Navigating the UK's new immigration system: Post-Brexit considerations for businesses and workers

Rose Carey and Kelvin Tanner, Partners, and Kate Gamester, Knowledge Development Lawyer, at Charles Russell Speechlys LLP explore the UK's post-Brexit immigration environment, highlighting the compliance pitfalls and how organisations can adapt to avoid them

Free movement between the UK and the EU finally ended at 11pm GMT on the 31 December 2020. With this, EU nationals (but not Irish nationals) became subject to UK immigration control and must now meet the requirements of the UK's Immigration Rules. At the same time, UK business travellers must meet the domestic laws of their destination EU country.

From an immigration perspective alone this has enormous implications and represents more change in this field than the UK has known for decades. In a post-Brexit world, it is now more crucial than ever for companies to monitor the activities of their employees undertaking overseas business trips to ensure compliance with the relevant local laws.

The end of the transition period also brings other challenges for business, not least concerns over the continued ability to source and recruit sufficient labour. Minimum skills thresholds apply for work sponsorship and UK companies no longer have unlimited access to EU workers to fill lower-skilled roles. For the construction, retail, and care industries, for example, who have been heavily reliant on EU workers, this will have far-reaching ramifications. Companies must also factor in the increased costs and compliance aspects of sponsoring EU nationals, where a work visa is now required.

The EU/UK Trade & Cooperation Agreement (TCA) brings some clarity regarding certain aspects of continued business mobility between the UK and the EU post-Brexit, but it falls far short of being a meaningful replacement to free movement.

EU Nationals already residing in the UK before the end of the transitional period

EU nationals residing in the UK for more than 5 years as at 31 December 2020 are eligible to apply for 'settled status' (permanent residency) under the existing EU Settlement Scheme (EUSS). This status enables the holder to stay in the UK and work without restriction. Those who were residing in the UK as at 31 December 2020 but for less than 5 years can also register under the EUSS to obtain 'pre-settled' status by the required deadline. They can then apply to convert their pre-settled status to settled status at the five year mark, provided they meet the residency requirements – typically not being outside of the UK for more than six months in each of the five qualifying years, unless one of a number of limited exemptions applies.

The application is free of charge and over 5 million EU nationals and their eligible family members have registered under the scheme to date. The deadline to register under the EUSS is 30 June 2021, although qualifying family members can continue to apply.

At this stage it is not clear what happens to those with pre-settled status after the 5 years if they cannot qualify for settled status. It is likely that anyone in that category will need to qualify for another visa in order to continue to live and work in the UK.

A further issue yet to be explored is what happens if the EU national fails to register by the deadline of 30 June, as the failure is likely to affect their right to work and live in the UK thereafter.

Another transitional measure open to EU nationals who fall under the relatively broad definition of being a 'worker' in the UK by 31 December 2021, but who are not primarily resident here, is the UK's Frontier Worker Permit. Again the application for this status can be made free of charge.

An eligible EU national wishing to enter the UK as a Frontier Worker from 1 July 2021 must hold a permit. Unlike for the EUSS, however, provided the EU national is able to prove Frontier Worker status by 31 December 2020, there is no long-stop deadline to apply. Frontier worker status does not lead to permanent residency in the UK but can be extended beyond the initial 5 years.

New EU arrivals to the UK

EU nationals arriving into the UK for the first time from 1 January 2021 for the purposes of work will in most cases require a work visa and sponsorship under the new immigration system.

Business travel

From the UK's perspective, the business visitor rules now apply to EU and non-EU nationals alike and the eligibility criteria is relatively clear. EU, EEA and Swiss national visitors may enter the UK for business purposes for up to six months at a time without applying for a visa in advance. Visitors are not permitted to take employment in the UK or undertake productive work, but may undertake certain permitted activities.

"EU, EEA and Swiss national visitors may enter the UK for business purposes for up to six months at a time without applying for a visa in advance. Visitors are not permitted to take employment in the UK or undertake productive work, but may undertake certain permitted activities"

Examples of permitted activities include:

- attending meetings, conferences, seminars, interviews;
- giving a one-off or short series of talks and speeches, provided that these are not organised as commercial events and will not make a profit for the organiser;
- negotiating and signing deals and contracts;
- attending trade fairs, for promotional work only, provided the visitor is not directly selling;
- carrying out site visits and inspections;
- gathering information for their employment overseas; and
- being briefed on the requirements of a UK based customer, provided any work for the customer is done outside of the UK.

