*This note is correct as at 1 July 2021 and is based on government guidance which may be subject to further change. Please don’t rely solely on this note as advice - you should take advice from your lawyer on the specific details your situation.*

**Brexit frequently asked questions**

The UK left the European Union on 1 January 2021. This frequently asked questions document deals with employment law related Brexit issues and questions. Click any of the questions below to be taken directly to that section of the document.

**SECTION ONE: What effect has Brexit had on UK employment law from 1 January 2021?**

[Q1: Is the UK still bound by EU employment law after 1 January 2021?](#Q1)

[Q2: Will UK employment law change as a result of Brexit?](#Q2)

[Q3: Do the GDPR rules still apply to my employees’ personal data?](#Q25)

[Q4: Can my business still send and receive employee data to and from another business in the EU without additional protections?](#Q26)

[Q5: Do you need to change your contracts of employment, policies or other documents as a result of Brexit?](#Q3)

**SECTION TWO: EU individuals and rights to remain**

[Q6: Can you carry on employing EU employees after 31 December 2020?](#Q5)

[Q7: How do my employees secure a permanent right to remain in the UK?](#Q6)

[Q8: How do I check that my EU employees have applied for or been granted settled or pre-settled status?](#Q28)

[Q9: What do I do if one of my employees is refused settled or pre-settled status?](#Q29)

[Q10: Can I dismiss an employee if they are unable to prove that they continue to have the right to work in the UK?](#Q30)

[Q11: What happens to those who do not make an application for settled or pre-settled status by the deadline?](#Q31)

[Q12: What about Irish employees?](#Q27)

**SECTION THREE: The new immigration rules where settled status is not granted**

[Q13: What are the new immigration rules for EU employees arriving in the UK from 1 January 2021?](#Q13)

[Q14: How does the new ‘points based system’ work?](#Q14)

[Q15: Where do I go for further advice on securing a Skilled Worker Visa for an EU employee?](#Q15)

**SECTION FOUR: Employing EU employees from 1 July 2021**

[Q16: What checks do I have to carry out before employing a new EU employee after 1 July 2021?](#Q11)

[Q17: What can happen if I don’t carry out the right to work checks correctly?](#Q12)

**SECTION FIVE: Families of EU employees**

[Q18: Will the families of my existing EU employees have the right to stay in the UK?](#Q23)

**SECTION ONE: What effect has Brexit had on UK employment law from 1 January 2021?**

***Q1: Is the UK still bound by EU employment laws after 1 January 2021?***

EU law is incorporated into UK employment laws in many different areas including:

* discrimination rights
* collective consultation obligations
* transfer of undertakings regulations (TUPE)
* family leave (eg maternity)
* regulations in relation to working time.

Existing EU employment law (for example TUPE) won’t change as a result of Brexit, unless the UK higher courts (Court of Appeal and Supreme Court) or the UK parliament choose to depart from it.

New EU laws or court decisions from 1 January 2021 will no longer apply to the UK.

Here’s the detail:

* The ‘European Union (Withdrawal Agreement) Act 2020’ ends the supremacy of EU law from 1 January 2021. Previously, if there was a conflict between UK and EU law, EU law took precedence. Going forward, that’s no longer the case.
* A ‘snapshot’ of the EU law that applied to the UK on 31 December 2020 has been created/taken. The laws that existed on 31 December 2020 will continue to apply unless changed by the UK parliament or appeal courts.
* From 1 January 2021 new laws created by the EU or decisions of the European Court of Justice will no longer apply to the UK. So, for example, the forthcoming minimum wage directive that is likely to be introduced by the EU won’t apply to the UK.

***Q2: Will UK employment law change as a result of Brexit?***

We don’t anticipate significant changes to UK employment law as a result of Brexit because many EU laws mirror or expand on legal protections that already existed in the UK before Europe began law setting. For example, there was a UK right of return from maternity leave before EU maternity leave rights were implemented.

Whilst changes to legislation are unlikely, if change does happen the following areas of employment law are the most likely to be considered:

* TUPE – a change to allow employers buying a business to change incoming employees’ terms and conditions to match those of their current employees may be possible
* Holiday pay – a change to limit holiday pay to basic pay and stop holiday accrual when an employee is on long term sick leave may be possible
* The Working Time Regulations - a change to remove the current maximum 48 hour weekly limit on working time may be possible
* Collective redundancy consultation – a change to amend or remove the requirement to consult with employee representatives when a business is making 20 or more redundancies may be possible
* Agency Workers Regulations – a change to remove the requirement to pay agency workers the same as directly employed staff after 12 weeks may be possible
* The Human Rights Act - to replace it with a new British Bill of Rights may be possible

***Q3: Do the GDPR rules still apply to my employees’ personal data?***

The GDPR (General Data Protection Regulation) is a piece of EU law introduced in 2018 which gave individuals more control over their personal data and created a common set of rules about data across the EU.

