White Paper - Employer Sanctions Act

Migration Amendment (Reform of Employer Sanctions) Act 2013

Introduction

The Government estimates that there are 100,000 people working in Australia illegally - people without a valid visa, or working without work rights. On top of this, there are many temporary residents who have a visa with work rights, but who are working in breach of their visa conditions - for example international students and working holiday makers.

Penalties for businesses engaging workers in breach of Migration Regulations were introduced by the Migration Amendment (Employer Sanctions) Act in 2007. Under the 2007 Act, hefty civil and criminal penalties can apply where a worker either does not have a valid Australia visa, or is working in excess of the work rights on their visa. An offence is committed if the business allows a person to work or refers a person to work in breach of work rights.

However, it has been difficult for these penalties to be applied because they require Immigration to show that the business was "at fault" - that is either **knew** that the person was working in breach of visa conditions or was **reckless** as to whether they had appropriate work rights.

What has changed?

The Migration Amendment (Reform of Employer Sanctions) Act 2013 allows Immigration to further clamp down on illegal work practices. The 2013 Act introduces a **"no fault" system** for civil penalties. This means that penalties will apply if a business engages workers illegally regardless of whether the business was actually aware of this, up to a **maximum of $94,500** for each person found working illegally.

An "infringement notice" system has been introduced in the 2013 legislation. This allows Immigration to levy **fines against businesses of up to $18,900** without needing to initiate court proceedings. The burden of proof will be on the business to show that they have taken "reasonable steps" at "reasonable times" to check the work rights of their workers to avoid the fines.

The legislation also expands the definition of "allow to work" to cover most commonly encountered **contracting relationships**. Even if the person is not a direct employee, businesses may be committing an offence if it participates in any "arrangement or series of arrangements" which results in the person working illegally.

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Referring a person without appropriate work rights is an offence under the legislation, meaning **recruitment consultants** are potentially liable if a candidate does not hold the correct visa.

Penalties apply to "**Executive Officers**" who know, or should have known, that the business has engaged workers illegally. This would include Directors, CEOs, CFOs and even company secretaries.

The Act has passed both Houses on the 27th of February 2013, received the Royal Assent on 14 March 2013 and is effective from 1 June 2013.

Offences under the new legislation

There are four offences under the new legislation:

1. Allowing, or continuing to allow an unlawful non-citizen to work
2. Allowing, or continuing to allow a non-citizen to work in breach of a work-related visa condition
3. Referring an unlawful non-citizen to work
4. Referring a non-citizen to work in breach of a work-related visa condition.

The following concepts are critical to understanding these offences:

- Non-citizens covered by the new legislation
- Allowing a person to work
- Referring a person to work
- Visa Condition Restricting Work

Each element of these offences is explained in more detail below:

Non-Citizens

A "non-citizen" is any person who is not a citizen of Australia. The following categories of people fall within this definition:

- **Unlawful non-citizens** are those who are in Australia but who do not hold any current Australian visa
- **Bridging visa holders -** those who are waiting for the outcome of an application for a substantive visa. Generally, the visa will expire 28 days after notice is given of a decision on their substantive visa application. Many, but not all, have work rights whilst awaiting their decision
- **Temporary visa holders -** such as international students, working holiday makers or 457 visa holders
- **Provisional visa holders -** the most common category are temporary partner visa holders, but can also include provisional business migration visa holders (in this case, there is a restriction on the type of work they can do) and provisional skilled migrants (who generally can only work in certain geographic areas)
- **New Zealand citizens -** generally New Zealanders can travel to Australia without obtaining a visa first, remain in Australia indefinitely and work full time in Australia but can lose their status if they commit a criminal offence.
- **Permanent visa holders -** who generally hold unrestricted work rights, but whose travel facilities expire every five years (e.g. Employer Nomination Scheme or ENS, General Skilled Migration).

Allowing a Person to Work

An offence occurs if a business **allows a person to work**, or **continues to allow a person to work** in breach of Migration Regulations.

This clearly covers direct employment arrangements. However, the 2013 legislation defines "allow to work" as follows:

> The first person participates in an arrangement, or any arrangement included in a series of arrangements, for the performance of work by the second person for the first person or another participant in the arrangement or any such arrangement.

This is a very broad definition, and is intended to arrangements such as labour hire and use of workers within various entities within a conglomerate. However, it gives Immigration the flexibility to regard just about any "arrangement" as deemed employment for the purposes of the new legislation.

Businesses should take steps to verify that workers have the correct work rights whether they are direct employees, temps or contractors, otherwise they may be committing an offence under the new legislation.

Referring a Person for Work

An offence can occur where a business refers a person for work with a third party.