Under the intra-corporate provisions, an employee of an overseas based company may advise/consult, trouble shoot, train and share skills and knowledge on a specific internal project with UK employees of the same corporate group, provided that no work is carried out directly with clients.

Importantly, payment for the activities from a UK source is prohibited, unless it is payment for reasonable expenses or if the activity falls within the definition of a very limited number of permitted paid activities. Payment is also allowable in the case of multinationals where their payroll is based out of the UK.

Since the pandemic began and more people have been working from home, we have seen many examples of people working remotely from another country. In the case of the UK, checking email and catching up with work whilst in the UK as a visitor must be incidental to the main reason for visiting the UK - an individual must not simply be doing his or her job remotely from the UK. If someone is aiming to visit or live in the UK with the intention of working here remotely, then this will require a work visa.

From the EU's perspective, the general rule is that business travellers can spend no more than 90 cumulative days in any 180 days undertaking business travel across the EU (notably the UK's rules are more generous allowing visits of up to six months at a time). That said, permissible business activities are not uniform across EU Member States, and so the precise immigration requirements of the destination country need to be checked in advance. Where work permission is required, obtaining a work visa or residency permit can take many months in certain EU countries and so careful forward planning is now vital.

Failure to comply with the conditions prevalent in another jurisdiction could have serious consequences for both the business visitor and the entity he or she is visiting. In the UK, business visitors who breach the conditions and engage in prohibited work could be prosecuted and fined, banned from entering the UK again for a period of time, or even, in the most severe cases, be sent to prison. The UK entity involved could be fined up to £20,000 under the civil penalty sanctions and, if prosecuted, the criminal sanctions allow for an unlimited fine and a term of imprisonment for up to 5 years.

The trade agreement

The TCA contains certain welcome provisions for defined business mobility categories such as Contractual Service Suppliers (CSSs) - employees of EU companies not already established in the UK - and for Independent Professionals (IPs) – self-employed persons with no business presence in the UK. Both categories, as indicated by their names, are designed to facilitate the continued delivery of business services between the EU and the UK to a degree, but both have strict eligibility criteria.

Importantly for the UK, the CSSs or IPs must also apply for a Tier 5 International Agreement visa in advance and the UK company contracting with them must have a Tier 5 International Agreement sponsor licence. In practice, this means taking on the sponsorship duties and responsibilities of migrants who are not your employees, which is likely to limit the attractiveness of this route for many UK companies.

Like the business visitor provisions of the TCA – the CSS and IP provisions do not apply in the same way across

(Continued on page 10)

(Continued from page 9)

each of the Member States, with some requiring economic needs tests and visas to be settled in advance.

From an outbound perspective, the harsh reality for UK companies is that they now have 27 different immigration regimes to contend with in relation to EU business travel and work and so great care is required to ensure compliance going forward.

In the interests of time, (the agreement was only reached on Christmas Eve), the TCA was initially signed, published, and applied from the end of the transitional period on a provisional basis by the European Commission without the full legal-linguistic revision. Under the previous current terms, the provisional application of the TCA was due to expire on 28 February 2021 but has now been extended to 30 April 2021. Further extensions may also occur.

Sponsoring workers in the UK under the new system

The previous Tier 2 (General) category for skilled workers with a job offer in the UK has transitioned into the new 'Skilled Worker' route. Tier 2 (Intra-Company Transfer) categories for existing employees of linked overseas entities are now known simply as the 'Intra-Company (ICT) Routes'.

Existing sponsor licence holders automatically had their licences transferred over when the new rules came into force on 1 December 2020. Companies without a sponsor licence who wish to sponsor EU nationals as well as non-EU nationals will need to apply for one.

The new routes will apply to EU and non-EU workers alike and companies should plan for the increased costs and administrative burden associated with sponsoring migrant workers.

The Skilled Worker route – what has changed?

In welcome news for all business sectors, the requirement to advertise a role in a Home Office prescribed manner, and to be able to show that no suitably qualified settled worker could be found before sponsorship was possible (known as the 'Resident Labour Market Test '), has been abolished. However sponsors still need to demonstrate a genuine need for the role in question, and that the migrant they wish to sponsor has the necessary skills, qualifications, and experience required for the role in question.

