

Alongside a last minute extension of temporary COVID-19 [adjusted right to work checks](#) until 31 August 2021 in light of ongoing lockdown restrictions, the Home Office has also updated its [Employer Right to Work Checks Supporting Guidance](#). Parts of this guidance were first issued in March of this year (on which we [commented](#) at the time) but Annex C of the latest version provides further information for employers on their obligations to EEA nationals from the 1 July 2021, coinciding with the deadline for applications to the EU Settlement Scheme on 30 June 2021. For the purpose of this note, the term “EEA nationals” includes EU, EEA and Swiss citizens but excludes Irish citizens. This aspect of immigration compliance has been the source of considerable debate and the new guidance still leaves a number of questions unanswered. The key points with our commentary are as follows:

- **EU free movement** – 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) who were living in the UK by that date 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 EU Settlement Scheme (EUSS), subject to meeting specific conditions.
- **Six-month grace period** – This will end with the EUSS application deadline on 30 June 2021. The grace period is intended to protect 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 eligible EEA nationals and their family members who apply to the EUSS by the deadline but who have not yet been granted status will retain the right to live and work in the UK until their applications are determined.
- **EUSS status for EEA nationals and their family members** – If an EEA national or their family member has been granted settled status by the Home Office, they will have a continuous right to work, in the same way as someone with indefinite leave to enter or remain. If an EEA national or their family member has been granted pre-settled status by the Home Office, they will have a time-limited right to work and the employer will need to carry out a follow-up check before that right to work expires.
- **Right to work checks up to and including 30 June 2021** – EEA nationals can use their passports or national ID cards to evidence their right to work up to and including 30 June 2021. They may also be invited to use the [online right to work service](#) (see below) but employers cannot insist that they do so before 1 July 2021.
- **Eligibility under the EUSS** – Employers are not expected to differentiate between EEA nationals who arrived in the UK before or after 1 January 2021 or otherwise assess an EEA national’s eligibility under the EUSS. The Home Office guidance states that an employer will maintain a continuous statutory excuse against liability for a civil penalty if the initial right to work checks were undertaken in line with its guidance. However, where an EEA national has advised that they do not have the right to work in the UK and/or that they are not eligible under the EUSS, or the employer otherwise knows this to be the case, we would advise against accepting an EEA passport or national ID card as proof of their right to work, but instead consider alternative options, including the points-based immigration system. This is because the guidance also states that an employer cannot rely on a statutory excuse obtained through a right to work check if it knows the employee does not have the right to work in the UK.
- **Using the online right to work service from 1 July 2021** – EEA nationals with EUSS status starting employment on or after 1 July 2021 must use the online right to work service to evidence their right to work in the UK. Although concerns that those granted EUSS status will not be issued with a physical document are entirely valid, the online right to work service has so far proved easy for employers to use. The employee or prospective employee is required to enter their passport number and date of birth into www.gov.uk/prove-right-to-work and is issued with a share code valid for 30 days. The employee may give this code directly to their employer or choose to send it via the online right to work service, in which case the employer will receive an email from right.to.work.service@notifications.service.gov.uk. The employer must enter the share code and the employee’s date of birth into www.gov.uk/view-right-to-work, and will then see a “profile” page. The employer should check that the profile page confirms the employee’s right to work and that the photograph in the profile page is of the employee presenting themselves for work by seeing them in person or via a video call. The employer must retain evidence of the online right to work check by printing or saving the profile page confirming the employee’s right to work, which will serve as the employer’s statutory excuse (the employer is not required to endorse or certify the page). Where the profile page notes that the potential employee’s right to work is time-limited, a record should be kept of that expiry date so that a follow-up check can be done prior to the employee’s right to work coming to an end.

- **Others who can use the online right to work service** – Currently, the online right to work service can also be used by those of any nationality who hold:
 - A biometric residence permit
 - A biometric residence card
 - Status issued under the points-based immigration system
 - A British National Overseas (BNO) visa
 - A frontier workers permit

