GOING GLOBAL

International employees working in the UK

In this final briefing, Part Six of our *Going Global Guide*, we look at the key points employers should bear in mind when seeking to recruit overseas employees to work for them in the UK. Given the free movement of workers within Europe and the wider EEA, candidates from within the EEA can take up employment in the UK in the same way as a UK national. However, where you are seeking to harness skills from the wider global market, it is essential to be aware of UK immigration rules.

The basics of UK immigration rules

The UK immigration system relies on UK employers to police immigration by making them responsible for ensuring that their workers have the right to work in the UK. Whilst this part of our Going Global Guide focuses on hiring individuals from outside the EEA, it is worth remembering that the obligation to carry out pre-employment immigration checks applies to all new recruits. Failure to check a worker's 'right to work' status before they start could result in a civil penalty of up to £20,000 per illegal worker, and potential criminal sanctions (unlimited fine and/or up to 6 months' imprisonment) for a breach committed knowingly.

When to start thinking about immigration

Immigration can be triggered as a concern at various points of the recruitment process: for example, when you advertise a post and an overseas candidate applies, or when you already have a specific overseas candidate in mind for a particular role. It is not uncommon for employers to make an offer to (or even employ) an ideal international candidate, only to find that there are a number of immigration hurdles to jump first, potentially meaning they can't recruit that person at all. As such, we recommend that potential immigration implications are considered as early as possible in the recruitment process.

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What do you need to think about first?

Does the candidate have permission to work in the UK already?
They may have a right to work in the UK if they are a British citizen, EEA national or potentially through commonwealth ancestry or other family connections. Alternatively, they may already be resident in the UK under one type of visa which they are able to 'switch' to another category allowing them to work in the UK.

How long do you want them to come to the UK for and what will they do?
If the individual is coming to the UK on a temporary basis for a business reason, but not to work, a visitor visa (which recently replaced the 'business visa') may be the most appropriate route. A visitor visa now permits a number of business activities, including: delivering training, attending meetings and holding negotiations.

Which immigration route is most suitable?
High net worth individuals may be able to obtain a visa to work in the UK under Tier 1. However, the main employment categories are Tier 2 and Tier 5, which are split into further sub-categories. Tier 2 (general) applies to skilled workers and is likely the most common. If you are part of a multi-national organisation, take care not to assume that employees are free to come to the UK and work in the UK office or branch by virtue of the group-company link. There is a separate visa category for intra-company transfers (see below).

What does immigration law require employers to do?

We have outlined below the main obligations which apply to an employer looking to recruit from outside the UK, including: becoming a sponsor, issuing certificates of sponsorship and satisfying the resident labour market test.

Sponsorship

In order to obtain a Tier 2 (general) visa, a prospective employee coming to the UK to work will need to be sponsored by their new employer. Therefore, if you are recruiting from outside the EEA for the first time, you must register to become a sponsor. The registration process can be completed online and requires you to satisfy the enforcing body, UK Visas and Immigration (UKVI) that, amongst other things, you are:

1. a genuine employer based in the UK and operating lawfully;
2. able to comply with employment and immigration law and good practice; and
3. willing to take on the responsibilities of a sponsor.

One of the main responsibilities a sponsor holds is a reporting obligation: essentially a duty to notify the enforcing body (the UKVI) of any changes to the sponsored employee's circumstances. The UKVI are keen to make it clear that holding a sponsorship licence is a privilege, and one that they can swiftly take away. For example, they have revoked sponsorship licences from employers who failed to report that an employee's contract had terminated or who incorrectly record their sponsored employees' work addresses. Sponsoring employers should have sufficient systems, checks and balances in place to ensure that all relevant information is reported accurately and within the given timescales.

Certificates of Sponsorship

As a sponsoring employer, you will be given an allocation of unrestricted Certificates of Sponsorship (CoS) which can be used at your own discretion but only in specific

circumstances (e.g. in respect of migrants you already employ; high earners with salaries of approximately £155k or more; and in some 'switching' scenarios).

However, the majority of prospective hires require a restricted CoS. A restricted CoS is specific to the individual applicant, so must be applied for on a case-by-case basis. Before a restricted CoS will be granted, certain criteria must be met, including the minimum skill threshold, minimum salary level, and confirmation that a Resident Labour Market Test has been completed (see further below). The UK system is points-based, and points are gained by meeting the criteria mentioned above. However, simply satisfying the minimum requirement is not always enough.

Since 2011, there has been a UK-wide limit on the number of restricted CoS that can be issued each year, broken down into monthly allocations. The threshold was reached for the very first time in June 2015 and has been reached again in subsequent months, so this trend looks set to continue. The result is that only those applicants scoring the highest number of points are making it through, meaning many businesses have been prevented from finalising appointments as planned. As posts with higher salaries attract a higher number of points, it is likely to be those at the lower end of the salary scale that may lose out if this trend continues. The key message to employers in the short-term is to plan ahead, consider timing issues and salary levels in advance, and be prepared for potential delays.

In most cases, if a suitable local candidate is found, they must be given the post even if the employer thinks that the international candidate would have been better.

Resident Labour Market Test

The Resident Labour Market Test ('RLMT') requires that employers who are seeking to fill a post, and who are considering recruiting from outside the EEA, must first advertise the post for at least 28 days, including certain details about the role and requirements, and using at least two specified advertising methods.

The aim of the RLMT is to protect the settled workforce by requiring businesses to advertise vacancies 'at home' first to give the settled workforce a chance to apply before casting their net into the wider, global market. The RLMT test does not apply in all circumstances, for instance it doesn't apply to intra-company transfers, so it is worth checking or taking advice on whether one of the statutory exceptions applies.

In most cases, if a suitable local candidate is found, they must be given the post even if the employer thinks that the international candidate would have been better. A suitable candidate is any worker who has the skills and experience the employer is seeking. Therefore, employers should think carefully about the job advert, in particular the skills and qualifications required. Whilst the advert or job description cannot be structured dishonestly in order to exclude local candidates (as the vacancy and description of the role must be genuine), businesses should ensure it is not so wide such that a local candidate could meet the requirements on paper but not in practice.

Intra-Company Transfers

Separate rules apply to employees who are being transferred by an overseas employer to a related UK business. This route is separated into four categories: short-term staff, long-term staff, graduate trainee, and skills transfer. As noted above, the RLMT does not apply to intra-company transfers. However, minimum salary and skill levels must be met, alongside additional criteria applicable to each category. Established staff transferring on a short or long-term basis must have worked for the multinational organisation for at least 12 months before they will be permitted to work in the UK via this route.

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Ongoing obligations

Once you have successfully recruited an employee from overseas, you continue to be responsible for reporting relevant changes in circumstances to UKVI and ensuring that the employee continues to hold the right to work in the UK for the duration of their employment with you.

We hope that you have found our Going Global Guide useful. All six parts will be available shortly in our comprehensive Going Global: International Employment Guide which will be available soon. Alternatively, please contact Shepherd and Wedderburn to speak to one of our experts on employment and international law.

This briefing is Part Six of our six-part *Going Global Guide* to international employment issues**.** The complete guide includes:

- Part One: Territorial scope of UK employment law
- Part Two: Employment contracts
- Part Three: Restrictive covenants
- Part Four: Employment checklist
- Part Five Secondments
- **Part Six: International employees working in the UK**

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