

EXPLANATORY MEMORANDUM TO
THE IMMIGRATION SKILLS CHARGE REGULATIONS 2017

[2017] No. [XXXX]

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department for Education and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 The Immigration Skills Charge Regulations 2017 (“the Regulations”) impose an obligation on persons who sponsor skilled migrants from certain overseas territories to pay a charge in respect of each skilled migrant whom they sponsor (that charge being “the immigration skills charge” or “the charge”).
- 2.2 These Regulations set out how the charge will operate, including by setting the amount of the charge, and providing exemptions from the obligation to pay it. The Regulations also specify when the charge must be paid and the consequences of non-payment.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

Other matters of interest to the House of Commons

- 3.2 Disregarding minor or consequential changes, the territorial application of this instrument includes Scotland and Northern Ireland.

4. Legislative Context

- 4.1 These Regulations are made under section 70A of the Immigration Act 2014, which was inserted into that Act by section 85 of the Immigration Act 2016. They are subject to the affirmative resolution procedure, and this is the first time that the regulation-making power is being used.

5. Extent and Territorial Application

- 5.1 The extent of this instrument is the United Kingdom.
- 5.2 The territorial application of this instrument is the United Kingdom.

6. European Convention on Human Rights

- 6.1 The Minister of State for Apprenticeships and Skills, Robert Halfon, has made the following statement regarding Human Rights:

“In my view the provisions of the Immigration Skills Charge Regulations 2017 are compatible with the Convention rights.”

7. Policy background

What is being done and why

- 7.1 Through the introduction of an immigration skills charge, the Government wants to incentivise employers to invest in training and upskilling the resident workforce, thus reducing reliance on migrant workers.
- 7.2 The Government is seeking to increase investment in skills to increase UK productivity. The data show that, on average, employers in the UK under-invest in training compared to other countries. There are many examples of good practice but at an economy-wide level, employer investment in training has been declining for 20 years; the UK is now 22nd out of 28 in the EU for the proportion of employees taking part in continuing vocational training courses.
- 7.3 In addition, the Labour Force Survey showed that by 2014 the number of workers participating in training courses away from their own workplace had collapsed since 1992. Eurostat's Continuing Vocational Training Survey showed that UK workers undertake 20% less continuing vocational training on average than the EU average. The UK Commission for Employment and Skills Employer Skills Survey 2015 showed that, while overall employer investment in training (in-kind and cash) increased between 2011 and 2015, per employee expenditure flat-lined at £1,600. The Survey also highlighted that there has been an increase in the proportion of businesses who only provide Health and Safety or induction training (11%, up from 9% in 2013), which is arguably not the training that will best equip individuals with the technical, analytical or people skills that staff need.
- 7.4 The immigration skills charge will be collected by the Home Office as part of the visa sponsorship process. The Home Office will transfer the income to the Consolidated Fund, less an amount to cover collection and administrative costs. The population percentages underlying the Barnett formula will be used by HM Treasury to determine the split of funding between the Department for Education and each of the Devolved Administrations. The income raised by the charge will be put towards addressing skills gaps in the UK workforce (less an amount to cover Home Office collection and administration costs). Further information about how the income from the charge will be used will be set out in due course.
- 7.5 There is a large degree of uncertainty around the potential income raised by the charge. A number of assumptions must be made in order to calculate the potential income, including the response of employers to the introduction of the charge, recently implemented changes to the Tier 2 skilled migration route and other forthcoming changes to Tier 2, and other factors which might affect Tier 2 volumes and compositions in the future. Each of these assumptions is subject to uncertainty. Based on current Tier 2 usage and the rate and exemptions announced in March 2016, it is estimated that the charge will raise £100 million in 2017/18.
- 7.6 The Government's intention to legislate for the charge was announced by the then Prime Minister in May 2015. The independent Migration Advisory Committee endorsed its introduction in its review of the Tier 2 skilled migration route in January 2016. The rate and scope of the charge were announced in a written ministerial statement on 24 March 2016. The charge is due to be introduced on 6 April 2017.
- 7.7 The immigration skills charge will be payable by sponsors licensed by the Secretary of State in the UK to recruit skilled workers from outside the European Economic

Area. The charge will be payable in respect of each skilled worker whom the sponsor recruits.

