

Brexit and the UK's new immigration system update - Q&As

Our Brexit webinar on 7 July 2020 generated a wide-ranging set of questions from attendees, which we have collated and answered below.

In these Q&As, unless otherwise indicated, the term 'EEA national' means nationals of countries included in the European Economic Area, as well as Swiss nationals. It excludes Irish nationals, who are already considered 'settled' in the UK. Irish nationals can, but are not required, to apply under the EU Settlement Scheme (EUSS).

If you need more detailed advice or training, please take a look at our [Immigration Solutions for HR](#) or get in touch with [Joanna Hunt](#), [Priya Gandhi](#) or your usual immigration contact.

Question	Answer
<p>1. What should employers be doing to ensure that current/future employees who are EEA nationals or their family members have the right to work?</p>	<p>We know that the current requirements for right to work checks will remain in place until the end of this year. For EEA national employees or employees who are family members of EEA nationals and start work on or before 31 December 2020, a correct right to work check carried out before the commencement of work will provide the employer with a statutory excuse against a civil penalty for illegal working. The excuse can be relied on if it emerges at a later stage that the person does not have the right to work in the UK. For EEA national employees and their family members with a confirmed right of permanent residence, the statutory excuse lasts for the duration of the employment according to current guidance. For family members with an extended right of residence, the statutory excuse lasts until their Biometric Residence Card issued by the Home Office expires, or until the date confirmed in an online right to work check.</p> <p>It is not clear yet what right to work checks employers will need to undertake for future employees who start work between 1 January 2021 and 30 June 2021, where they are eligible to apply under the EUSS but have not yet been granted status under it. It is also unclear whether employers will be required to verify at any point that an employee who started work before 1 July 2021 continues to have the right to work in the UK beyond the deadline to apply under the EUSS on 30 June 2020. We need urgent clarification on this from the Government and will let our clients know as soon as we have it.</p> <p>Currently, an employer can signpost employees towards information relating to the EUSS and support them to apply. However, they cannot require an employee to provide evidence of applying for or being granted status under the scheme.</p> <p>If, after the 30 June 2021 EUSS application deadline, an employer becomes aware that an EEA national employee or employee who is a family member of an EEA national has not applied for status under the EUSS or been granted British citizenship, then they cannot continue to employ them as they could potentially be</p>

	<p>prosecuted for knowingly employing an illegal worker. This would apply even if a compliant right to work check had been carried out before the commencement of employment.</p> <p>For any individuals who first arrive to live and work in the UK from 1 January 2021, employers will generally need to consider visa options for them under the main UK immigration system, including under Tier 2 of the Points Based System. We can provide further support with this if required.</p> <p>For further information or support on making EUSS applications or carrying out right to work checks, please have a look at our Immigration Solutions for HR.</p>
<p>2. Do employers have an obligation to ensure their employees have status under the EUSS?</p>	<p>Employers do not have any direct obligation to ensure this, but it is in employers' interests that employees are given support and information in order to apply under the EUSS by the deadline, for the reasons explained at 1.</p>
<p>3. What tools are available to businesses to check their employees have status under the EUSS and therefore the right to work?</p>	<p>Status under the EUSS can be checked via the Government's online right to work checking system.</p> <p>In some (but not all) cases, non-EEA family members will also receive a Biometric Residence Card confirming their status under the scheme.</p> <p>For employers who would like further support in upskilling their teams on this, please see our range of Immigration Solutions for Right to Work.</p>
<p>4. What happens to their rights if someone has settled status and then naturalises as a British citizen?</p>	<p>If someone becomes a British citizen then they are no longer subject to immigration control. This is the most secure British immigration status an EEA national or their family member can have. They must however check whether they are able to take dual nationality before embarking on a citizenship application and may also wish to take tax and estate planning advice.</p> <p>With limited exceptions, acquiring British citizenship also means that a person can no longer rely on EU free movement law, for example to bring a family member to live with them in the UK. They would need to use the UK immigration system instead, which is more expensive and includes more limited options. Each situation should be assessed on a case-by-case basis, but it may be preferable for some people to defer applying to become a British citizen until after the UK stops observing free movement arrangements at the end of this year.</p>
<p>5. If a person already has permanent residence status, do they have to apply and swap this for settled status?</p>	<p>Yes, they must still apply under the EUSS by 30 June 2021. However, they will not be required to swap their permanent residence for settled status if, instead of applying under EUSS, they have applied for British citizenship and have been granted it on or before 30 June 2021.</p>

