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The Labour Relations Act and employment of foreign nationals



What legislation governs the employment of foreigners in South Africa?

Foreign Nationals are no stranger to the South African labour market. Even though certain industries might be more likely to employ foreigners based on the nature of their trade, legislation governing the employment of foreigners is enforceable throughout all labour sectors.

Section 38(1) of the Immigration Act, Act 13 of 2003, reads as follows:

(1) No person shall employ-

- *an illegal foreigner;*
- *a foreigner whose status does not authorise him or 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.*

Because of section 38(1), employers are cautioned to conduct thorough background searches on potential employees to be sure they have the necessary working permits (if applicable). Employing an “invalid” foreigner not only exposes the employer to prosecution and fines, but they will also have to deal with labour procedures to dismiss the employee. If employment is offered to a foreigner who does not have the correct permit, the contract of employment is not necessarily void, but the underlying employment relationship would still be the main factor to consider.

In *Discovery Health Limited vs CCMA JR 2877/06* (the Discovery case) the Judge makes reference to an article by Craig Bosch. Bosch's view is that the concept of an employment relationship is an appropriate vehicle to extend the protection of the ***Labour Relations Act***, Act 66 of 1995 (LRA), to unauthorised workers. Even if a contract of employment contains a clause indicating that the employee may be dismissed if their work permit expires, this will not automatically warrant a dismissal without having followed due process.

What is the definition of an employee as per Labour Legislation Act?

The Labour Relations Act (LRA) defines an employee as “any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and any other person who in any manner assists in carrying on or conducting the business of an employer”, and “employed” and “employment” have meanings corresponding to that of “employee”.

In the Discovery case the court held that only an employee as defined in the LRA may claim protection under the LRA. The court further held that because a ***contract of employment*** is not the sole ticket for admission into the golden circle reserved for “employees”, the fact that the respondent's (employee) contract was contractually invalid only because the Applicant (the employer) had employed him/her in breach of section 38 (1) of the Immigration Act did not automatically disqualify him/her from the status of employee.

What then if a foreign national's work permit is invalid or has expired?

As seen above, ***foreign nationals will enjoy the protection afforded by the Labour Relations Act if they fall under the definition of employee.*** The contract of employment will not be the deciding factor. Where an employee's work permit expires, an employer will have to follow fair labour practices before disciplining or dismissing the employee. If any misconduct is present, the employer will have to follow disciplinary procedures. If, however, there is no misconduct, the employer will be advised to follow the incapacity process. This should be differentiated from medical incapacity.

Our experienced *labour relations consultants* deal comprehensively on your behalf with the relevant labour legislation and most common pitfalls that businesses encounter when employing individuals.

About our author: Audrey Cloete obtained her LLB degree from the North-West University Potchefstroom in 2003. She completed her articles with the main focus on Criminal Law and is also an admitted Conveyancer. Audrey joined SERR Synergy in 2015 where she currently works as a Legal Compliance Advisor.

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