

EXPLANATORY MEMORANDUM TO

THE IMMIGRATION (RESTRICTIONS ON EMPLOYMENT ETC.) (AMENDMENT) (EU EXIT) REGULATIONS 2023

2023 No. 12

1. Introduction

- 1.1 This Explanatory Memorandum has been prepared by the Home Office and is laid before Parliament by Command of His Majesty.
- 1.2 This Explanatory Memorandum refers to “EEA citizens” to mean citizens of the European Union (EU) countries and of other constituent countries of the European Economic Area (EEA) (Iceland, Liechtenstein and Norway) and of Switzerland.

2. Purpose of the instrument

- 2.1 This instrument makes amendments to immigration (including access to benefits and services).
- 2.2 It makes changes to the controls on migrant access to employment and the prescribed checks employers should make in order to obtain a statutory excuse against a civil penalty for employing a person without the right to work as a result of their immigration status. It also makes analogous amendments to regulations relating to illegal working compliance orders.
- 2.3 This instrument also makes other minor amendments to domestic subordinate legislation, including to the Citizens’ Rights (Restrictions of Rights of Entry and Residence) (EU Exit) Regulations 2020 (Restrictions Regulations 2020) and to the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020 to make them compliant with the EU Withdrawal Agreement, the EEA EFTA Separation Agreement and the Swiss Citizens’ Rights Agreement (“the Agreements”). Under the Restrictions Regulations 2020 a decision to deport certain EEA citizens and their family members, based on conduct that occurred before the end of the transition period at 11pm on 31 December 2020, can only be taken on serious grounds of public policy or public security in relation to a person with indefinite leave to enter or remain granted under Appendix EU (that is settled status under the EU Settlement Scheme (EUSS)). The amendment provides that said persons with limited leave to enter or remain granted under Appendix EU (that is pre-settled status under the EUSS) are also entitled to consideration on such grounds if they are eligible for settled status but do not yet have it.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

4. Extent and Territorial Application

- 4.1 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is the United Kingdom.

4.2 The territorial application of this instrument (that is, where the instrument produces a practical effect) is the United Kingdom.

5. European Convention on Human Rights

5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

6. Legislative Context

6.1 The Immigration, Asylum and Nationality Act 2006 (2006 Act) introduced the Right to Work Scheme. The Scheme allows the Secretary of State to serve an employer with a notice requiring the payment of a civil penalty of a specified amount where they have employed an individual who is disqualified from working on account of their immigration status.

6.2 Legislation setting out employer responsibilities to prevent illegal working has been in place since 1997. Since 2008, a system of civil and criminal sanctions for non-compliance has been in place, set out in the 2006 Act (sections 15-25).

6.3 The Immigration (Restrictions on Employment) Order 2007 (2007 Order) prescribes how an employer will be excused from paying a penalty where they conduct checks online (using the Home Office online right to work service on GOV.UK), use Identification Document Validation Technology (IDVT) service providers or undertake manual (checking of physical documents) right to work checks.

6.4 The Immigration Act 2016 (2016 Act) supplemented the controls provided in the 2006 Act by setting out a regime for illegal working business premises closure notices and compliance orders where employers repeatedly flout the law by employing illegal workers. This instrument amends the Illegal Working Compliance Orders Regulations 2016 (2016 Regulations) in order to ensure that the checks to be conducted by such employers are in line with the changes described above.

6.5 The Restrictions Regulations 2020 continued in effect, with modifications, certain provisions of the Immigration (European Economic Area) Regulations 2016 in relation to deportation decisions taken against those with leave to enter or remain granted by virtue of residence scheme immigration rules (that is, leave to enter or remain granted under Appendix EU).

7. Policy background

What is being done and why?

7.1 Employers are required to carry out checks, applicable to everyone including British and Irish citizens, to ensure an individual has lawful status in the UK before they employ them.

7.2 Right to work checks have been modernised by introducing digital checks using the Home Office online checking service as an alternative to paper and card-based documents for an increasing number of migrants. Employers have been able to rely on the online service to provide a defence against a civil penalty since 28 January 2019.

7.3 This instrument changes the way those with a continuing right to work due to an outstanding in-time immigration status application – submitted before their previous permission expires – or an associated administrative review or appeal, prove their

right to work. The instrument will enable them to use the online checking service to prove their right to work.