<p>6. What is the impact if someone doesn't apply under the EUSS?</p>	<p>Failing to apply under the EUSS by 30 June 2021 will have a significant adverse impact on an individual. They will cease to have any lawful UK immigration status, with the following implications:</p> <ul style="list-style-type: none"> • loss of the right to live, work and study in the UK • potential removal from the UK • exposure to hostile environment measures such as not being able to rent accommodation, access healthcare or hold a driving licence • potential prosecution if they work illegally, which can result in an unlimited fine, up to six months jail and having their earnings seized <p>It is therefore essential that individuals who are eligible to apply under the EUSS do so by 30 June 2021. There is provision for late applications to be considered, but anyone who makes a late application will have no lawful immigration status in the UK between 1 July 2021 and the date of any grant of pre-settled or settled status.</p>
<p>7. Does an application for settled status have to be made after five years' residence or is it automatically converted?</p>	<p>There is no automatic conversion and a separate, second application must be submitted. This must be done before the expiry of the pre-settled status at the latest. Normally a person will become eligible for settled status after a continuous period five years' residence in the UK. This date will be earlier than the expiry of pre-settled status (and in some cases substantially earlier). The Home Office will not issue any reminders about the earliest date a person can apply, so this date should be identified and diarised.</p> <p>If the person is not eligible to apply for settled status before their pre-settled status is due to expire, e.g. due to excess absences from the UK, then they would need to make a further application under the UK Immigration Rules if they want to continue to stay lawfully in the UK.</p> <p>Where a person has spent more than six months outside the UK in any 12 months in the lead-up to 30 June 2021, depending on the reasons for the absence, it may be beneficial for them to apply again for pre-settled status before 30 June 2021, so that they are issued with a fresh five-year period of leave. The Home Office has not published any specific policy on how absences due to the COVID-19 pandemic will be treated, however it is possible they could be ignored.</p>
<p>8. What is the deadline for swapping permanent residence to settled status – is it 30 June 2021?</p>	<p>Yes – all eligible individuals with permanent residence status must submit their applications under the EUSS for settled status by 30 June 2021. This includes people who have applied for British citizenship but who have not been granted it by this date.</p>

<p>9. From January 2021, if an employee with settled status asks to (for example) extend their holiday in their home EEA country by working at home there for a couple of weeks, maybe to spend time with their family, is a visa or something needed to be able to do that. Would the current A1 certificates not be valid?</p>	<p>A visa would not be required in this situation. Once someone has settled status in the UK, they can spend up to five consecutive years outside of the UK without it affecting their UK immigration status (four years for Swiss nationals and their family members).</p> <p>Separate advice would need to be obtained about the validity of an A1 certificate in these circumstances.</p>
<p>10. Would a County Court Judgment count as a fail towards the good character test for British citizenship?</p>	<p>Potentially yes, we would need to have further details to give specific advice.</p>
<p>11. Has the EUSS app now been moved to iPhone?</p>	<p>The 'EU Exit ID Document Check' app was initially only available on Android devices. It is now available for Apple devices too.</p>
<p>12. On what grounds might pre-settled status (or settled status be declined?</p>	<p>There are various grounds to refuse an application under EUSS, which are broadly categorised under eligibility and suitability.</p> <p>Eligibility requirements include substantive and documentary requirements. For instance, an application for settled status may be refused if the applicant does not meet the five-year continuous residence requirement or one of the exceptions to this. An application could be refused if the applicant cannot provide acceptable evidence of their EEA nationality or their family relationship to an EEA national.</p> <p>Suitability requirements include factors such as:</p> <ul style="list-style-type: none"> • deception in making the application, e.g. submitting false or misleading information, representations or documents • being subject to an order or decision that requires them to leave the UK or bars them from entering the UK, e.g. a deportation order or exclusion decision • on EU law public policy, public security or public health grounds, or on the UK law ground that refusal is conducive to the public good – this includes a consideration of the person's criminal history as well as other poor conduct

<p>13. Do EEA nationals have to apply for a work visa before arrival if they are coming to the UK on or after 1 January 2021?</p>	<p>The Immigration Rules currently allow for individuals to switch into a Tier 2 visa from various immigration categories within the UK. If an individual is ineligible to switch into Tier 2, they will need to apply for a visa before they travel to the UK.</p> <p>Currently, it is not possible to switch from visitor status to Tier 2 from within the UK (leaving aside current concessions relating to COVID-19). However, there are indications from the Government's policy statement on the new immigration system an EEA national may be able to enter as a visitor and apply for a Tier 2 visa once in the UK. They would however not be able to start work until the Tier 2 application has been granted.</p>
<p>14. For Tier 2 applications, what is the general salary threshold test and the occupational-specific salary threshold test?</p>	<p>There are two main salary thresholds for Tier 2 General and, of the two, it is the higher salary threshold that must be satisfied to be granted the necessary points for the application to be successful.</p> <p>(1) General threshold – this is currently set at £30,000 for Tier 2 but will be lowered to £25,600 under the new system</p> <p>(2) Appropriate rate threshold – this can be found by checking the Standard Occupational Classification Code (SOC) Code in Appendix J to the Immigration Rules for the occupation that most closely resembles the job on offer.</p> <p>Different thresholds will apply in some cases now and under the new system, for example for 'new entrants' to the workforce, and for intra-company transferees.</p>
<p>15. Does the end of the transition period mean all current EEA nationals working for an employer will need to be sponsored on a Tier 2 from 1 Jan 2021?</p>	<p>No. Any EEA national employees who start residing in the UK before 31 December 2020 can and should apply to regularise their status under the EUSS. Any new arrivals to the UK from 1 January 2021 are likely to have to apply for a visa under the UK's Immigration Rules, which will be a much more costly and onerous process for the employer.</p>
<p>16. How much will a Tier 2 (General) application cost?</p>	<p>Ignoring cost exemptions/reductions that apply in limited cases, the breakdown of costs for a typical 5-year Tier 2 General visa (no dependants) is currently approximately:</p> <ul style="list-style-type: none"> • Application fee – £1,220 from abroad or £1,408 from within the UK • Biometric enrolment fee – £19.20 • Certificate of Sponsorship fee – £199 • Immigration Health Surcharge – £2,000 (rising to £3,120 from 1 October 2020) • Immigration Skills Charge – £5,000/£1,820 (depending on the size of company) • Priority fees (not mandatory) - £300/£500