- 7.8 A skilled worker is defined as a worker who: is required to be sponsored in a job that, is skilled to level 4 or above of the Regulated Qualifications Framework, as applied by the immigration rules from 6 April 2017; is remunerated appropriately in accordance with the immigration rules; and who either (i) has been the subject of a resident labour market test as defined by the immigration rules (unless an exemption from the obligation to undertake that test applies) or (ii) will be applying for leave as an intra-company transfer. (An intra-company transfer involves the transfer of an established employee of a multi-national company who is temporarily transferred from outside the EEA to the UK branch of their organisation to undertake a skilled job which cannot be carried out by a new recruit.) The effect of the definition is to apply the immigration skills charge to sponsors of those seeking entry and stay in the UK under the provisions currently set out in the Tier 2 (General) and Tier 2 (Intra Company Transfer) categories of the immigration rules, subject to certain exemptions and transitional provisions (see paragraphs 7.16 to 7.18 below).
- 7.9 A sponsor will be liable to pay the charge at the point that it assigns a certificate of sponsorship to a skilled worker. The certificate of sponsorship itself is an integral part of the visa application process. In order to employ a skilled worker from outside the European Economic Area, an employer must first be licensed as a sponsor by the Home Office. A sponsor licence enables an employer to assign certificates of sponsorship online. The certificate sets out the details of the individual being sponsored and the job they are being sponsored to do. The certificate of sponsorship is a precursor to an application by the worker for entry clearance or leave to remain. Sponsorship provides evidence that the migrant will fill a genuine vacancy that can't be filled with a suitably qualified or skilled settled worker. It also requires employers to accept certain duties expected when sponsoring a migrant worker, for example ensuring that the employee continues to be employed in an appropriate role and paid an appropriate salary, and reporting any significant changes in their circumstances.
- 7.10 An employer must normally try to recruit a resident worker before sponsoring a skilled worker from outside the European Economic Area to fill a vacancy. The resident labour market test requires the employer to advertise the post nationally, in at least two media, for a minimum of 28 days. Only if no suitable resident workers are available can they assign a certificate of sponsorship. Some exemptions apply, for example for jobs in shortage occupations or if the person being sponsored is switching from the student route after completing their course.
- 7.11 The charge will be payable where a sponsor assigns a certificate of sponsorship to a skilled worker who is outside the United Kingdom and who therefore needs to apply for entry clearance. The charge will also be payable when a sponsor assigns a certificate of sponsorship to a skilled worker who is already in the United Kingdom, and that skilled worker intends to vary his or her existing leave. The full amount must be paid for the assignment of the certificate of sponsorship to be valid, and the certificate must be assigned before an individual can apply for entry clearance or leave to remain as a skilled worker. Without a certificate, the worker's application will be unsuccessful.
- 7.12 Additionally, the effect of the regulations is that where the charge has been paid in respect of an individual by a sponsor, but the individual seeks to change sponsor, the new sponsor will be required to pay the charge.

- 7.13 Where an individual applies to stay with their existing employer during their current period of leave but changes role into a different standard occupational classification code and the end date of their leave is later than that originally granted, the sponsor will be required to pay the charge for the additional length of leave requested. But, where an individual applies to stay with their existing employer during their current period of leave but their role changes such that it falls within a different standard occupational classification and their period of leave remains unchanged, the sponsor will not be required to pay the charge for this change.
- 7.14 Where an individual has leave or entry clearance under a different visa route at the time the regulations come into force, and later applies to switch to the skilled worker route, the sponsor will be required to pay the charge (except those seeking to vary existing leave in the UK as a student).
- 7.15 The charge itself is payable in the following amounts in pounds sterling and as indicated by the figures in the table, the amount of the charge depends on the duration of the skilled worker's prospective employment in the United Kingdom. The charge is set at a lower level for certain sponsors who are charities or small businesses.

	<i>Small or charitable sponsors</i>	<i>Other sponsors</i>
12 months or less	£364	£1000
More than 12 months, but no more than 18 months	£546	£1500
More than 18 months, but no more than 24 months	£728	£2000
More than 24 months, but no more than 30 months	£910	£2500
More than 30 months, but no more than 36 months	£1092	£3000
More than 36 months, but no more than 42 months	£1274	£3500
More than 42 months, but no more than 48 months	£1456	£4000
More than 48 months, but no more than 54 months	£1638	£4500
More than 54 months, but no more than 60 months	£1820	£5000

- 7.16 There are a number of exemptions from the obligation to pay the charge. In particular, the charge will not be payable by a sponsor in respect of certain graduate trainees, those in certain PhD level occupations, and those seeking to vary existing leave in the UK as a student.
- 7.17 The charge will not be payable where a skilled worker has, at the time the regulations come into force, leave to remain in the United Kingdom as a skilled worker. Nor will it be payable in respect of a person who has been issued a certificate of sponsorship before the regulations have come into force, and the application made using that certificate of sponsorship resulted in leave being granted as a skilled worker, with the skilled worker taking up work with the sponsor who issued the certificate.
- 7.18 Nor will a sponsor be liable to pay the charge when it assigns a certificate of sponsorship to a worker who was already in the UK as a skilled worker at the time the

regulations come into force and subsequently seeks to extend or vary their leave, whether by changing employer or otherwise.

