

The UK's New Points-based Immigration System: Home Office Guidance Is Published

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Following the publication of its new Immigration Rules (on which we previously commented [here](#)), the Home Office has, at last, published its [guidance for sponsoring workers](#) under the UK's new points-based immigration system. The system will apply to workers from outside the EU, EEA and Switzerland (together, for the purpose of this note, the EEA), as well as EEA (excluding Irish) nationals who arrive in the UK after 11 p.m. on 31 December 2020. The Home Office guidance provides the practical detail needed by sponsors to navigate a system that, with a few exceptions, will be open for applications from 9 a.m. on 1 December 2020. Where EEA nationals apply under the new system from outside the UK before 11 p.m. on 31 December 2020, any entry clearance granted will take effect from 1 January 2021, at the earliest. In most cases, EEA nationals will not be able to apply under the new system from within the UK until after 11 p.m. on 31 December 2020.

In the meantime, sponsor licence Authorising Officers will have last week received an email from the Home Office advising that, amongst other things:

- The Home Office will be making essential updates to its IT systems between 7 p.m. on Friday 27 November and 9 a.m. on Tuesday 1 December 2020. This means that sponsors will not have access to their Sponsor Management System (SMS) accounts or the online sponsor application form during these times.
- If your licence is due to expire between 27 November and 2 December 2020, you should make your application to renew your licence before the expiry date. If you do not make your application before this date, your licence will be extended for a temporary period of seven calendar days. You must apply to renew your licence within this temporary extension period, or it will lapse.
- If you currently hold a licence in Tier 2 General and/or ICT routes, your licence details will be automatically updated on 27 November 2020 so that you are licensed in the Skilled Worker and/or the Intra-Company routes and you will retain your current licence expiry date.
- Your annual allocation of Tier 2 General and/or ICT Certificates of Sponsorship (CoS) will also be automatically updated to a Skilled Worker and/or Intra-Company routes allocation and any unassigned CoS will be transferred over. The new allocations will have the same expiry date as the respective previous allocations.

- If you have a request in progress to increase or renew your annual allocation Tier 2 General and/or ICT CoS, the request will be considered and, if appropriate, granted under the new Skilled Worker and Intra-Company routes.
- From 1 December 2020, the CoS categories on the SMS will be updated and any CoS assigned from this date will be in the new category.

What do the changes to the Immigration Rules and sponsor guidance mean in practice, and how should employers prepare? The key points (with our commentary in each case) are:

- **This “new” immigration system is actually an adaptation of the existing Tier 2 points-based system.**
The Home Office is currently advising employers who intend to use the new system but do not already have a sponsor licence to apply for a sponsor licence now. The new Skilled Worker route will replace the current Tier 2 (General) route and can lead to indefinite leave to remain (settlement). The new Intra-Company route (comprising Intra-Company Transfer and Intra-Company Graduate Trainee) will replace the current Tier 2 (Intra-Company Transfer) Long-term Staff and Graduate Trainee routes and will not lead to settlement.
- **The general salary threshold under the new Skilled Worker route will be reduced from £30,000 to £25,600.**
This threshold will, however, be subject to a number of exceptions in the form of “tradeable” points:
 - Applicants for a role with a lower salary (subject to a lower limit of £20,480) may still qualify if the role is on the shortage occupation list and/or they have a relevant PhD (extra points are granted for a PhD in a STEM subject).
 - There will continue to be different arrangements for a small number of occupations (such as those in the health or education sectors) where the salary threshold will be based on published pay scales and for “new entrants” (broadly defined as recent UK graduates and those under the age of 26).
 - Applicants will otherwise need to be paid the higher of £25,600 or the specific salary threshold for their occupation (the “going rate”); for example, an experienced IT manager would need to be paid at least £42,800.

