STEVENS&BOLTON

RIGHT TO WORK CHECKS - FREQUENTLY ASKED QUESTIONS

The Home Office recently updated its guidance for employers in relation to right to work checks, which is available here.

We've set out below the answers to a number of questions we are often asked in relation to right to work checks, taking into account the latest changes.

WHY IS IT IMPORTANT TO CARRY OUT RIGHT TO WORK CHECKS?

There are a number of reasons why this is important. In particular, an employer may be liable for a civil penalty of up to £20,000 if they employ someone who does not have the right to undertake the work in question if that person commenced employment on or after 29 February 2008. However, if the employer has undertaken a compliant right to work check before the employee started work, the employer will have a statutory excuse against a civil penalty. This means that if the Home Office finds that the employer has employed someone who does not have the right to do the work in question, but the employer correctly conducted the right to work check, the employer will not receive a civil penalty for the illegal worker in question.

Further, if the employer is registered as a sponsor with the Home Office, one of the employer's duties is to undertake compliant right to work checks in relation to all of its employees. The Home Office will usually ask to see evidence of this when they undertake a sponsor compliance visit. If the Home Office finds that a sponsor is not undertaking the correct checks they may downgrade or even revoke the sponsor licence.

It's also important from a reputational perspective to undertake checks to ensure that you are not employing anyone who does not have the right to work in the UK.

WHO MUST UNDERTAKE THE RIGHT TO WORK CHECK?

The responsibility remains with the employer.

The responsibility for checking the document and undertaking a right to work check remains with the employer. Undertaking manual right to work checks may be delegated to the employer's members of staff (including agency workers engaged by the employer and working under its control), but the employer will remain liable for the civil penalty in the event the individual is found to be working illegally and the prescribed check has not been correctly carried out. The latest guidance makes it clear that employers may not delegate this responsibility to a third party and expressly states that, other than where an employer uses an Identity Service Provider (IDSP) for checks on British and Irish citizens who hold a valid passport (including Irish passport cards) – see below, an employer will **not** establish a

statutory excuse if the check is performed by a third party, such as a recruitment agency or the employer's professional adviser.

IS IT STILL POSSIBLE TO UNDERTAKE CHECKS REMOTELY, BY SEEING THE INDIVIDUAL'S PASSPORT AND IMMIGRATION DOCUMENTS ON A VIDEO CALL?

Unfortunately, COVID-adjusted right to work checks ended on 30 September 2022. The type of right to work check required now depends on whether the individual is a British or Irish national or a non-British/non-Irish national and also depends on the type of documentation the individual holds.

BRITISH/IRISH NATIONALS

Employers remain responsible for ensuring that the person is who they say they are.

Both British and Irish nationals have the right to work in the UK without immigration permission.

Employers may undertake what is known as a manual check. This means that the employer must see and take a copy of the individual's original passport or other permitted documents. Seeing a scanned copy or viewing the passport or other documents over a video call will not provide a statutory excuse. Therefore, employers will either need to arrange for the individual to post or courier their documents to the employer or arrange for an in-person meeting.

The employer must also check, by meeting the individual in person or virtually, that the individual's appearance is consistent with their photograph and that the name and date of birth and age are consistent. Employers also need to check that the documents are genuine, have not been tampered with and belong to the individual.

Alternatively, if the British or Irish national has a valid passport the employer may outsource part of the right to work check to an IDSP. The main advantage of this is that the individual is then able to upload a copy of their passport and a photograph to send to the IDSP and there is no need for them to provide the original passport. Employers still remain responsible for ensuring that the person is who they say they are and that their appearance and age are consistent with the photo and passport provided. Further information is set out in the latest guidance.