The good news is that the rules around processing employees’ personal data have not changed as a result of Brexit. This is because the GDPR was fully incorporated into UK legislation via the Data Protection Act 2018 and this continues to apply after Brexit.

***Q4: Can my business still send and receive employee data to and from another business in the EU without additional protections?***

The main data protection consideration as a result of Brexit is whether UK businesses can still send and receive personal data to and from other businesses in the EU without additional protection.

As part of the Brexit deal the EU has agreed to treat UK data protection as ‘adequate’. This means that you can continue to keep sending and receiving employee data to and from the EU (subject to the other safeguards set out in the Data Protection Act 2018) without additional protections until at least 27 June 2025 (when the position will be reviewed again by the EU).

***Q5: Do you need to change contracts of employment, policies or other documents as a result of Brexit?***

Not if your employment contracts include:

* A contractual promise (known as a warranty) that the employee has the right to work in the UK. This is included in our Intelligent Employment contracts which subscribers can access [here](https://www.halborns.com/wp-content/uploads/2020/10/Employment-contract-for-a-salaried-employee-21.10.20.docx)
* An obligation for the employee to tell you about any changes to their immigration status
* A right to terminate employment immediately (without notice or compensation) if the employee loses the right to work in the UK (take legal advice first in order to avoid discrimination or unfair dismissal claims).

**SECTION TWO: EU employees**

***Q6: Can you carry on employing EU employees after 31 December 2020?***

Yes, provided that they have evidence to support their right to work.

For EU, EEA or Swiss nationals (“EU Employees”) a passport or ID card continued to be proof of a right to work up to and including 30 June 2021.

From 1 July 2021, EU Employees need to either have settled or pre-settled status (see details below) or qualify under the new immigration rules (also explained below).

***Q7: How do my employees secure a permanent right to remain in the UK?***

EU Employees who arrived in the UK on or before 31 December 2020 were able to apply for a permanent or temporary right to stay in the UK (pre-settled or settled status) so long as they did so by 30 June 2021. If they did not apply by this date they will be classed as illegal immigrants and can be deported. If an EU Employee can show there is a good reason why they were unable to apply by 30 June 2021, they may be allowed to submit a late application for settled or pre-settled status.

Permanent UK residence - settled status

EU Employees who have accrued five years’ continuous residence in the UK were able to apply for settled status under the EU Settlement Scheme.

Once the individual is granted settled status they are entitled to:

* Work in the UK
* Use the NHS
* Enrol in education or continue studying
* Access public funds such as benefits and pensions, if they are eligible for them
* Travel in and out of the UK

Earning the right to apply for permanent UK residence - pre-settled status

EU Employees who haven’t yet accrued five years’ continuous residence were able to apply for ‘pre-settled status’ which allows them to live and work in the UK until they acquire the necessary five years' continuous residence (at which point they can apply again for settled status).

Application process

The application process for settled or pre-settled status is fully online and involves:

* ID verification and biometric data submission
* Online application form
* Automated data checks
* Uploading of evidence (for example evidence of having lived in the UK)
* Automated criminality and security checks

The application is free of charge and only the employee could apply (not you as the employer).

***Q8: How do I check that my EU employees have applied for or been granted settled or pre-settled status?***

Until 1 July 2021 a passport or ID card was sufficient proof of a right to work in the UK for EU Employees.

For new EU Employees starting work from 1 July 2021 you’ll need to check their settled or pre-settled status online [here](https://www.gov.uk/view-right-to-work) using a right to work share code that the employee obtains from [gov.uk](https://www.gov.uk/view-prove-immigration-status). They will not get a physical document to prove their right to work in the UK.

There’s no legal requirement to carry out retrospective checks for EU Employees who started before 1 July 2021. However, we’d recommend that you do so in order to satisfy yourselves that all of your EU Employees have a continuing right to live and work in the UK.

***Q9: What do I do if one of my employees is refused settled or pre-settled status?***

They can apply for a review of the decision (to correct administrative errors) or lodge an appeal. In most cases, the employee will be able to continue to live and work in the UK whilst their review or appeal is considered but you’ll need to take further advice and contact the [Employer Checking Service](https://www.gov.uk/employee-immigration-employment-status) to confirm a continuing right to work. If these routes are unsuccessful the EU Employee will no longer be legally entitled to work or live in the UK.