- 7.4 Those with an outstanding, in-time application for permission to stay in the UK have never been provided with a physical document confirming their lawful status in the UK without a check being required with Home Office checking services to confirm their rights. The instrument makes it simpler for employers to determine such an individual's right to work and makes it clearer what permission is held at what time. It also supports the delivery of a fully digital approach to applying for immigration status in the UK.
- 7.5 Under the 2016 Act, a court may make an illegal working compliance order. The 2016 Regulations prescribe the right to work checks which must be conducted, and the documents which must be produced to an immigration officer, where this is ordered by the court. The checks and documents specified in the 2016 Regulations are intended to be aligned with those which would give employers a statutory excuse from paying a civil penalty under the 2007 Order, and this instrument gives effect to that intention (regulation 5).
- 7.6 Under Appendix EU, a person with pre-settled status under the EUSS does not have to apply for settled status before their pre-settled status expires after five years. This means that someone granted pre-settled status after four years' continuous residence in the UK will be eligible for settled status after one year of further continuous residence but does not need to apply for settled status for a further four years. The instrument amends the Restrictions Regulations 2020, so that those with pre-settled status under the EUSS who are eligible for settled status can be considered under the higher deportation threshold as well as those who already have settled status.
- 7.7 Amendments to the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020 will ensure, for the purposes of access to benefits and services, that certain members of the post-transition group with a derivative right of residence under regulation 16 of the Immigration (European Economic Area) Regulations 2016 are included as protected by the Agreements. The amendments will also ensure that certain EEA citizens and their family members living in the UK before the end of the transition period can access social housing and homelessness assistance in Scotland under the Housing (Scotland) Act 1987, where eligible.

8. European Union Withdrawal and Future Relationship

- 8.1 This instrument is not being made under the European Union (Withdrawal) Act 2018 but relates to the withdrawal of the United Kingdom from the European Union because it makes changes as a consequence of, or in connection with, the end of free movement as enacted by the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 and because it implements obligations in the Agreements under the powers in the European Union (Withdrawal Agreement) Act 2020.

9. Consolidation

- 9.1 It is not intended to consolidate the various subordinate legislation amended by this instrument.

10. Consultation outcome

- 10.1 The Scottish Government has agreed the proposed amendments to the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020.

11. Guidance

- 11.1 This instrument will come into force on 2 February 2023. Guidance for employers will be updated to reflect these changes. It will be published in advance of the changes coming into force. Updated guidance for decision makers on deportation will be published when the relevant change comes into force

12. Impact

- 12.1 There is no, or no significant, impact on charities or voluntary bodies.
- 12.2 There is no, or no significant, impact on the public sector.
- 12.3 A full Impact Assessment has not been prepared for this instrument because the amendments relate to the maintenance of existing regulatory standards.
- 12.4 The changes to the Right to Work Scheme are not considered to have any adverse impact upon business and may lead to savings in costs. Use of the Home Office online checking service will reduce the regulatory burden on business and streamline employment checking processes to generate potential efficiency savings.

13. Regulating small business

- 13.1 The legislation applies to activities that are undertaken by small businesses. The instrument will have no, or no significant, impact on the regulation of small businesses.

14. Monitoring & review

- 14.1 The approach to the monitoring of this legislation is that an internal review will be carried out within 12 months of the legislation coming into force and the legislation may be amended accordingly.
- 14.2 This instrument does not include a statutory review clause and, in line with the requirements of the Small Business, Enterprise and Employment Act 2015, Rt Hon Robert Jenrick MP, Minister for Immigration, has made the following statement: a statutory review clause is not considered necessary here as the measures are beneficial to business and a review clause would be disproportionate.

15. Contact

- 15.1 John Harrison email: john.harrison@homeoffice.gov.uk and Thomas Ellis email: thomas.ellis@homeoffice.gov.uk at the Home Office can be contacted with any queries regarding this instrument.
- 15.2 Rebecca Nugent, Deputy Director for Compliant Environment Unit at the Home Office, and Matthew Bligh, Deputy Director for Enforcement and Criminality Policy Unit at the Home Office, can confirm that this Explanatory Memorandum meets the required standard.

15.3 Rt Hon Robert Jenrick MP, Minister of State for Immigration at the Home Office, can confirm that this Explanatory Memorandum meets the required standard.