- **The skills threshold under the new Skilled Worker route will be reduced from RQF 6 (graduate level and above) to RQF 3 (A level and equivalent or above).** This will give a wider number of sectors (including retail, hospitality, construction, and health or social care) the ability to sponsor workers in roles not previously considered sufficiently skilled for sponsorship. Employers can use the [ONS Occupation Coding Tool](#) to match a job to the nearest occupation code. They will then need to review the Appendix Skilled Occupations (yet to be published) under the Home Office's [Immigration Rules](#) to check that the job is sufficiently skilled to qualify for sponsorship and confirm the going rate for the role. Applicants will not need to hold an equivalent formal qualification; it is the skill level of the job they will be doing that determines whether the threshold is met.
- **Applicants under the new Skilled Worker route will need to demonstrate that they have a job offer from an approved sponsor, that the job offer is at the required skill level and meets the general salary threshold or the going rate for the job (whichever is higher), and that they meet the [English language requirement](#).** This reflects the current system for the sponsorship of non-EEA workers (with the exception of the Tier 2 ICT visa route, which does not require specific English language skills).
- **The current resident labour market test (RLMT) will be abolished.** This means that roles will no longer need to be advertised in a prescribed manner to show that no qualified settled worker is available. This will open up the sponsorship system to a number of employers previously unable (or unwilling) to prove that their preferred candidate is uniquely qualified for the role. However, sponsors are still subject to a strict requirement only to assign CoS where there is a genuine vacancy. Examples of vacancies that are not considered to be genuine include, but are not limited to, a role that does not actually exist; one that contains an exaggerated or incorrect job description to meet the minimum skills threshold or is otherwise a sham; or one that was created primarily to enable an overseas national to come to, or stay in, the UK.
- **The cap on the number of Tier 2 (General) visas granted each year (currently set at 20,700) will be "suspended".** Under the Skilled Worker route, there will be two types of CoS that can be assigned, known as "defined" and "undefined" CoS. Where the worker is applying from outside of the UK, they will require defined CoS, which must be requested by the sponsor on a case-by-case basis via the SMS. The Home Office has indicated that it will allocate defined CoS to the sponsor within one working day, although it remains to be seen if this deadline will be met in practice. Where the worker is applying from within the UK (e.g. by way of a change of employment or extension application), the sponsor must assign an undefined CoS from its annual allocation. Assigning the wrong type of CoS can lead to a worker's application being refused and possible revocation of the sponsor licence itself.
- **When assigning a CoS, a sponsor will now need to provide the Pay As You Earn (PAYE) scheme reference number under which the worker will be paid.** Where the worker will not be paid through PAYE, the sponsor will need to provide an explanation on the CoS.
- **The 12-month "cooling-off period" and six-year maximum length of stay in the Skilled Worker route are being removed.** Under Tier 2 (General), these rules required those applying for entry clearance or to switch into the route to have not been in the UK with a Tier 2 (General) visa during the past 12 months, and to spend a maximum of six years in that route. The Skilled Worker route will not restrict when applications can be made or restrict length of stay. This also means that those currently in the UK with a Tier 2 (ICT) visa will be able to switch into the Skilled Worker route and potentially qualify for indefinite leave to remain (settlement) after five years' continuous residence in the UK (running from the date on which the Skilled Worker visa was granted).
- **The remaining complex rules relating to switching are being relaxed.** Most applicants will be able to switch from one immigration route to another without having to leave the UK and without being affected by the current 12-month cooling-off period. Switching will continue to be prohibited for those in the UK under the category of visitor, short-term student, parent of a child student, seasonal worker, domestic worker or a person with leave outside the Immigration Rules.
- **The Intra-Company Transfer route will remain largely unchanged.** Applicants will require 12 months' experience working for a business overseas linked by ownership to its UK sponsor (unless their salary will be more than £73,900), their role must be skilled to RQF 6 or above and they must be paid at least £41,500 or the going rate for the job (whichever is higher). Applicants can be assigned to work in the UK multiple times, but they will not be able to stay in the UK for more than five years in any six-year period. In a departure from the current rules, applicants paid more than £73,900 (previously £120,000) can stay in the UK for up to nine years in any 10-year period.
- **The Immigration Skills Charge and the Immigration Health Surcharge will apply to visa applications on the same basis as they do now.** This means that even if a hard-to-fill role qualifies for sponsorship under the new system, many employers will be unable to afford the associated costs (particularly for lower-paid roles). However, those eligible for the new [Health and Care visa](#) will not be required to pay the Immigration Health Surcharge.
- **The Migration Advisory Committee (MAC) will maintain a shortage occupation list.** The list will no longer be used to determine which roles will be exempt from the resident labour market test (as this is being abolished), but rather to indicate which occupations in short supply should be allocated extra points to make up for offering a salary of less than £25,600 (subject to an overall minimum of £20,480). In September 2020, the MAC published its [review](#) of the shortage occupation list recommending the addition of a number of occupations, including senior care workers, nursing assistants, butchers, bricklayers and welders. However, no changes have been made to the current [Shortage Occupation List](#).

