

MAYER | BROWN

10Hundred

A Mayer Brown Series

100 days and counting

Immigration and Brexit: What we have learned so far





As we pass 100 days since the end of the Brexit transition period, it is time to reflect on what we have learnt so far in relation to how the end of Free Movement rights has affected British citizens and UK companies operating within the European Economic Area (EEA) and EEA citizens and EEA companies operating in the UK. It is also an important time to highlight some key deadlines which are rapidly approaching.

10 lessons learned and key things to consider

Set out in this brochure are what I believe, from an immigration standpoint, are the top 10 lessons learned and the key things to consider as we continue to adapt to life post-Brexit.



1. British citizens need immigration permission to operate in the EEA and EEA citizens to operate in the UK

This may seem like an obvious one to start with but it is also the most important. Even if a British citizen is only visiting an EEA country on holiday, they require immigration permission to enter that country. The same applies to EEA citizens holidaying in the UK. Now, in most situations, from a practical standpoint, individuals entering the UK / EEA will not notice any difference when they cross the border. They will not be required to obtain a visa before they travel and can simply apply to enter as a visitor on arrival by presenting their passport to an immigration officer or, for EEA nationals entering the UK, by using the eGates.

However, if EEA / British citizens will be entering the UK / EEA for any reason other than a short visit, they will need to obtain immigration permission prior to their date of travel.



2. Each EEA country has its own separate immigration system

When the UK was part of the EEA, the rights British citizens had to live, work and / or study in the EEA were the same across all EEA Member States. However, now, if a company wishes to send a British citizen to work in the EEA, the company will have to obtain the appropriate immigration permission for the specific EEA country in which the British citizen will be working. In addition, that immigration permission will not allow that British citizen to work in another EEA country. It is therefore important that UK employers get advice on the particular jurisdiction where they will be sending their British citizen employee as the requirements and processing times vary substantially between each country.



3. The activities that business visitors are permitted to undertake vary between each jurisdiction

From speaking to various clients, this is the issue that has come as the biggest surprise to British companies operating in the EEA. The majority of EEA countries are members of the Schengen Area. Consequently, for those who need a visa to visit the EEA, if they are travelling to a Schengen Area country, they can obtain one visa which permits them to travel to all the countries within the Schengen Area. However, the rules which govern what activities a business visitor may undertake vary between jurisdictions. This has been highlighted by the Trade and Cooperation Agreement signed by the UK and the EU which lists some typical business activities and whether individuals are permitted to undertake them in each jurisdiction.

The biggest takeaway for me from that list is that the UK takes a very liberal approach to the activities that those entering the UK as business visitors can undertake whereas some EEA jurisdictions take a very restrictive approach. It is therefore important, before a UK employer sends a British citizen to the EEA on business as a visitor, they check that the activities that the employee will be undertaking in the relevant jurisdiction(s) are permitted.



4. The amount of time that British citizens / EEA nationals can spend in the EEA / UK as visitors

British citizens visiting the Schengen Area can only spend up to a maximum of 90 days in any rolling 180 day period in the Schengen Area. This 90 day limit applies to the total time spent in all Schengen Area countries during a 180 day period whatever visitor activity the British citizen is undertaking. This limit is likely to be of particular concern to those British citizens who not only spend a lot of time in the EEA visiting for work but also have a holiday home in the EEA. In order to ensure this limit is not breached, employers may therefore wish to keep a record of how much time its employees are spending in the EEA for both business and pleasure to ensure they do not breach this limit.

In addition, those British citizens who have holiday homes in the EEA may wish to explore whether their property ownership gives them any residence rights in the country where it is located. If it does, and they obtain a residence permit for that country on that basis, time spent in that country will not count towards the 90 day limit.

For EEA citizens visiting the UK, there is technically no limit on the total amount of time that they may spend in the UK as a visitor. On each entry, a visitor is granted six months immigration permission to remain in the UK. They must leave the UK before the end of that six months but could then, technically, return to the UK and apply to enter for another six months.

However, each time they apply to enter the UK as a visitor, the EEA citizen must be able to demonstrate that the frequency and duration of their visits does not mean that they are basing themselves in the UK. A UK immigration officer is likely to take this view that an individual is breaching this requirement if they are spending more than half their time in the UK. In practice, I tend to advise clients that if they are spending more than four months a year in the UK as a visitor, to minimise the risk that they will be refused entry, they consider obtaining immigration permission which enables them to remain in the UK long term.

5. British companies wishing to hire EEA nationals, now or in the future, require a Skilled Worker sponsor licence

Where a UK employer is considering hiring non-British / non-Irish nationals, including EEA nationals, now or in the future, they will require a Skilled Worker licence in order to sponsor them to work in the UK. Sponsor licence applications can take up to eight weeks to be processed (longer if the application is deemed to be complex) so it is a good idea, if an employer in this position, for them to apply for a licence as soon as possible. My experience is that processing times for Skilled Worker licences are increasing and will only get longer as the global economy improves and UK employers look to increase their recruitment. The UK Government has also recently changed its policy in relation to Skilled Worker licences which means that UK employers can now apply for a licence even if they have not already identified an individual that requires sponsorship.



6. The range of jobs that UK employers can sponsor migrant workers to undertake has broadened

Under the UK immigration system in place before 1 December 2020, employers were only able to sponsor migrant workers to undertake roles which required skills at bachelor's degree level or above. Now, employers can sponsor migrant workers to undertake roles at school leaver level or above. Although not all school leaver level roles are capable of sponsorship, UK employers can now look to sponsor migrants in a broader range of positions which will therefore enable British businesses to draw from a wider global talent pool.



