House of Commons

EMPLOYING FOREIGN NATIONALS – GUIDANCE NOTE

Introduction

For staff members who hold a pass for the Parliamentary Estate, the Pass Access Unit will carry out checks to verify an individual's right to work in the UK.

Those individuals who may take up employment in the UK without special permission are:

- UK citizens or Commonwealth citizens with the right of abode in the UK;
- spouses, civil partners and long-term unmarried partners of UK nationals, whatever their nationality, who have been granted visas confirming their status or who are granted indefinite leave to remain in the UK;
- Swiss or European Economic Area (EEA) nationals (except citizens of Croatia) and their EEA family members, or non-EEA family members (of Swiss or EEA nationals) who have obtained an EEA family permit before coming to the UK or a residence card from within the UK ("family members" includes spouses or civil partners, dependent children or grandchildren under the age of 21 and parents or grandparents);
- spouses, civil partners, unmarried partners and dependants (ie dependent children under the age of 18) of people who have permission to work in the UK under tier 2 of the points-based system, or who hold a UK work permit that is still valid, provided that such dependants have been granted a visa confirming their status before coming to the UK;
- people born in a Commonwealth country who have a grandparent born in the UK and who have been granted an ancestry visa before coming to the UK;

FURTHER INFORMATION

The following government guidance addresses checking an employee's work status:

https://www.gov.uk/government/publications/right-to-work-checks-employers-guide

There is also a Code of Practice on avoiding race discrimination whilst preventing illegal working:

https://www.gov.uk/government/publications/right-to-work-checks-code-of-practice-on-avoiding-discrimination

- people who have obtained visas under tier 1 of the points-based system and their dependants who have been granted a visa confirming their status before coming to the UK;
- overseas students (other than student visitors) granted visas permitting them to undertake a course of study at a UK institute of further education (with restrictions) and, where eligible, their dependants who have been granted a visa confirming their status before coming to the UK; and
- anyone with indefinite leave to remain in the UK.

Prior to 1 January 2014, Bulgarian and Romanian nationals who wanted to work in the UK had to obtain prior permission.

The provisions of the Immigration, Asylum and Nationality Act 2006

Provisions in the Immigration, Asylum and Nationality Act 2006, which came into force on 29 February 2008, make it a criminal offence to take on an employee knowing that he or she is an adult (ie aged 16 or over) who is subject to immigration control and:

- who has not been granted leave to enter or remain in the UK; or
- whose leave is invalid, has ceased to have effect or is subject to a condition preventing the individual from accepting the employment.

The responsibility lies with the employer to make sure, before it employs an individual, that the person has the right to work in the UK.

Under the Immigration, Asylum and Nationality Act 2006, employers should, prior to allowing a job applicant to start work, take the following steps to check whether he or she has the right to work in the UK:

- Require the job applicant to produce one or two original documents in defined combinations, indicating that he or she has the right to work in the UK.
- Check that the documents appear to relate to the job applicant.
- Keep a copy of the documents.

Although it is not a legal requirement to check and retain copies of such documents, by doing so employers are provided with a defence, or statutory excuse, against liability for payment of a civil penalty for employing a migrant worker illegally. Copies of such documents should be kept for the duration of the person's employment and for two years after termination of employment. However, an employer that checks and retains copies of documents confirming a worker's right to work will not have a statutory excuse if they knowingly employ an illegal migrant worker.

The employer must check and copy either one or two of a specified combination of original documents from approved lists A or B (see List of specified documents).

Employers are expected to take reasonable steps to verify the authenticity of the documents produced for this purpose, although they are not required to be experts on detecting forgeries.

When checking documents, employers should therefore:

- check photographs to make sure that they are consistent with the job applicant's appearance;
- check the date of birth to ensure consistency with the job applicant's appearance;
- where any document provided contains a different name for the applicant, request further documentation to explain the reason for the discrepancy (eg a marriage certificate);
- check the expiry dates of any leave for the individual to enter or remain in the UK and any government endorsements in the passport, such as visas; and
- take any further steps that it would be reasonable to take to verify that the job applicant is the rightful owner of the documents that he or she has produced.

There is an additional duty to conduct follow-up checks in cases where an individual whose employment began on or after 29 February 2008 has been granted only limited leave to remain and work in the UK (ie where the individual has produced documents from List B). Employers should, therefore, set in place a system whereby the expiry date of the individual's leave to remain is tracked and repeat follow-up checks are conducted prior to the relevant expiry date. The follow-up checks should take the same form as the original document check. In this way, employers can ensure that the continued employment of the individual is legal. From 16 May 2014, in limited circumstances, a follow-up check may be required earlier than at the point of expiry of an individual's permission (for List B, group 2 documents (see List of specified documents)).

If, during the recruitment process, it is evident from an individual's documentation that his or her permission to work in the UK will expire in a few months, the employer should either ensure that it takes the necessary steps in good time to extend or renew the permission, or that it ceases to employ the individual. Continued employment in these circumstances could be viewed as "knowing" employment of an illegal worker, for which there are criminal, as well as civil, penalties (see below).