- **The £35,800 salary threshold for indefinite leave to remain (settlement) applications is being removed.** Instead, the sponsored employee must have a salary that equals or exceeds £25,600 per year or the going rate for the occupation (whichever is higher).
 - **There will be no general low-skilled or temporary work route.** This will have a significant impact on businesses heavily reliant on lower-skilled or lower-paid EEA workers, assuming the salary and skills threshold reductions mentioned above do not go far enough to allow for the sponsorship of all or most types of worker in short supply.
 - **In the longer term, a “broader unsponsored route within the points-based system to run alongside the employer-led system” will be introduced.** In line with the recommendations from the MAC, the government has indicated that this route would “allow a smaller number of the most highly skilled workers to come to the UK without a job offer ... example characteristics for which points could be awarded include academic qualifications, age and relevant work experience.” This is reminiscent of the previous Tier 1 (General) visa category abolished in 2015 and, if it can be used by highly skilled workers rather than just exceptionally talented ones, it would have the benefit of reducing the cost and administrative burden for employers, while allowing applicants to switch roles or employers more easily. However, at the same time, the government has said it will not be introducing a route specifically for self-employed people. It says that they should make use of the Innovator or Global Talent visa routes, though the criteria for these are so prescriptive that, in reality, they will only be available to a very small number of people.
 - **Other existing visa routes already open to non-EEA citizens will be introduced for EEA nationals, such as the current Tier 5 route for temporary workers (which might include the Youth Mobility Scheme, although this currently only applies to a small number of nationalities).**
 - **From the summer of 2021, a new Graduate Immigration Route will be available to international students who have a valid Tier 4 visa at the time of application and who have completed a degree at undergraduate level or above at a Higher Education Provider with a track record of compliance.** Successful applicants to this route will be able to stay and work, or look for work, in the UK at any skill level for a maximum period of two years. Graduates will be able to switch into skilled work once they have found a suitable job. The new route will be available to any eligible student who graduates from the summer of 2021. This includes students who have already started their courses.
 - **EEA nationals will be considered “non-visa” nationals, allowing them to visit the UK for up to six months without having to apply for a visa before travelling.** This would only apply to those coming to the UK for tourism or eligible under the UK business visitor rules, and not those coming here for substantive work or to fill a role.
 - **Overall, those sectors heavily reliant on lower-paid and lower-skilled EEA workers will be the worst affected by the new system.** Businesses already using the current Tier 2 points-based system for non-EEA workers may find the new system more accessible and easier to use, given the salary and skills threshold reductions and the abolition of the RLMT. The government has said it will seek to provide a “streamlined and simplified system,” but it has yet to provide any detail on what this means in practice. In the short to medium term, if nothing else, the significant cost and administrative burden of sponsorship is likely to be prohibitive for many sectors reliant on EEA workers, and they will inevitably be forced to come up with alternative solutions to fill workforce shortages.
 - **In the meantime, employers reliant on a material population of EEA workers should:**
 - As far as possible, ensure that any new EEA hire not already living in the UK takes up residence in the UK before 31 December 2020, even if their role cannot start by that date.
 - Carry out a review of their hard-to-fill roles based on skill level and salary to determine whether these may qualify for sponsorship under a more accessible points-based system.
 - Apply for a sponsor licence as soon as possible, if they do not already have one. As we approach the end of 2020, if demand for sponsor licences rises as expected, processing times (currently around four to six weeks) are likely to increase significantly.
 - Account for the considerable extra cost and administrative burden of having to sponsor non-British hires from 2021.
 - Continue to support and communicate with their existing EEA workforce about the need to apply under the EU Settlement Scheme for pre-settled or settled status (further guidance can be found in our [Brexit Settlement Scheme FAQs](#)). The deadline for applications is 30 June 2021, but given that we do not know how an already stretched Home Office will cope with demand over the coming months, it would be sensible not to put off applying until the last minute.
- It is important to remember that the new points-based system will not apply to EEA workers already resident in the UK before 31 December 2020 – they will be able to continue to reside and work in the UK (in any role) by obtaining status under the EU Settlement Scheme.

Employers should not require existing EEA employees to prove that they have either pre-settled or settled status. In addition, the Home Office's [current guidance](#) indicates that from 1 January 2021, employers must continue to check applicants' right to work in the same way as they do now until 30 June 2021 (for EEA nationals this simply means having sight of their original passport or national ID card). Employers should ask EEA nationals starting employment on or after 1 July 2021 whether they have pre-settled or settled status but should not carry out retrospective checks on existing employees. As the new points-based system is intended to apply to EEA (excluding Irish) nationals relocating to the UK from January 2021, this raises the question of whether employers will be required to check that such applicants arrived in the UK before or after the cut-off date of 31 December 2020.

There is currently no formal guidance on this point, but, informally, the Home Office has said that in the case of EEA nationals starting work on or before 30 June 2021, employers will not be required to determine when they arrived in the UK, nor will they be penalised for employing anyone not eligible under the EU Settlement Scheme, providing proper right to work checks are carried out on their EEA passports or national identity cards. In our view, however, an employer who is actively aware that an EEA national starting work on or after 1 January 2021 is not eligible under the EU Settlement Scheme and has no other right to work in the UK could be at risk of a civil penalty or guilty of the offence of illegal working if it employed them without obtaining a visa for them under the new points-based system. Further clarity from the Home Office is urgently needed in relation to these issues and it has indicated that more detailed guidance will be issued in due course – we will continue to update you as matters develop.

Our UK Business Immigration team can advise on all your immigration requirements, including sponsor licence applications. For further guidance, please contact Annabel Mace, partner and head of UK Business Immigration, or Supinder Sian, partner.

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