

# FOREIGN NATIONAL WORKERS

EVERYTHING YOU NEED TO KNOW FROM YOUR RIGHTS TO THEIRS

October 2023

The Immigration Act defines an 'illegal foreigner' as a person:

- ✓ Who enters South Africa in breach of the Immigration Act
- ✓ Or someone who does not have the correct documentation such as an asylum seeker permit, legal recognition of refugee status, or a valid permit or visa in their passport.

The term '**illegal foreigner**' is an issue as it creates the perception that the person is a criminal. A person cannot be 'illegal' just because they do not have the correct documents:

Many asylum seekers have applied for an extension of their visa but have not yet received them as there is a backlog at Home Affairs.

In South Africa, foreign nationals wanting to work in this country, need to have specific documentation. They must have a valid work visa and passport. They must carry copies of their work visa and passport with them at all times (not the actual documents).



## DOCUMENTATION FOR LEGAL EMPLOYMENT:

- ✓ **Visa and Work Permit:** Foreign nationals must obtain a valid visa and work permit before starting employment in South Africa. These documents are typically issued by the Department of Home Affairs.
- ✓ **Valid Passport:** A valid passport is essential for all foreign workers. Passports must be valid for the duration of the work permit.
- ✓ **Offer of Employment:** Foreign workers need a formal job offer from a South African employer to secure a work permit.
- ✓ **Police Clearance:** Some permits may require a police clearance certificate from the applicant's home country.

## TYPES OF WORK VISAS

- ✓ **Critical Skills Visa:** For specialized workers with critical skills in demand in South Africa.
- ✓ **General Work Visa:** For foreign nationals with job offers for positions that cannot be filled by South African citizens. ***For our industry, this visa is typically the most common one.***

Always remember that the visa must mention the industry they work in i.e. hospitality/restaurant/something similar must be mentioned on the visa (cannot say farming for example)





## DOCUMENTATION HANDLING


- ✓ **Original Documents:** Foreign nationals should keep original documents in a safe and secure location.
- ✓ **Certified Copies:** Certified copies of important documents (e.g., work permit, passport) are often required for various administrative purposes. ***This certification can take place at any Police Station***
- ✓ **Keep Copies:** It is advisable to keep copies of essential documents in case of loss or theft. Keep copies on file in the workplace.

## RIGHTS OF EMPLOYEES

- ✓ **Treatment:** Foreign employees have the right to fair treatment, equal pay for equal work, and a safe working environment.
- ✓ **Union Membership:** Foreign workers have the right to join trade unions and participate in collective bargaining.
- ✓ **Access to Legal Representation:** In case of disputes or issues related to documentation or employment, foreign employees have the right to seek legal representation and remedies through appropriate channels.
- ✓ **Foreign nationals are not required to carry the originals of their work visa and passport with them at all times. Copies are acceptable, but they must be certified by a notary public or a commissioner of oaths.**

## RIGHTS OF EMPLOYERS

-  **Verification of Documents:** It is your responsibility to ensure that all documents are originals, accurate and you have a certified copy on file.
-  **Employment Contracts:** Employers should keep contracts that clearly state the terms and conditions of employment, including the validity of work permits.
-  **Cooperation with Authorities:** Employers must cooperate with law enforcement, police, and immigration officials during inspections or investigations. You have the right to ask for identification of the officials.
-  **Suspension or Termination:** If a foreign employee's documentation is found to be invalid or expired, the employer has the right to suspend or terminate their employment.



Make a note of expiry dates on your file and remind your employees to renew their visas/permits. Give them 3 months notice. Record the conversation on file.