> ***"the harsh reality for UK companies is that they now have 27 different immigration regimes to contend with in relation to EU business travel and work and so great care is required to ensure compliance going forward"***

The annual cap on skilled workers entering the UK has been suspended. This means that, for the time being at least, there will no longer be a limit on the number of migrant workers who can come to the UK under this category each year.

The overall minimum salary threshold has been reduced from £30,000 to £25,600, and this can be reduced to as low as £20,480 where there are certain tradeable points characteristics, although the role will still need to meet the 'going rate' for the relevant job, if higher. At the same time the overall skills threshold has been reduced from RQF Level 6 (Degree level or higher) to RQF Level 3 (broadly A Level or higher), opening up a wide range of new roles now eligible for sponsorship.

The cooling off period no longer applies and it is easier to switch into this route from within the UK. Eligible applicants and their family members can still qualify for settlement/permanent residency in the UK after 5 years and there has been no change to the continuous residency criteria – applicants, including family members where applicable, should not have absences of more than 180 days in any rolling 12 month period during each of the qualifying years.

The ICT route

Whilst the TCA contains provisions for intra-corporate transfers for up to 3 years, the UK's rules are more generous, allowing for up to 5 years generally, and up to 9 years for 'high earners', and the Home Office has confirmed that this will not change, at least for the time being.

The skills threshold for the ICT and its sub-category for graduate trainees remains the same at RQF Level 6 and there has been no reduction in the overall minimum salary requirement of £41,500 for the ICT route, and £23,000 for the graduate trainee route.

Whilst the future of the category is currently under review by the Migration Advisory Committee (MAC), one key benefit of this route compared to the Skilled Worker route remains the fact that it carries no English language requirement. They key drawback is that it does not provide a route to settlement/permanent residency in the UK. However, it is now possible to switch from the ICT route or the previous Tier 2 ICT route onto a Skilled Worker visa to put someone onto a path to settlement.

Compliance requirements

The requirement for employers to hold a sponsorship licence, with its associated compliance duties, remains an integral part of the new system. The key overarching sponsor compliance requirements remain the same and comprise:

- monitoring immigration status and preventing illegal working;

- maintaining migrant contact details;
- record-keeping;
- migrant tracking and monitoring; and general sponsorship duties.

The Home Office will conduct regular audits to check that the sponsor is complying with its sponsor duties, and many of these audits now take place remotely. This means sponsors will need to ensure that they are conducting their 'right to work' checks correctly, that they have adequate records for their sponsored workers, that they are able to monitor the whereabouts of their sponsored workers, and that they are reporting promptly when required to do so.

Problems can often occur where the sponsored workers are not employees, as in the case of CSS and IP's under Tier 5 where the UK sponsor may not have access to the workers records such as salary information. Our clients are also needing support to review their internal compliance processes now that more employees are working for them remotely.

Compliance issues may also arise where workers' roles change significantly, as this often requires new sponsorship, or where there are structural changes to the business. Licences are not transferable and, in the case of a change in owner of the business, this will often mean that the old licence is no longer valid and the new owner of the organisation will have to apply for a new one.

There are also steps to be taken where a sponsored worker is transferring under TUPE as the result of the transfer of the undertaking. Failure to take the necessary steps following a restructure of the business, or failure to apply for new sponsorship where a worker's role has changed, could mean that employees' existing sponsorship loses its validity, and they are therefore working illegally.

"a valid right to work check (in person, online, or virtual) provides a defence against a civil penalty. However, an employer who employs someone whom it knew or had 'reasonable cause to believe' did not have the right to work in the UK, could be liable for criminal prosecution in the most severe cases"

Sanctions for non-compliance can be severe. In serious cases sponsors can lose their licence and, if this occurs, all existing sponsored migrants will have the remaining duration of the visas 'curtailed' (cut short) to sixty days – leaving them little time to either find another sponsor, apply under a different immigration route (if eligible), or ultimately leave the UK. The sponsor can also face fines and prosecution for breaches of legislative obligations to prevent illegal working .

