

Benefits Bulletin

EEA Nationals and Universal Credit...

14th February 2019

Issue **3** [2019]

1. Introduction

The situations in which non-British Nationals can claim Social Security benefits are complex. This Benefits Bulletin seeks to set out the situations in which non-British European Economic Area nationals (from this point on referred to as 'EEA Nationals') may be able to apply for Universal Credit. This is particularly relevant as Universal Credit is replacing many of the benefits (and tax credits) that may have been available to some EEA Nationals in certain circumstances.



It is also very relevant as Brexit approaches. Update bulletins will be provided if there are any changes as plans develop. At this stage, when Brexit happens, this will not in itself remove the rights of some EEA Nationals to claim and receive benefits and tax credits that may be currently available to them.

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2. What is Universal Credit?

Universal Credit is a new benefit for people of 'working age' which replaces old 'means-tested benefits' for most people. It is designed to ensure that people have sufficient income for day-to-day living and, where applicable, to pay their rent and certain mortgage payments.

How much Universal Credit is actually paid (if any) will depend upon a person's (and their partner's) financial and personal circumstances.



To be able to apply for Universal Credit a person must be able to satisfy both the residency rules and basic conditions.

This means that in the case of an EEA National, establishing whether they can apply for Universal Credit involves two stages:

- **Stage One:** establishing that they meet the residency conditions
- **Stage Two:** ensuring that they meet the basic conditions.

An EEA National's ability to apply for and be entitled to Universal Credit could fail at either stage.

See Section 5. The Residency Rules... for more information on the residency rules.

Under the **basic rules** a person must:

- be aged 18 or over and under the qualifying age of Pension Credit; and
- have savings/capital of £16,000 or below; and
- not be in education.

However, special rules apply to allow certain 16/17-year olds to claim Universal Credit, including those that are too sick to work, lone parents and those that may be considered to be 'estranged' from their parents. Similarly, exceptions also apply to enable some people in education to apply, including some disabled students and lone parents. Do seek further information and advice as necessary.

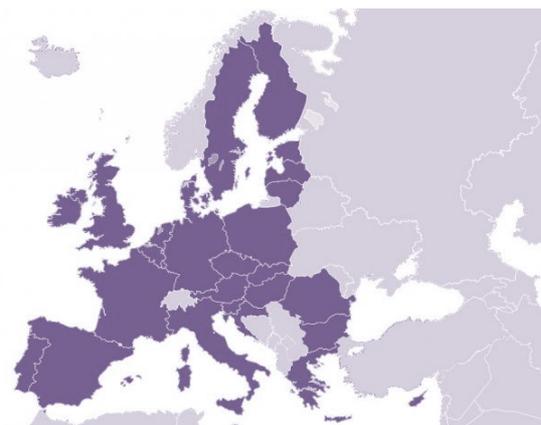
The benefits that Universal Credit replaces are Income-based JSA, Income-related ESA, Income Support, Child Tax Credit, Working Tax Credit and Housing Benefit. These are the, so called, 'legacy benefits'.

Those people who presently receive a 'legacy benefit' will be expected to apply for Universal Credit if they have a relevant change of circumstances. This might happen if they start work or if they cease working (e.g. due to being made redundant). Those people who remain on 'legacy benefits' will be invited to apply for Universal Credit at some stage in the future.

3. The European Economic Area

The European Economic Area (EEA) was established in 1994. It links the countries of the European Union (EU) with the countries of the European Free Trade Association, creating the European Single Market and guaranteeing the so called 'four freedoms' - the free movement of goods, capital, services and labour.

The countries presently in the European Economic Area are those within the United Kingdom (England, Scotland, Wales and Northern Ireland) plus Austria, Belgium, Bulgaria, Croatia, Republic of Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, Iceland, Liechtenstein and Norway.



Note 1: Switzerland is neither a member of the EU nor EEA but is part of the single market. This means that Swiss nationals have the same rights to live and work in the UK as other EEA Nationals.

Note 2: Between 1.7.2013 and 30.6.2018 a Croatian national required an 'accession worker registration certificate' to be able to reside legally (as a 'qualified person') in the UK.

