.2.10 Frontier Workers

18.2.10.1 For those EU citizens who are not resident in the UK, the new option of a Frontier Worker permit lets an individual come to the UK to work while living elsewhere. To be eligible all of the following apply:

- › from the EU, Switzerland, Norway, Iceland or Liechtenstein
- › live outside of the UK
- › have worked in the UK by 31 December 2020
- › have kept working in the UK at least once every 12 months since they started working in the UK.

18.2.10.2 In addition, the permit will only be available to those who either:

1. have been in the UK for less than 180 days in the last twelve-month period, or
2. have returned to their country of residence at least once in the last six-month period, or twice in the last twelve-month period.

18.2.10.3 Frontier workers will need a permit to enter the UK to work from 1 July 2021; until that time they can enter the UK with their passport or national ID card. There is no fee for the permit which, once issued, will be valid for up to 5 years.

18.2.11 Posted workers

Under the EU free movement of people provisions, workers posted into an EU member state should enjoy equality with employees of the host state in terms of certain specified employment rights, including working time rights, minimum rates of pay, health and safety, equality and maternity related rights. However, the Brexit withdrawal agreement did not cover any new arrangements for posted workers. As a result, EU countries may now impose different registration and work permit rules to posted workers than to locally-employed individuals.

18.2.12 Legislative changes

18.2.12.1 As part of the EU-UK Withdrawal Agreement, the UK has agreed not to lower the level of employment law rights in the UK to a level that would be below those rights that existed on 31 December 2020 (but only where this would affect trade or investment).

18.2.12.2 This focus on “affecting trade or investment” is part of the ‘level playing field’ concept that was said to dominate large parts of the negotiations that led to the EU-UK Withdrawal Agreement. If the UK was to diverge from EU employment laws, and is perceived to gain an unfair advantage in respect of trade or investment, it will be open to the EU to take measures to “rebalance” the playing field. Such measures would include the imposition of tariffs – subject to an arbitration process.

18.2.12.3 Employers should accordingly be aware of the potential for changes to employment laws in the UK, particularly with regards to potential changes to matters such as (among other things);

- › the Transfer of Undertaking (Protection of Employment) Regulations 2006 (known as “TUPE”);
- › the Working Time Regulations 1998; and
- › protection of agency workers’ rights.

18.3 Brexit – GDPR implications

- 18.3.1 In relation to GDPR and the transfer of data, as part of the EU-UK Withdrawal Agreement the EU has agreed to delay any transfer restrictions for at least a period of four months (with scope for a further delay of six months). This has been described as the “bridge” period. Following the bridge period, employers who receive data from the European Economic Area (EEA) will be subject to further measures in relation to GDPR and compliance.
- 18.3.2 Those employers that do not send or receive data to or from the EEA, and who already comply with the GDPR, will likely not need to make any significant changes in order to ensure continued compliance.
- 18.3.3 For those employers that do receive data from the EEA, current BEIS guidance notes that alternative safeguards should be implemented to ensure compliance in future (such as the use of Standard Contractual Clauses (SCCs)). Such safeguards should be implemented by April 2021 (if not already done so) in case the bridge period does not get extended any further. For further information on GDPR and data protection see section 9.