

RIGHT TO WORK (“RTW”) CHECKS IN THE UK - A REFRESHER AND SOME NEW RULES

Introduction

Since 2008, it has been necessary for all employers to ensure that any future employees (or workers) have the right to work (“RTW”) in the UK. This is required to prevent illegal employment and employers can be fined a civil penalty for non-compliance of up to £20,000, per illegal employee, and publicly named and shamed. The rules were introduced under the Immigration Asylum and Nationality Act 2006 and are regularly updated and hence it is recommended that you register with the [Home Office here](#) to receive regular updates.

It should be noted that anyone employed pre 29 February 2008 and who has continual employment since this date, is outside the scope of this legislation and no checks are required.

UK and Irish Nationals

Previous rules

The most common way to satisfy the RTW is to check the employee’s passport. At present this can be in person or a virtual check (under Covid relaxations, until 30 September 2022) whereby the document verification is carried out over a video link. The employer must ensure that the photo in the passport looks to be the same person as the employee and that the document looks to be genuine. A clear copy of the passport must be taken and retained. This process cannot be out sourced and must be carried out by the employer named in the employment contract. There are three main points to note here;

1. In a group situation, it is the actual employer, not another group company, who should carry out the checks
2. The check must be carried out before the employee starts – hence checking on the day the employee starts should only be done if the employee comes in early i.e before their start time (whilst this may seem to be a technicality, where problems arise, this can further augment any non-compliance)

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3. The copy documentation must be kept for two years after the employment ends.

If the potential employee does not have a passport or a birth (or adoption) certificate, a certificate of registration or naturalisation as a British citizen can be provided, together with a letter from a Government Agency (e.g HMRC) showing the person's name and National Insurance number. Assuming the documents appear genuine and the details correspond with the information known of the employee, this is sufficient. Again copies must be taken and retained for the same period as mentioned above.

Rules with effect from 6 April 2022

The same in person or virtual (until 30 September 2022) checks, as described above, will remain valid. Alternatively, and with effect from 6 April 2022, an Identity Service Provider (IDSP) can be appointed, who it is recommended is certified, and this IDSP can undertake part of the verification process, albeit the ultimate responsibility will still rest with the employer. This will enable the employer to continue with an alternative virtual check beyond 30 September 2022 and may be useful where remote working is in place. It is anticipated that the cost of this out sourced verification will be in the region of £70 per employee. To undertake this process, the employee must have a valid passport and agree to upload their details to the IDSP, who will utilise validation tools to verify the document details and run other verification checks. A list of certified IDSPs can be found [here](#) although this certification is presently in its infancy.

If an IDSP is to be used, employers should review their documentation and processes, ensuring offer letters and employment contracts make reference to such third party checks being carried out where relevant, and considering GDPR related matters too.

Non UK and Non Irish Nationals

Where an individual has a Biometric Residence Card, Frontier Worker Permit or Biometric Residence Permit, employers must use the Home Office's online Right To Work portal from 6 April 2022 found [here](#).

There was no obligation previously to carry out such checks online and employers could obtain the relevant original document, such as a Biometric Residence Card, and make the necessary checks in front of the employee.

To use the right to work portal, the individual must log on and provide their employer with a share code, beginning with W, and their date of birth. The employer then logs on using these two pieces of data and carries out their checks of the individual, including a video call or in person to ensure that the individual and their photo match. The portal will provide details of the individual's right to work, the authorised roles and specify any restrictions. In addition, the employer should note the date that the RTW expires and ensure they have systems in place to follow up the RTW before it expires. Finally, the employer should retain a copy of the individual's profile page on file for the duration of the employment, plus two years.

EU Settlement Scheme

With effect from 1 July 2021, EEA and Swiss nationals must provide evidence of their RTW in the UK. If the individual has either settled or pre-settled status under the EU Settlement Scheme, employers must use the online Home Office portal to verify their status. Where the individual has pre-settled status, the employer should note when this expires and carry out a follow up check before the RTW expires. There may be occasions where the application is still pending and if this is the case, legal advice should be sought.

Asylum Seekers

The Government has introduced various rules regarding the RTW and asylum seekers over the years and these are often changing in response to world and political events. Hence it is advised that the latest Government guidance is reviewed if there is a potential employment situation. As a general rule, asylum seekers cannot work in the UK whilst their claim is being considered; there are some exceptions such as where the claim has taken more than 12 months through no fault of the individual.

Students

Many overseas students will have been granted a RTW in the UK during their study period, but there are often strict conditions associated with the RTW. Employers must be careful that any contracts issued are not in breach of these conditions. The most common scenario is for a Tier 4 student visa to have been issued, which will generally restrict the student to working a maximum of 20 hours per week during term time; care needs to be taken for a postgraduate research student as often there will not be designated term dates and hence the 20 hours per week is for the whole year. At the end of the student's studies, they can usually work for a period of up to 4 months full time. However, employers must check the details of each potential employee's visa.

Indefinite Leave to Remain ("ILR")

If a potential employee has been granted an ILR, which is usually evidenced by a stamp in the passport, then this provides the employer with the necessary confirmation of a RTW in the UK, subject to undergoing the normal validity checks. However, if the ILR stamp is in an expired passport, this is not acceptable for a RTW - the employee needs to apply for a biometric residence permit.

Conclusions

Whilst recruiting staff is part and parcel of any business, the RTW checks are onerous and should not be treated lightly, as the penalties for non-compliance are high. Furthermore, employers should ensure that their policies are up to date and, where information is to be shared with third party agencies for checking, this should be explicitly stated, and potential employees made aware of the data sharing. There are very detailed rules surrounding each scenario of potential employees and this briefing sets out a high level review, detailing the main changes introduced in April, and as currently announced, the changes for the end of September.

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