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**BREXIT**

## **4. EU rights of residence as a self-employed person**

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 self-employed person.

### **Right to reside as a self-employed person under European Union (EU) law**

EEA and 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 self-employed person under EU law?**

A self-employed person is someone working for themselves or as the owner of a business rather than working for an employer. They can choose their activity, their working conditions and how they charge for their work. They undertake work under their own responsibility in return for payment made in full directly to them. EU law does not specify the number of hours that need to be worked or the amount of money that needs to be earned in order for a person to qualify as a self-employed person. Instead, the work undertaken must be an 'effective and genuine' activity and must not be 'purely marginal and ancillary'. These concepts are not clearly defined and are similar to the principles used to determine if someone is a worker (see ILPA's separate information sheet on the EU right to reside as a worker).

### **How many hours does a person need to work?**

A person may qualify for a right of residence even though they do not do many hours of self-employed work per week, provided that the work is genuine and effective and not marginal. The case law discusses these issues in relation to employees but can also be applied to self-employment. 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 the work was genuine and effective.

### **Is there a minimum level of earnings required?**

EU law does not specify a minimum level of earnings necessary to be considered self-employed. 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. Parallels can be drawn for self-employment.

In the UK, decision-makers apply a Minimum Earnings Threshold which is £155 per week or £8,112 per year in 2016/7. Decision-makers examine the previous three months of self-employment and consider whether the individual earns more or less than this threshold. It is arguable that the use of a minimum earnings threshold breaches EU law and could be challenged through bringing a test case. The threshold is only the starting point, however, and if a person earns less than the threshold, decision-makers must also look at other factors. There is some guidance recognising that self-employment may include periods of inactivity and there may be times, especially at the beginning, where a person works long hours but is not yet receiving much profit. The steps that a person takes in the course of self-employment are identified as relevant as well as their person's motives and intentions.

### **What about periods when a person is not working?**

As discussed above, there is some guidance that may be relied on which states that a person may experience periods of inactivity while they are self-employed.

Under EU law, a self-employed person who records themselves as involuntarily unemployed (by registering with a job centre) may retain their status for six months if they have worked in the UK for less than one 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. The UK regulations (which only refer explicitly to workers) create stricter requirements than EU law allows by requiring the submission of evidence of a genuine chance of being engaged for the first six month period and stronger evidence subsequently. These may therefore be subject to legal challenge. EU law also provides that self-employed people who stop working to undertake vocational training may also retain their right of residence. This must be related to their previous work unless they became involuntarily unemployed.

Self-employed people may retain their right of residence during periods when they are temporarily unable to work because of an illness or accident. A pregnant woman who takes maternity leave may retain her status as a worker for 12 months following the birth of her child even if she later chooses not to return to work. It may be argued that the same principle applies to women who take time away from their self-employed activities to have a baby.

### **How do EU citizens who are self-employed 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.

In most cases, people may use an online application process to apply for a registration certificate confirming their right of residence or for a document certifying 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. Otherwise people may use paper form EEA (QP) with separate forms for their family members to apply for registration certificates and form EEA (PR) 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 self-employment and residence in the UK. Family members must provide proof of the relationship. More information is available in the resource below.

### **Further information**

*EU rights guide. Self-employed: 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>