

Farewell to free movement

Samar Shams considers how employers and their advisers should prepare for Brexit, possible restrictions on travel to the US and higher fees to sponsor migrant workers



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The meaning of Brexit has changed continuously since the British referendum to leave the EU nine months ago and will continue to do so. This article focuses on how employers can ensure their businesses' fitness for the future in a shifting immigration landscape.

How to support workers from the EEA

Brexit means the end of free movement, as Theresa May made clear in a speech on 17 January on exiting the EU. In the speech setting out the UK's 12 priorities for negotiating Brexit, she said:

You cannot control immigration overall when there is free movement to Britain from Europe... Brexit must mean control of the number of people who come to Britain from Europe.

She also described a phased process of implementation, which would begin at the end of a two-year Article 50 process. For European Economic Area (EEA) migrants, this is likely to translate into their rights being determined by their arrival date in the UK. Those arriving before the referendum on 23 June 2016 would enjoy the best treatment. Those arriving between 23 June 2016 and the date of Brexit would constitute another tranche afforded certain rights, while those EEA nationals arriving after the Brexit date would be treated differently again.

Employers should encourage EEA national employees and any affected family members to apply for documentation of their rights. We don't know what evidence people will be required to produce. However, it seems likely that those who already have

documentation of their rights will find it easier to maintain those rights in the future.

Some employers are supporting employees by providing EEA application surgeries and training sessions, or by paying for immigration lawyers to assist with applications. EEA nationals and EEA national family members who have not yet been in the UK for five years do not qualify for documentation showing the right of permanent residence. However, they can apply for documentation of their right of extended residence and should be encouraged to do so.

What UK policies might replace free movement?

The UK needs both highly skilled and low skilled workers to support its economy.

The chancellor, Philip Hammond, stated in Treasury questions on 25 October 2016 that post-Brexit controls would not apply to highly skilled and highly paid EU workers. It is not clear how this assertion would translate into immigration policies. EU nationals could perhaps apply for a document confirming their highly skilled status. Their current or prospective employer could certify that they are skilled in their industry sector. It might be necessary for a third party, perhaps the Department for Business, Energy and Industrial Strategy or UK Visas and Immigration, to endorse the individual.

While these measures may seem onerous, they would be less rigid than the current requirements for skilled non-EEA workers, and would resemble the skilled-worker points system in Australia. Theresa May has,

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however, argued that the Australian points-based system is not suitable for the UK as it does not give the government control over numbers.

Even with controls over numbers, the UK would need to admit lower-skilled workers. David Metcalfe, the former head of the Migration

Under SAWS, the Home Office contracted with operators through whom workers would apply and be allocated to employers. Employers had to accommodate workers and they could not bring in family members. At the time SAWS closed, the cap was 21,250 migrants per year.

There have been calls to introduce regional visas to channel migration to regions with low populations and skills gaps. There may be practical difficulties, however, given that the UK is a relatively small country where people are more likely to live and work in different locations and to travel frequently to different sites.

Potential regional visa programmes could include a London visa. The London Chamber of Commerce has proposed granting current EU employees permanent residence and a new Capital Work Permit system to control future migrant worker access.

Scotland, where 62% of voters wanted to remain in the EU, is another strong candidate for a regional visa programme. In a speech on 20 December 2016, Nicola Sturgeon, Scotland's First Minister, proposed that Scotland should remain in the Single Market, with control over its own immigration policies. In her response to Theresa May's speech on 17 January 2017, Sturgeon said that the UK leaving the Single Market would 'undoubtedly' bring a second Scottish independence referendum closer.

Even with controls over numbers, the UK would need to admit lower-skilled workers.

Advisory Committee who was recently appointed as the first director of labour market enforcement, has suggested that lower-skilled EU migrants should be subject to a work authorisation scheme. The scheme would be modelled on the time-limited and capped Seasonal Agricultural Workers' Scheme (SAWS), which closed in 2013. SAWS applied to Romanian and Bulgarian nationals in the period before they benefitted from full free-movement rights under EU law.

The scheme could be tailored to lower-skilled sectors such as retail, construction and food processing, but the cap would need to be significantly increased to meet the UK's needs.

This two-tier solution has been advocated recently by several Labour MPs, who advocate free movement for the highly skilled with job offers and sector-based quotas for lower-skilled workers.

