

November 20, 2015
2015-142

flash Alert

A Publication for Global Mobility and Tax Professionals by KPMG's Global Mobility Services Practice

United Kingdom – Amended Sponsor Guidance Tightens Compliance, Record-Keeping

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On 19 November 2015, the U.K. Home Office published amended Tier 2 and 5 of the Points Based System Guidance for Sponsor (the "Sponsor Guidance"), which takes effect immediately.¹ The changes cover many areas affecting the duties that registered sponsors must comply with including:

- the duties of individuals who are named to the Home Office as responsible for compliance;
- the investigatory and enforcement powers that the Home Office may exercise;
- the records sponsors must keep;
- changes to reflect amendments to the immigration rules that govern the granting of U.K. visas.

While there are also other changes, clarifications, and industry specific modifications, this *Flash Alert* briefly describes the key changes affecting businesses sponsoring Tier 2 migrants in the United Kingdom.

Why This Matters

The Sponsor Guidance sets out the rules that sponsors must follow to obtain and maintain their sponsor licence and issue Certificates of Sponsorship ("COS"). It also explains what investigations the Home Office may undertake to check compliance and what enforcement action the Home Office may take when it finds non-compliance.

Registered sponsors must still determine that they are in compliance with the changes to the Sponsor Guidance and must therefore amend their processes and procedures immediately to conform to the new provisions. Most importantly, sponsors must foster proper compliance with the new record-keeping duties and rules around cooperating with the Home Office. Failure to do so could result in the Home Office taking action against a sponsor, including revocation of the sponsor licence.

Background

The Sponsor Guidance was first introduced in 2008 when Tier 2 visas replaced work permits in the United Kingdom. It sets out the rules governing Sponsor Licences. The Home Office grants employers Sponsor Licences that allow the employer to issue COSs to migrant workers. A COS allows the individual to obtain a Tier 2 visa to work in the U.K. for the employer.

The Sponsor Guidance has no statutory basis, but has been endorsed by the U.K. Supreme Court as being permitted under the government's general administrative power to carry on the business of government. As a result, it can change without warning, as has happened now. This is the first change since the election of the current U.K. government in May this year, but is an unusually extensive set of changes.

Individual Duties

The main thrust of the changes is to emphasise the “trust” that the Home Office puts in sponsors to help maintain immigration control. An “Authorising Officer” is already named to the Home Office as taking responsibility for compliance with the Sponsor Guidance at each sponsor. However the role of Authorising Officer is being enhanced to say that he or she “is responsible for the activities of all SMS (the system used to generate COS) users, so must have a system in place to check these activities.”² The Sponsor Guidance goes on to say “we recommend that as a minimum the authorising officer checks the COS assigned to migrants on a monthly basis”.³

KPMG Note

For large sponsors, the idea that the Authorising Officer should check all COSSs is impractical. The Authorising Officer is meant to be the “most senior person responsible for the recruitment of all migrant workers and ensuring that all of your sponsor duties are met”.⁴ That suggests it should fall to a senior leader in Human Resources or recruitment. However, managers at that level will rarely be involved in the detail of a COS.

Rules about issuing COSs to the family members of staff have also been expanded upon. It was already prohibited for an SMS user to assign a COS to his or her family member. The list of what is considered a family member has been lengthened. In addition, new rules have been added to say that if a sponsor assigns a COS to a family member of anyone else within the sponsor organisation (if it is classed as a small- or medium-sized business) or if it is aware that it is assigning a COS to a family member of anyone else within a sponsor organisation (if classed as a large business), it should add a sponsor note on the COS to say this.

KPMG Note

It is not clear how compliance with this new rule will be monitored. Neither employers nor the Home Office are required to keep details of the family members of staff, so it will be easy for small- and medium-sized businesses to become inadvertently non-compliant. The Home Office will not necessarily have full information to allow it to monitor compliance either.

Investigation and Enforcement

The changes give new investigation and enforcement options to the Home Office. In terms of investigation, three new provisions are added:

- **What it means to cooperate with the Home Office.** Cooperating with the Home Office now includes the Home Office forbidding various activities during a visit by its compliance officers including “shouting” and “insults about [their] procedures, [their] staff or other people”⁵.
- **Photographs of business premises.** Compliance officers are given power to take photographs of the business premises to retain as evidence.
- **Non-factual roles or vacancies.** If a sponsor is suspected of assigning a COS that relates to a role or vacancy that is not genuine, the sponsor’s licence may be suspended while the investigation into whether to revoke the licence is ongoing.

When dealing with breaches in compliance, the Sponsor Guidance is now explicit in saying that the Home Office may allow sponsors to retain their licences where the breaches are minor and they are remedied through an action plan issued by the Home Office. However, it should be noted that a formal action plan incurs a fee of £1,476⁶.

Serious breaches may lead to the suspension of the licence pending further investigation, or even the immediate revocation of the licence. Examples of serious breaches are given that emphasise threats to immigration control or systematic failing being the key determinants of a serious breach.

The new guidance makes additions to the consequences of employing illegal workers. If the sponsor's licence is revoked as a consequence, the sponsor will be precluded from reapplying for a licence for 12 months.

KPMG Note

The clarifications about enforcement are welcome additions to the Sponsor Guidance that make clear where enforcement action will be targeted. The investigatory provisions are more controversial. Compliance with the rules about cooperating with the Home Office will fall to the subjective judgment of compliance officers. Businesses may also not wish to allow photography on site where this is generally prohibited for reasons of confidentiality or security. However, failure to allow photography may be deemed uncooperative and therefore non-compliant in itself.

