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Important tips when employing Foreign Nationals



Many people throughout Africa look at South Africa as a preferred destination that offers socio-economic opportunities, with the result that it has become home to numerous inter-continental and inter-regional migrants seeking lucrative employment.

Employers often don’t realise that they need to comply with specific laws relevant to the employment (and terminating the employment) of these immigrants, namely the Immigration Act 13 of 2002 and the Employment Services Act 4 of 2014.

Defining a foreign national

A foreign national is defined in the Employment Services Act as “an individual who is not a South African citizen or does not have a permanent residence permit issued in terms of the Immigration Act”.

Employer's duty as per Section 38 of the Immigration Act:

- No person shall employ–
  - an illegal foreigner;
  - a foreigner whose status does not authorise him/her to be employed by such person; or
  - a foreigner on terms, conditions or in a capacity different from those contemplated in such foreigner's status.
- An employer shall make a good faith effort to ascertain that no illegal foreigner is employed by him or her or to ascertain the status or citizenship of those whom he or she employs.

It is clear from the above that the employer has a duty to ascertain the status of a prospective employee and to ensure that the permit remains valid while employed.

Employers should be aware that if they knowingly employ an illegal foreigner, they could be fined or face imprisonment of up to one year for a first offence. Employers must therefore ensure that foreign nationals in their employ are in possession of valid work permits.

In the case of ***Discovery Health Limited v CCMA & Others [2008] 7 BLLR 633 (LC),*** the employee was dismissed after the expiry of his work permit. The Labour Court made two significant findings:

- The intention of the Immigration Act is not to render a contract of employment concluded without a valid permit null and void. The contract of employment remains valid until it is terminated by the employer.
- Even if the contract had been invalid, the employee still fell within the definition of an employee for purposes of section 213 of the Labour Relations Act and therefore enjoyed the protection afforded by this Act.

In conclusion

It is clear that an employer may not simply terminate the employment contract without giving notice and following a fair procedure. Section 23(1) of the Constitution determines that everyone has the right to fair labour practices, including foreign nationals. Even if they don't have a valid work permit, they still enjoy all the rights afforded by labour legislation such as the Labour Relations Act, Employment Equity Act and Basic Conditions of Employment Act, to name a few. The employer can treat the situation as an incapacity on the grounds that an employer may not legally employ a foreigner without a valid permit and thus follow the process set out in the Labour Relation Act. The employer should, however, allow the employee an opportunity to obtain a valid permit and assist with the process.

SERR Synergy assists businesses in a practical and supportive way with regard to the required processes and procedures to ensure labour legislation compliance as per the above case and example. We ensure that employers apply the correct and fair procedure by providing them with a company policy for dealing with work permits and by

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