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BREXIT

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## 3. EU rights of residence as a worker

This information sheet explains how citizens of European Economic Area (EEA) countries and of Switzerland gain the right to reside in the UK as a worker (an employed person) under European Union (EU) law.

### Right to reside as a worker

EEA/Swiss nationals have an initial right of residence in the UK for a period of three months without restrictions. They may then gain a right of residence in the UK if they undertake activity as a worker, self-employed person, student or are a self-sufficient person. These activities are often known as 'exercising Treaty rights' as they are rights of free movement protected under the EU treaties. Other rights associated with the right to reside include the right to be accompanied by certain family members and protection from discrimination. People who have exercised Treaty rights for a continuous period of five years in the UK will acquire permanent residence though there are circumstances in which this may be acquired sooner.

### Who qualifies as a worker under EU law?

A worker is an employee: a person employed for a period of time to work for another person or a company and receives payment for their work. EU law does not specify the number of hours that need to be worked or the amount of money to be earned in order for a person to qualify as a worker. Instead, the work undertaken must be an 'effective and genuine' activity and must not be on 'such a small scale as to be regarded as purely marginal and ancillary'. One way of understanding this (but not the only way) is to consider whether the work has genuine economic value and whether it is needed, but decision-makers need to look at all the circumstances to determine if work is 'effective and genuine'. Case law can give guidance on when work may be considered 'effective and genuine' and there are some examples below.

### Can part-time work be considered?

Yes. Part-time workers may be considered workers for the purpose of the right to reside provided that the work is not marginal. In the case law, a piano-teacher giving 12 lessons per week supplementing their income with social security payments was recognised as a worker. Ten hours work per week was accepted as 'effective and genuine' in another case. In some cases, even fewer hours may be sufficient depending on the existence of other factors that could demonstrate that the work is genuine and effective.

### Is a minimum level of earnings required?

EU law does not specify a minimum level of earnings necessary to be considered a worker. The work must simply be 'genuine and effective' activity and not on such a small scale as to be marginal. In cases considered by the European Court of Justice, and its successor, the Court of Justice of the European Union, people have been accepted as workers even where their earnings were below the level necessary for a minimum standard of living and needed to be supplemented with benefits.

In the UK, decision-makers apply a Minimum Earnings Threshold which is £155 per week or £8,112 per year in 2016/7. Those earning more than the threshold are regarded as workers whereas the circumstances of those earning less than this threshold will be considered more closely to assess whether their activity is 'genuine and effective'. Factors that may be considered in addition to earnings include the number of hours worked, the regularity of the activity, the length of the contract, and whether this was intended as being short or long-term. It is arguable that the use of a minimum earnings test breaches EU law and could be challenged through bringing a test case.

### **How are periods out of work considered?**

EU law recognises the need for a person to have time to find a job after arriving in another EU country in order to be able to exercise their Treaty rights as a worker. Under EU law, a person may seek employment for a period of six months and this period may be extended if they can provide evidence that they are continuing to seek work and have a genuine chance of being engaged. This is not reflected in the UK regulations that are applied. These allow (in addition to the initial three month right of residence) a period of 91 days to look for work if the person can evidence a genuine chance of being engaged at that stage and require stronger evidence for this period to be extended. The additional requirements may breach EU law.

Separate EU provisions enable people who have already worked in the UK to retain their right of residence as a worker in certain circumstances. A woman who takes maternity leave from work will retain her status as a worker for twelve months following the birth of her child even if she later chooses not to return to work. People who are temporarily unable to work because of an illness or accident may retain their right of residence during that period. Those who stop work to undertake vocational training also retain their status as a worker though if this is by choice rather than through involuntary unemployment, the training must be related to the previous employment.

People recorded as involuntarily unemployed (by registering at a job centre and looking for work) may retain their status for six months if they have worked in the UK for less than a year, or a longer period if they have worked in the UK for more than a year and can show a genuine chance of being engaged. UK regulations require the submission of evidence of a genuine chance of being engaged for the first six month period and stronger evidence subsequently, which are more onerous requirements than EU law allows.

### **How do EU workers apply for residence documentation?**

There is no requirement to apply for residence documents, as the right of residence is acquired automatically through exercising Treaty rights, but these documents can help prove that the person has the right to reside in the UK and this may, although we cannot be sure, become more important in the context of Brexit.

Most people may use an online application form to apply for a registration certificate confirming their right of residence or for documents confirming permanent residence. The online process allows family members to be included on the same form and the use of a local authority service for checking passports so that these can be retained while the application is considered. In other cases, people may use paper form EEA (QP) to apply for a registration certificate with separate forms for their family members. Form EEA (PR) is used for paper applications for documents confirming permanent residence.

The application must be accompanied by a fee of £65 for each person, their passport or identity card and evidence of employment in the UK. Where family members apply, proof of the relationship must also be provided. More information is available in the resource below.

### **Further information**

*EU rights guide. Workers: guide to making an application in the UK*, by Colin Yeo (barrister): <https://www.freemovement.org.uk/free-ebook-application-guides-for-eu-citizens/>

All ILPA's Brexit information sheets are available at: <http://www.ilpa.org.uk/pages/brexit-information.html>