

## Top tips to protect your business from migration penalties

Employer Sanctions legislation has been in place for several years now but many employers still do not fully appreciate and understand the requirements on their businesses and the associated compliance and record keeping obligations.

All businesses, but particularly those in skillshortage industries such as health and engineering, and businesses that hire students, should consider some practical tips to make the process easier and ensure full legal compliance.

Employers must be aware of the citizenship and visa status of their employees at all times. This involves a lot of planning, documentation and a clear understanding of the myriad immigration regulations.

Many businesses have suffered downtime dealing with the Department of Immigration, lost staff or lost their right to sponsor workers, simply because they have not done their homework.

### Tip 1: Treat all employees equally

1 in 2 Australians were born overseas. You can never assume, based on name, length of time in the country, or any other indicator that someone is an Australian citizen. Everyone who is not a citizen living in Australia holds a visa. With more than 170 different visas it is essential to investigate each new employee's situation individually as not all visas permit work, or place restrictions on the length and nature of work that can be performed.

It's important to put the same questions about citizenship and visa status to all prospective staff. Targeting only some workers can leave the business exposed to claims of discrimination.

Human resource professionals should also consider what sort of evidence of citizenship and visa status it should be your policy to request. The Department of Immigration expects that a copy of the photo ID and evidence of citizenship for all new workers should be obtained, but few businesses go to this level.

But, in some instances you may want proof. For instance where you doubt a claim a new employee is Australian. It then becomes critical that the right to ask for evidence of citizenship exists in relation to everyone and that you are not discriminating against that one employee.

To complicate matters further, if the business has approval from the Department of Immigration to sponsor workers, this sponsorship can be suspended, or barred temporarily or permanently if there has not been full compliance with immigration and other laws, including discrimination laws.

### Tip 2: Check work rights

It is critical that you know your foreign employees' visa and work rights status because employing a foreigner who doesn't have the right to work, or who doesn't hold a current visa, may lead to regulatory enforcement actions. For a company a criminal penalty of up to \$66,000 applies per illegal worker employed. Individuals face jail for up to 2 years.

Once you know your prospective worker is a foreigner, you'll need to assess whether they have the appropriate right to work in the role you want them for.

Minimum information you need to collect generally includes the person's full name, as shown in their passport, date of birth, current visa subclass type and visa expiry date. This should be confirmed by sighting and making copies of the relevant visa labels and the passport.

In some cases more information may be needed, such as where the person's visa is linked to the status of their spouse.

It is also worth considering whether you will require employees bring in their passport and visa evidence for you to take copies, or if you will rely on copies provided by them. Increasingly, visas are approved by email which makes tampering with printouts easier than ever.

Processes for verifying information provided must also form part of any policy that has a reasonable chance of protecting the business if things go awry.

### Tip 3: Beware of Privacy Limitations

Under the Privacy Act 1988 (Cth) employers are exempt from privacy regulations in relation to accessing personal details of employees for matters pertaining to their employment. But employers trying to access visa details to manage their foreign employee's employment relationship are stymied by different federal privacy restrictions in the Migration Act. Under the Migration Act, personal identifying information collected by DIAC is more stringently protected and employers are told that they must obtain information directly from the visa holder.

The Migration Act does allow for personal information to be disclosed with written consent, but this is not enshrined in DIAC policy and departmental officers will refer employers to the visa holder touting privacy restraints. Alternatively employers are directed to use the Visa Entitlement Verification Online service (VEVO), which requires the employee's consent and details. If you don't already have it, consent may not be forthcoming, particularly if a visa has been cancelled.

If VEVO cannot find the employee, because, for example their passport number has changed, you are left with contacting the Department of Immigration whose officers will only inform employers who are sponsors of a person whether they are still a sponsor or not. If not a sponsor, without consent you will only be provided with general information.

### Tip 4: Get reliable advice

The first point of call for most employers who want information about visas is to ring the Department of Immigration. However, advice given by the Department of Immigration is not binding on them.

Many clients over the years have been told incorrect information and in some cases visa holders have been forced to leave Australia as a result. If you use a lawyer, you should make sure they are a registered migration agent as only agents are authorized to provide immigration assistance. They will also be more knowledgeable about the range of visas that exist. You should ask to see a copy of the Code of Conduct for Migration Agents, under which an agent is required to give you a reasonable estimate of fees for any work done. A qualified agent is probably your safest option to verify work rights and visa status.

### Tip 5: Keep Informed

The obligation not to employ an illegal worker is continual. The Department of Immigration expects all employers to check citizenship status and record details of work rights prior to engaging new staff.

This is feasible, yet doesn't assist employers where visas are cancelled or if the employee applies for another visa unknown to your business.

As an employer, even if you sponsor a person for a visa, the Department of Immigration will not inform you if a new visa is granted to that employee, or if an employee's visa is cancelled. This causes 2 problems:

(1) failure to comply with sponsorship obligations for a person you are unaware has a visa and

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(2) how to avoid sanctions for employing a person whose right to work was cancelled.

Businesses should, therefore, require that employees provide details of changes to their visa status, and regularly conduct visa status checks. This means it is important to get consent to check visa status at a time the employee is willing to give it to you such as when they apply for or get the job.

**Tip 6: Get Organised**

There is little point collecting data about visa status and not putting in place monitoring for important events - such as visa expiry or loss of work rights. Most students are limited to working 20 hours a week, and this needs to be monitored. You can make this a more efficient and quick process if you put in place a well-defined migration compliance system and management team.

There are also other preliminary steps to undertake such as:

- Organizing training for everyone involved in recruitment. They all need to be aware of the importance of conducting proper due diligence on citizenship and visa status before employees begin work.
- Keeping proper records of visa status and all visa status and work rights checks
- Reviewing the recruitment process from start to finish to ensure there is no way a foreigner can be employed without proving they have the right to work.
- Recording all dealings with the Department of Immigration.
- Keeping copies of any policy on checking visa status, or immigration sponsorship as it exists from time to time. This may be relevant in future discussions with employees or even the Department of Immigration.

**Tip 7: Prepare for change**

Never assume that because something worked last year for one employee that it will work again. Everything needs to be checked on an individual basis for each employee. Migration law literally changes daily. It is one of the most contentious areas of the law and visas change with the political winds.

For the same reason, never trust what an employee says - he is probably just as confused as you are. Clients often tell me they are on a "spouse" visa (that you assume is a permanent visa) when they actually have a student visa on the basis they are the spouse of a student (a temporary visa).

Many visa holders do not know what visa they hold and regularly confuse temporary and permanent visas. So never expose your business to the risk without proper checks. A mistaken belief an employee has "permanent residency" can mean you don't monitor visa expiry dates and expose your business to criminal penalties for employing an illegal worker if the visa expires.

Sponsoring and employing foreigners is hard work and involves much more than just completing a couple of forms. With proper planning compliance with immigration laws is not burdensome. But proper policies, planning and forethought is needed to avoid problems.

**About the author**

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This is really great advice for business. It is my experience that any business that does not address all of these issues will face problems down the line. It is hard enough for Australian born employees to understand the myriad of business laws and regulations, let alone trying to adjust when coming from overseas. Lack of clarity about systems and processes, linked to a failure to communicate can lead to considerable conflict and damage to individual and organisational reputations. Openness and transparency are so critical to this process. Compliance and treating all applications consistently and ethically helps to maintain the integrity of the entire system.

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