4. Brexit and Benefits

In 2016 the UK electorate voted to leave the European Union and, in turn, the European Economic Area. As things stand, 'Brexit', as it has become to be known, is set to take effect on 29.3.2019. What follows will depend upon the terms on which the UK leaves - with a 'Withdrawal Agreement' or without one.

What we do know is that in preparation for Brexit the government has introduced an '**EU Settlement Scheme**' to protect the rights of EEA Nationals living in the UK, giving them a legal right to remain. Under this scheme EEA Nationals who are presently living in the UK may apply to continue living in the UK beyond **30th June 2021**. Depending on how long the EEA National has been living here, they may apply for '**settled status**' (where they have been living in the UK for 5 years or more) or '**pre-settled status**' (where they have been living in the UK for less than 5 years). Those given 'pre-settled status' may apply for 'settled status' once they have been living here for 5 years. The present deadline for applications is **30th June 2021** but this may change to 31st December 2020 if the UK leaves without a Withdrawal Agreement.



See the following links for more information:

www.freemovement.org.uk/how-to-apply-for-settled-status-temporary-status-brexit/

www.gov.uk/settled-status-eu-citizens-families

The fee for applications is currently £65.00 for EEA Nationals aged 16 or over and £32.50 for those aged under 16. It is understood that those who already have a valid 'UK permanent residence document' or already have indefinite leave to remain in or enter the UK will not have to pay. There will be no fee when people apply on or after **30th March 2019**. Furthermore, we now know that anyone who had applied prior to this date and paid a fee will get a refund.

Under the current planning arrangements, it looks as though post Brexit there will essentially be two types of EEA Nationals living in the UK with a right to remain: those with 'settled status' (i.e. those who have been living in the UK for 5 years - see Note 3: Living in UK below) and those with 'pre-settled status' (i.e. those who have been living in the UK for less than 5 years).

It is understood that those with 'settled status' will be able to access Universal Credit (and other benefits) in the same way as British citizens, whereas those with 'pre-settled status' will only be eligible to Universal Credit (and other benefits) in the same circumstances as EEA Nationals without 5 years residency do at present. See Section 6. Right to Reside.

Note 3: Living in the UK Under additions to the immigration rules, living means lived or living in the UK. The definition makes no reference to a person needing to have lived in the UK with a 'right to reside' in order to qualify. Clearly someone who has had a right to reside as, for example, a worker or self-employed person in the UK for five or more years will be eligible to apply for 'settled status'. But, an EEA National who has lived in the UK but undertaken little or no work may still qualify. It is not necessary for a person to have had a 'right to reside' throughout the five year period.

United Kingdom Immigration Rules - Immigration Rules Appendix EU

The above information is a guide only and does not represent immigration advice. Please seek specialist advice from a qualified immigration adviser.

It is estimated that 3.2 million European Union Nationals presently live in the UK and one million UK citizens live in other European Union countries.¹ European Union migrants are less likely to claim out-of-work benefits and, while they are more likely to qualify for in-work benefits, many fail to claim them.²

[1] House of Commons Exiting the European Union Committee (Second Report of Session 2016-17)
[2] Migration Observatory Oxford University 2016

5. The Residency Rules...

The residency rules for Universal Credit eligibility mean that to be able to apply for Universal Credit EEA Nationals must ordinarily:

1. be **physically present** in Great Britain when they apply and continue to claim Universal Credit.

AND

2. be **habitually resident** in, what is known as, the 'Common Travel Area' (which includes the UK, Ireland, Channel Islands and the Isle of Man) when they apply, meaning that by the date of their claim they have already lived in the area for an 'appreciable period' (this normally means that the person has already been living in the area for at least 3 months) and that they have an intention to settle here for a temporary or permanent period.

AND

3. have a **right to reside** in the UK – a person will normally have a 'right to reside' if they are here working or as a self-employed person or the family member of such a person. See Section 6. Right to Reside for more information.

