

Before you even employ anyone are they even eligible to work in the UK?

This is becoming a real issue for employers but did you know you must check new employees are eligible to work in the UK and have the appropriate documentation to be able to do so BEFORE THEY START WORK.

The new regime

29 February 2008 saw the beginning of radical reforms to immigration and migration with the introduction of a points based system similar to the Australian model. It is the Government's intention to sweep away the current complexities and to bring into force a flexible system which can respond to changes in the labour market as well as imposing Civil Penalties for illegal workers as from 29th February 2008.

The points based system will be based on a five tier structure and will have significant impact on those companies proposing to make new work permit applications and/or extension applications, in that they will need to apply to be licensed as a sponsor and have various ongoing obligations in order to maintain their licence.

Tier 1 which includes Highly Skilled Migrants and was implemented in March 2008. The criterion that must be met to make a successful application under Tier 1 is very similar to that under the existing Highly Skilled Migrant Programme (HSMP). The applicant will need to obtain 75 points in various sub-categories such as experience, qualifications, age, UK experience and earnings. Although the existing exemption that allows applicants with MBAs from certain universities automatically to score enough points to qualify has been removed. The English Language requirements have also been increased. Under the current HSMP the International English Language Testing System (IELTS) the applicant must reach Band 6. Under the new scheme they must score 6.5.

Highly Skilled Migrants who need to make an application for an extension of their existing leave to remain must do so under Tier 1. From April 2008 Indian

Highly Skilled Migrants coming to the UK for the first time must make their application under the new scheme and from Summer 2008 the scheme will go live for all highly skilled migrants coming to the UK.

Tier 2 covers the existing Work Permit Scheme, albeit on a greatly modified basis, and as from Autumn 2008 will include an English language requirement and electronic certificates of sponsorship issued by the licensed UK companies.

The future

The government plans to introduce another three tiers as follows:-

Tier 3: Limited Numbers of low skilled workers needed to fill temporary labour shortages; Tier 4: Students; and Tier 5: Youth mobility and temporary workers/people allowed to work in the United Kingdom for a limited period of time.

Migrants will score points based on aptitude, experience, age and also the level of need in any given sector.

New checks

Since February 2008 all prospective employees must be asked to provide identification of their eligibility to work in the UK prior to their commencement of employment. There is a list of approved documentation that Brethertons can provide you with should you need it however it is not enough just to check the documents. Accurate records need to be (1) made and (2) kept of the dates the checks are carried out and copies of the documents must be taken and filed. The converse side to this new obligation is a new range of penalties should employers fail to comply with it. There will be a new criminal offence for employers who *knowingly* employ illegal migrant workers and this offence will carry a maximum 2 year prison sentence and an unlimited fine. You may feel that you are safe from this penalty, however, there is also a civil penalty for those employers who *negligently* employ a person over the age of 16 who

is subject to immigration control and who has not been granted leave to enter or remain in the UK or whose leave is invalid/cease to have effect/subject to a condition preventing that person from being employed - an 'illegal migrant'. This is a trap that is easier to fall into if an employer is not carrying out the documentation prior to employing an individual.

Importantly, there will be a new continuing responsibility for employers of migrant workers with a time limited immigration status to check their ongoing entitlement to work in the United Kingdom. Employers are protected under the old rules for employees that they have taken on prior to 29 February 2009 provided that you have made the checks at the beginning of the employment. This raises particular issues for employers who inherit employees as a result of the purchase of a business or the taking on of a contract where TUPE (the Transfer of Undertakings (Protection of Employment) Regulations 2006 applies so as to transfer employees over to your business. In that situation you would be wise to ask all those transferring employees for ID.

Beware Discrimination

You must ask all prospective employees for identification documentation so as to be fair to all. If you only asked non British prospective employees that would be race discrimination. To apply a policy that you will only employ UK nationals or that you will not employ a particular nationality will also be race discrimination.

A word to the wise though, the person doesn't have ID or is not eligible to work in the UK you cannot just dismiss or not employ them as this could give rise to a race discrimination claim. They may be going through a process to obtain a work permit etc so you should take advice if this situation arises, especially as compensation for race discrimination is unlimited as there is no cap!