Record-Keeping

Appendix D of the Sponsor Guidance already contained extensive requirements for keeping records relating to sponsored migrants. The following new documents are added to the list:

- The migrant's travel ticket or boarding card, if an entry stamp (a stamp on the entry clearance vignette in the passport) is absent.
- Where applicable, a copy of a migrant's Disclosure and Barring Service (DBS) check.
- Where resident labour market tests ("RLMT") are not undertaken, sponsors are still required to retain copies of:
 - detailed and specific job descriptions outlining the duties and responsibilities of the post which must include the skills, qualifications, and experience required for the post; and
 - any qualifications the migrant holds to confirm skill level and/or documents that show the migrant had the skills and experience to do the job (for example, references from a previous employer or other evidence of experience).

The provisions about destroying documents have been deleted.

KPMG Note

Curiously, the notes that set out the changes in the new Sponsor Guidance say that sponsors should be required to keep references as evidence of the migrant's previous experience if they are appointed on the basis of this experience. However, this requirement does not actually appear anywhere in the text.

Amendments to Immigration Rules

Various changes have also been incorporated that reflect changes to the Immigration Rules that were announced on 29 October and take effect on 19 November 2015.

- Four jobs in the digital technology sector are being added to the Shortage Occupation List. These include product manager, data scientist, senior developer, and cyber security specialist based in small- and medium-sized qualifying companies (20-250 employees) and require five or more years of experience plus experience of leading a team.
- Nurses are also being added to the Shortage Occupation List pending a review of the Migration Advisory Committee in view of potential risks associated with high nursing vacancies and winter pressures.
- From 6 April 2016, applicants applying for Tier 2 indefinite leave to remain will need to meet the salary threshold of £35,000 (rising each year in line with wage inflation).
- Entry clearance grants are being changed allowing them to be post-dated in line with the applicant's date of travel to the U.K. providing this is no later than 14 days after the start date given by the applicant's Tier 2 sponsor.
- Tier 2 and Tier 5 have added provisions for shared parental responsibility confirming that a migrant can be absent from work without pay for more than 4 weeks and this will not fall under a prohibited change in employment.
- Dependents will be exempt from showing maintenance when extending their stay under the Tier 2 provisions, even if they applied at a later date to the migrant.
- The evidence required for English language will now be an online verification number that applicants must provide instead of documentary evidence. The Home Office can verify this online.

Other Changes

There are various other changes that include clarifications, corrections, and industry specific modifications. However three substantive changes relate to mergers and acquisitions, indefinite leave to remain ("ILR") applications, and extensions for people who were sponsored in roles at National Qualification Framework ("NQF") Level 3 or 4 when these were permitted and are extending.

Mergers and Acquisitions

Sponsors have a duty to inform the Home Office if they are involved in a merger, takeover, de-merger, or other similar change, for example if a sponsor sells all or part of the business.

The Home Office has now introduced "*Annex 8 - Further help on mergers and takeovers*," which provides a flow-chart and useful examples to help sponsors understand their compliance duties that must be reported via the sponsor management system. The examples allow sponsors to understand how these situations work in practice and what is required by them to foster their adherence to their sponsorship duties.

NQF Level 3 or 4 Roles

Migrants sponsored under Tier 2 provisions can only work in occupations at or above NQF Level 6 (or the equivalent in Scotland) unless an exception applies. Before 13 June 2012, the level was NQF Level 4, and before 6 April 2011, it was NQF Level 3. The new requirement is that where a sponsor is applying for a licence or applying for a COS to extend the migrant's leave, the sponsor is meant to add a sponsor note the COS to explain that the migrant meets these exception criteria and why (s)he is eligible to extend the leave.

Indefinite Leave to Remain (ILR)

A new provision is added to say that if a sponsor licence is suspended while the Home Office is considering an application for ILR from a Tier 2 or 5 migrant sponsored by the sponsor, the Home Office will not make the decision on the ILR application until the outcome of the suspension is decided. If the licence is revoked, the Home Office will refuse the settlement application.

KPMG Note

The new guidance on mergers and acquisitions is a welcome addition that will make planning corporate transactions easier. However specialist advice will still be required on these cases and early consideration of immigration issues will typically be required.

The guidance on NQF Level 3 and 4 roles also provides a sensible pointer to help avoid incorrect decisions being made.

It will be interesting to see how the new provision on ILR works in practice given that once someone obtains ILR, he no longer requires a sponsor. Migrants who are affected may challenge the provision if they face a refusal on this basis.

Conclusion

These changes to the Sponsor Guidance are the first since April 2015. In the world of U.K. immigration that is an unusually long period of constancy.

KPMG LLP's (U.K.) Legal Service Immigration team continues to work with many large employers and regularly engages with the Home Office on compliance issues. We can help with any issues you may have in this area.

Footnotes:

1 See: <https://www.gov.uk/government/collections/sponsorship-information-for-employers-and-educators> .

2 "Tier 2 and 5 of the Points Based System: Guidance for Sponsors" paragraph 6.17 at: (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/477792/Tier_25_guidance_11-15_word_v1_0doc.pdf).

Footnotes (cont'd):

3 "Tier 2 and 5 of the Points Based System: Guidance for Sponsors" paragraph 6.17
(https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/477792/Tier_25_guidance_11-15_word_v1_0doc.pdf).

4 "Tier 2 and 5 of the Points Based System: Guidance for Sponsors" paragraph 6.15
(https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/477792/Tier_25_guidance_11-15_word_v1_0doc.pdf).

5 "Tier 2 and 5 of the Points Based System: Guidance for Sponsors" paragraph 15.16
(https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/477792/Tier_25_guidance_11-15_word_v1_0doc.pdf).

6 See:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/419449/fees_table_for_website_2015_03_30.pdf .

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