

Brexit Breakout: The status of your EU employees



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There are estimated to be three million people in the United Kingdom whose right to live and work here currently depends on free movement. Many of these European citizens are concerned about what will happen when Britain leaves the EU in March 2019. Employers need to know what scenarios could apply and how to offer the most appropriate support.

Now that the Brexit negotiations have begun, for senior leaders and HR directors the situation of your EU employees is becoming clearer. Both sides have published position papers on citizens' rights, with the UK Government offering any current employee a route to 'settled status' in the United Kingdom. There is actually significant agreement between the Government and the European Commission. Nevertheless, major differences still need to be overcome and questions remain, not least about specific criteria.

We explain what you need to know, allowing HR teams to have a clearer view of the months and years ahead. Staff retention is already a key issue, given recent surveys, and reassuring and engaging employees on some of the issues raised by Brexit is now critical.

The current system

In theory, freedom of movement¹ allows EU citizens the right to travel to another EU country and:

1. Reside for up to three months without any conditions.
2. Reside for more than three months if working or self-employed, subject to conditions.
3. Permanently reside after five years of continuous residence, subject to conditions.

In practice, the UK views any restrictions after three months as unenforceable. For this reason, it has never imposed conditions on EU employees. Until the referendum, few bothered to apply for a Permanent Residence Certificate after five years, because they only needed one to apply for British citizenship. They started to bother in June 2016:

It is thought that some 100,000 permanent residence applications have been processed [...] Some diplomats are said to be concerned about the "unnecessary bureaucratic hurdles" being raised by the UK against EU citizens. One of the problems is that the 85-page application was not designed for use by EU nationals, but was originally created to scrutinise non-EU spouses of EU citizens who were seeking residency rights in Britain.²

The Home Office has advised people not to apply, admitting it couldn't cope with the volume of applications. Its officials are also rejecting many applications on technicalities, including gaps in evidence

¹ The residency rights of nationals are covered by the EU's Free Movement Directive from 2004, which also covers EEA and EFTA countries (Iceland, Liechtenstein, Norway and Switzerland). It is a feature of the single market, which is best understood as a zone applying EU regulations to all of its activities, under EU law.

The agreed basis for the Brexit negotiations involves withdrawal from the single market. Although commentators often assume that the UK could continue to be a member of the single market as a matter of choice, it has never been offered by the EU27 and is not a viable outcome of the current process. Unless the UK remains associated with the single market during a transitional period, the Free Movement Directive will cease to apply in 2019. It is currently implemented through the Immigration (European Economic Area) Regulations 2016.

² The Financial Times, 27 April 2017 – [link](#).

and a little-known EU requirement to have held private healthcare insurance, despite qualifying for NHS treatment. The new UK proposals address these issues.

What do both sides agree on?

Both sides agree in principle about what the deal on citizens' rights should cover and its basic features. From the perspective of UK employers, the areas where there is clarity and guidance can be given to employees are:

- **Domestic law** – changes to UK law to clarify the legal status of EU citizens already living here at the point of withdrawal. Without legislation, employers would have difficulty knowing who has the right to work here.
- **Recognition** – an administrative process for claiming UK residency rights, including an application system, criteria, evidence requirements and documentation. This could involve employers providing documentary evidence for former staff or contractors.
- **A cut-off date** – people arriving after this specified date may find it harder to claim permanent residence after 5 years. Current employees are exempt, but it could affect new hires between now and 2019, depending on the date chosen. The actual date is an area of disagreement (the Government's offer, set out below, means that employers shouldn't experience a problem).
- **Reciprocity** – equivalent protection for UK nationals living in the EU. The Commission accepts this, but without all of the guarantees it wants for EU27 citizens.
- **Access to services** – reciprocal arrangements for settled EU and UK nationals on benefits, pensions, healthcare, social housing, access to education and university, etc. This would ensure that none of your current EU employees face changes to their personal circumstances.
- **Employment** – ongoing mutual recognition of professional qualifications, at least for those nationals already in employment on that basis. Employers would need to continue recognising qualifications to practice from EU states, although this might not apply for new hires after 2019.
- **EEA/EFTA** – a separate agreement to the withdrawal terms between the EU27 and the UK, extending the deal to EEA/EFTA nationals. Without this extension, employees from Iceland, Liechtenstein, Norway and Switzerland could lose their right to work here.
- **Common Travel Area** – before freedom of movement, nationals from the UK and the Republic of Ireland could already live and work anywhere in the shared CTA. Recognising the Common Travel Area means no change (and no paperwork) for current or prospective Irish employees.

