Yorkshire & Humber Region
ASC International Recruitment Fund

2nd August 2024

Market Support and Training Package



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International Recruitment: Legal Issues

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"They're excellent - they're very professional and very experienced."

Chambers 2021

Legal Issues

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i. Immigration requirements.
ii. Ethics in international recruitment.
iii. Discrimination.
iv. Contracts and repayment clauses.

Immigration

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Universal requirements:

- Permitted to work in the UK
- Prescribed document checks

All changed at 11pm 31 December 2020:

- EEA nationals subject to the same immigration requirements as other nationals
- EU settlement scheme

Immigration Rules Outline

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No permission to work required:

- British Citizens (not the same as British overseas citizens or British overseas nationals)
- Those with the right of abode in the UK
- Indefinite leave to remain
- EU/EEA nationals with settled status
- Refugees (granted refugee status); Asylum claimants with "Application Registration Card"; some overseas students.

Permission required:

- Everyone else
- Usually obtained by sponsorship
- Tier 2 replaced with Skilled worker and other routes

Sponsorship

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Skilled Worker:

- A genuine job offer with specific duties and responsibilities. The role should genuinely exist and be necessary for the business
- Meet a skill level requirement of at least RQF level 3, the equivalent to A-levels
- Minimum salary/earnings: £38,700 pa (from April 2024) unless come under the transitional arrangements
- Must demonstrate English proficiency to at least an CEFR Level B1
- Points scoring
- Shortage Occupations including social care which appear on Immigration Salary List (from April 2024 formerly the Shortage Occupation List)

Global Business Mobility:

- Introduced April 2022
- For foreign businesses – temporary work arrangements
- Various methods and uses points scoring
- Probably mostly irrelevant

Scale-Up, Intra-Company Transfer, Various Temporary Worker routes:

- Probably mostly irrelevant or occasional use
- Replaced elements of Tier 2 and Tier 5

Various Others (business visits, High Potential Individuals etc):

- Probably mostly irrelevant or occasional use

Adult Social Care

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Health & Care Worker Visa:

- Employer needs Certificate of Sponsorship
  - **Essential** reading/guidance: DHSC/Skills for Care Toolkit
- Check the Occupation Code is one eligible
  - **6135: care workers and home carers**
  - **6136: senior care workers**

Sponsorship

- Skills for Care/DHSC helpsheet
- Documentation/Registration
- People
- Costs

Time – 8-12 weeks; £500 fast track – 10 days

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Documentation/Registration

Bank Statements	Employers Liability Insurance Certificate	CQC Registration Documents
HMRC Registration	Company Tax return	Hierarchy Organisational chart
VAT certificate	Audited annual accounts	Business Leases/Ownership proof

People

- Authorising Officer – key. Owner/Registered Manager?
- Key Contact for Home Office
- Level 1 User

Costs

- £536 (2 of: turnover under £10.2m; balance sheet under £5.1m; under 50 staff)
- £1,476

Practicalities – work with recommended and experienced recruiters

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Guidance, Guidance, Guidance

- International recruitment to adult social care: A guide for councils | Local Government Association
- Working with agencies - top tips | NHS Employers

Adult Social Care

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Guidance, Guidance, Guidance

- International recruitment (skillsforcare.org.uk)
- skillsforcare.org.uk/resources/documents/Recruitment-support/International-recruitment-toolkit-March-2024.pdf

Immigration Compliance

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One final element:

- Immigration Audits
  - Immigration Advice Service session - this morning (2 August)
  - Compliance in a time of constantly changing rules

Ethics in International Recruitment

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Health and Social Care Expectations (Skills for Care):

- "Code of Practice for the International Recruitment of Health and Social Care Personnel in England"
  - Cross refers to the WHO Global Code of Practice
- Code:
  - No active recruitment from red and amber list countries
  - Creates an Ethical Recruiters List
    - "Although the ethical recruiters list is maintained by NHS Employers, the list should be used by all health and social care organisations engaged in international recruitment, both in the public and independent sectors"
  - Applies minimum standards expected in recruiting overseas professionals
  - Does **not** prevent individuals applying to Social Care organisations from red/amber list countries

Discrimination - Recruitment

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Employer (A) must not discriminate against or victimise a person (B):

- In the **arrangements** A makes for deciding to whom to offer employment (section 39(1)(a) and 39(3)(a), EqA 2010
- As to the **terms** on which A offers B employment (section 39(1)(b) and 39(3)(b))
- By **not offering** B employment (section 39(1)(c) and 39(3)(c))
- In relation to employment by A, **harass** a person (B) who has applied to A for employment (section 40(1)

Discrimination - "Arrangements"

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- Construed broadly
- Includes:
  - Format /content of application forms
  - Physical arrangements
  - Location & Timing of interviews
  - Job descriptions / Person specifications

Duty to make reasonable adjustments

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An employer has a duty to make reasonable adjustments where a provision, criterion or practice, or a physical feature of its premises, has the effect of placing a disabled person at a “substantial disadvantage” (defined as one that is more than minor or trivial) when compared with persons who are not disabled. The employer must take such steps as it is reasonable to avoid the disadvantage.

