

The Home Office has recently updated its right to work [guidance](#), including a [factsheet](#) in relation to checks for existing and prospective employees and job candidates from the European Economic Area and Switzerland (all referred to in this note as EEA nationals, employees or candidates). The guidance is intended to inform employers of their obligations following the end of the Brexit transition period on 31 December 2020, the introduction of the UK's [new points-based immigration system](#) and the deadline for eligible EEA nationals to apply to the [EU Settlement Scheme \(EUSS\)](#) by 30 June this year.

This aspect of immigration compliance has been the source of some debate ever since it became clear that there would be a six-month gap between the introduction of the UK's new points-based immigration system as it applies to EEA nationals from 1 January and the deadline for applications to the EUSS on 30 June. The new guidance leaves some questions unanswered, but the key points, along with our commentary, are as follows:

- **As we know, free movement between the EU and the UK came to an end at 11 p.m. on 31 December 2020.** EEA nationals (and their families) living in the UK before then are eligible to apply for status under the EUSS. EEA nationals can also be joined in the UK after that date by certain close family members who will be eligible to apply under the EUSS, subject to meeting specific conditions.
- **There is a six-month grace period, which will end with the EUSS application deadline of 30 June 2021.** This period protects the rights of those EEA nationals and their family members who were lawfully resident in the UK at the end of the transition period on 31 December 2020, but who have not yet been granted status under the EUSS. This means that EEA employees and their family members who have not yet been granted status under the EUSS but apply by the deadline retain the right to be, and work, in the UK until their application is determined.
- **The Home Office has reiterated that right to work checks for EEA nationals will not change until after 30 June.** Until then, EEA nationals can use their passport or national ID card to evidence their right to work. The Home Office's [right to work checklist](#) of acceptable documents remains unaltered for this purpose.
- **EEA nationals with status under EUSS may choose to use the Home Office [online service](#) to evidence their right to work if they want to.** However, employers cannot refuse to accept a passport or ID card from an EEA citizen for evidence purposes or insist that they use the Home Office's online checking service to prove their right to work during the grace period. This applies to both existing and prospective employees.
- **The Home Office has now expressly stated that employers are not expected to differentiate between EEA nationals who arrived before or after 31 December 2020.** Although employers are not prohibited from trying to establish an EEA candidate's UK arrival date, we would advise against doing so, not least because it is not a reliable indicator of their eligibility under the EUSS. This applies to those who are eligible to join EEA family members in the UK after 31 December, as well as those relying on an earlier period of five years' continuous residence in the UK for the purpose of obtaining settled status. Employers who make recruitment decisions based on their own untested perception of a candidate's eligibility under the EUSS could put themselves at risk of discrimination claims. However, where an EEA candidate has stated that they do not have the right to work in the UK and/or are not eligible under the EUSS, a prospective employer should not accept an EEA passport or ID card as proof of their right to work and should consider alternative options including the [points-based immigration system](#).
- **The Home Office has said that it recognises that employers wish to ensure the stability of their workforce and that they may provide help and support to employees to obtain the immigration status they need beyond 30 June.** It goes on to say that employers may, therefore, invite those who already have status under the EUSS to evidence their right to work using the Home Office online service. However, as above, employers cannot insist that their EEA employees use the online service to verify status or discriminate against those who wish to use their passport or national ID card for that purpose or decline to disclose their status during the grace period.

- **There is no mandatory requirement to carry out retrospective checks on EEA nationals employed on or before 30 June 2021.** Employers who discover that they are employing an EEA national without the right to work after this date will be able to rely on a statutory excuse against a civil penalty, providing the initial right to work check was carried out in line with the Home Office's guidance at the time of first employing the EEA national. Employers who choose to carry out retrospective checks must ensure that they do so in a non-discriminatory manner. The Home Office guidance refers employers to its [Code of practice for employers: Avoiding unlawful discrimination while preventing illegal working](#). However, this was published in 2014, before these issues arose, and unfortunately provides no practical guidance as to how retrospective checks on EEA nationals can actually be carried out in a non-discriminatory manner.
- **The Home Office's messaging around allowing employers to invite EEA employees to evidence their status under the EUSS whilst discouraging retrospective checks is confusing.** The Home Office appears to want employers to identify employees who have not yet applied under the EUSS but stops short of allowing them to insist that employees provide that information. In most cases, the need to encourage EEA employees to apply before the deadline could surely be met by general, rather than targeted, communications. One wonders what might be gained by inviting employees to confirm their status voluntarily if a refusal to respond cannot lawfully be acted upon.
- **Right to work checks will change on 1 July 2021 – all EEA candidates hired on or after that date will need to prove they have status under the EUSS using the [online service](#) or that they have some other form of right to work other than their nationality.** The Home Office has indicated that new guidance on how to conduct right to work checks on EEA nationals will be provided in advance of this date. It seems likely that it will maintain its current position that employers will have a statutory excuse against a civil penalty for illegal working discovered after 30 June as long as they carried out a right to work check as set out in the guidance current at the time of their first employing the EEA national. However, it remains to be seen whether it will move from discouraging retrospective right to work checks to encouraging, or actively requiring, employers to seek out and take action against those who do not hold status under the EUSS, even where their employment began on or before 30 June. In any event, further (or, rather, any) guidance on how retrospective right to work checks on EEA nationals can be carried out in a non-discriminatory manner would be welcome – employers are keen to do the right thing but may justifiably feel that there is too thin a line between right to work compliance and immigration-related discrimination claims.

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