

Since the EU referendum, many employers have asked us how best they can support their EEA staff in the UK and we have previously published [guidance](#) on steps that can be taken to protect their immigration position. The government's recent Brexit White Paper has indicated its intention to safeguard the status of EEA nationals in the UK (and the issue is currently the subject of debate between the House of Lords and the Commons), but it seems we are no further forward on how this will work in practice or when any concrete assurances will be given. There is also mounting concern among employers with a material proportion of EEA staff as to whether they will be left short of workers at all skill levels if their access to the EEA labour market is restricted or removed altogether (fuelled further by indications of a drop in the number of EEA nationals coming to or continuing to work in the UK, even before we have left the EU).

Any new policy relating to freedom of movement has yet to be formulated, although the government appears to recognise the potential for skills shortages and, therefore, restrictions may be phased in gradually. It is also unclear how the Home Office will cope with assessing and regularising the status of around 3 million EEA nationals in the UK (current time estimates for completing this task under the current system range from 14-140 years). *The Guardian* has reported that analysis recently carried out by the Liberal Democrats showed that, in the last two quarters of 2016, around 28% of applications for permanent residence were refused or declared invalid. If there is to be any prospect of giving EEA nationals in the UK certainty relating to their status within a meaningful timeframe, therefore, (perhaps by way of "straightforward" cases being certified by local authorities, trained Post Office staff or even employers), the rules will need to be dramatically simplified.

We are still months, maybe years away from the finer detail of any future policy but here a few suggestions as to how employers might put themselves in the best position to act promptly as and when the government's intentions become clearer:

- Assess the nationalities of your workforce with a view to supporting your current EEA staff as well as understanding the impact on your business if you are restricted from recruiting a similar proportion of EEA staff in the future. Many employers will have done this already, but some may have incorrectly assumed that they have this information within their existing databases. If you do not yet have it, you are not alone – the Financial Times recently reported that numerous government departments (including the Home Office) do not know how many EEA nationals they employ.

Whilst it is a legal requirement to check that *all* employees have the right to work in the UK by keeping a copy of specified documents, it is *not* a requirement to separately record an employee's nationality and it has not been a practical necessity until now, given that EEA nationals have an unrestricted right to work in the UK. It should, of course, be possible to collate nationality data through a review of individual employee files, but the practical implications of doing this for a large workforce are obvious.

- Consider developing a way to collate information beyond the mere nationalities of your EEA staff. Although we have a sense that EEA nationals already in the UK at a given point will be protected, we do not know whether they will all automatically be granted permanent residence (without, for example, needing to show five years' continuous residence in a qualifying status) or if those who do not yet qualify for permanent residence will be given some sort of interim status and allowed to stay until they do qualify either under the current strict criteria or a simplified version. In the meantime, asking your EEA staff to focus on and spell out their specific circumstances will help assess the extent of the challenge faced, the support they may need once future immigration policy is decided and the extent to which your business may be affected. For those who have not already applied for or obtained a document confirming their permanent residence, the type of questions to be asked could include:

**"Have you already obtained a registration certificate as an EEA qualified person?"** (this will formally demonstrate that they were lawfully resident in the UK at a given point, even if they have not yet acquired permanent residence); **"On what date did you first come to the UK?"**; **"In what capacity have you been here, i.e. worker, self-employed, student, self-sufficient including any gaps in employment?"**; **"What documentation do you have to support this (e.g. P60s, pay slips, employer letters/contracts)?"**; **"Have you held comprehensive sickness insurance for any time spent in the UK as a student or self-sufficient person?"**; and **"Have you been absent from the UK for more than six months in each 12-month period of the five years you intend to rely on to demonstrate permanent residence?"**

This data could be collated through asking EEA staff to complete a simple online form on an anonymous basis (bearing in mind that, initially, this is about understanding the profile of your EEA staff rather than advising them on their individual status). Ensuring this data is complete will take time and effort but staff could be encouraged to provide it by offers of support in relation to their status such as immigration helplines or advice clinics organised by the employer.

- Be aware that non-EEA nationals currently resident and working in the UK on the basis of their relationship with an EEA national will feel that they are in a similarly vulnerable position – if their spouse/partner loses the right to reside in the UK, so will they. Include this group in the support being given to EEA staff.
- Assess the skill level of the roles held by your EEA staff (ideally, using the Home Office’s Standard Occupational Classification [codes](#)). This will assist your understanding of whether these roles might be considered sufficiently skilled to qualify for Tier 2 sponsorship if this or a similar system is applied to EEA nationals in the future, whether there is a need to up-skill the UK workforce to fill these roles (and how to go about this) or whether these roles are considered lower-skilled (and may by their nature always be difficult to fill without access to the EEA labour market).
- If you have not already done so, start making representations on behalf of your business by responding to parliamentary group and select committee calls for evidence (either directly, through us or a trade body) not only in relation to your EEA staff in the UK, but also in respect of how you see your business will be affected if it has no or restricted access to the EEA labour market in the future. Recent reports suggest that the “key sectors” which will be able to obtain five year work visas for EEA nationals include software engineering, health and social care, farming and hospitality, but other sectors – manufacturing, engineering, construction and retail, for example – will also surely need preferential treatment? To support representations on behalf of your sector, collate detailed data about hard-to-fill roles (across all skill levels), including the nationality of those filling them, reasons for rejection given by candidates, periods that roles remain unfilled (and how this has affected your business) and retention rates, as well as details of skilled roles where you have had to resort to sponsoring non-EEA nationals under Tier 2 of the points-based system.
- Anticipate the cost of additional HR resources and systems to cope with the support needed for existing EEA staff (if and when new criteria relating to permanent residence are announced) and additional visas for future EEA eligible staff. Pre-employment right-to-work checks may also become more complex if an assessment of EEA nationals’ right to work in the UK or permanent residence (outside the current process) is shifted to the employer in an attempt to lessen the burden on the Home Office. Consider recruiting HR staff with an understanding of or a willingness to get involved in immigration compliance and processes.

- Continue to communicate with all your staff about what you are doing – you will not be able to give them all the answers at this stage, but letting them know that they are valued and that you have their best interests in mind may encourage them to remain in the UK during this continued and, for some, agonising uncertainty.

If you have any questions relating to this or any other UK immigration matter, please contact one of the partners in our UK Business Immigration team.

## Contacts

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