If a potential new recruit fails to provide the necessary documentation to demonstrate that he or she has the right to work in the UK, the employer should not allow him or her to commence employment. Further, employers that have grounds to believe that a person who is seeking to work in the UK does not have the right to do so may, at their discretion, report that person to the Home Office.

Penalties

Failure to comply with the provisions of the Immigration, Asylum and Nationality Act 2006 will render an employer liable to both civil and criminal penalties.

There are civil penalties for employers that employ illegal workers as a result of negligent recruitment and employment practices. Employers are liable to be fined up to £20,000 per illegal worker (increased from £10,000, with effect from 16 May 2014).

It is a criminal offence for employers knowingly to employ illegal migrant workers. Employers could incur unlimited fines. Further, individual directors and/or senior managers who know or consent to the illegal employment of the workers concerned may also be convicted and face up to two years' imprisonment.

EEA nationals

With the exception of Croatian citizens, citizens of any country in the European Economic Area (EEA) are entitled to work in the UK without special permission. The EEA consists of the following countries:

Austria	Luxembourg	Malta
Cyprus	Romania	Czech Republic
Denmark	Norway	Estonia
Poland	Finland	Portugal
France	Latvia	Belgium
Belgium	Liechtenstein	Bulgaria
Lithuania	Croatia	

Prior to 1 May 2011, migrants from eight of the 10 countries that joined the EU on 1 May 2004 - the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia - were required to register with the Home Office under the Accession State Worker Registration Scheme if they planned to work for a UK employer for more than one month.

Prior to 1 January 2014, there were restrictions on employed work for Romanian and Bulgarian nationals (although they have had the right to travel throughout the EU since 1 January 2007). These restrictions were lifted with effect from 1 January 2014. Prior to that date, Bulgarian and Romanian nationals who wanted to work in the UK had to obtain authorisation before commencing employment, unless the employment fell into one of the exempted categories. There was a two-stage process for obtaining the necessary authorisation. First, the employer had to apply for a work permit for the individual. (The work permit arrangements were retained for employers wishing to employ Bulgarian or Romanian nationals in skilled jobs.) Second, the Bulgarian or Romanian national had to apply to the Home Office for an accession worker card in respect of the particular employment. Bulgarian and Romanian nationals could also obtain an accession worker card to authorise them to work in certain low-skilled jobs in the food manufacturing sector, subject to an annual quota (see Sectors-based scheme (closed)). A2 workers on these schemes had their right to work limited to 12 months and did not have access to benefits or public housing.

Croatia joined the EU on 1 July 2013. From that date, citizens of Croatia have the right to travel throughout the EU but restrictions are in place on employed work for Croatian workers. EU member states may regulate Croatian's access to their labour markets for up to five years from the date of Croatia's accession to the EU (ie to 30 June 2018). This restriction may be extended for a further two years (ie to 30 June 2020) if the labour market would otherwise be adversely affected.

Croatian nationals who want to work in the UK must obtain authorisation prior to commencing employment. They require a certificate of sponsorship under tier 2 of the points-based system (rather than the old-style work permit system that applied for Bulgarian and Romanian nationals prior to 1 January 2014). Croatian nationals must also apply for an accession worker card before they can commence employment.

Citizens of Croatia do not need to obtain prior authorisation to work in a self-employed capacity.

When a Croatian national has worked lawfully in the UK for 12 months, he or she is free to continue to work without restrictions.

Citizens of Switzerland also have the right to work in the UK without special permission.

Regardless of their nationality, family members of Swiss or EEA nationals living in the UK also have an automatic right to reside and work in the UK. They can first obtain an EEA family permit from their nearest diplomatic post abroad before coming to the UK, to evidence their right of residence and right to work. Applicants from within the UK are issued with a residence card, on application to the Home Office. "Family members" includes spouses or civil partners, dependent children or grandchildren under the age of 21 and parents or grandparents. Partners who are not married or in a civil partnership and other relatives who are not EEA nationals (including extended family such as brothers, sisters and cousins) do not have an automatic right to live or work in the UK although they may apply for permission to do so if they are dependent on the EEA or Swiss national, or in the case of partners who are not married or in a civil partnership, if they are in a durable relationship with the EEA national.

List of specified documents

To verify a job applicant's right to work in the UK, the employer is required to see, and keep a copy of either one document, or two documents in defined combinations, from either List A or List B.

List A documents are those that indicate that the holder is entitled to live and work in the UK indefinitely. List B documents indicate that the holder has restrictions on his or her right to work in the UK, in relation to the length of time he or she may continue to work legally.

Following a satisfactory right to work check, an employer will establish a statutory excuse against liability for a civil penalty:

- for List A documents, for the duration of the employee's employment;
- for List B (group 1) documents, until the expiry date of the employee's permission to live and work in the UK, at which point a follow-up check is required; or
- for List B (group 2) documents, for six months beginning with the date of the Positive Verification Notice from the Home Office employer checking service, at which point a further check is required.

(Prior to 16 May 2014, if the job applicant provided a document from List B, to keep its excuse the employer had to repeat the checks at least once every 12 months, until the applicant provided a document from List A or left the employment.)

