

Illegal foreigners in your employment

By Christiaan Swart, senior legal advisor, LWO Employers Organisation

Employers are prohibited from employing any illegal foreign nationals in terms of the *Immigration Act, 2002 (Act 13 of 2002)*. Where an employer is found guilty of contravening this act, the employer will face imprisonment of no longer than one year, for a first offence, or can be fined.

Employers should ensure that potential employees are in possession of a valid work permit/visa. Be sure to conclude a fixed-term contract with such a person, clearly stating that the contract is valid for the duration of the valid work documentation.

Where the foreign national is employed on a permanent contract, or without any contract, the employer must follow a fair procedure before terminating employment. Take note that South African labour legislation protects foreign nationals, even if they don't possess a valid work permit/visa. This means foreign nationals can also approach the Commission for Conciliation, Mediation and Arbitration and lodge a claim for unfair dismissal if the employer does not follow a fair procedure.

Steps to take

The employer must act as soon as he/she becomes aware of the fact that the employee's work documentation has expired by informing the employee that legislation prohibits the employment of illegal foreign nationals and that it is therefore a requirement to continue employment. Should he/she fail to produce a valid work permit/visa within a reasonable time, it could lead to the termination of employment.

The employer must provide the employee with the opportunity to obtain the required valid work permit/visa. This could entail giving the employee time off in order to obtain the documentation, and even assistance with the application. If the employee fails to produce the required valid work permit/visa, the employer must follow the proper incapacity procedure to terminate employment and dismiss the employee.

The incapacity procedure


Issue a notice of an incapacity consultation. This notice must set out that the issue regarding the employee's valid work permit/visa will be discussed as he/she is operationally unable to perform his/her contractual obligation. Should he/she fail to provide the required valid documentation, it could lead to termination of employment.

Consult with the employee and discuss the notice in full. Provide the employee with the opportunity to respond to the allegations of not being in possession of the required

valid documentation. Discuss any possible assistance that can be offered to the employee. Warn the employee that, if the valid documentation is not provided, it could lead to termination of employment.

Should the employee fail to provide the required valid documentation, issue the employee with a notice to attend an incapacity hearing. During the hearing, provide all the facts/documents/evidence to the chairperson. The employee will also be given the opportunity to state his/her case before the chairperson. The chairperson may recommend dismissal.

UIF registration

Employers must also ensure that foreign employees are registered with the Unemployment Insurance Fund (UIF). The only exception where the employer does not have to register the employee for UIF, is when the employee is appointed on a fixed-term employment contract and will return to his/her country of origin after the contract expires. 



Laat jou arbeidsregskwessies in bekwame hande

- Suksesvolle arbeidsregadvies SEDERT 1990
- SPESIALISTE in arbeidsregswetgewing
- Praat met gekwalifiseerde REGSPRAKTISYNS

SLUIT NOU AAN

Leave your labour law matters to our efficient team

- Successful labour law advice SINCE 1990
- SPECIALISTS in labour law
- Speak to qualified LEGAL EXPERTS

JOIN NOW

Die LWO is 24/7 beskikbaar by 0861 101 828 

The LWO is available 24/7 on 0861 101 828

 info@lwo.co.za  www.lwo.co.za

Mondstuk van die Suid-Afrikaanse aartappelbedryf • Mouthpiece of the South African potato industry

CHIPS

VOL 38 NO 1 • JANUARY / FEBRUARY 2024

**CULTIVATING SOIL HEALTH:
VITAL FOR
POTATO PRODUCTION**

**World potato markets
at the end of 2023**

**'n Kykie na die
pepper ringspot-situasie**

**WHEN THE CHIPS ARE DOWN:
ROLE OF THE SPUD
IN GLOBAL FOOD SECURITY**

**Plaagdoderresidu's en
voedselveiligheid**