Business Immigration

A summary of FAQs from our webinar

WALKER MORRIS

Sponsoring migrant workers and the new Point-Based Immigration System

If we are looking to recruit Swiss, Iceland, Norwegian, Liechtenstein nationals, from 1 January 2021 we will have to have sponsor them, is that correct?

Yes , that is correct, nationals from these countries will be treated the same as EU nationals and will require sponsorship from 1 January 2021. The Home Office considers that not only will the new system be more streamlined and straightforward, but it will also be fairer as it will treat people from every part of the world equally. However, it should also be noted that individuals who arrive in the UK from these countries by 31 December 2020 will still have the right to make an application under the EU Settlement Scheme, and right to work checks for individuals from these countries will remain the same until 30 June 2021 as they will for EU nationals i.e. passport and national ID card will still be acceptable until that date.

If your organisation does not already have a sponsor licence, we can help with making an application. If a sponsor licence is already in place, now is a good time to give it a "health check" to make sure you are able to continue with overseas recruitment from January, e.g. ensure there are enough unused certificates of sponsorship to meet likely increased demand, ensure the licence is held by the correct employing entity, ensure the "key personnel" information is current, and that any Home Office notification requirements have been complied with. The government has also now issued further guidance on how the new sponsorship system will operate, which contains some key differences from the current regime. In particular, the lowering of salary and skills thresholds means that roles that weren't previously capable of sponsorship may be in the future. Again, we can help with all aspects of this.

The timescales for processing sponsor licence and visa applications seem very long – is there a fast track option available?

There is no fast-track option for applying for a sponsor licence in the first instance – the Home Office gives a standard timescale of 8 weeks, but they indicate that the majority of applications are processed within around half that time (provided there are no complicating factors). Sometimes the Home Office may make a visit to your premises before determining the application – all such visits are suspended at the moment, which may result in the decision being delayed.

Once you have a sponsor licence in place, certain requests (such as changes to user details, requesting more Certificates of Sponsorship, updating office address) can be made via a priority service, which costs £200 per use. 60 requests will be accepted for consideration per day (although the request itself is not guaranteed to be granted) on a first come first served basis. This priority service is currently suspended due to the coronavirus pandemic and the Home Office have not been able to give an indication of when it will next be available.

There is also a premium customer service option available, although this is a subscription service and is costly (£25,000 per year for large organisations). The service includes a fixed number of priority upgrades in the price, as well as a dedicated account manager, training packages and various other benefits.

For employees who need to apply for a visa, there are priority and super priority services which allow for a decision within five working days or 24 hours respectively. The employee must first attend an appointment to have their biometric evidence taken and provide supporting evidence to their application. These services can cost up to around £1,000, depending upon the type of service required and whether the employee is applying from inside the UK or not. Again, the services are suspended at the time of writing due to coronavirus, but centres offering visa services in the UK are beginning to open up again as lockdown measures are eased.

Where can we find the list of jobs which will be covered by the new immigration rules - to help identify skills gaps?

The Government has recently published some more detailed guidance on the new rules, which includes the full list of SOC codes which will be eligible for sponsorship under the new Skilled Worker route (which will replace the existing Tier 2 (General) route from 1 January 2021). These are set out in Appendix E of the full guidance, which can be found here.

One of the key features of the new regime is that the skills and salary thresholds have been lowered, which means that roles that were previously not capable of sponsorship may be in the future. In the health and social care sector, that includes senior care assistants, health care assistants and support workers, and nursing assistants. In the construction industry, builders, carpenters, plumbers and electricians are just some examples of roles which are now potentially eligible. In the retail and leisure industry this includes sales supervisors and administrators, warehouse and logistics managers, sports and travel managers to list a few, as well as chefs and bar/restaurant managers in the food and drink sector. A wide range of technicians in various fields may now also be capable of sponsorship, such as laboratory technicians, IT technicians, pharmaceutical, medical and dental

Sponsoring migrant workers and the new Point-Based Immigration System

technicians, photographers and sound engineers.

Will the immigration health surcharge still apply under the new system?

Yes, the purpose of the surcharge is to "ensure that migrants make a proper financial contribution to the cost of their NHS care". This fee is payable as a lump sum in addition to the visa application fee and currently must be paid by most non-EEA nationals applying for temporary permission to stay in the UK for more than 6 months.

Not only will it continue to apply to non-EEA migrants as well as being extended to EEA nationals at the end of the transition period, it is also set to increase from approximately £400 per applicant to £624 per applicant (with a slightly lower fee for under 18s) from October 2020.

This additional charge has always been somewhat controversial, and the proposal to increase it further has become even more so in light of the current pandemic. The Government have announced plans to make an exception for NHS and care workers, although how and when this will be implemented is unclear at the time of writing.

How many Certificates of Sponsorship can approved sponsors apply for each year? Will there be a limit?

The current cap on Tier 2 visas for skilled workers will be removed from 1 January 2021. However, it should be noted that the Government have indicated that they will keep this under review, so it is plausible that they may re-introduce the cap at a later date.