- 7.19 A refund of all or part of the charge may be given. The circumstances will be set out in guidance.
- 7.20 In March 2016, the Government announced that it will simplify the immigration rules for work categories, removing the out-dated terminology of tiers and points-scoring. These regulations do not, therefore, refer to Tier 2 but to rules for skilled workers and intra-company transfers.

Consolidation

- 7.21 There is no need for any consolidation as this is the first time that this power has been used.

8. Consultation outcome

- 8.1 The recommendations in the independent Migration Advisory Committee's January 2016 report, following its review of the Tier 2 skilled migration route, informed the development of this policy. The Committee consulted widely before making its recommendations to the Government. Its report is available on the gov.uk website at <https://www.gov.uk/government/publications/migration-advisory-committee-mac-review-tier-2-migration>.
- 8.2 While most respondents to the Committee's consultation were not in favour of the proposed charge, the Committee strongly supported its introduction. The Government considered the Committee's recommendations before announcing the rate and scope of the charge on 24 March 2016, including the Committee's advice that it considered "...for the sake of simplicity, clarity and in order to maximize its effect, the ISC be applicable to all employers recruiting migrants across all Tier 2 routes". The Government also took account of the MAC's advice that "... the ISC takes the form of an upfront payment added to the cost of a Certificate of Sponsorship, payable at the time of application for the initial CoS and extension visas. The charge should be calculated based on the length of the CoS".
- 8.3 In deciding to introduce the policy, the Government also took account of data on investment in training by UK employers (see paragraphs 7.2 and 7.3 above).
- 8.4 A full public consultation has not taken place.

9. Guidance

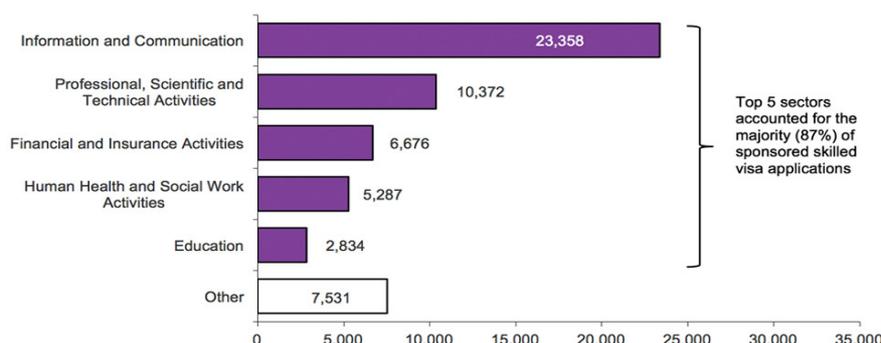
- 9.1 Detailed guidance relating to the charge will be placed on the gov.uk website.

10. Impact

- 10.1 The impact on business, charities or voluntary bodies is that those employers that are sponsors under the Tier 2 skilled worker route will be required to pay the charge.
- 10.2 The impact on the public sector is that those public sector employers that are sponsors under the Tier 2 skilled worker route will be required to pay the charge.
- 10.3 The charge will impact employers who use the Tier 2 (General) and Tier 2 (Intra Company Transfer) routes to recruit skilled workers. The impact will vary depending on whether employers choose to use the Tier 2 route, the number of Certificates of Sponsorship employers choose to assign, whether they will be required to pay the

standard rate or the reduced rate for smaller sponsors and charities, and also the length of time an employer chooses to employ a worker for. We might expect employers who currently rely on Tier 2 to benefit the most from the upskilling of the resident workforce, which the income raised by the charge will be put towards.

- 10.4 The table below shows the five sectors that accounted for the majority of sponsored skilled visa applications, according to Home Office Immigrations Statistics published on 23 February 2017:



- 10.5 An Impact Assessment has not been prepared for this instrument. The immigration skills charge is classified as a tax and is therefore out of scope of the new Better Regulation Framework.

11. Regulating small business

- 11.1 The legislation applies to all employers that are sponsors under the Tier 2 skilled worker route, which could include small businesses.
- 11.2 To minimise the impact of the requirements on small businesses, small businesses that employ skilled migrants from outside the European Economic Area will pay a reduced rate.

12. Monitoring & review

- 12.1 The Department for Education will keep the operation of the charge under review, with support from, amongst others, the Home Office. This will include reviewing the policy after 12 months' operations. Parliament will receive an assessment of income generated by the charge after the first year of operation.

13. Contact

- 13.1 Queries regarding this instrument should be directed to the Department for Education at immigration.skillscharge@education.gov.uk.