

Bird & Bird & COVID-19 & Immigration Law



24 March 2020

UK employers who employ non-EU nationals on Tier 2 work visas should be on high alert for immigration compliance issues arising from unpaid leave, reduction in salary and any changes to the terms of employment. We also highlight the various logistical issues when recruiting or on-boarding prospective employees from an immigration perspective.

Whilst we anticipate the Home Office to introduce a pragmatic solution, employers are advised to remain alert to the potential pitfalls that COVID-19 can create for the unwary.

Compliance Issues

Listed below are immigration issues which are likely to cause compliance breaches for Tier 2 sponsors under Home Office regulations.

Unpaid leave

There are very strict limits on how long a Tier 2 visa holder can be placed on "unpaid" leave.

The Home Office guidance prohibits employers from continuing to sponsor Tier 2 visa migrants where the "unpaid" leave will exceed four weeks in a calendar year. The only exceptions are:

- statutory maternity leave/paternity leave/parental leave/shared parental leave/adoption leave
- sick leave
- assisting with a national or international humanitarian or environmental crisis overseas, provided you agreed to the absence for that purpose

- taking part in strike action as part of a legally organised industrial action

If any Tier 2 visa migrants need to be put on "unpaid" leave for more than 4 weeks in a calendar year, their sponsorship must be cancelled.

Reductions in salary

As Tier 2 visas are issued based on an assessment of the migrant meeting a specific salary criteria, reducing the salary (even for a temporary period) creates a minefield from an immigration perspective.

- Reduction in salary is only permitted under specific circumstances. These mostly mirror the reasons described in the "Unpaid leave" section as described above.
- Assuming a reduction in salary is permitted under Home Office regulations, there are other compliance issues to be aware of:

- 1) For Tier 2 (General) visa holders, their proposed reduced salary must be examined carefully to determine if it continues to meet the minimum requirements and whether the reduced salary is still within the advertised salary rate.

If your Tier 2 (General) visa holder recently obtained their leave (e.g. within a year), we highly suggest avoiding any reduction in their salary below the advertised salary rate that was used for the role, even if the new proposed rate is above the £30,000 salary threshold.

The Home Office is very wary of employers reducing a Tier 2 (General) visa holder's salary below the advertised salary range soon after they obtain their work visa, as it raises an inference that the advertising process was a sham. It remains to be seen whether the Home Office will relax their approach for migrants who are affected by COVID-19.

- 2) For Tier 2 (Intra Company Transfer) visa holders, the proposed reduced salary must also be examined very carefully as it must be above the higher of the minimum threshold of £41,500 per year or the salary as required by the applicable occupation code.

[Significant changes to core job duties](#)

As Tier 2 visas are role specific, a new application is required before being permitted to work in a new role that requires the migrant to be in a different occupation code.

COVID-19 is not likely to change this restriction. Employers are advised to carefully review the proposed changes of Tier 2 migrants (including intra company transfer migrants).

[Prohibition on recourse to public funds](#)

Tier 2 migrants are not permitted to access public funds until they become settled in the UK.

It remains to be seen whether the new *Coronavirus Job Retention Scheme* will be exempt from the non-recourse to public funds restriction.

Logistical Issues

We also discuss the logistical issues faced by employers when recruiting or on-boarding prospective employees.

[Remote on-boarding and legal right to work checks](#)

For legal right to work check purposes, employers are advised to exercise caution when on-boarding prospective candidates from their home.

Whilst there is an **online** legal right to work check option available for many non-UK

nationals holding a biometric residence permit, this option is not possible for UK nationals or EU nationals who have yet to apply for a new digital status under the EU Settlement Scheme.

It is also burdensome when on-boarding British Citizens as employers must check their "original" passport. As many prospective employees will begin their work remotely, this places a heavy burden on the HR team as they cannot physically inspect their "original" passport.

Whilst there is an option to send the original passport to the HR team for on-boarding purposes, this has the downside of lost delivery. Employers are advised to seek further advice on the scope of risk assumed when on-boarding prospective employees remotely.

[Delay in work start date for Tier 2 visa holders](#)

Employers are prohibited from delaying the work start date by more than 28 days for Tier 2 visa holders. This strict rule creates many complications as a Tier 2 migrant may not be able to travel to the UK due to COVID-19 even after their visa applications have been approved. Under the current Home Office regulations, such individuals must apply for a replacement 30-day visa to allow them to travel to the UK.

We are also aware of instances where a Tier 2 visa applicant is unable to travel to the UK as their passport is held at the visa application centre due to COVID-19.

[Closure of overseas visa application centres](#)

All visa application centres in China have been closed for months. Most biometric enrolment centres in the USA are now closed. Many other visa application centres are closed or in the process of being closed.

COVID-19 is likely to create a surge in demand for application processing once the visa application centres re-open, which is likely to result in appointment unavailability and further delays.

Inability to extend a visa due to COVID-19

For many Tier 2 visa holders seeking to extend their leave in the UK, it is likely the biometric enrolment centres operated by Sopra Steria may close without notice. This will prevent migrants from being able to submit their extension application before their current leave expires, which has the effect of exposing employers to claims of employing illegal workers (e.g. overstayers).

We anticipate the Home Office will grant an automatic extension of leave for all affected foreign nationals for a limited time as they have done for Chinese nationals who have been affected by COVID-19.

Our experienced global mobility team can assist and advise your business throughout these changing times

Yuichi Sekine

Head of UK Business Immigration

Tel: 44 207 982 6419
yuichi.sekine@twobirds.com



Jonathan Goldsworthy

Senior Associate, Business Immigration

Tel: + 44 207 905 6389
jonathan.goldsworthy@twobirds.com



Tom Mintern

Associate, Business Immigration

Tel: +44 207 982 6519
tom.mintern@twobirds.com



Summary

COVID-19 has created many thorny legal and logistical issues for employers doing their best to comply and maintain their A-rated sponsor licence. Whilst the Home Office is expected to issue updated guidance on COVID-19, employers are advised take precautionary measures to comply with their obligations as a trusted sponsor.