Note 4: An EEA National who is classed as a 'worker' or a 'self-employed person' is exempt from the 'habitual residence test'. This means that an EEA National may come here and upon starting work or working as a self-employed person they may apply for Universal Credit to help them with the costs of day-to-day living and rent.

6. Right to Reside

Currently, EEA Nationals have a right to enter the UK and remain here for a temporary period. However, to remain in the UK an EEA National requires a 'right to reside' and it is only when an EEA National has such a right that they are able to apply for Universal Credit (but also see Note 5: Universal Credit Exclusions on page 6).

There are essentially **SIX** main types of situations in which an EEA National has a 'right to reside'. These are as a:

- 1. Jobseeker:** The EEA National has come here to look for work or they have been living here and are now looking for work having previously had a 'right to reside' as a worker, self-sufficient person or student. To count as a 'jobseeker' the EEA National must be able to evidence that they are indeed looking for work. They must also be able to show that they have a genuine chance of getting a job (a 'genuine chance of being engaged'). After a period of 91 days as a jobseeker, the evidence of their job prospects must be 'compelling' for them to continue to be treated as a jobseeker.
- 2. Worker:** An EEA National will be regarded as a 'worker' where they are in an 'employment relationship' (i.e. they provide services in return for remuneration and the work they do is at the direction of another person) and undertaking work that is 'genuine and effective' rather than 'marginal and ancillary'. Whether the work undertaken is 'genuine and effective' depends on such factors as the hours worked, the regularity of the work, the level of remuneration and duration of the work.

3. Self-employed Person: An EEA National will be considered to be a 'self-employed person' if they run a business providing services in return for remuneration that is not under the direction of another person. The services provided must be 'genuine and effective' rather than 'marginal and ancillary'. (As in 2. above).



4. Self-sufficient Person: A 'self-sufficient person' is an EEA National who lives here and, whilst doing so, is not a burden on the 'social assistance system' meaning that they are not claiming any 'means-tested benefit' and not reliant upon NHS services should they succumb to ill-health or to injury. They must simultaneously have comprehensive sickness insurance.

5. Student: An EEA National who is studying will have a right to reside providing that they are enrolled as a student in a government-accredited establishment.

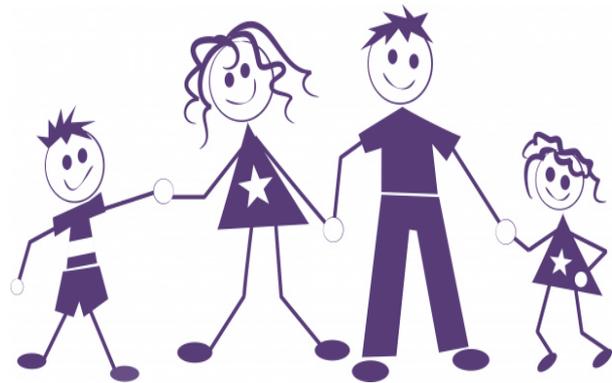
To qualify as a student, the EEA National must not be claiming any 'means-tested benefit' and not reliant upon NHS services should they succumb to ill-health or to injury. They must simultaneously have comprehensive sickness insurance.

6. Family member: A family member of an EEA National who has a 'right to reside'. A 'family member' of an EEA National will be the EEA National's:

- married or civil partner
- child, grandchild or great-grandchild and aged under 21
- child, grandchild or great-grandchild and aged 21 or over but who is 'dependent' (meaning: see below) on the EEA national in question
- parent, grandparent or great grandparent but is 'dependent' (meaning: see below) on the EEA National in question.

Dependent: This means that the family member receives 'material' support for or towards the 'basic necessities of life' (e.g. financial support for day-to-day existence or accommodation) from the EEA National in question.

These 'family members' will have the same 'right to reside' status as their EEA National relative. This means that, for example, the 'family member' of an EEA 'worker' will also have a 'right to reside' as an EEA 'worker' for benefit purposes and so have the same right to apply for Universal Credit.



An EEA National may also be able to establish a 'right to reside' as an '**extended family member**' of another EEA National that already has a 'right to reside' where they:

- are the partner of an EEA National and they have a lasting/durable relationship with them
- have a serious health problem and the EEA National is their carer
- were previously dependent on the EEA National whilst living in another EEA country.