<p>17. Will restricted CoS still be approved by the panel on the 5th of each month?</p>	<p>The cap on Tier 2 visas will be removed from 1 January 2021 but we do not know for certain how the Home Office will still operate the system of requests for restricted certificates in the lead-up to the changes come into force. We expect to see more announcements from the Home Office in the coming months.</p>
<p>18. Will EEA nationals coming to the UK on a secondment after 31 December 2020 require a Tier 2 visa?</p>	<p>Potentially, yes. If they are not eligible for status under the EUSS due to previous residence in the UK, then an employer will have to consider visa options under the UK immigration system. This will involve considering Tier 2, or possibly routes such as a Tier 5 Youth Mobility Scheme visa if they are under the age of 31.</p>
<p>19. What are the options for the cultural/arts sector where an organisation is managing celebrities?</p>	<p>For any individuals travelling into the UK before 31 December 2020, we would recommend that they apply under the EUSS for pre-settled status. This will provide some flexibility to continue travelling in and out of the UK as required for a 5-year period.</p> <p>Holders of pre-settled status can be absent from the UK for two consecutive years without losing their status, but they will need to consider the inability to meet the continuous residence requirements for settled status at the end of the 5-year period. At that point, they would potentially need to qualify under the new immigration system in order to re-enter/remain in the UK.</p> <p>For EEA nationals under the age of 31, a Tier 5 Youth Mobility Scheme visa may be an alternative suitable option.</p>
<p>20. Are health care assistants covered by the planned NHS visa route?</p>	<p>We do not know for certain yet. We are awaiting the full rules and guidance to be announced and we will publish an update once we have them.</p>
<p>21. Will there be a fee for Intra-Company Transfers (ICTs) visas?</p>	<p>There will not be a government fee to add an ICT licence to an existing sponsor licence. However, each individual ICT visa application will have associated government costs – please see the breakdown of fees provided at 17.</p>
<p>22. Some skilled professions are predominantly self-employed, which is permitted under Tier 2 General. Will the new system allow sponsors to sponsor on a self-employed basis?</p>	<p>We are not aware of any change to the current policy on this point. However, the Home Office has not yet published the relevant Immigration Rules or accompanying guidance, so this will need to be checked once these are available.</p>

<p>23. Can dual nationals use their alternative passport to apply for visa status?</p>	<p>It would depend on what nationality they have. From 1 January 2021, all people who do not have the right of abode in the UK will be subject to the same Immigration Rules, however there will still be some advantages of holding one nationality in comparison to another. For example, non-visa nationals can come to the UK for visits and a small number of other reasons without having to get a visa from abroad. It is expected that EEA nationals will be given non-visa national status. There are also some immigration routes that are only open to certain nationalities, such as the Tier 5 Youth Mobility Scheme and UK ancestry. It is anticipated that EEA nationals may become eligible for the Tier 5 Youth Mobility Scheme, however it is not yet known whether this will apply to all EEA nationals or only nationals of countries that the UK concludes a bilateral agreement with.</p> <p>The Home Office would also expect applicants to declare all their nationalities on a visa application form.</p>
<p>24. If a UK employee needs to travel into the EEA to visit suppliers, do they need a visa?</p>	<p>From 1 January 2021, UK nationals will be considered as ‘visitors’ once they travel to the continent. They will need to ensure that at the time of entry their passport has at least six months’ remaining validity. The six month period must be calculated ignoring any period of time the passport is valid for in excess of ten years. They must also keep within the limits of visits to the Schengen area, i.e. spending no more than 90 days in each 180-day period. They will also need to ensure they only undertake activities which are allowed as a visitor. Business meetings such as ‘visiting a supplier’ are permissible as a visitor so this should be fine. However, UK nationals will not be able to ‘work’ without visa permission in the country they are travelling to.</p> <p>Before travelling, they will also need to get authorisation under the European Travel Information and Authorisation System (ETIAS), which is due to be introduced during 2021. ETIAS authorisation will cost €7 and lasts for three years.</p>

This publication states the position as at 9 July 2020. It provides general guidance only: expert advice should be sought in relation to particular circumstances. Please let us know by email (info@lewissilkin.com) if you would prefer not to receive this type of information or wish to alter the contact details we hold for you. © July 2020 Lewis Silkin LLP