

# UK Employment Law BRIEFING



September 2008

## Changes to the UK immigration system

In February 2005 the Home Office announced a new 5 year strategy for immigration and proposed changes to the immigration rules. As part of the radical overhaul of the migration system the old work permit scheme is to be abolished with effect from **1st November 2008**. Under the new system there will be 5 tiers of individuals who can come to work in the UK. These are:

- Tier 1 – highly skilled migrants such as investors and entrepreneurs;
- Tier 2 – skilled workers with job offers and intra-company transferees;
- Tier 3 – low skilled workers filling specific temporary shortages;
- Tier 4 – students; and
- Tier 5 – youth mobility and temporary migrants.

The changes for highly skilled individuals came into force in February 2008 and the remaining tiers are to be implemented during 2008 and 2009 incrementally. Most migrants will now be permitted to work based on a Points-Based System and will hold a Certificate of Sponsorship.

The launch of the Points-Based System is to simplify the process by which individuals can enter into the UK and make it clearer whether an individual will qualify for entry. Responsibility for ensuring that employees can work in the UK will now fall on the employer who must comply with a new set of rules and be licensed to sponsor such workers.

Tier 1 migrants are the only individuals under the Points-Based System who do not need a sponsor. All applicants under Tier 1 will however need to show they have enough money to support themselves and their independents.

To avoid civil and criminal liabilities for employing someone without permission to work in the UK an employer must understand who does and does not require permission to work.

### English Language Requirement

In every Tier, except the investor category of Tier 1, applicants under the Points-Based System will need to demonstrate that they have a command of English to a specified level. This is to enable migrants to participate inside and outside the workplace fully.

The language requirement is separate from and additional to the need to demonstrate the threshold number of points under the Points-Based System.

If an applicant cannot fill the English language requirement then he or she will not be able to enter the UK regardless of the number of points he or she has. Applicants must demonstrate that they have either passed an approved English language test or come from a majority English speaking country or have a recognised degree taught in English.

### Criteria

In order to enter or remain in the UK, other than under Tier 1, applicants will need to qualify for points by fulfilling certain criteria including intra-company transferees. The criteria will very much depend on the category but will include factors such as education, previous earnings, age and personal assets. The migrant will also have to show an ability to support themselves and their dependants while in the UK.

The employer will have to show that it could not fill the post from the resident workforce (unless it is an intra-company transfer). This will include showing that the job vacancy has been advertised for at least 2 weeks. Intra-company transferees must score a total of **60** points and skilled workers **70** points.

### Sponsorship

However, before an employer can employ a foreign national under Tiers 2 to 5 it will be required to register with UK Border and Immigration Agency (“UKBA”) to obtain a licence to sponsor non resident workers.

**If employers are not licensed to be a sponsor they will not be able to recruit a non-EU resident skilled worker or an intra-company transferee from 1st November 2008.**

Once licensed however, if an employer is satisfied that the individual fulfils all the necessary criteria under the Points-Based System it will issue a Certificate of Sponsorship to the applicant it wishes to employ.

## Employers' Licence

As sponsors under the Points-Based System are in control of issuing Certificates of Sponsorship to potential migrants, the role of sponsor carries with it a great deal of responsibility.

All sponsors must therefore be licensed by the UKBA before they are able to issue certificates. The Government's statement of intent for sponsors makes it clear that thorough checks will be carried out and sponsors will have to fulfil strict criteria before a licence application will be approved. In particular, UKBA will be looking for evidence that:

- The sponsor is a bona fide organisation which operates lawfully in the UK;
- The sponsor is trustworthy; and
- The sponsor is capable of carrying out its duties.

In order to comply with the background checks the potential sponsor will need to provide documentary evidence and the history and background of its organisation and its key personnel. Any history of dishonesty or improper conduct in immigration matters is likely to be viewed seriously and may result in the application being refused.

The application must be completed online and can be applied for now. The fee for a licence to sponsor is £1,000 (or £300 for small companies qualified under the Companies Act 2006).

Once an organisation has been awarded a sponsorship licence it will need to comply with rigorous monitoring, recording and filing requirements. If the organisation's HR practice or track record in immigration matters suggests it will not be able to cope with the requirements, the sponsor may again fail in its licence application.

If an employers' licence is approved, the employer will be awarded a sponsorship licence which will normally last for 4 years. During this period the employer will be able to issue certificates and act as a sponsor for individuals coming to the UK under a quota of certificates.

All licensed sponsors will need to carry out certain duties such as:

- Record keeping;
- Reporting;
- Complying with the law;
- Co-operating with UKBA.

UKBA will keep under review the actions of sponsors under the Points-Based System. If any dishonesty or any incompetence

is identified it may decide to withdraw the licence or suspend the sponsor, serve penalty notices or prosecute the sponsor for knowingly employing illegal migrant workers.

## Penalties for employing illegal workers

A new system of civil penalties was introduced early this year as part of the Government's wider immigration strategy. Under this system employers face a maximum fine of £10,000 for each illegal worker employed as a result of negligent or less diligent recruitment and employment practices. Employers who knowingly employ illegal migrants face an unlimited fine and/or maximum of 2 years' imprisonment.

If an employer has complied with the relevant procedures, an employer may be able to establish a statutory excuse from paying a civil penalty which means checking and copying certain original documents as part of the pre-employment checks. Employers must also take care to avoid possible discrimination so it is vital that they request documentation from all prospective employees not just those who appear not to be EU nationals or not to have permission to work in the UK.

## To Do Checklist:

The forthcoming changes to the immigration rules are not yet fully in effect but employers must ensure that they are fully prepared for them. This will include:

- Auditing all current employees work permit records;
- Gathering information required for a licence application as soon as possible;
- Appointing a permanent UK member of staff to be responsible for the licence application and compliance;
- Reviewing employment policies, offer letters and recruitment strategies; and
- Ensuring their record keeping is in order to obtain the best rating for a sponsorship licence.

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