NON-BRITISH AND NON-IRISH NATIONALS

If the individual has a Biometric Residence Card (BRC), Biometric Residence Permit (BRP), Frontier Worker Permit (FWP), an e-VISA/digital immigration status or has pre-settled or settled status under the EU Settlement Scheme employers must now undertake a Home Office online right to work check through the Home Office portal entitled "Check a job applicant's right to work: use their share code" on GOV.UK. Since 6 April 2022 checking the individual's immigration documents, such as their BRP, will not of itself establish a statutory excuse.

The individual must provide a share code to the employer and obtain this by logging onto the portal: "Prove your right to work to an employer: get a share code". The share code must begin with the letter "W".

The employer must then carry out the check by accessing the employer part of the online service at "Check a job applicant's right to work: use their share code" in order to obtain a statutory excuse against a civil penalty. It is not sufficient to view the details provided by the prospective or existing employee on the migrant part of the service.

The Home Office online service allows checks to be carried out by video call. Employers do not need to see physical documents as the right to work information is provided in real time directly from Home Office systems. Employers do however have to check that appearance, age, date of birth and names are all consistent as well as any restrictions on work and the expiry date of the immigration permission.

The latest guidance also states that employers should advise individuals to update the photograph on their online account if it is appearing incorrectly or is of poor quality.

A manual check will need to be taken for any other non-British or non-Irish nationals – for example if the person has a visa in their passport. In those cases, the employer must see the original documents.

ARE THERE ANY SPECIAL CONSIDERATIONS FOR EUROPEAN NATIONALS OR THEIR FAMILY MEMBERS?

Employers should undertake right to work checks for any EEA nationals they wish to employ. Most EEA citizens will be able to prove their right to work using the Home Office online service. Where appropriate, the Home Office online service will advise when a follow-up check must be carried out.

If the individual informs you that the individual has an application pending under the EU Settlement Scheme we recommend taking further advice as to how to conduct a compliant right to work check.

DO EMPLOYERS NEED TO OBTAIN ANY FURTHER INFORMATION BEFORE EMPLOYING A STUDENT?

Taking advice is recommended if you wish to employ a student.

Not all students are permitted to work in the UK and there are restrictions even for those who are permitted to work. In particular, students who are permitted to work may only work 10 or 20 hours during term time and work full time during vacations. They are also not permitted to undertake a permanent role. Therefore, in addition to carrying out the right to work check to ensure the student is able to work, an employer must also obtain, copy and retain details of the student's academic term and vacation times covering the duration of their period of study in the UK for which they will be employed.

The latest guidance states that the dates should be provided by the education provider, either directly or indirectly if the student is providing a letter or email which they have received from their education provider setting out the required details.

The guidance also goes on to say that it is up to the employer to determine if the information provided is sufficient. For instance, where information showing course dates on the education provider's website differs from that in any letter received, the employer may wish to seek further clarification.

We recommend taking advice if you wish to employ a student.

WHAT HAPPENS IF THE INDIVIDUAL HAS AN APPLICATION PENDING AT THE HOME OFFICE?

In this case, the employer will need to contact the Home Office's Employer Checking Service (ECS) to establish a statutory excuse. Before doing so it is important to ask the individual for any information or documentation indicating that they have an outstanding application for permission to stay in the UK with the Home Office, which was made before their previous permission expired or that they have an appeal or administrative review pending and, therefore, cannot provide evidence of their right to work.

Employers will also need to use the ECS in other circumstances including in certain cases where there is a pending application under the EU Settlement Scheme, where the employer is satisfied that the individual has not been provided with any acceptable documents and the employer is unable to carry out a check using the online service or the employer considers that it has not been provided with any acceptable documents, but the individual presents other information indicating they are a long-term resident of the UK who arrived in the UK before 1988.

In these circumstances, the employer will establish a statutory excuse only if it is issued with a Positive Verification Notice (PVN) confirming that the named person is allowed to carry out the type of work in question. This usually lasts for six months.

DO EMPLOYERS NEED TO CONDUCT ANY FOLLOW UP CHECKS?

