

## **Brexit - What it means for your business**

Currently there are estimated to be around 3 million EU nationals living in the UK, representing about 6.6% of the workforce. Thursday's referendum result will therefore have an impact on businesses in the UK who employ EU staff or who trade in the EU.

We have already received many questions from solicitors and others about the impact of the vote on forward planning for their business. Here we have an initial look at the impact this will have on business immigration and provide answers to some of the most frequently asked questions.

This area will undoubtedly be the subject of much change in the coming months and years. We will update our website regularly to keep you informed of changes as they happen. In the meantime, if you have any questions or concerns, please do not hesitate to contact one of our business immigration experts, Satinder Gill, Ian Wright or Millie Polimac, or our Senior Clerk David Portch.

**Q: My UK business employs EU workers and I wish to retain them. What can I do?**

**A:** The answer to this may depend on how long the EU worker has been residing in the UK and at which point they gain their 5 years of permanent residence.

***i) Right to remain and work prior to the Article 50 mechanism being invoked***

At present EU nationals, their spouses and family members have the right to reside in the UK and also the right to work pursuant to Directive 2004/38, as implemented by the Immigration Regulations 2006. They do not need to fulfill the requirements of the PBS system. This applies to non-EU nationals who are a family member of the EU citizen. It also applies to those commonly referred to as "primary carers", that is, those who have rights to residence and work as *Chen, Zambrano* or *Ibrahim and Teixeira* carers.

Until Article 50 TFEU negotiations end they will still have the right to reside and work here unless any transitional provisions are brought in during the Article 50 negotiations (see below).

Employers can therefore keep employing such persons under the same conditions for the time being.

***ii) Right to remain and work during transitional period once notice of withdrawal is given under Article 50 until exit date***

Not much is likely to change in the transitional period, unless the UK government takes action to prevent free movement. During the referendum campaign there was talk by those in the Leave camp that they should repeal certain EU laws immediately, particularly the ones relating to immigration.

If the UK did try to prevent the free movement of workers during the transitional period, this would be contrary to the EU Treaties, which the UK is still bound to follow during the negotiations. Any failure to allow free movement would not only be a breach of the

free movement provisions of the Treaty but also a breach of Article 4(2) TEU embodying the principle of sincere cooperation. Technically, a breach of its EU obligations could lead to the Commission taking action before the CJEU which could in turn impose fines, although this may be an unattractive option politically.

### ***iii) Right to remain and work after the exit***

What will happen after the UK leaves depends on what deal ends up being agreed during the withdrawal process. Boris Johnson has stated that those EU nationals who are already in the UK will be allowed to remain. This could be done by creating a new category of indefinite leave. What is not clear is where the line will be drawn in determining who is allowed to stay. Will it be those EU nationals who are resident prior to the Referendum taking place or at the end of the Article 50 negotiations? Will there be a requirement of minimum residence before they will qualify to stay? Will it include their spouses, children or other dependent family members? Will it apply to all categories – eg workers, those looking for work, those who study, primary carers and those who visit for other reasons?

It is also not clear how checks will be carried out as to who was resident in the UK at the relevant time, notwithstanding the fact that many EU nationals who are present in the UK have not had to apply to any authorities and their family members have not necessarily applied for family permits. In practice this problem would probably be overcome by EU nationals showing evidence of tenancy agreements, utility bills, employment contracts and the like, to prove their residence for the requisite period of time.

The position of family members of EU nationals who are from countries outside the EU is not clear. The government may introduce restrictions in this field in the future but that is mere speculation for now.

Furthermore, there has been no indication in relation to their right to work. Presumably if they are granted leave the government will be keen for them to continue working as otherwise this will place a burden on the benefits system. Whether they would be required to fulfill the conditions of the PBS system in this respect is not yet clear.

### ***iv) How can EU nationals maintain their existing rights prior to Brexit***

To avoid those uncertainties employers should encourage those who have accrued 5 years residence to apply for permanent residence in the UK. The first step is to apply for a permanent residence card. If granted, this can lead to British citizenship if desired or permitted. Our view is that this will provide more protection than permanent residence or indefinite leave. As this is a right stemming from national law it is not likely to be threatened when the EU Treaties stop having effect in the UK once withdrawal has taken place. Statistics suggest that about 71% of EU nationals present in the UK have been here for 5 years or longer.

