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Brexit: Immigration and Emigration

This note addresses the impact of Brexit on UK immigration laws. It is one of a series of *GTM Alerts* designed to assist businesses in identifying the legal issues to consider and address in response to the UK's referendum vote of 23 June 2016 to withdraw from the European Union.

The issue of freedom of movement of EU nationals was at the heart of the Brexit referendum and will continue to be one of the most debated topics over the coming months.

Whatever the ultimate outcome of Brexit, it is likely to affect the 1.8 million EU residents who currently live and work in the UK as well as the 1.2 million British nationals who currently live and work in the EU.

Current Position

The UK has not left the EU. It will remain a member of the EU, and EU law will continue to apply in its territory, for some time. Therefore the immediate immigration situation has not changed and it will not change until the UK's exit date from the EU. For EU nationals working in the UK, and vice versa, this means that they will continue to have the same rights and entitlements as they have always had – in the short-term at least.

The situation will change once the UK formally exits the EU. Before exiting, however, the UK needs to go through the exit procedure set out in Article 50 of the EU Treaty, starting with notification to the European Council of its decision to leave the EU. Notification is very unlikely to occur until after 9 September 2016, when a new UK prime minister is due to be announced (although it is possible that the announcement could be sooner), and may be further delayed to allow consideration of the UK's preferred exit terms and model for its future relationship with the EU. When notification is made, it will trigger an up to two-year initial period of negotiation with the EU – on terms of exit only; negotiation of new arrangements with the EU will be conducted separately and possibly at a later stage. The negotiation period is extendible,

although only with the unanimous consent of the UK and each of the 27 remaining EU Member States. To read more about the timeline for the UK's exit and exit procedure, please see our previous *GTM Alert*, "[Brexit: The Timeline.](#)"

Taking these factors into account, Brexit is unlikely to occur until 2019 at the earliest.

The Political Environment

Business Secretary Sajid Javid has said that retaining the UK's access to the single market will be a priority during the exit negotiations. However, EU leaders have made it clear that they will not grant access to the single market without freedom of movement, not least because they are anxious to avoid similar referendums in their own countries and because of their desire not to be seen to be giving ground to the UK on its exit, thereby setting what could be a dangerous precedent. In the current socio-political climate, it is difficult to envisage EU leaders giving the UK many concessions.

On 29 June 2016, the Prime Minister David Cameron announced that a special Brexit unit had been created within UK government, headed by Oliver Letwin, a Conservative MP and member of the Cabinet, to explore relationship models for the UK's interaction with the EU and what immigration effect each would have.

It is worth bearing in mind that the existing EU relationship models for Switzerland and Norway (on which the UK's negotiations might be based) provide for full freedom of movement of workers in exchange for access to the single market. Although it is correct that there are other models (*eg.* Canada and Turkey) where those countries are allowed to impose immigration controls, it is noteworthy that those countries are not permitted access to the entire free trade area.

Mr. Cameron refused to reassure British nationals living abroad that their interests would be protected, with Ministers saying it would be unwise to fully "guarantee" EU citizens' rights without a deal for Britons abroad. In response, MPs from all parties have attacked the government's stance, stating that people should not be used as bargaining chips.

British Nationals Living in the EU/EU Nationals Living in the UK

It is possible that EU citizens currently exercising their Treaty rights in the UK would be allowed to stay, with the prospect of obtaining permanent residence or indefinite leave to remain - in return for parity of treatment of UK nationals residing in other member states. Obvious practical issues here include what date should be used as the "trigger" for protecting existing workers' rights (the date of the referendum?) and the fact that the government is unable to track the date on which an EU national enters the UK as this is prohibited by EU law.

Some argue that the Vienna Convention guarantees that UK citizens living abroad would not be forced to leave their adopted EU country (and vice versa) on the basis that such rights do not terminate when the treaty ends. However, individuals are not parties to the Vienna Convention (states are) and it is unclear how an individual might be able to enforce any rights under the Vienna Convention. As the right to live in other parts of the union is directly linked to European citizenship, it is difficult to see how the Convention would be of material assistance if that right falls away. Furthermore, France and Romania have not signed the Vienna Convention.

Note that where an EU national has exercised free movement rights for five years in a single member state, they can apply for permanent residency if they are able to prove that they have been economically active for the entire five-year qualifying period. There might therefore be a distinction between individuals who have a permanent residency right and those who have not yet applied or who do not qualify. The European Court of Human Rights protects the rights of UK individuals who live in another EU country and The European Convention on Human Rights protects an individual's right to private and family life – which might apply if they were forcibly returned to their original country.

Whatever the eventual position, the UK's Immigration (European Economic Area) Regulations 2006, which implement the EU Citizens Rights Directive (often referred to as the Free Movement Directive), may need to be amended in some form.

Conclusion

In the absence of a substantive UK exit plan at present, it is difficult to predict the type of relationship model that the UK and the EU will have and therefore the long-term impact of Brexit on immigration, but there are some practical steps businesses should consider taking in the interim:

- Reassuring affected employees that there will be no immediate change to their employment status;
- Auditing the workforce in terms of affected employees' location and immigration status; and
- Address immigration applications that could be made now.

Further information on issues related to Brexit can be found [here](#).

This *GTM Alert* was prepared by **Russell Lamb** in Greenberg Traurig Maher's London office. Questions about this alert can be directed to:

- > [Russell Lamb](#) | +44 (0) 203 349 8708 | lambro@gtmlaw.com
- > [Ian R. Macdonald](#) | +1 678.553.2467 | macdonaldi@gtlaw.com
- > [Rosanna M. Fox](#) | +1 212.801.3197 | foxr@gtlaw.com
- > The GTM Brexit Team:
- > [Gillian Sproul](#) | +44 (0) 203 349 8861 | sproulg@gtmlaw.com
- > [Lisa Navarro](#) | +44 (0) 203 349 8757 | navarro@gtmlaw.com
- > Or your [Greenberg Traurig Maher](#) attorney

For more information:

Greenberg Traurig Maher LLP
The Shard, Level 8
32 London Bridge Street
London SE1 9SG

T +44 (0) 20 3349 8700
F +44 (0) 20 7900 3632
www.gtmlaw.com

Albany +1 518.689.1400	Delaware +1 302.661.7000	New York +1 212.801.9200	Silicon Valley +1 650.328.8500
Amsterdam + 31 20 301 7300	Denver +1 303.572.6500	Northern Virginia +1 703.749.1300	Tallahassee +1 850.222.6891
Atlanta +1 678.553.2100	Fort Lauderdale +1 954.765.0500	Orange County +1 949.732.6500	Tampa +1 813.318.5700
Austin +1 512.320.7200	Houston +1 713.374.3500	Orlando +1 407.420.1000	Tel Aviv[^] +03.636.6000
Berlin⁻ +49 (0) 30 700 171 100	Las Vegas +1 702.792.3773	Philadelphia +1 215.988.7800	Tokyo[⌘] +81 (0)3 4510 2200
Berlin-GT Restructuring⁻ +49 (0) 30 700 171 100	London[*] +44 (0)203 349 8700	Phoenix +1 602.445.8000	Warsaw[~] +48 22 690 6100
Boca Raton +1 561.955.7600	Los Angeles +1 310.586.7700	Sacramento +1 916.442.1111	Washington, D.C. +1 202.331.3100
Boston +1 617.310.6000	Mexico City⁺ +52 55 5029.0000	San Francisco +1 415.655.1300	Westchester County +1 914.286.2900
Chicago +1 312.456.8400	Miami +1 305.579.0500	Seoul[∞] +82 (0) 2.369.1000	West Palm Beach +1 561.650.7900
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