The outlines of a deal are clear. At this stage, the sides are only discussing rights and rules for people who move to the UK, or vice versa, before March 2019. What future immigration rules could involve is not part of the initial negotiations. That is an important 'missing piece' of the puzzle for employers and could feature in either the Withdrawal Agreement, or any transitional arrangements, or an eventual

Free Trade Agreement. The longer the 'missing piece' remains, the more risk there is of the skilled EU talent pool looking for alternative employment outside the UK. Which may mean organisations in the UK may need to increase their retention and acquisition strategies to be deemed more attractive to this talent pool.

Points of dispute

These areas are not as directly relevant to employers, with the notable exception of how employees will qualify for immediate 'settled status'. Rather, they are the potential deal-breakers. Failure to reach agreement on citizens' rights, or reach it at an early stage in the process, would have indirect consequences for the workforce of every UK company.

- **Jurisdiction** – the EU wants its own court, the Court of Justice of the European Union (known as the ECJ to most, but to lawyers as the CJEU), to enforce the terms of the agreement in the UK after Brexit. This would be grotesquely one-sided and is a red line for the Government. Media coverage of the working groups suggests that the Commission is preparing to back down, with British plans for international arbitration favoured.
- **Specified date** – the UK has suggested the day Article 50 was triggered, namely 29 March 2017. The Commission has specified the date of withdrawal, two years hence.
- **Divergence** – rather than treating EU citizens as equivalent, the Commission wants them to be protected for life against any change that a UK Government might make to the rights and entitlements of British nationals. This would create an increasing number of 'super rights' for EU employees, potentially extending to the workplace and the benefits system.
- **Super rights** – there are some 'super rights' already, such as the ability of an EU citizen to bring a non-EU spouse to the UK without an income test, which the Government proposes to end when it withdraws. The Commission believes they must apply after Brexit.
- **EU law and future rights** – these issues are related to jurisdiction, and involve the EU's ability to move the goal posts on rights after the deal, as the interpretation of citizens' rights in the remaining 27 states develops. This would be wholly unacceptable to the UK.
- **Qualification and evidence** – the UK's proposals do not specify all of the application criteria for settled status. This appears to be a deliberate negotiating stance, putting the onus on the Commission to express any preferences. The Government will not want basic operational matters to be complicated by the terms of the Withdrawal Agreement.
- **Benefits** – the UK has conceded on benefit payments for family members who live abroad, which has been particularly contentious in relation to Child Benefit. This will help to secure the support of certain EU members. The Commission may still attempt further concessions and 'super right' guarantees, most of which would be politically impossible for the Government.

The apparent progress of the working groups established for the talks is encouraging, but there are significant issues to resolve. As the talks become more specific, disagreements are inevitable before any deal is reached. It is therefore essential for HR directors to continue to communicate with their employees to make sure any uncertainty can be managed and addressed on a case by case basis. This can be done with a strong leadership stance on the matter. A leadership team who demonstrate transparency and reassurance during these times will reap the benefits amongst a more engaged and confident workforce.

The Government's offer

The proposals in the Command Paper, [*Safeguarding the Position of EU Citizens Living in the UK and UK Nationals Living in the EU*](#), describe a new UK legal framework. After withdrawal, EU citizens and their families will have a two-year grace period in which to apply for a residence document. Employees will need to apply to maintain their right to work in the UK.

