

Right to work checks – *what you need to know*

Ongoing Covid-19 restrictions and recent changes to the UK's immigration system mean more than ever, it is crucial that employers are carrying out right to work checks correctly.

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 jail sentences 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.

Process

Right to work checks should be carried out for all staff, regardless of their background. Making assumptions on a prospective employee's permission to work in the UK could expose an employer to discrimination claims. The safest course of action is to always check everyone you employ and retain a copy.

The Home Office frequently publishes guidance on the exact process employers should follow to establish a statutory excuse. Employers should always ensure they are following the latest guidance and note that changes do not have retrospective effect on checks that have already been carried out. There are two main ways of checking an individual's right to work; the three-step 'manual' process outlined below and an online checking service in certain circumstances:

1

Obtain original documents from the individual, from the list of acceptable documents outlined by the Home Office

2

Check the documents are genuine in the presence of the individual, noting any expiry dates or restrictions

3

Make a clear copy of the check, noting the date it was carried out and retain for at least two years after the employment ends.

Depending on the documents provided at Step 1, a follow up check may be required during the employment. If conducting an online check, the service will make it clear if a follow up is necessary. We recommend employers maintain a database to prompt any necessary follow-ups or visa renewal applications.

Covid-19 changes

Since 30 March 2020 the normal checking process has been temporarily amended due to Covid-19. While checks continue to be necessary, the process has been 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. Once temporary measures end, retrospective checks will be required for employees who started work or who required a follow up check while they were in place.

EU Settlement Scheme

The EU Settlement Scheme allows EU/EEA/Swiss citizens to apply to regularize their UK immigration status. Those citizens who were resident in the UK on or before 31 December 2020 have a 'grace period' until 31 June 2021 to make an application. As a result, EU/EEA/Swiss citizens can evidence right to work by producing a passport of national ID card until that point. Crucially, employers cannot require individuals to provide evidence of an application to the EU Settlement Scheme, or any status granted under it, until 1 July 2021.

This loophole arrangement is concerning. Technically, an Employer can continue to accept a passport or national ID card as evidence of right to work for EU/EEA/Swiss citizens – and so obtain a statutory excuse – but as they cannot require evidence of an application under the settlement scheme, they have no way of knowing if an individual has done so unless the information is shared voluntarily. Individuals arriving in the UK after 31 December 2020 would be subject to the UK's revised points-based immigration system. Clearly, there is potential for widespread business disruption in the second half of 2021 if employees are subsequently found to be working illegally.

Changes to the UK's immigration system

January 2021 saw the long advertised overhaul of the UK's points-based immigration system for skilled workers. The changes mean UK employers will be required to obtain a sponsor license to recruit non-UK talent even if they are EU/EEA/Swiss citizens. Failing to carry out right to work checks correctly not only exposes employers to civil and criminal penalties as well as reputational risk – the Home Office publishes a list of those sanctioned for illegal working – penalties for illegal

working can directly affect a business's ability to obtain a sponsor license. As competition for talent inevitably increases, this could seriously compromise a business' ability to recruit effectively.

Conclusion

In a boost to employers, the Home Office has confirmed that after 30 June 2021 retrospective checks will not be required for existing employees. While that is obviously good news for employers, the inability to check before 30 June 2021 presents challenges. The new immigration system, coupled with the provisions of the EU Settlement Scheme will almost certainly lead to updated government guidance as we approach that cut-off point. In the meantime, we recommend that employers audit their existing right to work check process and records to ensure ongoing compliance. We also recommend that employers ensure recruitment is approached carefully and consistently and that offers of employment are conditional on candidates having a right to work.

We regularly assist businesses with right to work issues and audits and 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.

If you would like further information, or have a specific concern, please contact a member of our Immigration team.

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