In the last two cases an '**extended family member**' could be, for example, a brother, sister, aunt, uncle, cousin, nephew or niece. In the last example the person must have come to the UK when the EEA National did and they must continue to be dependent upon them.

Any EEA National seeking to establish a 'right to reside' as a 'extended family member' will need a 'EEA family permit' (or a 'registration certificate'/'residence card') which can be obtained from the Home Office.

An EEA National who has a 'right to reside' on the above grounds is referred to as a 'qualified person' and is considered to be 'residing legally' in the UK. See also Box 1.

Note 5: Universal Credit Exclusions: An EEA national whose only 'right to reside' is as a 'jobseeker' or 'self-sufficient person' or 'student' will not be able to claim Universal Credit. For those who are here looking for work this is different from the old 'legacy benefit' system whereby a jobseeker could claim Income-related Jobseeker's Allowance for at least 91 days.

BOX 1: Obtaining Permanent Right to Reside

An individual who has been a 'qualified person' (because they have held a 'right to reside') and 'resided legally' in the UK for a period of at least 5 years, gains a permanent right to reside. This means that they would no longer need to satisfy the 'right to reside' test on other grounds. In such a situation the EEA National would be able to apply for Universal Credit in the same way as a British Citizen. However, a permanent right to reside would be lost if the EEA National was absent from the UK for more than 2 consecutive years. There are other ways in which an EEA national can obtain a permanent right to reside. This includes when an EEA National reaches the age of retirement following a period as a 'worker' or 'self-employed person', or on the grounds of permanent incapacity following a period as a 'worker' or 'self-employed person'.

Please note that there are other circumstances in which a person may establish a 'right to reside' in less than 5 years. These include, for example, where the person is a family member of a 'worker' or 'self-employed person' who has died and where a 'worker' or 'self-employed person' reaches retirement age or becomes permanently incapacitated due to ill-health/disability. Do seek further information and advice as necessary.

Moving forward, it is our understanding that those EEA Nationals that presently hold a 'permanent right to reside' status (e.g. because they have been a 'qualified person' for 5 years or more) will be able to apply for 'settled status' upon application.

BOX 2: Retaining Worker or Self-employed Person Status

In some circumstances, an EEA National with a right to reside as a 'worker' or 'self-employed person' may retain that status even when they cease work or self-employment. This includes where the person:

- loses their job or business through no fault of their own
- temporarily stops work because of an illness or accident
- undertakes vocational training that is linked to their previous job or business
- is pregnant and has entered the maternity period
- ceases work because of the effects of the latter stages of pregnancy.

As the law stands, the provision enabling a worker to retain their 'worker' status when ceasing to work during the latter stages of pregnancy only applies to a worker, not a self-employed person. **An EEA National is able to apply for Universal Credit during any period in which they are able to retain their 'worker' or 'self-employed' status.**



BOX 3: A Derivative Right to Reside

In some situations, an individual may be able to secure what is known as a 'derivative right to reside' in the UK and, as such, be able to apply for Universal Credit. The provisions are complicated but apply mainly to ensure that an EEA National child can continue their education in the UK and save them having to move between EEA countries in the event that their EEA National parent(s) loses employment and/or separate.

As an example, a person may secure a 'derivative right to reside' if it may be shown that they are the 'primary carer' of a child who has been living in the UK whilst their mother/father were working here and that the child would, by necessity, be unable to remain living here if it were not for the care and support they provide. (Note: Different rules apply if the child in question is a British National. Do seek further information and advice as necessary). As a 'primary carer', the person must have responsibility for the day to day care of the child, including the responsibility for the making of decisions about their education, health, and finances. To qualify the person must be a family member of the child or their legal guardian, and their main carer or shared carer.

A person could also secure a 'derivative right to reside' if they are the 'primary carer' of a 'self-sufficient child' and the child in question could not remain living in the UK should their 'primary carer' leave. A 'self-sufficient child' is a child who has sufficient resources to support not only themselves but also their 'primary carer'. In such cases the nationality of the 'primary carer' would be irrelevant. However, the child must be an EEA National (not a British National).



