

How to recruit foreign nationals

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Many HR professionals recognise that foreign nationals – whether the migrant population in the UK or overseas workers looking to migrate to and work in the UK – can be a valuable resource to employers looking for highly skilled employees and help solve the current recruitment crisis. In particular, there is a resident labour shortage of engineers, nurses, doctors, IT professionals, construction workers and accountants, in both temporary and permanent positions.

However, the process for recruiting a foreign national is not straightforward, and the Government's agenda on immigration is making compliance more difficult. The burden has increasingly shifted from the Home Office to employers, leaving them with a challenge to minimise red tape and stay on the right side of the law.

Immigration law is continuously in the spotlight for various reasons and is subject to regular change. With so many businesses now hiring professionals from abroad, it is crucial to keep an eye on developments to ensure compliance and avoid any unwanted repercussions.

Who requires special permission to work in the UK?

European Economic Area (EEA) nationals (except Croatia, where different rules apply) and citizens of Switzerland are allowed to work in

the UK without special permission, though employers are still required to carry out a “right to work” check on such employees before they start work (see below).

Sponsoring non-European Economic Area nationals

If an employer wishes to employ non-EEA nationals, it must sponsor them under the UK's points-based system. This is a time-consuming and complex process that requires the employer to apply for, and obtain, a sponsorship licence from the Home Office. To do so, the employer must meet various eligibility and suitability criteria.

After being registered as a sponsor, the employer may assign a Certificate of Sponsorship for any non-EEA nationals that it wishes to employ, provided that they meet the various relevant criteria for one of the Tiers under the UK's points-based system (see below).

Employers should consider instructing a specialist adviser to oversee or carry out the sponsorship process from start to finish. If an application is unsuccessful, there is no right of appeal; mistakes can be costly and delay essential recruitment. An expert can help complete the process efficiently and with the best chance of success, resulting

in a complete and appropriately skilled workforce for the employer.

The points-based system

The UK's points-based system requires most non-EEA nationals to meet the criteria for, and be sponsored by the employer under, one of Tiers 2 to 5. The most common category for skilled workers is Tier 2 (General).

Under Tier 2, the recruitment process will depend on various factors, such as whether the position is an Intra-Company Transfer (relevant for businesses with overseas offices), or whether it appears on the shortage occupation list, published by the Home Office. The prospective employee must score the requisite amount of "points" in order to qualify for a Certificate of Sponsorship.

The employer may be required to advertise the position for a specified number of months, and the salary must be at least the appropriate threshold. The thresholds for various types of job are defined by the Home Office and depend on the seniority of the role. For example, the salary required by a mechanical engineer is at least £27,400 for a new entrant and £32,900 for an experienced worker.

A recent report produced by the Government's immigration advisers, the Migration Advisory Committee

(MAC), suggested raising the minimum salary threshold for skilled workers coming to the UK to £30,000. The report also states that companies hiring skilled workers from outside the EU should potentially face a £1,000 surcharge per head.

"Right to work" checks

Whether or not the prospective employee is sponsored under the points-based system, the employer must check his or her right to work in the UK – known as a "right to work" check – before starting employment.

The Home Office publishes two lists, called List A and List B, that set out the various acceptable documents. To satisfy itself that the prospective employee has the right to work, the employer must obtain, from him or her, a document (or combination of documents) specified in either list. Relevant documents include passports and biometric residence permits.

The employer must inspect the original documents in the presence of the individual. By carrying out this check, the employer will establish a statutory defence against liability for employing workers illegally.

Throughout the recruitment process, the employer must not discriminate against any applicants or

prospective employees on the ground of race.

Retaining and re-checking documents

Employers must retain copies of all relevant documents evidencing an employee's right to work and record the date on which they were checked. Where an employee has limited leave to remain in the UK, the employer must carry out further checks during his or her employment.

Penalties for non-compliance

The chances of an employer accidentally not complying with the complex rules are high and even a small mistake can have serious consequences.

A business found to be employing a person who does not have the right to work in the UK can be fined up to £20,000 per illegal worker – a sum that could result in closure for many small- and medium-size enterprises. Where an employer is found to have knowingly employed an illegal worker, the business owner can face criminal prosecution – potentially resulting in prison – and an unlimited fine.

Where an employer fails to comply with its sponsorship duties, the Home Office may downgrade, suspend or revoke its sponsorship licence, any of which will have serious business repercussions.