However, primary carers cannot acquire permanent residence. Thus, if the government repeals the Immigration Regulations 2006, primary carers will lose their rights and will have to satisfy the requirements of the UK Immigration Rules.

Businesses who wish to keep primary carers may have to apply for a sponsor licence, if they do not already have one, and also conduct a resident labour market test.

**Q: What about if I want to employ EU workers in the future?**

**A:** The answer to this depends at which point in time during the withdrawal process the company will wish to employ EU workers.

Subject to what is negotiated as part of the withdrawal, and also depending on how long such negotiations take, it seems unlikely that EU workers arriving from now on will be able to acquire permanent residence. If the UK does not negotiate anything further in relation to a favourable treatment of EU workers then employers wishing to hire them will need to do so under the PBS system.

**Q: My business is based in the UK and I wish to post UK workers to an EU country**

**A:** Again, for the foreseeable future there should be no problems with sending UK workers to other EU countries.

In anticipation of the withdrawal date, employers should investigate how their UK workers can obtain a right to reside and work in an EU state.

One way is to check whether their UK workers have a right to obtain the nationality of another EU country and if so to apply for it. This would mean that they could be sent to work in the EU without having to apply for work permits in the country they are being posted to.

Failing that, it is likely that UK workers would have to apply for an EU Blue Card. This is an EU-wide work permit which allows high skilled workers from non-EU countries to work and live in any country of the EU under certain conditions. A person can apply to any EU Member State which is participating in the scheme to obtain the Blue Card. He has to fulfil certain conditions such as producing evidence of an employment contract with a salary of at least 1.5 times higher than the average gross national salary for that Member State.

For those Member States of the EU that are not participating in the Blue Card scheme companies will only be able to send workers if they obtain a work permit in accordance with the laws of the Member State to which the person is being sent.

**Q: My Business employs non-EU nationals and I wish to post them for a project in the EU**

**A:** Currently such a company can send workers to other EU countries under the *Van der Elst* concession. This means that so long as they have work permits in the UK, they can be sent to another EU member state for the purposes of carrying out a temporary services contract without a further work permit being applied for.

Similarly, other EU companies can send non-EU workers to the UK, the UK having implemented *Van der Elst*.

Depending upon the terms of Brexit and once EU law stops being binding, the UK may be free to reverse the effect of *Van der Elst* and the relevant guidance. In the UK the *Van der Elst* principle also applies to Swiss workers, although they are subject to a limit of a maximum of 90 days of work per year, and they cannot bring family members with them. The UK may take a similar approach to other EU workers in future.

**Q: My business employs low-skilled EU workers such as cleaners and waiters. Will I be able to retain them post-Brexit?**

**A:** If such migrants have not been in the UK for a sufficiently long period of time to allow them to acquire rights of permanent residence then it will be difficult to keep employing them, unless something is specifically negotiated during withdrawal, or UK immigration law is modified following withdrawal. At present the PBS system makes it difficult to employ such low-skilled workers and so leaves a gap post Brexit.

**Q: I am a University attended by EU students. What are the consequences for me?**

**A:** Once an exit is negotiated, and subject to any terms negotiated to the contrary, Universities will be able to charge higher fees to EU students. They will also have to admit students through the Tier 4 route, as is currently the case for students from non-EU countries.

### **Our business immigration services**

At Five Paper, we work for employers, charities and education providers on all aspects of business immigration and related employment law. We are regularly instructed on

- Sponsor licensing compliance and revocation
- Tier 2 General, Sportsperson, Minister of Religion and Intra-Company Transfer
- Tier 5
- The right to work
- Objections and appeals against civil penalties
- EU law applications

Our clients range from start-ups, SMEs, blue chips, professional sports clubs, charities, faith-based organisations and education providers in the public and independent sectors.

We also work for individuals, senior employees, directors, entrepreneurs, investors, overseas representatives and business visitors.

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