## CONSEQUENCES OF HIRING ILLEGAL IMMIGRANTS

1. The **responsibility** falls on the employer when they decide to employ a foreigner. The law does not penalize the foreigner for accepting or working with no visa.
2. An employer may not employ a foreign national whose status does not allow him/her to be employed, or on terms and conditions, or in a capacity, that differs from those associated with his/her status
3. Even if your foreign national **DOES NOT** have the correct documentation or valid working visas, they are still protected from unfair dismissal under the Labour Relations Act 66 of 1995, as amended (“the LRA”).
4. If you have hired a foreign national without the correct documentation, this is seen as an offence which is punishable with a fine (R7 000 – R100 000 per illegal worker) or imprisonment, which will not exceed 12 months for their first offence. ***The penalty is dependent on the contravention.***

## DO ILLEGAL WORKERS HAVE ANY RIGHTS?

Yes, the Employment Services Act, 2014, in section 8(4) determines that illegal workers still have rights. It's the employer's responsibility that they hire someone with the correct documentation



## DOES THE COMPANY KEEP ANY DOCUMENTS FOR THE FOREIGNER?

Immigration legislation requires that South African employers with foreign national employees keep the following documents on record:

- Certified copies of passports, reflecting personal particulars.
- Copies of each work visa
- Proof of the capacity in which each foreigner is or was employed.
- Copies of IRP5 forms or certificates of earning and job descriptions.

The employer must keep records of the following for two years after a foreigner has left:

- The termination of the foreigner's employment.
- Any breach by the foreigner of his or her status according to the Immigration Act / Regulations.

## ASYLUM SEEKERS AND REFUGEES WITHIN SOUTH AFRICA

An application for asylum in South Africa is made in terms of the Refugees Act. An asylum seeker is a person who has applied for asylum and is awaiting to hear if they are able to stay or not.

For example, if it's found that any person has a criminal record against humanity in their own country, they will not qualify to be granted refugee status.

Refugees and Asylum seekers visas will have a 'right to work' endorsement on their visa. No further work visa is necessary.

# ZIMBABWEANS

A Zimbabwean who would like to work in South Africa must have a valid work permit or be a permanent resident holder.

To stay on the right side of the immigration law, the employer must verify if they have a valid work visa.

The Zimbabwean Exemption Permit (ZEP) was implemented by the Department of Home Affairs in 2017 with the aim of regularising the stay of undocumented Zimbabweans in South Africa. It replaces previous permits including the DZP and ZDP.

## THE ZIMBABWEAN EXEMPTION PERMIT (ZEP)

The Department of Home Affairs has extended the Zimbabwean Exemption Permits deadline by another six months, ending 30 June 2024.

It is very important to take note that ZEP holders are still allowed to perform work and can continue receiving other South African services from banks, financial and/or learning institutions. While they wait for their renewed ZEP, as long as they have a valid one,, they cannot be arrested, ordered to depart the country, or be detained for deportation.

The liability to ensure that employees have the necessary legal status to be employed rests with the employer.

Employees may not be dismissed once their permits expire. Employers must grant the employee reasonable time off and assistance in applying for an alternative visa.

Don't wait till the last minute to follow incapacity procedures.

## WAIVER EXEMPTIONS

A Waiver is when a person, government, or organization agrees to give up a right or says that people do not have to obey a particular rule or law.

A waiver can be considered by Home Affairs:

- Where certain requirements cannot be fulfilled, a special waiver request may be considered by the Department of Home Affairs (DHA) when submitted in terms of section 31(2)(c) of the Immigration Act, 2002, as amended.
- A waiver application is a formal written request to the DHA to set aside certain prescribed requirements for a visa in any given category. This means that companies and/or individuals may, on good cause, be exempted from certain prescribed requirements.

Typical scenarios would include:

- A waiver letter can be submitted with the General Work Visa application instead of the Department of Labour Certificate.
- The employer may have received a negative recommendation from the Department of Labour.
- The applicant may not be able to produce an evaluation from the South African Qualifications Authority (SAQA) of their foreign qualifications.
- The applicant may not be able to travel abroad to their country of origin or of permanent residence to submit an application.
- The applicant is unable to obtain/produce a Police Clearance Certificate.
- In the case where numerous people of an organisation need the same prescribed requirement, a company may apply for a blanket waiver (mostly used for Corporate Visa applications).

If you have any questions, please contact us at  
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