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Sectoral free movement programmes are also possible. The National Farmers' Union has voiced deep concern about inadequate seasonal labour sourcing, citing the need for a further 40,000 seasonal workers a year. It has mooted a new student workers' scheme, open to all international agricultural students.

Impact of Trump's travel ban

US President Donald Trump offers a parallel universe, where banning citizens of seven countries and all refugees keeps America safe, despite 15 of the 19 9/11 attackers being Saudi Arabian citizens (whom his travel ban did not cover) and despite evidence that private Saudi Arabian citizens provide terrorist groups with most of their funding. The travel ban brought into force by executive order on 27 January 2016 was terminated via a temporary restraining order issued by a federal judge. At the time of writing this article, the Trump administration had announced that it was preparing a new version of the travel ban that would address the constitutional concerns raised by the courts.

The travel ban is one of ten immigration policies that Trump set out in a speech at a rally in Arizona on 31 August 2016. Other policies include a wall along the Mexican border and termination of Obama's amnesty policies.

The general effect of Trump's immigration policies is likely to be adverse for multinational companies with major operations in the US. Multinational corporations swiftly condemned the travel ban initiated on 27 January, with Starbucks, Amazon, Google, Netflix and Apple all voicing objections. Representatives from a variety of sectors, including tech, finance, travel and entertainment have argued that a travel ban would be damaging.

It is worth noting that companies might be able to access exemptions from the ban for affected employees. On 2 February 2017, Microsoft filed a formal request asking the US Secretaries of State and Homeland Security to create a process to grant exceptions to the January executive order to permit 'responsible known travelers with pressing needs' to re-enter the country while protecting the nation's security. The 27 January ban was rendered ineffective the day after Microsoft made its request so we don't know whether the request would have been granted. If the

administration creates a process to grant exceptions to a travel ban, the effects on many companies could be limited to an administrative burden.

In contrast to the effects on US-based multinationals, UK employers might benefit from a US travel ban. Whereas such a ban would make it more difficult for US employers to attract the best talent and compete in the international marketplace, it would make UK companies more attractive to skilled workers and investment. Further,

Home Office. It may be helpful to communicate with its officials through an immigration adviser to mitigate potential exposure to penalties. It is important to request clarifications and exceptions where appropriate and to challenge disadvantageous decisions where possible.

Prevention of illegal working practices and documentation should be robust and up to date. Employers who are sponsors of migrant workers

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some of the banned countries, including Somalia and Sudan, enjoy strong GDP growth, so a US travel ban would afford the UK the opportunity to build stronger links with these growing economies. UK companies with a presence in the US would suffer disruption to operations, however, if their employees fell under the terms of any ban.

Steps to take now

In-house counsel should encourage employers to focus on maintaining a good relationship with the

should ensure that their sponsor compliance systems are effective.

The government has been collecting information via a number of public enquiries. UK policy makers have been seeking businesses' views and their openness to suggestions on immigration policy has been unprecedented. Whatever the other potential effects of Brexit and Trump's presidency may be, they could provide a great opportunity for reform of the UK immigration system. ■

The Immigration Skills Charge is coming

There is one more important change that UK employers and their advisers need to prepare for: from 6 April 2017, the Immigration Skills Charge will significantly increase the fees payable by employers when sponsoring skilled migrants. The charge is only relevant to sponsors of Tier 2 migrants under the Points-Based System.

The Immigration Skills Charge is being introduced via the Immigration Act 2016 following a recommendation from the Migration Advisory Committee. Its aims are to encourage employers to train the resident workforce and to reduce reliance on migrant workers.

Employers will pay £1,000 per year per migrant, so a three-year visa will result in a £3,000 surcharge and a five-year visa will mean a £5,000 surcharge. A reduced charge of £364 per year per migrant will apply to small companies and charities. Employers will have to pay the fee upfront when a Certificate of Sponsorship is assigned to a skilled worker as part of the sponsorship process.

Organisations can mitigate the effects of the charge by carrying out any planned recruitment within the next month.

The Immigration Skills Charge will not apply to Tier 2 migrants who are sponsored under Tier 2 before 6 April 2017 and are applying to extend their stay in the UK under Tier 2. There will be exceptions to the Immigration Skills Charge, including one for Tier 4 students switching into working visas. Also, unlike the Immigration Health Surcharge, there will be no Immigration Skills Charge for dependent family members applying with the main applicant.