***Q10: Can I dismiss an employee if they are unable to prove that they continue to have the right to work in the UK?***

Legal advice should always be sought first to avoid unfair dismissal and discrimination claims. In particular, you must fully investigate whether the employee does in fact have a right to work and offer an appeal against dismissal (to allow the employee to provide further proof evidencing their right to work and you to make further checks to confirm the right to work where appropriate). There are also certain circumstances in which EU Employees may be allowed to submit an application for settled or pre-settled status after 30 June 2021, if they can show that they had a good reason for not applying by the deadline. Where this applies you’ll need to take further advice and get confirmation from the [Employer Checking Service](https://www.gov.uk/employee-immigration-employment-status) that you can continue to employee the employee whilst their application is determined.

***Q11: What happens to those who do not make an application for settled or pre-settled status by the deadline?***

Based on the government guidance, they will automatically lose the right to live and work in the UK unless they can show that they had a good reason for not applying by the deadline. Before dismissing an employee for this reason you will need to take legal advice to avoid claims for unfair dismissal or discrimination.

***Q12: What about Irish employees?***

Citizens of the Republic of Ireland continue to have the automatic right to live and work in the UK and this is unaffected by Brexit.

**SECTION THREE: The new immigration rules**

***Q13: What are the new immigration rules for EU Employees arriving in the UK from 1 January 2021?***

From 1 January 2021 the right of free movement into the UK for EU Employees ended. New EU Employees arriving from 1 January 2021 have to qualify under the new immigration ‘points based system’ and obtain a visa which allows them to work in the UK. The following guidance is given below by way of general information and specific legal advice should always be obtained from an immigration specialist (contact us for a recommendation if required).

***Q14: How does the new ‘points based system’ work?***

In summary, under the new immigration rules:

* EU and non-EU citizens will be treated equally - it makes no difference whether you are from the EU or not
* Individuals wanting to come to the UK will have to score at least 70 points to qualify for a ‘Skilled Worker Visa’ (which is the main route for new migrants into the UK)
* There is currently no limit on the number of people entering the UK under the Skilled Worker Visa route
* Skilled Worker Visas will need to be sponsored by a UK employer (who will need a sponsor licence from the government)
* The ‘resident labour market test’ no longer applies (this is where you had to advertise the role for UK or EU employees first before seeking to recruit from outside the UK).

You can find more information about the new rules [here](https://www.gov.uk/guidance/recruiting-people-from-outside-the-uk-from-1-january-2021).

***Q15: Where do I go for further advice on securing a Skilled Worker Visa for an EU Employee?***

You will need a sponsor licence issued by the government. For more information on the sponsorship licence application scheme click [here](https://www.gov.uk/uk-visa-sponsorship-employers). Alternatively there is a sponsorship, employer and education helpline available on 0300 123 4699, open Monday to Thursday, 10am to 3pm. If you’re planning on sponsoring visa applications and you do not currently have a sponsor licence you should consider getting approved now.

The following links provide additional support for securing a Skilled Worker Visa:

* [Skilled worker visa eligibility requirements](https://www.gov.uk/skilled-worker-visa/your-job)
* [Skilled worker visa: eligible occupations and codes](https://www.gov.uk/government/publications/skilled-worker-visa-eligible-occupations/skilled-worker-visa-eligible-occupations-and-codes)

**SECTION FOUR: Employing new EU employees from 1 July 2021**

***Q16: What checks do I have to carry out before employing a new EU Employee on or after 1 July 2021?***

You will need to see proof that the employee has applied for or been granted settled or pre-settled status or that they have a visa which allows them to work in the UK. You will no longer be able to accept an EU Employee’s passport or ID card as evidence of a right to work in the UK.

***Q17: What can happen if I don’t carry out the right to work checks correctly?***

You can face a penalty of up to £20,000 per employee for employing an illegal employee as well as possible criminal sanctions. For this reason, it is essential you put in place a process to establish (and review where necessary) your employees’ right to work status.

**SECTION FIVE: Families of EU employees**

***Q18: Will the families of my existing EU employees have the right to stay in the UK?***

Non EU family members (including spouses, civil and unmarried partners, dependent children and grandchildren) of EU Employees were also able to apply under the EU Settlement Scheme for either pre-settled or (if they have five years’ continuous residence) settled status.

Family members also will be able to join EU Employees in the UK after 31 December 2020, where the relationship existed on 31 December 2020. The same applies for children born or adopted after 31 December 2020.