The proposals have also yet to be finalised at this stage and may be subject to change as trade negotiations progress with the EU. Although the overall system of employment sponsorship will remain in place and existing Tier 2 sponsors will have their licences automatically converted to the new Skilled Worker category, it is not currently clear exactly how the system and the application processes for sponsors will operate.

The Government's recently published document providing further detail on the new system indicates that existing sponsors will be allocated an appropriate number of certificates of sponsorship once the new licence category becomes active, although how this will be calculated and whether it will be based on any existing allocation remains to be seen. It seems likely that the restricted CoS and the associated application process will no longer apply, but whether they will continue to apply in the same way in the months prior to the new system being introduced is unclear for now. The latest guidance is likely to be the first of many, so further guidance from the Home Office is anticipated over the next few months.

How will employees apply for their visa under the new system? Will it be similar to the process for the EU Settlement Scheme?

Most visa applications can be made online currently, and this is likely to remain the case. From January 2021, most EU citizens will not need to attend a Visa Application Centre to enrol their biometrics and will instead provide facial images using a smartphone self-enrolment application form, in a similar manner to the way in which an application can be made under the EU Settlement Scheme using a smart phone. Non-EU citizens, and some EU citizens applying on specific routes or who are unable to use the self-enrolment option, will still need to attend a Visa Application Centre appointment to provide facial images and (in the case of non-EU citizens) fingerprint biometrics, where required.

The Government's long-term aim is that all visitors and migrants to the UK will provide their biometric facial images and fingerprints under a single global immigration system, and they will increasingly look to deliver this digitally wherever possible.

Is there any information available about the English language requirements under the new system?

It is not anticipated that the English language requirements will change much under the new system, save that they will be extended to EEA citizens as well an non-EEA citizens from 1 January 2021. Migrant workers can still meet these requirements by passing a secure English language test with an accredited provider, holding a degree taught in English or being a national of a majority English speaking country. The secure English language test may test speaking and listening ability as a minimum, or may cover reading, writing, speaking and listening skills, depending upon the immigration route.

There are special provisions in place for certain healthcare professionals and students, and these will also remain unchanged. The list of English speaking countries will, however, be extended to include Ireland and Malta so that individuals who have studied in those countries will be able to rely upon their qualifications to prove their English language proficiency.

COVID-19 and Immigration

Is it likely that the introduction of the new immigration system will be delayed due to the pandemic?

The Government has already confirmed that there will be no extension to the Brexit transition period, and the formal deadline for them to seek an extension passed on 30 June 2020. Given that this is a key area of policy for the current Government, it seems unlikely that they would seek to delay its implementation at this stage.

Similarly, there are no indications that the proposals to extend the requirement for sponsorship to EU nationals (who currently have the right to work without being sponsored) from 1 January 2021 will be postponed as a result of the global pandemic. The Immigration Bill which sets out the legal framework for these changes passed its second reading in the House of Commons on 18 May 2020, and looks set to be on course to become law.

Therefore employers who do not currently have a sponsor licence because they have only needed to recruit from within the UK and EU in the past are being urged to make applications for a licence as soon as possible, to ensure they are in a position to sponsor individuals from the EU from 1 January if required. If your organisation does not already have a sponsor licence, we can help with making an application.

Furthermore, the requirement for EU nationals to register under the EU Settlement Scheme in order to gain longer-term rights to continue living and working in the UK remains in place.

Can sponsored employees be furloughed and have their wages reduced under the Coronavirus Job Retention Scheme?

The Government's current guidance on the CJRS makes it clear that individuals who are working in the UK under visas are eligible to be furloughed and employers are entitled to have their salary reimbursed under the scheme (subject to compliance with the terms of the scheme).

Employers may reduce the salary of sponsored workers to 80% of their salary or £2,500 per month, whichever is lower, but any changes must be part of a company-wide policy to avoid redundancies in which all workers are treated the same. The changes must also be on a temporary basis and sponsored employees' pay must return to at least previous levels once the CJRS ends or they are no longer furloughed. Reports must be submitted to notify the Home Office of all salary changes.

However, employers should be cognisant of the fact that the CJRS only applies to employees who are covered under the employer's PAYE system. Therefore the salary of any migrant workers working under a Tier 2 (Intra-Company Transfer) visa whose salaries are paid overseas will not be recoverable by the employer under the CJRS. In addition, any decision to furlough individuals on the grounds of their immigration status is likely to be discriminatory.

If a sponsored employee is working from home due to coronavirus, do we have to report this to the Home Office?

No – although sponsors must continue to report changes to their own circumstances and changes to migrants' circumstances as normal, the Government has confirmed that working from home temporarily under these particular circumstances does not count as a change of work address needing to be reported.

Sponsors should also ensure that they can still monitor attendance at work as part of their other ongoing reporting and monitoring duties.

EU Nationals

Will there be a requirement for employers to monitor pre-settled status expiry dates after 30 June 2021 for those who are granted it under the EU Settlement Scheme?

