

Understanding obligations and the law when it comes to immigrant employees

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Many people throughout Africa, look at South Africa as a place which offers socio-economic opportunities; and as a result, it has become home to many inter-regional and inter-continental migrants seeking gainful employment. What many employers don't realise is that there are particular laws applicable to employing (and dismissing) these immigrants, which all employers will need to be aware of. We set out below a high-level summary of the key considerations you ought to be aware of in employing foreign nationals.



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In terms of the Immigration Act, it is unlawful for an employer to knowingly employ a foreigner who is not authorised to be employed in South Africa. Any foreigner requires a valid work visa to work in South Africa. Often such visas are linked to a specific employer and are not transferrable. All employers are also required to make a good faith effort to ensure that they do not employ illegal foreigners. Employing a foreigner without the required visa and/or a failure to make the required good faith effort to determine an employee's status are offences which could result in a fine or imprisonment. This means that it is incumbent on all employers to obtain the identity documents and, where appropriate, the visas of all its employees and ensure their continued validity.

Immigration vs labour relations laws

In our experience, the dilemma that many employers face is how to address a situation where post-employment they realise that members of their workforce do not have the required permit to legally work in South Africa either because the employee never had the required visa (the employer failed to check this at the time of employment) or because the employee's work visa has expired.

An employer's inclination may be to simply terminate the relationship on the basis that due to the Immigration Act the relationship is unlawful. Such a termination, however, falls short of the requirements set out in the Labour Relations Act which protects all employees regardless of the employee's legal status to work in South Africa. As with any other employee, the employment relationship between the parties may only be lawfully terminated for a fair reason and after following a fair process.

Reviewing work permits

There are only three grounds on which an employer may lawfully terminate an employment relationship: misconduct; incapacity; and the employer's operational requirements.

The specific ground for termination determines which process an employer must follow. A failure to hold the required visa may be treated as an incapacity issue. Case law has, however, indicated that the employer must provide the employee with reasonable assistance to attempt to rectify his or her illegal status. This includes affording the employee an opportunity to engage with the Department of Home Affairs (giving reasonable time off) and completing and submitting necessary forms to support the employee's efforts. Paramount to the entire process is that an employer must ensure that the employee is treated with dignity and respect.

Notwithstanding the general guidelines set out above, the facts and circumstances of each individual are unique, and each situation must be addressed and dealt with on its specific merits. As a starting point, all employers need to conduct careful and periodic reviews of their employees' work permits to ensure that they are not falling foul of the law and are appropriately managing any risks.

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