Permanent Right to Reside: Please note that holding a 'derivative right to reside' does not mean that the person is a 'qualified person'. Therefore, a period with a 'derivative right to reside' status does not count towards gaining a permanent right to reside. (See Box 1. Obtaining Permanent Right to Reside).

Universal Credit Entitlement: The Universal Credit rules specify that an individual who derives a 'right to reside' from a child (e.g. because they are their 'primary carer') will lose that 'right to reside' if they gain an alternative 'right to reside'.

So, for example, if a person had a 'derivative right to reside' from a child in education and then claims Universal Credit, that person could lose their 'derivative right to reside' if they were compelled to look for work under their Universal Credit 'claimant commitment'. This is because they would gain an alternative 'right to reside' as a 'jobseeker' and, as already outlined, a 'jobseeker' does not have a right to apply for Universal Credit.

It is arguable that excluding 'primary carers' who are also 'jobseekers' from having a 'derivative right to reside' under European Union law and thereby excluding them from Universal Credit infringes European Union law because it undermines the requirement to enable the child to continue in his/her education. In consequence, it could be open to legal challenge.

Do seek further information and advice as necessary.



7. EEA Nationals

Other Benefits

This Benefits Bulletin focusses on the rights of EEA Nationals to apply for Universal Credit. However, EEA Nationals may be entitled to other benefits depending upon their individual circumstances.

For example, an EEA National may be able to apply for:

- **Carer's Allowance:** If they are caring for a disabled child or adult who has been awarded Disability Living Allowance (middle or higher rate care component), Personal Independence Payment (daily living component) or Attendance Allowance.
- **Personal Independence Payment:** If they are disabled and aged 16 or over but under 65 years old and need longstanding help with their personal care/daily living and/or mobility.
- **Attendance Allowance:** If they are disabled and aged 65 years old or over and need help with their personal care.
- **Pension Credit:** If they have reached the 'qualifying age for Pension Credit'. This is a 'means-tested benefit' designed to provide pensioners with a basic income for day-to-day living.
- **Child Benefit:** For any dependent children they are 'responsible' for.

However, do note that each of the above benefits has similar presence and residency (and 'right to reside') conditions attached. Do seek further information and advice as necessary.

8. Non-EEA Nationals

The benefit rights of non-EEA Nationals are complicated and outside the scope of this Benefits Bulletin. When seeking to advise non-EEA nationals please be aware that:

- non-EEA Nationals normally require permission to enter and remain in the UK
- a non-EEA National is normally a 'person subject to immigration control' (PSIC)
- a PSIC will normally need a visa to enter or remain in the UK
- a PSIC is not normally entitled to Social Security benefits, indeed when permission is granted to a PSIC to remain in the UK it is often on condition that they 'have no recourse to public funds' (i.e. they do not claim any benefits).

An asylum seeker is not a PSIC. An asylum seeker is a person who leaves their country of origin and applies for asylum in the UK.

Asylum Seekers are not normally allowed to work. They are also not entitled to claim any benefits. Instead asylum seekers are supported by the Home Office whilst seeking asylum. The Home Office will provide them with a basic amount of money intended to meet the cost of day-to-day living and accommodation. A failed asylum seeker is not lawfully present in the UK. They are not usually entitled to any financial support. They are not entitled to claim any Social Security benefits. Do seek further information and advice where necessary.

If a person's application for asylum is successful, they will be given refugee status (normally for a temporary period). Those with refugee status may claim benefits in the same way as British Nationals. Whilst they have to be resident in the UK to claim Social Security benefits, they are not subject to any right to reside or 'habitual residence' test conditions.

Welfare Rights Service
Specialist Support Team
City of Wolverhampton Council
WRS@wolverhampton.gov.uk

The details provided in this Benefits Bulletin are meant to provide a guide on important and topical issues relating to Social Security Benefits. The details should not be treated as an authoritative statement of the law. The details may be subject to change by new regulation and/or case law. Do seek further information and advice as necessary.