

Immigration Law Update

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Introduction



Immigration was a key topic for discussion in the EU Referendum debate. Since the Referendum, there have been no clear statements from government on the position of EU nationals living in the UK and UK nationals living elsewhere in the EU. Consequently, the position remains uncertain.

For non-EU companies and individuals who wish to come to the UK to work or set up in business, the immigration options are limited.

The civil penalties for employing workers illegally are high and employers could also find themselves subject to new criminal penalties. Details are set out below.

New Criminal offences to prevent illegal working

The Immigration Act 2016 includes a new criminal offence for employing illegal workers and increases the penalty for a conviction.

The following provisions were introduced on 12 July 2016:

- An extension of the criminal offence of “*knowingly employing*” an illegal migrant to include circumstances where an employer has “*reasonable cause to believe*” that the person is an illegal worker;
- An increase in the penalty for that offence from two years to five years imprisonment;
- Power to close businesses that continue to flout the law through the use of illegal labour and ensure that any licences granted to businesses e.g. for the sale of alcohol, are only held by those who comply with immigration laws;
- Increased powers for immigration officers to enter business premises to search for documents and to seize and retain evidence in relation to an offence.
- Creation of a new offence of illegal working which would enable the earnings of the illegal workers to be seized under the Proceeds of Crime Act 2002.



Civil Penalties

All employers are required to carry out Right to Work checks on all new workers (regardless of nationality) to verify that they have the right to work in the UK. The Home Office has issued guidance on the documents which employers should request.

The maximum civil penalty for employing workers illegally is £20,000 (per worker). There are, however, mitigating factors which can reduce or avoid the penalty such as reporting suspected illegality, co-operating with any Home Office investigations and satisfying the Home Office that effective document checking practices were in place.



The Government has increasingly relied on civil penalties for enforcement purposes, given the difficulty of proving the criminal offence of knowingly employing an illegal worker. The new criminal offence of “reasonable cause to believe” that the person is an illegal worker is intended to be easier to prove and could result in more prosecutions. Alternatively, it will act as a deterrent.

Comment

The new penalties are aimed at rogue employers who exploit illegal migrants for their own gains but are also aimed at making it harder for migrants to live and work illegally in the UK. Unfortunately, honest employers can find themselves “guilty” by mistake and the penalties are high. The new criminal penalty would operate alongside and reinforce the existing system of civil penalties for employing illegal workers (whether employed or self-employed).

Rights of EU Nationals living in the UK

At present, all European Union (EU) nationals have the right to live and work in any other member states under the treaty principle of “free movement of workers”. The right extends to family members whether or not those family members are also EU nationals.

There are some restrictions on free movement of workers which give the other member states the right to refuse entry or deport an EU National on grounds of public policy, public security or public health but these restrictions are limited.

Since the UK Referendum on EU membership, the legal position has not changed although there is much uncertainty and speculation regarding the future of EU nationals living in the UK and UK nationals living elsewhere in the EU.

However, until such time as the UK gives notice under Article 50 of the Lisbon Treaty to terminate their EU Membership, the UK remains an EU member and is subject to EU law, even if the UK's political participation has decreased. The minimum period of notice under Article 50 is two years so EU membership will not cease overnight.

UK legislation does not tend to be retrospective. If the UK leaves the EU in say three years' time, there would most likely be a cut-off date so that any EU national living in the UK before that date (possibly the Referendum date) would have the right to remain in the UK.

Action for EU nationals

If EU nationals currently living in the UK want to secure their position, they can apply for permanent residence after five years in the UK. This would give them the permanent right of settlement i.e. to live and work in the UK without restriction. After six years in the UK, they can apply for UK nationality and would probably want to do this on a dual nationality basis so as to keep their EU rights.

EU nationals who have been living in the UK for less than five years should apply for a registration certificate evidencing their right to reside in the UK and date of entry. This would be useful in support of any future application for permanent residence.

The registration certificate and permanent residence application are not currently compulsory for EU nationals living in the UK but should now be considered given the current uncertainty. The Home Office fee for these applications is relatively inexpensive (£65) compared to other immigration applications.

Comment

The EU's policy on migration i.e. to encourage free movement throughout the EU is the complete opposite of UK immigration policy which is aimed at restricting migration. If the UK does leave the EU and free movement of workers no longer applies, then any employer wishing to employ EU nationals without permanent residence in the UK will need to rely on the sponsorship licence scheme.



The sponsorship application process is unnecessarily complicated and the fact there is a cap on the number of certificates (formerly work permits) which can be awarded will also restrict employment of EU nationals. It is possible the cap could be substantially increased (and exceptions could apply) but there is no indication of this at present, and the position remains uncertain.

Current immigration options

For non-EU companies and individuals who wish to come to the UK to work or set up in business, the options are limited. The government is also imposing stringent checks and will refuse applications



which do not comply with or satisfy the requirements.

The current options are: investors, entrepreneurs, employment of skilled workers – sponsorship and exceptional talent. The main requirements for these options are set out below:

Investors - The individual must have at least £2m (increased from £1m in November 2014) to bring to the UK of their own money and to invest £2m in UK Government Bonds or in Share Capital or Loan Capital in a UK company (but not property companies).

Entrepreneurs - The individual has to have access to and invest £200k of funds into a new business or an existing UK business and meet certain criteria concerning this business. In particular, after three years the individual will need to demonstrate that the £200k was invested as originally planned and that the business has created two new full time jobs.

Employment of Skilled Workers – Sponsorship - Companies wanting to employ migrant workers are required to be registered with the Home Office as a licensed sponsor. They can then issue a certain number of certificates of sponsorship (formerly work permits) each year based on their applications. They also have to comply with various record-keeping requirements to retain their licence and carry out a resident labour market test (RLMT) to show there is no suitable resident worker to undertake the role. The RLMT is not required for intra-company transfers, shortage occupations and those positions for salaries of £153,500 or more.



The Government has imposed an annual limit of 20,700 on the number of Tier 2 Certificates which can be issued (nationwide). The certificates are assessed on a point scoring system. More points are awarded for high salaries and shortage occupations. The minimum salary for a Tier 2 Certificate is £20,800 per year. The cap does not apply to intra company transfers or salaries of £153,500 or more.

Exceptional Talent - This applies in very limited circumstances. The applicant has to be endorsed as an internationally recognised leader or emerging leader in the field of science, humanities, engineering, medicine, digital technology or the arts.



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Disclaimer

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