

Right to work checks for European nationals Q1/Q2 2021

OCTOBER 2020

During the first six months of 2021 (known as the 'Grace Period') employers conducting right to work checks on European nationals will be directed by the '[Right to work checklist](#)' to accept a valid European passport or national ID card as sufficient proof of right to work. But Regulations made in September 2020 confirm that these individuals will not necessarily have an underlying right of residence in the UK, storing up potential legal issues for employers.



WHAT IS THE ISSUE?

Free movement under European law will end in the UK on 31 December 2020. Europeans who began living in the UK by that point must apply for status under the EU Settlement Scheme, and will have until the end of the Grace Period on 30 June 2021 to make this application.

From 1 July 2021, they must hold or have made an application under the EU Settlement Scheme to retain their ability to live and work in the UK.

However, [Regulations](#) dealing with the legal position of Europeans arriving in the UK show that a European who first arrived in the UK during the Grace Period will need a visa to be able to work legally.



RIGHT TO WORK GUIDANCE

Employers are experiencing difficulties with the [Right to Work check guidance](#). They are required to conduct Right to Work checks when hiring a new worker, by confirming that the worker holds a valid Right to Work document. But the government has confirmed that this guidance will not change during the Grace Period. The [guidance to employers](#) on employing Europeans after 31 December 2020 states:

You'll need to check a job applicant's right to work in the same way as now until 30 June 2021. Until this date job applicants can prove their right to work in the following ways:... EU, EEA or Swiss citizens can use their passport or national identity card. You have a duty not to discriminate against EU, EEA or Swiss citizens. You cannot require them to show you their status under the EU Settlement Scheme until after 30 June 2021.

Without the risk of undertaking any discriminatory steps, employers are being placed in an extraordinary position. Specifically, without requesting evidence of when a worker first entered the UK, current guidance implies that right to work checks are to be conducted on the documentation presented despite not confirming if the individual has the right to work.

EMPLOYER STRATEGY

Employers need to protect themselves against inadvertently employing illegal workers. But they also need to consider employee welfare, potential discrimination claims and reputational issues. Employers should consider two cohorts.

Cohort 1: European worker started employment in the UK before 31 December 2020

Europeans working for an employer in the UK on or before 31 December 2020 will retain a right to live and work in the UK. Their right of residence will continue after the end of the Grace Period provided they have an approved or pending application under the EU Settlement Scheme. A successful application to the EU Settlement Scheme will result in valid status either for 5 years (if the case of Pre-Settled Status) or indefinitely (in the case of Settled Status). Workers in this cohort who do not apply to the Scheme by 30 June 2021 risk being unable to evidence their right to work, as well as difficulty holding a bank account, renting a property or accessing healthcare.

Action	Considerations	Advantages	Risks
Right to Work check on the basis of a European passport	<ul style="list-style-type: none"> Eligible individuals must apply for status under the EU Settlement Scheme by 30 June 2021. If they do not, they are potentially working illegally and in future could experience difficulty evidencing right to work to new employers, opening a bank account, renting a property or accessing healthcare Employers should ensure that they have a communication strategy in place to promote the need to apply 	<ul style="list-style-type: none"> A right to work check on the basis of a European passport gains a statutory defence against illegal working No retrospective checks of this cohort are required by current employers 	<ul style="list-style-type: none"> If an individual doesn't apply, they don't get a status that they are entitled to Risk that the individual is deemed to be working illegally from 1 July 2021
Communicate the coming changes	<ul style="list-style-type: none"> This cohort must have made an application to the EU Settlement Scheme by 30 June 2021 Ensure messaging is balanced and non-discriminatory 	<ul style="list-style-type: none"> As above 	<ul style="list-style-type: none"> As above
Request voluntary disclosure of whether they have status (or have applied) under EU Settlement Scheme	<ul style="list-style-type: none"> The worker will receive a letter confirming when they have applied to the Scheme. Alternatively they can provide proof of their status, or an online Right to Work check can be conducted, however, there is a risk that this is deemed discriminatory Employers should seek employment law and data privacy advice before going ahead 	<ul style="list-style-type: none"> No retrospective checks of this cohort are required by current employers If individuals do not disclose, you can target your communications to encourage them to apply 	<ul style="list-style-type: none"> We suggest that this is not made a mandatory request as this may be deemed discriminatory or GDPR breach