Exceptions – Occupational requirements

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An employer may discriminate lawfully in limited circumstances:

- Where, having regard to the nature or context of the work, being of a particular sex, race, disability, religion or belief, sexual orientation or age (or not being a transsexual person, married or a civil partner) is an occupational requirement.
- Where the employment for the purposes of an organised religion.
- Where the employer has a religious ethos.

Exceptions – Positive Action

- Positive action not positive discrimination
- Where an employer has a reasonable belief that people who share a protected characteristic (i) suffer a disadvantage connected to the characteristic; (ii) have different needs or (iii) have disproportionately low participation.
- Reasonable belief – based on evidence.
- The employer may take action which is proportionate to meet the stated aims of (i) remedying the disadvantage, (ii) meeting the differential needs or (iii) encourage participation.
- Proportionate means of achieving the stated aim – is there a less discriminatory way the aim could be achieved?

Exceptions – Positive Action

- Recruitment and promotion - the tiebreaker provision
- Can be used both at shortlist and selection stage.

- You can positively discriminate in favour of disabled people over non-disabled people (but not other disabled people.)
- Guaranteed interview schemes.

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Pre-employment health questions

- unlawful to ask questions about disability and health before you make a job offer.
- Can only do so if necessary and fall within one of the narrow statutory exceptions:
    - find out if reasonable adjustments are needed to process;
    - whether will be able to carry out an intrinsic part of the job;
    - whether has a particular disability where having that disability is an occupational requirement;
    - to monitor the diversity of people applying for the job;
    - to take positive action in relation to disabled people; or
    - Where another legal requirement means an employer has to ask.

Advertisements

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- Be careful to ensure do not dissuade groups from applying.
- Stick to the real requirements of the job
- Make available accessible formats (e.g. Braille, large print).
- Advertise internally and/or externally?
- Target your advertising carefully.

Advertisements

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Pitfalls from the case law:

- "Mature" may exclude younger applicants (*Beck v Canadian Imperial Bank of Commerce)*
- Requiring certain level of post-qualification experience may also constitute indirect discrimination (*Rainbow v Milton Keynes Council*)
- Requirement that the candidate must already have the right to work in the UK may constitute indirect discrimination on grounds of race (*Osborne Clarke Services v Purohit)*

Contracts

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- Contract of employment should be available in advance of engagement so that the basis of employment offer is understood
- Code of Practice expects more:
  - the job description and person specification
  - the terms and conditions of engagement
  - the visa application process (including for dependents)
  - professional registration processes
  - location of job and indication of likely living costs in that area
  - access to health services for the candidate and, if relevant, their family
  - proximity of relevant religious institutions, if applicable
  - access to education for family members
  - information on national associations, diaspora groups and communities, and relevant trade unions for further support
  - information on the code of practice and how to raise a complaint

Contracts

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- Addressing costs:
  - Costs to the employer:
    - Agency Fees
    - Sponsorship Licence
    - Certificate of Sponsorship
    - Immigration Skills Charges
    - Visa
    - Relocation Package options (shared costs):
      - Flights
      - Visa
      - Language tests
      - Pastoral supports (sim card, accommodation, Wi-Fi etc)
      - Loans for re-tests
      - Loans for professional registrations and assessments (nurses getting PIN)
  - Costs to the candidate/employee
    - Language Testing
    - Professional Registration

Recovery of Costs

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- Contractual repayment clauses ("golden handcuffs")
- Bad press:

  MPs demand end to repayment clauses in contracts of overseas health workers

  Are Repayment Clauses Causing Retention Issues For International Nurses?
- Code of Practice addresses and permits repayment clauses
- **Not** usually included (CoP):
  - Immigration Skills Charge and Immigration Health Charges should not be a part of any repayment – Home Office refunds are available
  - Sponsor licence – relates to the employer and not the individual
  - Certificate of Sponsorship
- Illegal for recruitment agencies to charge candidates a fee

CoP on recovery of costs 1

- Transparency
  - Clearly set out in job offer/contract with itemised list of costs to be reclaimed
  - Auditable recoupment (bank transfer/salary sacrifice
  - Expressly that nothing reclaimed before arrival in the UK
- Proportionate
  - Relate to the individual, not an overall process (eg not interview costs or agency fee)
  - No interest charges
  - Repayment plan is needed
- Timing
- Flexibility

CoP on recovery of costs 2

- Timing
  - Repayment schedule is needed
  - CoP example:
- leaving within 0 to 12 months: can be charged 100% of total itemised expenses
- leaving within 13 to 24 months: can be charged 50% of total itemised expenses
- leaving within 25 to 36 months: can be charged 25% of total itemised expenses
- leaving after 36 or more months: no repayable expenses after 36 months of service

- Flexibility (individual circumstances should be taken into account):
  - The health and wellbeing of the recruit
  - Where the recruit leaves due to bullying, discrimination or poor work conditions
  - Where the recruit's personal circumstances change beyond their control
  - Move for career progression

Any questions?



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Contact

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