7. Most EEA nationals will need to take an English language test before applying for a long term UK visa

A frequent requirement to obtain long term immigration permission to live, work or study in the UK is the ability to communicate in English to a certain level. Individuals from countries deemed to be English speaking, such as the USA, Canada, Australia and New Zealand, automatically satisfy this requirement, as do individuals who have obtained a qualification at bachelor's degree level or above which they can demonstrate was taught in English. All other applicants must prove that they have passed a UK Government approved English language test.

However, the only EEA country which is deemed to be English speaking is Malta. This means that, unless they can demonstrate that they possess a bachelor's degree or above which was taught in English, an EEA national looking to secure long term UK immigration permission is likely to be required to pass an English language test before they can submit their UK immigration application.



8. The deadline for applying under the EU Settlement Scheme is 30 June 2021

EEA nationals who were in the UK on or before 31 December 2020 are entitled to apply for long term immigration permission to remain in the UK under the EU Settlement Scheme. If they have been in the UK for less than five years, they may qualify for pre-settled status, which is valid for five years. If they have been in the UK for five years or longer, they may qualify for settled status, which is a form of UK permanent residence, which entitles them to remain in the UK indefinitely.

It is important to note that EEA nationals looking to apply under the Scheme must submit these applications before 30 June 2021. These applications can be submitted from within the UK or from overseas. Individuals looking to apply for pre-settled status must be able to demonstrate that they were physically present in the UK, even if it was only for one day, before the 31 December 2020 and within six months of the date that they submit the application.



9. Time spent in the UK many years ago can count towards an application for settled status

If an EEA national previously spent five years in the UK, during which they spent at least half their time in the UK, they may qualify for settled status no matter how long ago they completed this five year period, provided they can demonstrate that they have entered the UK at least once every five years since they completed the five year period. I have successfully assisted many clients with these applications. I thought that I was doing well when I assisted an individual who had completed the five year period in the 1990s until I heard about another individual who was granted settled status on the basis of a five year period completed in the 1980s!



10. UK employers need to change how they undertake right to work checks from 1 July 2021

Until 30 June 2021, UK employers who recruit EEA nationals are only required to see the EEA national's original EEA passport or national identity card in order to complete a valid right to work check. They are not required to check that the EEA national has an immigration status which allows them to undertake the offered employment. This is even though, since 1 January 2021, all EEA nationals have been required to have UK immigration permission in order to work in the UK.

From 1 July 2021, UK employers will have to undertake more rigorous right to work checks for EEA nationals. However, the UK Government is not issuing immigration documents to EEA nationals. Instead it is issuing a virtual status linked to an EEA national's passport. UK employers will therefore be required to check the immigration status of an EEA national using an on-line portal. This means that employers will need to change their right to work check policies in order to accommodate this new process.



The next 100 days

As the global economy slowly emerges into a post-Covid world, employers will be looking to increase their recruitment from the global labour market and to send employees to other countries on business. In addition, globally mobile individuals will be considering their options to live, work and / or study in various countries. In this context, it is important that employers and individuals take into account the additional immigration restrictions resulting from Brexit when considering their future mobility plans.

About the author

James Perrott joined Mayer Brown on April 26, 2021 as counsel within the Global Mobility & Migration practice in London. James, an experienced UK immigration lawyer, will lead the firm's Mobility & Migration practice in Europe.

James acts for private and corporate clients across a variety of sectors on UK inbound immigration matters. His practice includes advising on policy, processes and compliance and regulatory issues. In addition, James frequently advises clients on the impact of regulatory changes following Brexit, both in the UK and across Europe.



Teaser

Within our next piece we will address mobility topics and issues throughout the EU.

Mayer Brown is a distinctively global law firm, uniquely positioned to advise the world's leading companies and financial institutions on their most complex deals and disputes. With extensive reach across four continents, we are the only integrated law firm in the world with approximately 200 lawyers in each of the world's three largest financial centers—New York, London and Hong Kong—the backbone of the global economy. We have deep experience in high-stakes litigation and complex transactions across industry sectors, including our signature strength, the global financial services industry. Our diverse teams of lawyers are recognized by our clients as strategic partners with deep commercial instincts and a commitment to creatively anticipating their needs and delivering excellence in everything we do. Our "one-firm" culture—seamless and integrated across all practices and regions—ensures that our clients receive the best of our knowledge and experience.

Please visit [mayerbrown.com](https://www.mayerbrown.com) for comprehensive contact information for all Mayer Brown offices.

Mayer Brown is a global services provider comprising associated legal practices that are separate entities, including Mayer Brown LLP (Illinois, USA), Mayer Brown International LLP (England), Mayer Brown (a Hong Kong partnership) and Tauil & Chequer Advogados (a Brazilian law partnership) (collectively the "Mayer Brown Practices") and non-legal service providers, which provide consultancy services (the "Mayer Brown Consultancies"). The Mayer Brown Practices and Mayer Brown Consultancies are established in various jurisdictions and may be a legal person or a partnership. Details of the individual Mayer Brown Practices and Mayer Brown Consultancies can be found in the Legal Notices section of our website. "Mayer Brown" and the Mayer Brown logo are the trademarks of Mayer Brown.

© 2021 Mayer Brown. All rights reserved.

Attorney Advertising. Prior results do not guarantee a similar outcome.

Americas | Asia | Europe | Middle East

[mayerbrown.com](https://www.mayerbrown.com)