

Tier 2

Managing compliance issues

Sophie Barrett-Brown

Senior Partner

Laura Devine Solicitors, London

Questions:

- How can you actively mitigate the compliance problems for employers wishing to sponsor a skilled worker?
- How is a change in a sponsor's circumstances (eg a merger, demerger, corporate restructure or insolvency) going to impact on existing sponsor licenses?

Answers?

- Managing compliance
- Common problems
- Change of circumstances
- Strategic considerations
- Recent developments in Tier 2

Business risks of getting it wrong

- UKVI increase in enforcement activity
- Tier 2 licence refusal/suspension/downgrading/revocation
- Potential bar on further licence application for 6 months / 12 months / 5 years
- Curtailment of leave of sponsored workers
- Illegal workers face general grounds of refusal for future applications
- Civil penalty
- Negative publicity

Tier 2 – sponsor duties

Duties of sponsors include:

- ensuring individual qualifies for CoS (pledge criteria met and migrant likely to comply with conditions of leave)
- RTW document checks
- tracking expiry dates
- monitoring and notifying Home Office of certain changes
- co-operating with Home Office audits

Record keeping duties

- photocopy/electronic copy of migrant's passport/BRP showing right to work
- migrant's up-to-date address, telephone/mobile numbers
- other Appendix D documentation (including copy of contract, record of absences, evidence of salary payments etc)
- note new requirements: detailed job description, qualifications, references
- RLMT documents including screenshots of adverts and applications shortlisted to final interviews

Tier 2 – sponsor duties

Reporting duties

- must report to Home Office within 10 working days if:
 - not turn up for 1st day (and any reason given);
 - absent more than 10 working days without reasonable permission;
 - termination of employment/stop sponsoring individual (details of new sponsor if known).
- significant change in migrant/sponsor's circumstances:
- promotion/change in title/core duties (is new immigration permission required);
- change in salary (exceptions include annual increments/bonuses)
- place of work
- sponsor ceases trading/becomes insolvent, substantially changes the nature of its business or involved in merger/takeover – report within 20 working days

Genuineness Test - Tier 2 (General) and (ICT)

- Refuse LTE/LTR where reasonable grounds to believe:
 - job is not genuine vacancy exist or has been exaggerated to meet the Tier 2 skills threshold (currently NQF Level 6).
 - migrant not appropriately qualified to do the job
 - stated requirements of the job in CoS and any advertising are inappropriate or tailored to exclude resident workers (General only) .
- In assessing this they will consider:
 - knowledge of the role;
 - relevant experience relative to skills required to do the role;
 - knowledge of the sponsor in the UK;
 - explanation of how migrant was recruited; and
 - any other relevant information

Applying for a Tier 2 sponsor licence

Application will be refused if:

- Home Office not satisfied that sponsor can offer genuine employment that meets the Tier 2 (General) requirements – Annex 1 (m)
- sponsor has been asked to provide “any documents or information” to support the application and is not provided within the time limit – Annex 1 (k) Tier 2 and 5 of the PBS – Guidance for Sponsors V04.15

Applying for a Tier 2 sponsor licence

Tier 2 (General) mandatory information – Appendix A V04/15

- why applying for licence
- details about sponsor's business
- roles sponsor intends to fill – including job titles, duties, salaries, skills and experience required
- details of RLMT
- details of migrant selected for role

Mergers, takeovers, demergers, ownership changes

- Licence is *not* transferable
- Ownership changes may require notification or new licence application (within 20 working days)
- Appropriate approach depends upon factors including whether:
 - complete or partial takeover/merger
 - sale of all, part of or controlling shares in the entity
- Previous licence may be made dormant (if no longer needed by that entity) and access given for reporting (otherwise report via email) or surrendered
- Impact of TUPE or similar arrangements

Common problems

- New sites, entities, ICT links
- Departure of Authorising Officer or Level 1 User
- Incomplete RTW checks (eg no record of date, not carried out for resident workers)
- RLMT deficiencies (eg no closing date, no location, UJM ad not printed on date of first posting)

Employers' liability

Right to work checks – establishing defence

- before start work:
 - visual check for identity
 - view original document(s) from prescribed lists
 - retain copies in permitted format
 - record date check was made
- entry clearance: 30 day travel vignette - 2nd check required once BRP issued
- follow-up checks to be completed before leave expiry (28 day grace period where reasonably satisfied submitted in-time application/appeal)
- follow-up checks in 6 months if certain documents provided eg. Certificate of Application
- partial right to work checks no longer a mitigating factor
- retain documents for 2 years after employment ceases
- NB: interplay with sponsorship

Tier 2 – cooling-off period

Exclusion period

- 12 months from date departure from UK if able to evidence (**otherwise** date of leave expiry/date leave superseded)
- cannot re-enter as a Tier 2 migrant during exclusion period (NB can spend the period in the UK in another category)

Not applicable if:

- salary of £155,300 or more
- did not actually enter the UK with Tier 2 leave and has evidence of this
- previous Tier 2 CoS was assigned for 3 months or less
- previously Tier 2 leave was in the ICT skills transfer, graduate trainee or short term staff sub-categories and now applying as long term staff

Tier 2 (General) and (ICT)

| | Tier 2 (ICT) skills transfer | Tier 2 (ICT) graduate trainee | Tier 2 (ICT) short term staff | Tier 2 (ICT) long term staff | Tier 2 (General) |
|--|-----------------------------------|--|--|---|-------------------------------------|
| Purpose | Sharing knowledge (supernumerary) | Accelerated management trainee programme | Established employees – short assignment | Established employees – longer assignment | New hires – high earners |
| Maximum period | 6 months | 12 months | 12 months | 5 years (9 years if high earner) | 6 years (max 5 years at a time) |
| Minimum salary | £24,800 | £24,800 | £24,800 | £41,500 | £20,800 |
| Service with linked entity overseas | Yes but no minimum period | 3 months | 12 months | 12 months | None |
| RLMT | No | No | No | No | Yes (unless exemption eg. £155,300) |
| English language | No | No | No | No | Yes – level B1 CEFR |
| ILR | No | No | No | No | Yes |

Tier 2 (General) – the ILR time bomb

- Minimum salary (or SOC code rate if higher):
 - £35,000 from 6 April 2016
 - £35,500 from 6 April 2018
 - £35,800 from 6 April 2019
 - £36,200 from 6 April 2020
- 180 days per year maximum absence
- Maximum total period 6 years (for applications made from 6 April 2011 - therefore bites from April 2017). Must leave UK after 6 years if not able to obtain ILR (or apply in another category)

Risk management

- Ensure clients fully understand duties prior to licence application
- Interrogate the clients' HR systems, RTW checking history etc
- Conduct audits
- Offer training for HR managers
- Client may wish to appoint a designated immigration compliance officer
- Tailored pre/post-approval compliance advice for each CoS/leave to enter/remain application
- Keep sponsor informed/updated - ongoing communication
- Ensure clients aware of trigger points for reporting/other action so that
- Ensure migrants are aware of basis of their sponsorship (provide a copy of the CoS) and conditions of leave

Tier 2

Managing compliance issues

Sophie Barrett-Brown

Senior Partner

Laura Devine Solicitors, London