There will be two types of document, corresponding to:

1. **Settled Status** – EU citizens who have been continuously resident in the UK for five years will be allowed to stay indefinitely by applying for settled status, equivalent to Indefinite Leave to Remain in existing domestic law.
2. **Temporary Status** – EU citizens who arrived before the cut-off date, but haven't lived continuously in the UK for five years, will be able to apply for permission to stay until they reach that point, equivalent to Leave to Remain in domestic law. When they reach five years' of continuous residence, they will be able to apply for settled status.

When should employees apply?

The early application system will help to spread the three million anticipated applications across three years, but will probably be limited to settled-status applications to avoid unnecessary claims. Based on the published information, employees who arrived in the UK:

- **Before 2014** – can apply for settled status at any point between 2018 and early 2021.
- **Before March 2016** – should wait until they have reached five years' of continuous residence, and then apply for settled status before the end of the grace period.
- **After March 2016** – should apply for temporary status within the grace period, and then apply again for settled status when they reach five years' of continuous residence.
- **After March 2017** – should apply for temporary status within the grace period, but may be subject to different rules when applying for settled status from 2022.

Regardless of the specified date, employees who arrive here before March 2019, and work for reputable companies, are unlikely to face any difficulty in repeatedly extending their leave to remain, or in obtaining settled status after five years.

Handling any uncertainty

Having active conversations about the development of these agreements is vital to keep all of your employees engaged. The unsettling nature of Brexit has impacted organisations and employees alike. Whilst agreements are being negotiated and the picture of the UK's future is being painted, we are still a long way off March 2019. And the aftershock of this will undoubtedly bring years of further uncertainty.

Over the years, we have seen many organisations turn their employee's anxiety and trepidation into confidence and productivity. By focusing on retention, engagement and developing leadership capabilities, organisations can minimise the risk of the uncertainty inherent in this unusual situation. With the second round of talks coming up, it is hoped it will be possible to share the details of any new employment status with staff. But regardless of the pace of the Brexit talks, developing your leaders should be a priority now to ensure everyone remains engaged and productive during such uncertain times.

If you are looking for support on how to develop your leaders through such uncertainty you can get in touch on **020 7933 8333**. If you want to know more about status of your EU employees see the Q&A's below.

Practical questions

Are Irish employees really unaffected?

Yes, because both sides agree on preserving the Common Travel Area. As the Government's Policy Paper Factsheet on the *Rights of EU Citizens in the UK* notes:

The rights of British and Irish citizens in each other's countries are rooted in the Ireland Act 1949 and not impacted by the proposals outlined in our policy paper. The arrangements between both countries pre-date our respective memberships of the EU.

As such, Irish citizens residing in the UK will not need to apply for settled status to protect their entitlements. [Page 3, UK Factsheet.]

Because of its importance within Northern Ireland, and the terms of the peace process, this would apply even in a 'no deal' scenario.

Should EU employees apply for permanent residence now?

No. Employers who have been advising applications, or offering employees assistance with them, should reassess their position.

The Government is required to continue offering certificates until withdrawal:

We will comply in full with our legal obligations, including in respect of administrative procedures for providing documentation for those exercising Treaty rights [Page 4.]

However, the certificate will not be sufficient for residence when the UK leaves the EU and those with certificates will be forced to go through an additional process:

For those who have already obtained a certificate of their permanent residence, we will seek to make sure that the application process for settled status is as streamlined as possible. [Page 6]

The new application process for settled status will be simpler than that for permanent residence, without hurdles that have plagued the current system. Given this, it makes no sense to join the backlog of permanent residence applications.

What about those already waiting to have their application processed?