Employers will need to undertake a further right to work check if the individual has time-limited permission to work in the UK. This check should take place just before the individual's previous permission comes to an end, so employers should ensure they diarise this. The follow-up check is designed to prevent people from overstaying their immigration permission where this is time-limited.

If the individual has a pending immigration application the employer will need to use the ECS (see above). However, on the date on which the employee's permission expires, to continue to employ them the employer must be reasonably satisfied the employee:

- Has submitted an in-time application to extend or vary their permission to be in the UK
- Has made an appeal or an administrative review against a decision on that application which is outstanding
- Is unable to provide acceptable documentation but presents other information indicating they are a long-term lawful resident of the UK who arrived here before 1988

In such cases, the employer's statutory excuse will continue from the expiry date of the employee's permission for a further grace period of up to 28 calendar days to enable the employer to obtain a positive verification from the ECS or carry out a Home Office online check. This 'grace period' does not apply to checks carried out before employment commences.

If, during either the initial 28 calendar days, or the six-month PVN period, the employee provides evidence that their case has been decided with permission to stay granted, the employer must then conduct a right to work check in the normal way to maintain its statutory excuse.

WHAT HAPPENS IF AN EMPLOYEE'S EMPLOYMENT TRANSFERS TO THE EMPLOYER UNDER TUPE?

Employers should undertake a fresh right to work check on all transferring employees.

In these circumstances, right to work checks carried out by the transferor (the seller) are deemed to have been carried out by the transferee (the buyer). As such, the buyer will obtain the benefit of any statutory excuse established by the seller.

However, if the seller did not conduct the original checks correctly, the buyer would be liable for a civil penalty if an employee, who commenced work on or after 29 February 2008, is later found to be working illegally.

Also, a check by the buyer may be the only way to know when any follow-up check should be carried out in respect of employees with time-limited permission to work in the UK.

For these reasons, employers who acquire staff in cases of TUPE transfers should undertake a fresh right to work check on all transferring employees, especially those whose employment commenced before 29 February 2008. The right to work check must be undertaken within 60 calendar days from the date of the transfer.

HOW LONG MUST RIGHT TO WORK CHECK DOCUMENTATION BE KEPT FOR?

Employers must keep a record of every document they have checked, including the online profile in the case of online checks. This can be a hard copy or a scanned copy in a format which cannot be manually altered, such as a jpeg or pdf document. Copies of the documents must be kept for the duration of the person's employment and for a further two years after they stop working for the employer. The latest guidance states that the employer must be able to produce the documents quickly and that the documents must then be securely destroyed two years after the employee's employment ends.

When carrying out the check, employers must also make a note of the date on which the check was carried out. This can be by either making a dated declaration on the copy or by holding a separate record, securely, which can be shown to the Home Office upon request. This date may be written on the document copy as follows: "the date on which this right to

work check was made: [insert date]" or a manual or digital record may be made at the time the employer undertakes the check. The guidance states the employer must be able to show this evidence if requested to do so in order to demonstrate that it has established a statutory excuse. This process must be repeated for any follow up check.

Latest guidance makes it clear that an employer may face a civil penalty if they do not record the date on which the check was performed in this way and further that simply writing a date on the copy document does not, in itself, confirm that this is the actual date when the check was undertaken.

ARE THERE ANY CIRCUMSTANCES WHERE YOU WILL NOT OBTAIN A STATUTORY EXCUSE IF YOU HAVE CARRIED OUT A RIGHT TO WORK CHECK?

An employer will not obtain a statutory excuse if:

- They did not carry out the right to work check in accordance with the guidance which applied at the time
- It is reasonably apparent that the person presenting the document is not the person referred to in that document, even if the document itself is genuine
- They know that the individual is not permitted to undertake the work in question e.g. if the employer knows the individual no longer has permission to work
- They know that the documents are false or do not rightfully belong to the holder

KEY CONTACT

For further information about any of the issues raised in this guide, please contact:

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