

FACT SHEET: EMPLOYING A NON-CITIZEN WITHOUT ENTITLEMENT TO WORK IN NEW ZEALAND

The use of unlawful workers can deny opportunities for lawful workers and undermine working conditions.

The Immigration Bill (tabled in the House on 08 August 2007) does not propose to change current obligations on employers to only employ those non-citizens with entitlement to work. The Bill proposes to change the current “reasonable excuse” provision in the Immigration Act 1987. This provision can be used in certain situations by employers to justify employing workers who are not entitled to work.

The current situation: the Immigration Act 1987

Under the Immigration Act 1987, an employer must not either knowingly, or without reasonable excuse, employ a non-citizen who is not entitled work in New Zealand. However, if the worker in question provided the employer with an Inland Revenue Department tax code declaration IR330 form, and the employer did not know the worker was not entitled to work, the employer is deemed to have a “reasonable excuse”.

Problems with the current situation

The current “reasonable excuse” provision in the Immigration Act 1987 limits prosecution of employers who employ a non-citizen without entitlement to work.

This is because of the use of the IR330 form as a reasonable excuse. An IR330 form is completed by an employee when they commence employment or want to change their tax code.

An IR330 form is an employee’s self declaration of their tax status and entitlement to work. Neither the Department of Labour nor the Inland Revenue Department collect or review IR330 forms. They are held by the employer.

The context for the problem

In 2005/06 the number of overstayers and temporary permit holders in New Zealand was estimated at 242,000. Overstayers (17,300 in 2005/06) have no entitlement to work in New Zealand, and temporary permit holders may only work if the conditions of their permit allow them to do so. While the labour market is tight and with unemployment at a record low, there is greater incentive and opportunity for overstayers and temporary permit holders to work unlawfully, if they should wish.

Proposed changes: the Immigration Bill

The Immigration Bill proposes that holding an IR330 form would no longer constitute a “reasonable excuse” for employing a non-citizen without entitlement to work. Instead employers would be required to take reasonable precautions and exercise due diligence to establish work entitlement.

An employer's obligation remains essentially the same. The key change is to the "reasonable excuse". The change is intended to provide a stronger incentive for employers to check work entitlement during the employment process.

The penalties for employers remain the same as under the Immigration Act 1987.

Obligation on employers to check entitlement

The Immigration Bill, if enacted, will not require employers to check the work entitlement of existing employees. While there is no positive obligation on employers, they will be well-advised to adopt a systematic approach to this issue, if they wish to ensure compliance with the law.

Assistance for employers

Inquiry system

It is proposed that the new immigration legislation allow the Department of Labour to disclose work entitlement information to an employer to enable them to verify that a prospective employee is entitled to work, and for how long.

The Department of Labour is intending to develop an online inquiry system to enable employers to check a prospective employee's entitlement to work. The inquiry system will provide relevant information about a non-citizen's entitlement to work and any relevant conditions (for example, that the non-citizen is entitled to work only for a particular length of time). The Department also intends to develop alternative methods of providing this information to employers without internet access.

The Department of Labour will ensure that the system complies with the Privacy Act 1993. There will also be an obligation on employers who obtain information from the Department to comply with the requirements of the Privacy Act.

Best practice guidance

In addition to the planned inquiry system, the Department of Labour intends to work with employer organisations and unions to develop guidance for employers on what constitutes "reasonable precautions and due diligence".

This best practice guidance will be publicly available to all employers. It is likely to recommend that prospective employers should:

- ask if person is entitled to work
- seek documentary evidence of entitlement
- check the evidence, and
- keep a record of the evidence.

Current practice

Many employers already routinely check entitlements to work in the employment process by asking for proof of citizenship or a birth certificate, or checking a prospective employee's immigration status as part of the recruitment process.

Under the proposed Bill, these practices will be facilitated by the online inquiry system and the establishment of best practice guidance.

Linking tax file numbers to work entitlement

It has been suggested that the Department of Labour seek to link Inland Revenue Department tax file numbers to work entitlement. Inland Revenue has advised the Department of Labour that work entitlement is not required before a tax file number is issued. This is for a number of reasons, including the fact that individuals should have tax file numbers in many circumstances when they do not have, or require, entitlement to work.

The possession of a tax file number is therefore not the same as evidence of entitlement to work in New Zealand.

Further information on this issue can be sought from the link Inland Revenue Department. Their website can be found at www.ird.govt.nz.

Public input

The Department of Labour sought public input and held discussions with stakeholders throughout the Immigration Act review process.

The public will be able to comment on the changes proposed in the Immigration Bill during the Select Committee process. Further information on this process can be found at www.parliament.govt.nz.