There are reported to be up to 150,000 applications from EU citizens that now serve little purpose, with fees paid and people's passports held for processing. It would be sensible for the Government to allow applications to be withdrawn in exchange for a refund, or a discounted 'settled status' application. If this doesn't happen, employees might want to withdraw their applications anyway. The fee would be lost and it could delay any subsequent application that an employee wished to make for full British citizenship. However, many certificate applications are being rejected, on grounds that will not apply to the settled-status process.

There are also considerable advantages to getting a passport back, which employers whose staff undertake international travel as part of their role would appreciate and could help retain key talent going forwards.

Should EU employees apply early for settled status?

The Government is offering a voluntary, early application process to provide reassurance and stagger the volume of settled-status applications over a longer period. It says:

We expect the new online application system to be up and running in 2018 [Page 5, UK Factsheet.]

Applying early, therefore, would require a continuous residence in the UK from 2013 onwards. If there is reason for an employee to believe that they may need to break this continuity before 2021, applying early is advisable. Otherwise, they are likely to have three years in which to make an application. Applying before withdrawal, but after any teething problems with the online system and evidence requirements are solved, is probably the most sensible course.

Will the online system involve submitting a passport?

This isn't clear. The UK proposals mention providing 'evidence' of a passport, which could involve a different process to physical submission:

It is likely that those EU citizens and their family members who wish to take advantage of the streamlined digital process will need to provide evidence of their passport to prove their identity. [Page 12]

Evidence of some kind seems more than merely 'likely', but an alternative to submission appears to be the current preference.

What other evidence will they need?

Again, this isn't clear, although the parameters are fairly obvious. The Government says:

Our aim is to make the application process as streamlined and user-friendly as possible for EU citizens and their families lawfully resident in the UK. We intend to use existing government data, such as income records, to minimise the burden of documentary evidence required (for example, to prove continuous residence). [Page 12]

As the requirements could form part of the Withdrawal Agreement, there is an element of negotiation tactics in not setting out more detail. Equally, the Home Office might not have reached a view on what is feasible or desirable at this stage.

Will EU employees be forced to carry ID cards?

No. Contrary to the impression given by headlines like “EU must show us your ID papers!” (The Metro, 27 June 2017), there is no such requirement in the Government proposals.

Why is a residence document necessary?

The proposals assume that a new UK immigration system will put some restrictions on the ability of EU citizens to move to the UK for work, or to access public services. Employers can currently rely on an EU27 passport as sufficient evidence of a right to work. As soon as this changes, it becomes necessary to have an alternative to a passport or an ID card for EU citizens already living here. A residence document helps employers to avoid doubt and comply with the law.

Does a legal right to remain depend on getting a residence document?

This remains to be seen. According to the Government’s proposals:

After our departure, it will become mandatory to apply for permission to stay in the UK.
[page 13]

The European Commission has, at first glance, a different position:

EU27 citizens or UK nationals who resided legally respectively in the UK or EU27 at the date of entry into force of the Withdrawal Agreement should be considered legally resident even if they do not hold a residence document evidencing that right. [Page 2, [Essential Principles on Citizens’ Rights](#)]

It would be possible to consider someone as legally resident under the terms of the Withdrawal Agreement, while also recognising their breach of a mandatory requirement under UK law to register for permission to stay. The open question then relates to the consequences of the breach.

For employers, the question is whether an EU employee has the right to work in the UK. By far the easiest way for them to demonstrate that right is to apply for a residence document during the three-year window, irrespective of what the negotiations conclude about those who do not.

Does a gap in residence mean restarting the five-year clock?

Possibly. Without any further rules being applied, this would fall under the common law concept of being ‘ordinarily resident’, within which a person’s intention is paramount, rather than the length of time involved. Months spent elsewhere for study or for temporary work are compatible with being ordinarily resident in the UK. On the other hand, a week abroad that was begun with the intention to move permanently would, in theory, reset the clock on that person’s continuous residence.

For this reason, it would be far easier for the Government to apply some simple rules on permissible gaps rather than expose applications to complicated case law. Long holidays and study breaks are likely to be unproblematic, either way, with work placements depending on the circumstances.

