

EMPLOYMENT & INCENTIVES

Right to work checks

– *Key changes: July 2021*

1 July 2021 marked the end of the six month post-Brexit 'grace period'. During this period eligible European Economic Area (EEA) citizens and their family members who were resident in the UK by 31 December 2020 needed to apply to the EU Settlement Scheme to preserve their right to live and work in the UK.

It is crucial that employers understand the impact that the end of the grace period has on right to work checks and carry these out correctly. This article looks at the latest updates to right to work checks and the steps employers must take to ensure they remain compliant.

3 MIN READ

Introduction

UK employers have a duty to prevent illegal working and those found employing illegal workers face civil and criminal penalties, with fines of up to £20,000 per illegal worker and potential criminal prosecution in the most serious of cases. Crucially, employers who check employees' right to work in the manner prescribed by the Home Office can establish a statutory excuse against prosecution in the event they are found to be employing someone who does not have permission to work in the UK. The Home Office has recently updated the approach to be taken in light of the grace period ending.

Changes affecting EU Nationals from 1 July 2021

Brexit ended 'free movement' in the UK on 31 December 2020. The six month 'grace period' to 31 June 2021 allowed eligible EEA citizens and their family members resident in the UK before 31 December 2020 to apply to the EU Settlement Scheme to preserve their rights to live and work in the UK.

Although free movement ended on 31 December 2020, during the 'grace period' there was no change to the way employers were required to conduct right to work checks on EEA nationals.

However, from 1 July 2021, EEA citizens and their family members are now required to demonstrate their immigration status in the UK in the same way as other foreign nationals. They can no longer rely on an EEA passport or national identity card to prove their right to work.

On 18 June 2021 the government published a draft Code of Practice on preventing illegal working and issued updated guidance regarding changes to the way EEA citizens

prove their right to work in the UK from 1 July 2021 onwards.

EEA nationals will now need to provide proof of their UK immigration status granting a right to work in the UK. This includes status issued under the EU Settlement Scheme or the Immigration Rules (usually under sponsorship), or evidence of a pending application under either system. Proof will generally be provided by a Positive Verification Notice obtained via the Home Office's online Employer Checking Service.

The draft Code and the latest government guidance has also significantly amended the list of acceptable right to work documents to reflect the post-Brexit position:

- EEA national passports, national identification cards and specified EEA Regulations documents are no longer acceptable documents as evidence of Right to Work in the United Kingdom (with the exception of Irish citizens).
- Changes to the acceptable document list from 1 July 2021 also include:
 - » Irish passport and identity card

- » A document issued by the Crown Dependencies in Jersey, Guernsey or the Isle of Man which has been verified as valid by the Home Office Employer Checking Service
- » A frontier worker permit issued under regulation 8 of the Citizens' Rights (Frontier Workers) (EU Exit) Regulations 2020
- Specific reference is also made in the draft Code to evidence of status or a pending application under the EU Settlement Scheme.

COVID-19 Adjusted Checks

Since 30 March 2020 the normal checking process was temporarily amended due to COVID-19. While right to work checks continue to be necessary, the process was simplified to allow employees to provide digital copies of their documents and facilitate checks by video rather than in person. The Home Office accepts that in some cases employees may not be able to produce the required documents due to COVID-19. If that is the case, employers should take care not to discriminate because

an individual cannot evidence their right to work. Instead, employers can use the Employer Checking Service to establish if an individual has permission to work.

The government guidance issued on 18 June 2021 announced that the COVID-19 Adjusted checks process will end on 31 August 2021. From 1 September 2021, employers are required to carry out physical document checks with the individual present or via video link if the employer has access to the original right to work documents.

It is also important to note that employers do not need to carry out retrospective checks on EEA nationals that were employed during the 'grace period'.

Employers will maintain a defense against a civil penalty if the check they have undertaken during this period was done in the prescribed manner as set out in the COVID-19 adjusted checks guidance. However, any individual identified with no lawful immigration status in the UK may be liable to enforcement action

Conclusion

The end of the prescribed 'grace period' means employers need to be aware of their responsibilities when recruiting migrant workers. We recommend that employers audit their existing right to work check processes and records to ensure ongoing compliance. Employers must ensure recruitment is approached carefully and consistently and that offers of employment remain conditional on candidates having a right to work.

We regularly assist businesses with right to work compliance and sponsorship of migrant workers. We have worked with a number of businesses to minimise risks while remaining compliant with current government guidance when recruiting during the 'grace period' until 30 June 2021 and continue to do so after 1 July 2021. If you would like further information, or have a specific concern, please contact a member of our Immigration team.



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