Cohort 2 : European worker started employment in the UK from 1 January 2021 - 30 June 2021




Europeans residing in the UK by 31 December 2020 will be eligible to apply to the EU Settlement Scheme. Those who arrive in the UK after that date will require a visa to live and work in the UK. There is no easy answer here. Below are three broad approaches, with the advantages and pitfalls of each from an immigration perspective.

Option	Considerations	Advantages	Risks
Continue to conduct Right to Work checks on the basis of a European passport or National ID card	<ul style="list-style-type: none"> ▶ Gains a statutory defence against employing illegal workers during the Grace Period and potentially beyond ▶ Worker may have no underlying right to work 	<ul style="list-style-type: none"> ▶ No change in approach needed ▶ No risk of discrimination 	<ul style="list-style-type: none"> ▶ Worker may not have the right to work (or if eligible for status under the EU Settlement Scheme, may not have the right to work from 1 July 2021). If uncovered the worker may need to stop work causing disruption to the business. ▶ Reputational and legal risks of employing illegal workers
Mandatory disclosure of whether the worker arrived before 1 January 2021 (not recommended)	<ul style="list-style-type: none"> ▶ This goes beyond what the employer requires to gain a statutory defence against employment illegal workers during the Grace Period 	<ul style="list-style-type: none"> ▶ Minimises risk of illegal working ▶ Can track expiry of pre-settled status 	<ul style="list-style-type: none"> ▶ Risk of being deemed discriminatory. Employers should consult with their employment law advisers before imposing a mandatory requirement during the Grace Period
Voluntary disclosure of whether the worker arrived before 1 January 2021	<ul style="list-style-type: none"> ▶ Worker needs to apply to the EU Settlement Scheme by 30 June 2021 ▶ Employers may be able to sponsor worker under new immigration system if they are not eligible for status under the EU Settlement Scheme ▶ See our guide to the new system 	<ul style="list-style-type: none"> ▶ Reduces risk of illegal working ▶ Narrows pool of workers who may experience issues 	<ul style="list-style-type: none"> ▶ Risk of illegal working not eliminated ▶ Employers should consult with their Employment Law Adviser and Data Privacy Officer before requesting and gathering

Cohort 3: European worker started work from 1 July 2021

The guidance is not yet published but it is likely that this cohort will need to evidence their right to work by showing a visa which permits work, possibly under the EU Settlement Scheme or under the new immigration regime.

What could employers request to prove eligibility for EU Settlement Scheme status?

Employers Checking Service Online check 	Declaration 	Proof of arrival in the UK 
<p>Online check that can confirm if the worker has a pending application with the Home Office. A positive verification notice will protect the Employer for six months</p>	<ul style="list-style-type: none">▶ Worker advised that they will not have a right to work if they first arrived in the UK from 1 January 2021 and asked to sign declaration that they can legally work▶ Places onus on the worker and does not require unnecessary data collection	<ul style="list-style-type: none">▶ Worker provides proof they came to the UK before 1 January 2021▶ Acceptable evidence can include proof of address, a bank statement showing spending in the UK, a used plane ticket, amongst other possibilities▶ Evidence may be burdensome to assess

Fragomen LLP are immigration law specialists and cannot provide advice in employment or data privacy law. These resources are provided for informational purposes only. Immigration requirements and procedures are subject to change.

FURTHER INFORMATION

If you would like further advice on any of the above, or on any immigration matter, please contact your Make UK advisor or alternatively you can email MAKEUKimmigration@Fragomen.com.

¹ European nationals refers in this document to EEA (European Union, plus Iceland, Norway and Liechtenstein) or Swiss nationals. British and Irish citizen will retain an unrestricted right to live and work in the UK after 2020.