Documents that are acceptable on their own from List A include:

- UK passports showing that the holder is a British citizen;
- European Economic Area (EEA) passports;
- EEA national identity cards;
- UK residence documents issued to a national of an EEA country or Switzerland confirming permanent residency in the UK;

- UK residence documents issued to a family member of a national of an EEA country or Switzerland confirming permanent residency in the UK;
- a current passport endorsed to show that the holder is exempt from immigration control and is allowed to stay in the UK indefinitely; and
- a current biometric immigration document (Biometric Residence Permit) issued by the Home Office indicating that the holder is allowed to stay in the UK indefinitely.

Documents that are acceptable in defined combinations from List A include an official document issued by a previous employer or government agency bearing the individual's name and permanent national insurance number, plus:

- a full birth certificate issued in the UK that specifies the name of at least one of the holder's parents; or
- a full adoption certificate issued in the UK that specifies the name of at least one of the holder's adoptive parents; or
- a current immigration status document issued by the Home Office with an endorsement that the individual is allowed to stay in the UK indefinitely or that there is no time limit on his or her stay; or
- a certificate of registration or naturalisation as a British citizen.

Documents that are acceptable on their own from List B include:

- a current passport endorsed to show that the holder is allowed to stay in the UK (for a limited period) and is allowed to do the type of work in question; or
- a current biometric immigration document (Biometric Residence Permit) issued by the Home Office indicating that the holder is allowed to stay in the UK (but not indefinitely) and is allowed to do the type of work in question; or
- a current residence card issued by the Home Office to a non-EEA national who is the family member of an EEA or Swiss national.

Documents that are acceptable in defined combinations from List B include:

- a current Immigration Status Document containing a photograph issued by the Home Office to the holder with a valid endorsement indicating that the holder has permission to stay in the UK and is allowed to do the work in question, together with an official document giving the applicant's permanent national insurance number and his or her name, issued by a Government agency or a previous employer; and
- certain other documents when produced in the prescribed combination.

The Right to work checklist sets out the documents (in List A, List B (group 1) and List B (group 2)) that are acceptable evidence of an individual's right to work. These lists apply with effect from 16 May 2014. If the job applicant provides a document from List B (group 2), the employer must also obtain a Positive Verification Notice from the Home Office employer checking service. The employer must also obtain a Positive Verification Notice if the job applicant is unable to provide evidence of his or her right to work in the UK because he or she has a Home Office application or appeal pending.

In relation to students who have limited permission to work, from 16 May 2014 employers must also obtain, copy and retain details of academic term and vacation dates covering the duration of the period of study in the UK for which they will be employed.

Also from 16 May 2014, employers can no longer accept indefinite leave to remain or a valid unexpired visa or residence permit in an expired passport as evidence of the right to work.

A certificate of the right of abode will confirm the right to work only if it is endorsed in an unexpired passport.

Employees who commenced employment prior to 29 February 2008

In respect of employees who began their current employment prior to 29 February 2008, the provisions of the original Asylum and Immigration Act 1996 apply. Under that Act, there was no ongoing duty to conduct checks on existing workers' right to work in the UK after they had been employed. The duty to check individuals' right to work in the UK applied only at the point of recruitment. Employers can still be liable for prosecution, however, if they employed an illegal migrant between 27 January 1997 (the date the original Act came into force) and 28 February 2008 and did not, prior to the recruitment of that individual, carry out the necessary document checks to establish the statutory defence. However, the employer will not be entitled to rely on the statutory offence where it knowingly employs an illegal migrant worker, regardless of any document checks carried out.

Asylum seekers and refugees

An asylum seeker is someone who has applied for recognition of refugee status in the UK and is awaiting either a decision on his or her initial application or the outcome of an appeal against rejection of his or her claim for refugee status.

Asylum seekers do not normally have the right to work in the UK. In contrast, refugees (ie those who have received a positive decision on their asylum claim) have full employment rights in the UK.

Avoiding race discrimination

Under the Equality Act 2010, it is unlawful to refuse employment to a job applicant on the grounds of nationality. Rejection for employment on racial grounds is unlawful at any stage of the recruitment process.

In *Osborne Clarke Services v Purohit [2009] IRLR 341 EAT* (decided under the repealed Race Relations Act 1976), the employer adopted a policy of automatically excluding applicants who were non-European Economic Area (EEA) nationals for training contracts if, on the face of it, they did not have the right to work in the UK. In a decision that was upheld by the Employment Appeal Tribunal, the employment tribunal found that this policy amounted to unlawful indirect race discrimination. Non-EEA nationals were disproportionately affected by the policy and the employer had failed to provide any evidence to justify its assumption that it would be unable to secure work permits for such applicants. *Purohit* was decided under the now abolished work permits scheme, but the duty to avoid unlawful discrimination remains under the points-based scheme. It follows from this case that employers that adopt a policy of rejecting outright candidates who appear not to have the right to work in the UK, or who require tier 2 entry clearance, will be at risk of breaching the Equality Act 2010, unless they can show objective justification for their actions.

Any questions?

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