

Brexit: Steps Employers Should Take Now





Brexit Step-by-Step Planning for UK Employers

The prospect of extending the deadline for the UK's withdrawal from the European Union past 31 October 2019, the Brexit date, remains uncertain. UK employers accordingly do not know whether they will have to address the consequences of withdrawal imminently. In view of this, employers should take several key steps now to protect their workforce—even if no deal is reached by 31 October.

Step 1 – Identify Candidates for and Accelerate Applications Under the EU Settlement Scheme

CITIZENS (AND THEIR FAMILIES) OF THE EU, ICELAND, LIECHTENSTEIN, NORWAY, AND SWITZERLAND WHO ARE CURRENTLY IN THE UK

Under the previous home secretary, the UK Home Office introduced new Immigration Rules to provide for the rights of EU citizens (and their family members) to remain in the UK post-Brexit. The EU Settlement Scheme (“EUSS”) provides the basis for EU citizens and citizens of Iceland, Liechtenstein, and Norway (collectively, the “EEA”) and Switzerland who are resident in the UK, and their family members, to apply for domestic UK immigration status when freedom of movement no longer applies.

We discuss below the terms under which applications may be made and the previously announced rights and privileges offered to candidates who are eligible for and complete the online application for the EUSS.

SETTLED STATUS FOR THOSE WHO HAVE BEEN CONTINUOUSLY RESIDENT IN THE UK AT LEAST 5 YEARS

- Applicants from the EEA countries and Switzerland (and their families) who have been continuously resident in the UK for 5 years at the date of application will be eligible to apply for settled status under the EUSS.
- Once they have held settled status for 12 months, they may then be eligible for British citizenship.
- If they are married to British citizens, they may be in a position to apply for citizenship on receipt of settled status.

- Future absences from the UK of 5 years or less should not impact their settled status—although this period is still subject to confirmation.
- Any children born in the UK after settled status is obtained will automatically be British.

PRE-SETTLED STATUS FOR THOSE WHO ARE NEWER TO THE UK

- An applicant who has been continuously resident in the UK for less than 5 years up to the date of application will be eligible for 5 years limited leave to remain (“pre-settled status”).
- An application for settled status may be made after an applicant has completed 5 consecutive years on condition that the applicant has not been absent for more than 6 months of any year.
- Absences from the UK of 2 years or less should not impact pre-settled status (however, note that this period is still subject to approval).
- Children born in the UK to a parent with pre-settled status will automatically be eligible for pre-settled status.
- All status will be electronic and linked to a valid passport. If passports are renewed, applicants must update their details with the Home Office. This requires submission of the newly issued passport, which can be held for up to 6 weeks.

APPLICATION PROCESS

- The EUSS is open, and it is free to apply. Applicants can access the application at <https://www.gov.uk/settled-status-eu-citizens-families/applying-for-settled-status>.
- Applicants will be required to prove their identity and disclose any criminal convictions.
- The deadline for registering if “no deal” is reached is 31 December 2020.

- The deadline if a deal is reached is 30 June 2021.

To ensure that the maximum protection of rights is maintained, currently eligible candidates should apply **prior to 31 October 2019**. The application period is expected to remain open, however, for the entire periods noted.

Step 2 – Establish a System to Track EEA and Swiss New Hire and Traveler Obligations After 1 November 2019

EEA AND SWISS CITIZENS (AND THEIR FAMILIES) WHO ARRIVE IN THE UK AS OF 1 NOVEMBER 2019

Under recent announcements by the current home secretary, the UK will continue to allow EEA and Swiss citizens entering the UK for the first time after 11 pm on 31 October 2019 to live and work in the UK until the end of the previously envisaged transition period on 31 December 2020. In order for individuals who enter as of 1 November 2019 to remain past 31 December 2020, they will need to register under a new European Temporary Leave to Remain (“ETLR”) scheme. Employers who have a reliable tracking system to monitor deadlines for such obligations will ensure longer-term authorizations for these eligible citizens.