For EEA nationals who start employment on or before 31 December 2020, the Home Office has taken a policy decision that their employers will not be required to carry out follow up checks, and will not be required to carry out retrospective checks (EU passports and national ID cards remain in List A). This may also be the case up to 30 June 2021, although this is not yet clear and further guidance is likely to be issued on this point. This is despite that fact that many EEA nationals who will have been employed before that date will not yet have unlimited immigration permission to remain and work in the UK on 1 January 2021 (e.g. they may have been granted, or would be eligible for, pre-settled status rather than settled status under the EU Settlement Scheme ("EUSS")).

Unfortunately, this potentially leaves employers in the slightly unusual position of having established the statutory excuse (and therefore avoiding any civil penalties) but potentially still being liable for the criminal offence of knowingly employing an illegal worker. This situation may arise if the employer becomes aware of, or has reasonable cause to believe that, an employee who was employed before 31 December 2020 has not registered under the EUSS by the 1 June 2021 deadline, or further down the line, that an employee who was granted pre-settled status did not subsequently obtain settled status following 5 years' continuous residence. This could also be the case for employees who were employed between 31 December 2020 and 30 June 2021 who are not eligible for the EUSS. The best advice at present is to continue to ensure that employees are aware of the EUSS and what is required, and we anticipate that the situation may become clearer as arrangements for the new immigration system develop.

How can we be sure that someone has applied for settled or pre-settled status and has been accepted?

Employers cannot require existing employees, or those who are recruited up until the 30 June 2021 deadline for making an application under the scheme, to provide evidence of having applied for or been granted a particular status under the EU Settlement Scheme according to current Government guidance. As noted above, this puts employers in the unusual position of potentially being prosecuted for knowingly employing an illegal worker, even where they may have carried out the correct checks prior to the start of employment.

Employers can continue to point employees towards relevant information and support them in making their applications, and should ensure that communications remain open and frequent in that respect as the deadline draws closer. They would not, however, be able to continue to employ an individual if it came to light after 30 June 2021 that they had not made the application before the deadline.

Employers do not have any specific obligation to ensure that their eligible employees have made an application under the Scheme, but it is clearly in the interests of both parties that employees are given an appropriate level of information and support to assist them in doing so ahead of the deadline. See below for the individual implication on the employee if they do not submit their application in time.

If an existing employee who is an EU national wants to notify us of the outcome of their application under the EU Settlement Scheme or ask for help before 30 June 2021, is this an issue?

Not necessarily, there is a difference between asking to see proof that someone has applied to the scheme and opening a dialogue to ascertain whether they need any help or support with the process. Employers should not be asking existing employees to prove that they have been granted settled or pre-settled status before 30 June 2021 as this is likely to constitute discrimination.

It should be noted that further guidance regarding acceptable right to work documents for EEA and Swiss migrants resident in the UK before 31 December 2020 and commencing employment between 1 January 2021 and 30 June 2021, but who have not obtained a status under the EU Settlement Scheme, is anticipated in due course.

Employers may wish to check in with their employees from a wellbeing perspective to ensure that they still feel welcome and part of the organisation and are comfortable that they have everything in place going forward or know who to ask if they have concerns. Employees may also wish to tell their employer about their status for their own peace of mind or to clarify things – if this information is offered up voluntarily then this is not an issue. It is advisable to ensure that employees are aware of the scheme as far as possible, although employers should also be careful to avoid giving specific immigration advice as it may be a criminal offence to do so without the appropriate accreditation.

EU Nationals

What will happen if an EU national doesn't apply for the EU Settlement Scheme before the deadline of 30 June 2021?

The Government has made it clear that all EU Nationals are encouraged to apply for the Scheme as soon as possible if they have not already done so and there will be no general extension granted, although it will be possible for those who have "reasonable grounds" for not applying before the deadline to receive an extension. It is not yet clear exactly what will constitute reasonable grounds, but further guidance is anticipated in due course.

EU nationals who have not applied for the scheme but remain in the UK beyond 30 June 2021 will potentially become unlawful residents. This scenario holds serious implications for the individual such as the loss of their right to live, work and study in the UK, exclusion from renting and access to healthcare, potential prosecution for illegal working and possible deportation. The Government have sought to downplay this angle since it was first mentioned in October 2019 and it seems that there will be a provision for late applications as the Scheme will need to remain open for other purposes such as the reasonable grounds mentioned above. However, anyone making a late application will have no lawful immigration status from 1 July 2021 until the application is granted so the message remains that it is essential for eligible employees to make their application before the deadline.

Business Immigration contacts:

Shabana Muneer, Senior Associate
Employment
+44 (0)113 283 4401
shabana.muneer@walkermorris.co.uk

Suzanne Treen, Director
Employment
+44 (0)113 283 4562
suzanne.treen@walkermorris.co.uk

Watch our full webinar here and visit our Business Immigration Hub for more resources.

Prepared by
Walker Morris LLP

33 Wellington Street
Leeds LS1 4DL
T +44 (0)113 283 2500
www.walkermorris.co.uk