Right to work checks – additional risk and compliance considerations when employing EU nationals

Under preventing illegal working legislation, employers can face a civil penalty of up to £20,000 per worker employed illegally. There is a statutory excuse against this if the employer conducted a right to work check in accordance with Home Office requirements. However, this would not help against the criminal sanction where employers employ someone who they knew or had 'reasonable cause to believe' did not have the right to work in the UK. It is the 'reasonable cause to believe' that causes concerns for employers. What is "reasonable cause"? The sanctions can be severe, with an unlimited fine and imprisonment for up to 5 years.

Currently, there has been no change to Home Office guidance for right to work checks for EU nationals starting work between 1 January 2021 and 30 June 2021. The Home Office has confirmed that checking the passport or ID card of an EU national, either in person, or remotely under temporary COVID-related provisions, is sufficient to provide a defence against any civil penalty in the event that the individual is subsequently found not to have the right to work in the UK.

The risk here to employers is that EU national new hires may not have a right to work if they entered the UK for the first time on or after 1 January 2021. It has been confirmed that a valid right to work check (in person, online, or virtual) provides a defence against a civil penalty. However, an employer who employs someone whom it knew or had 'reasonable cause to believe' did not have the right to work in the UK, could be liable for criminal prosecution in the most severe cases. Inadvertently employing someone who has no right to work could also lead to future employment issues.

The Home Office has responded to employers' concerns about its current policy by stating that it reserves criminal sanctions "for the most serious cases of non-compliance with the Right to Work Scheme" and continues that such sanctions are "not intended for employers who have employed EEA citizens in good faith during the grace period and have completed a right to work check in the prescribed manner". Although the Home Office may reserve criminal sanctions for the most serious cases of non-compliance it does not mean that the Home Office cannot take action against less serious cases – a breach is still a breach after all.

In addition, the current policy guidance goes further than this by warning that asking EU nationals for documentation over and above that which is necessary may amount to discrimination on the part of employers. This puts employers in a difficult position, in particular in relation to conducting retrospective checks on existing EU national employees from 1 July 2021 onwards. The Home Office has

(Continued on page 12)

confirmed that this is not required, but again this exposes employers to the risk that they are employing someone illegally.

Where an employer does decide to conduct retrospective checks, according to the Home Office they "must ensure that they do so in a non-discriminatory manner". It is difficult to understand how this might be possible without conducting repeat checks on an entire work force and it is hoped that further guidance on this is forthcoming.

This remains an area of concern. If an EU employee hired after 1 January 2021 tells a manager at a social gathering that s/he only entered the UK for the first time after 1 January 2021, should the employer then check further into the employee's immigration status? What if the employee goes on to say s/he does not need a visa as s/he is European? If the employer fails to investigate or take action, could this lead to prosecution on the basis that the employer had reasonable cause to believe this employee did not have the right to work?

Clarification in this area will be welcome, and is potentially forthcoming. The Home Office has confirmed that it will release its post-30 June right to work guidance 'in due course'.

The future

Whilst companies can continue to employ EU nationals already in the UK by 11pm on 31 December 2020, meeting future labour needs will inevitably become more difficult as the new rules start to bite. The UK currently has no designated route for lower skilled workers, other than for those working in the agricultural sector, and even then the category remains under review.

Even where sponsorship is possible, (i.e. the role is deemed sufficiently skilled enough), some companies such as start-ups may not be able to afford the high costs of sponsorship, or be able to pay the minimum salary requirements, which might be above what they pay existing employees.

Many organisations may simply be put off by the more extensive compliance obligations that come with sponsorship.

It may be that EU migrants become eligible under the Youth Mobility Scheme in due course, which enables nationals of certain countries aged 30 or under to obtain a two year visa permitting them to work for any employer in the UK. This route does not currently include EU nationals, but may do so in the future depending on the result of on-going trade talks with the EU.

A new 'self-sponsored' visa category for highly skilled migrants may also be introduced, but further details on this are still awaited.

Looking to the future, employers will need to consider their recruitment needs carefully and, more than ever, plan ahead, factoring in the time it may take to obtain visas and the costs of applying for those visas, as well as the additional responsibilities that recruitment of non-UK nationals will place on their HR staff and Compliance Officers.

Rose Carey
Kelvin Tanner
Kate Gamester
Charles Russell Speechlys LLP
rose.carey@crsblaw
kelvin.tanner@crsblaw.com
kate.gamester@crsblaw.com