In the event of a no-deal Brexit, these post-November 1 arrivals will face tougher border controls, as the home secretary announced on 4 September 2019. In a move signaling the end of free movement in its current form, a tougher UK criminality threshold will be applied in order to keep out and deport those who commit crimes. The new controls will be introduced alongside ETLR.

- Absent any deal, freedom of movement pursuant to membership in the EU will cease as of 1 November 2019.

- As a practical matter, up until 31 December 2020, EEA and Swiss nationals will be able to continue to use their original valid passports to travel to the UK and prove their right to work in the UK. It is also possible their national identity cards will suffice for both purposes, at least initially.
- The prior government announced in January 2019 that a limited 3-month period would apply to EEA and Swiss nationals who enter the UK after 1 November 2019, during which these individuals would be granted an automatic “deemed leave to remain” (they may reside, work, or study in the UK). According to this previously announced plan, they would be permitted to remain past 3 months only if they file for a 36-month “extension” under the ETLR.
- The home secretary has indicated that there will be no 3-month deadline and that filings under ETLR will be required only if individuals entering as of 1 November 2019 (and before 31 December 2020) wish to stay for an additional 36 months. Leave granted under the ETLR scheme would begin on the date of the ETLR grant (not the EEA or Swiss national’s initial entry to the UK) and will be evidenced digitally, in a similar format to the EUSS, which is applicable to EEA and Swiss nationals who are in the UK prior to Brexit.
- Those wanting to stay beyond the 36 months will be required to convert into a different visa category under new immigration rules, which will come into effect from 1 January 2021. Those who do not qualify will have to leave the UK when their ETLR status expires.
- It is expected that time spent with ETLR status will combine with time under any other immigration category leading to settlement, such as Tier 2 (General), for the purpose of accruing 5 years’ continuous residence in the UK towards indefinite leave to remain (“ILR”)

APPLICATION PROCESS

- Applications under ETLR must be submitted prior to 31 December 2020.
- The application will be online.
- Mirroring the EUSS, applicants will simply be required to prove their identity and disclose any criminal convictions.
- A fee will apply to applications for ETLR, but the Immigration Skills Charge and Immigration Health Surcharge will not apply. No fee has been agreed to date.

Step 3 – Prepare for Home Office Audits

RIGHT TO WORK CHECK (“RTWC”) RECORDKEEPING FOR ALL EMPLOYEES BASED IN THE UK

To date, the government has indicated that employers will not be required to conduct new RTWCs on EEA and Swiss employees who commenced employment prior to 31 October 2019. But employers are vulnerable to penalties for failure to maintain appropriate RTWC records as part of their legacy compliance with the law.

Employers accordingly should use this period to review their RTWC records for all active employees, as well as revalidate time-limited visa holders.

Home Office inspectors will review both RTWC records and other records, such as proof of appropriate visa applications for expatriates, proof of lawfully conducted resident labour market testing (for applicable categories, e.g., Tier 2 General), and required payroll records.

Step 4 – Monitor EU Rules for British Entry into Switzerland and EEA Countries

Under the Withdrawal Agreement (a deal), the principle of reciprocity applies. The UK will continue to permit EEA and Swiss nationals to enter and work freely until the end of 2020 and vice versa. In the event of “no-deal,” Switzerland and each EEA country will apply its own domestic criteria and policy to the status of British national residents and those seeking entry.

Step 5 – Establish a Rapid Response Team to Handle New Developments

Maintain up-to-date communications with leadership of HR, global mobility, and legal on changing Brexit developments and establish a rapid response team in case of disruption or difficulties as new requirements stemming from Brexit set in.

- Keep recruiters and business leaders informed.
- Have a clear escalation protocol for employees who encounter admission difficulties, as UK ports may experience confusion or disruption as Brexit changes are implemented.
- Instruct your travel agency to promptly apprise your leadership of any changes communicated to the agency.

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