What's the difference between 'settled status' and UK citizenship?

This is a question HR directors are likely to be asked more frequently as the process progresses. Settled status has been defined as equivalent to ILR, which gives the same rights as UK citizenship in most instances, but can be lost:

Indefinite leave to remain is also known as settlement or 'settled status', and having this means that a person can stay in the UK without any time restrictions. Indefinite leave can lapse, if the holder stays outside the UK for a continuous period of more than two years.

[Page 19]

UK nationals have an ongoing right of abode in the UK, regardless of the length of any periods spent abroad. On gaining settled status, EU citizens would be able to apply for naturalisation as a British subject after one year.

Is only qualifying for temporary status a problem?

Not really. It would be necessary to maintain a five-year period of continuous residence before applying for settled status, from whatever point this can be claimed. Under leave to remain:

A person who holds this immigration status has a time limit on his or her stay. In the context of this document, resident EU citizens granted this status under our proposed scheme would not be subject to further conditions, for example restrictions on employment or study. [Page 20]

This may restrict an employee's ability to undertake work abroad but, otherwise, should not represent a problem. It is obviously easier to apply just the once, rather than applying first for temporary status and again, later, for settled status.

Could any employees get caught out by the specified date?

Yes, it's essential for HR directors to be aware that if employees were first employed in the UK after March 2017, and the specified date is set before the start of their employment. They will be able to apply for temporary status, but might not qualify for settled status at the end of five years:

The ability of EU citizens arriving after the specified date subsequently to obtain further or indefinite permission to stay will depend on the rules in place at the time at which they apply. These will be decided by the UK closer to the time. [Page 11]

In reality, the specified date is unlikely to be set as early as March 2017, and could be as late as the withdrawal date in 2019. Even recent employees are unlikely to be affected.

Employees whose arrival falls after the specified date will still be able to apply for temporary status, but would face a different route to extending their stay or obtaining settled status. New employees arriving after withdrawal will be subject to whatever new immigration system or transitional arrangements are put in place.

What will happen at the end of the grace period?

This depends on the negotiations. Employers would need to assess the position of EU employees who had failed to apply for a resident document during the previous three years.

Could the proposed system change?

Yes. Although the Government will be reluctant to shift too far from its proposals, they represent its opening stance in a negotiation process, not a settled declaration of policy, let alone legislation. Once established in law, it is highly unlikely that proposals will change. It is not clear at this stage whether the Immigration Bill in the Queen's Speech will act as the vehicle for the proposals, or whether additional legislation will be introduced after negotiations have proceeded further.

The Government is offering its own email update service via:

www.gov.uk/guidance/status-of-eu-nationals-in-the-uk-what-you-need-to-know

The second round of talks begins on 17 July 2017.

¹ "Teamwork on the Fly", Harvard Business Review, April 2012.

² The 'Workforce Change' research was conducted by Opinium in September 2016 among 1,000 managers in small and large companies in the UK.

³ The *Rate your Manager* research was conducted by OnePoll in February 2016. They surveyed 1,000 employees and 1,000 managers across the UK.

⁴ Tony Nicholls, Management thinker/Change authority, "Just how can you quickly spin up teams on the fly and make them more efficiently?", *HR Zone*, 11th November 2016.

⁵ The 'New Year, New Career' research was conducted in November 2015 by OnePoll amongst 1,000 full-time employed adults in the UK.

⁶ Opinium conducted the research between 1st – 11th December 2016 among 2,000 UK adults in full-time employment (18 years +).

About LHH Penna

When your business is changing, you need to support your people through it. Whether you're restructuring, changing your culture or developing your leaders, we'll help. We work with companies to simplify the challenges of workforce transformation. We do that by helping their people navigate change, become better leaders, develop their careers or find a new path in life. The results: a strong employer brand, less risk and better business performance.

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