

Brexit: Immigration and the Right to Work

Despite continuing uncertainty over Brexit, the position regarding the rights of EU nationals¹ to continue to live and work in the UK is clear. In particular, EU nationals can now regularise their status in the UK by making an application under the new EU Settlement Scheme. We also have a reasonable idea of how the immigration landscape may look when a new regime is introduced in January 2021. As a result, organisations are in a position to communicate with their existing EU workforce about what they need to be doing to regularise their status in the UK and to start planning for a new immigration system.

In this briefing, we explain how the immigration and right to work position may vary depending on whether the UK leaves with a deal or with no deal.

EU nationals in the UK

Brexit will ultimately lead to an end to the free movement of people as regards EU nationals entering the UK and UK nationals entering the remaining EU member states. However, this will not affect EU nationals who are in the UK before the relevant cut-off date as they will be able to regularise their status by obtaining pre-settled or settled status under the new EU Settlement Scheme.

The key question is what is the 'relevant cut-off date'?

The answer depends on whether the UK leaves the EU with a deal or with no deal.

- **Deal:** there will be a transition period until at least 31 December 2020 during which time EU law relating to free movement of people would continue to apply.
- **No deal:** no transition period but the government has confirmed that free movement of people would continue under UK law until the end of 2020. EU citizens will be subject to security checks, as now, but will face tougher UK rules on criminality and conduct committed after Brexit. The government set out its latest position on the no deal immigration arrangements to apply to EU citizens after Brexit in a policy paper published on 4 September 2019. Further detail can be found here:

<https://www.gov.uk/government/publications/no-deal-immigration-arrangements-for-eu-citizens-moving-to-the-uk-after-brexit/no-deal-immigration-arrangements-for-eu-citizens-arriving-after-brexit#crossing-the-border-after-brexit>

And how about the right to work?

Deal or no deal, EU nationals will continue to be able to freely enter the UK and engage in work (employed or self-employed) or study without a visa until 31 December 2020. The government has indicated in its policy paper that it does not expect employers to be checking when an EU national entered the country

¹ References to EU nationals in this note include EEA and Swiss nationals and third-party family members. It does not include Irish nationals who will continue to benefit from the Common Travel Area agreement in place between the UK and Ireland.

until a new immigration regime is introduced in 2021. However, organisations should still be mindful of how the long term right to work position may differ between a deal and a no deal scenario. In both cases, the date on which the employee entered the UK will be critical. The table below summarises the position (as at 22 October 2019)².

	Existing EU nationals currently employed and any hired prior to Brexit date		Future EU nationals hired between Brexit date and 31 December 2020		Future EU nationals hired after 1 January 2021	
	Deal	No deal	Deal	No deal	Deal	No deal
EU Settlement Scheme	Eligible	Eligible	Eligible	Not eligible	Will not benefit from principle of free movement under either EU or UK law.	
Right to work	No impact on right to work subject to deadlines below	No impact on right to work subject to deadlines below	No impact on right to work subject to deadlines below	Eligible to work but need to register for EU Temporary Leave to Remain	Subject to new immigration regime. Evidence of right to work in the UK will be required.	
Pre-settled or settled status	Must obtain prior to 30 June 2021	Must obtain prior to 31 December 2020	Must obtain prior to 30 June 2021	Temporary Leave to Remain – status after 30 December 2020 currently unclear		

What about UK nationals working in the EU?

Deal: reciprocal arrangements will apply to UK nationals living and working in EU member states prior to the end of the transition period.

No deal: the position is less clear and could vary from country to country. UK nationals should keep the situation under close review as they may become subject to new immigration requirements and restrictions sooner than anticipated. Not all EU countries have set out their position on immigration in the event of a no deal and it is possible that some EU countries will not reciprocate the UK position.

² All dates subject to change particularly if the 31 October 2019 deadline is extended.

Future immigration system

The government has been very clear that it intends to introduce a new immigration regime covering EU nationals from 1 January 2021. Following an assessment by the Migration Advisory Committee (“MAC”) on the impact of Brexit on the UK labour market, Theresa May’s government endorsed a White Paper which gave us a reasonable idea of what the new regime may look like. In particular, it was proposed that EU nationals should not be given preferential treatment over non-EU nationals.

Boris Johnson has gone back to the drawing board and asked the MAC to submit fresh proposals for delivering a system which concentrates on welcoming the ‘brightest and best’ talent from around the world and focuses on sectors where there is a shortage of labour. He would like this system to be based on the model used in Australia which is a points-based system. Further proposals are anticipated in January 2020.

Post-Brexit travel

EU nationals visiting the UK

Deal: free movement will continue during the transition period and so no issue for EU nationals wanting to visit the UK.

No deal: free movement will continue under UK law and so no issue for EU nationals wanting to visit the UK up until 31 December 2020.

From 1 January 2021: it will be necessary to assess whether or not a trip will fall within the visitor rules or if the activities will constitute work and therefore be caught by the new work visa system applicable to EU nationals. UK nationals may need to apply for pre-travel authorisations even if they are visa-exempt.

UK nationals visiting the EU

Deal: current position maintained during the transition period.

No deal: restrictions may take effect sooner than anticipated with UK nationals becoming subject to visitor rules which could vary from country to country. The EU has indicated that visitor rules will apply to enable UK nationals to travel across the Schengen Area without a visa for up to 90 days in any 180 day period. It will become important to plan ahead and assess which trips will fall within the visitor rules and which may require advance entry clearance. In all cases, you will need to analyse the duration, frequency and purpose of the trip to determine whether it is appropriate to enter as a visitor.