Where an online check is not possible (e.g. for those with other documents such as UK passports or visas endorsed in current passports), employers must conduct a traditional manual right to work check.
- **Updated right to work checklist** – Annex B of the latest Home Office guidance includes an updated list of acceptable documents for manual right to work checks from 1 July 2021. A number of documents previously on the list have been removed, including EEA passports, national ID cards and residence or permanent residence documents issued under The Immigration (European Economic Area) Regulations 2016. Additions to the list include an Irish passport or passport card, an Irish birth or adoption certificate together with an official document including the person's National Insurance number, a document issued by the Crown Dependencies Jersey, Guernsey, or the Isle of Man, which has been verified as valid by the Home Office Employer Checking Service and a frontier worker permit.
- **Irish citizens** – Continue to have unrestricted access to work in the UK. From 1 July 2021, they can prove their right to work using their Irish passport or Irish passport card, or their Irish birth or adoption certificate together with an official document giving their permanent National Insurance number and their name issued by a government agency or a previous employer.
- **Retrospective checks** – There is no mandatory requirement for an employer to carry out retrospective checks on EEA nationals whose employment began on or before 30 June 2021. Employers will maintain 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. The Home Office guidance states that employers who choose to carry out retrospective checks must ensure that they do so in a non-discriminatory manner. The Home Office 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 specific guidance on how retrospective checks on EEA nationals should be carried out in a non-discriminatory manner. It may be sensible to ensure that retrospective checks are only conducted where the employer knows or has reasonable cause to believe that a particular employee does not have the right to work or that checks are done on all employees as part of a compliance audit across part or all of the employer's business, but the code of practice offers no detail on that front. Further (or, rather, any) guidance on how retrospective checks on EEA nationals should be conducted 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.
- **EUSS status applied for but not granted by 30 June 2021** – EEA nationals and their family members who have applied to the EUSS by the deadline but who have not yet been granted status will be issued with either an EUSS Certificate of Application (CoA) or an EUSS email confirming receipt of their application. In those circumstances, the prospective employer should use the [Employer Checking Service](#) (ECS) (not to be confused with the online right to work service) to obtain confirmation of the pending application in the form of a Positive Verification Notice, which will provide a statutory excuse for a further six-month period allowing the employee to start work pending a final decision on their application (further checks via the ECS should be done prior to the end of the six-month statutory excuse until the application is approved or refused in line with the Home Office guidance).

- **Transitional measure for those who miss the EUSS deadline** – For the first time, the Home Office has addressed the position of EEA nationals employed on or before 30 June 2021, but who do not apply to the EUSS before that date. Where an EEA national has reasonable grounds for missing the EUSS application deadline, they will be given a further opportunity to apply. The Home Office acknowledges that employers may have chosen to carry out a retrospective check (despite there being no obligation to do so), have completed an internal audit or have been made aware that an employee does not have a lawful status in the UK. Under a transitional measure in place until 31 December 2021, where an employer identifies an EEA employee who has not applied to the EUSS by 30 June 2021, the guidance states that the employer does not need to dismiss them immediately, providing their employment started on or before 30 June 2021. In such circumstances, the employer should advise the employee that they must make an application to the EUSS within 28 days and provide the employer with a CoA. If they do not make an application to the EUSS within 28 days, the guidance states that the employer should take steps to terminate their employment (the Home Office does not provide employment law advice on how this should be done). If the employer is provided with a CoA, it must then contact the [ECS](#) to confirm the individual has applied and obtain a Positive Verification Notice, which will provide a statutory excuse against a civil penalty for six months pending a final decision on the application (further checks via the ECS should be done prior to the end of the six-month statutory excuse until the application is approved or refused in line with the Home Office guidance).

- **Where the transitional measure does not apply** – EEA nationals starting employment after 30 June 2021 who have not applied to the EUSS by the deadline and have no alternative immigration status in the UK cannot benefit from the transitional measure. Further, although not explicit in the Home Office guidance, it is reasonable to assume that the transitional measure would not apply to an EEA national employed on or before 30 June 2021 but where the employer knows that they are not eligible to apply under the EUSS. It follows, therefore, that where you are aware that an employee is not eligible to apply under the EUSS and has no other immigration status allowing them to work in the UK, you should consider taking steps to terminate their employment (subject to following a process that is reasonable in the circumstances, particularly if the employee has two or more years' continuous service). As part of this process, you should consider whether the individual may be eligible for sponsorship under the points-based system and, if so, seek advice on whether you have any obligation to offer them sponsorship.

- **Liability for illegal working** – It is worth noting that the Home Office guidance appears to reassure employers with the following statement in the guidance: "... the criminal offence of employing an illegal worker is generally reserved for the most serious cases of non-compliance not intended for employers who have employed EEA citizens in good faith having completed a right to work check in the prescribed manner and are acting in accordance with this guidance to support their employees to make an application to the EUSS". This may provide some comfort for employers concerned about the immigration status of employees taken on during the grace period from 1 January to 30 June 2021. However, the guidance does not provide a similar assurance in relation to the risk of being issued with a civil penalty in the event that the employer knows that they are not eligible to apply under the EUSS and has no other immigration status allowing them to work in the UK. Employers who are genuinely concerned about the right to work of any of their employees should, therefore, seek appropriate advice to manage their competing employment law and immigration compliance obligations.

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