This applies to businesses operating a service referring people to another for work - this would capture most recruitment agencies and labour hire services.

An offence occurs if the referred candidate did not have a visa or appropriate work rights at the time they were referred to the end user.

It is then very important for recruitment agencies and labour hire businesses to check that candidates have appropriate work rights ahead of referring them to employers.

Visa Conditions

Breach of any "work related conditions" can result in an offence. Such conditions can include:

- **Conditions prohibiting work entirely:** the most common condition of this kind is condition 8101 which prohibits any work in Australia.
- **Restrictions on amount of work which can be done in Australia:** for example, International Students can work only 40 hours per fortnight whilst their course is in session (condition 8105). Working Holiday Makers can only work for a maximum of 6 months for each employer (condition 8547).
- **Restrictions on what sort of work can be undertaken:** most 457 visas are subject to condition 8107 which allows them to only work for their sponsoring employer in the occupation in which they were nominated. Business visitor visas have condition 8115 which does not allow them to engage in any work which could be done by an Australian citizen or permanent resident.

Not only do businesses need to know whether a person is permitted to work in Australia, they need to understand what kind of work and how much work a person is allowed to do.

State of Mind for Civil Penalties

Under s.486ZF of the new legislation, it is not necessary to prove the person's intention,

knowledge, recklessness, negligence or any other state of mind to establish a civil offence.

In other words, the fact that a person is working in breach of visa conditions could be enough for a business to be fined under the new legislation. A system of "strict liability" has been introduced which puts the burden of proof on the business to show that it has taken reasonable steps to check the visa conditions of its workers.

Defences to civil proceedings

If Immigration detects a person working illegally, a business would need to establish one of the statutory defences to avoid civil penalties.

The business will need to show that it has taken "reasonable steps" at "reasonable times" to verify the person's work rights. "Reasonable Steps" could include:

- Using a computer system prescribed by Migration Regulations to verify visa conditions before work and shortly after the expiry of the visa
- Creating a contractual obligation for another party to verify the person's work rights
- Viewing an Australian or NZ passport, Australian citizenship certificate, or certificate of permanent resident status

Many employers check visa labels in passports prior to employing people. Unfortunately, this does not establish a statutory defence under the new legislation.

In addition, circumstances may well change after a person commences work, for instance:

- The person's visa may expire
- The person may have a bridging visa - if the application is refused, the person may no longer have work rights.
- The person may obtain a further visa, which has reduced or no work rights
- The person's visa may be cancelled for breach of visa conditions

Unless the employer is checking the visa status of their employees regularly, there is no way for them to know whether these have occurred and they may unknowingly be committing an offence by continuing to employ the person.

Offences for Executive Officers of Corporations

The legislation extends offences to "Executive Officers" of companies where the business has committed an offence. Under the new legislation, "Executive Officers" include:

- Directors of companies
- Chief Executive Officers
- Chief Financial Officers
- Company Secretaries

An executive officer may be personally liable if they know or are negligent as to whether workers are engaged in breach of visa conditions (s.245AJ).

If they are a position to influence conduct of the company, executive officers must take all reasonable steps to avoid the breach being committed. Criminal and civil penalties can apply.

Directors and company officers must take steps to ensure the business is employing best practice in checking workers' visa status to avoid potential personal liability for offences under the new legislation.

Penalties under the 2013 Act

The 2013 Act gives the Department of Immigration a wide range of possible sanctions which can be imposed on employers and agencies:

- **Warning** - generally an Illegal Worker Warning Notice (IWWN) will be issued on the first offence
- **Infringement Notice** - if the conduct continues, the Department can issue an infringement notice requesting payment of a fine. This does not require the Department to undertake court proceedings, and the fine will stand unless the business can provide evidence in defence.
- **Proceedings for Civil Penalty Order** - The Department can also undertake civil proceedings for offences. This can result in a higher fine for the business, as well as the additional costs and inconvenience of undertaking court proceedings.
- **Criminal Proceedings** - For serious or repeated offences, criminal proceedings can be undertaken. In this case, the Department would need to show intention or recklessness on behalf of the business. Higher fines are applicable, as well as possible imprisonment of up to 2 years for each offence.
- **Aggravated Offence** - These are criminal offences which apply where there has been exploitation of workers (e.g. forced labour, sexual servitude or slavery). Imprisonment of up to 5 years is possible for these offences.

The penalties and process for each level of offence are summarised below:

	Infringement Notice	**Civil Penalty Order**	**Criminal Offence**	**Aggravated Offence**
How Enforced	Issued by DIPB	Civil Court Proceedings	Criminal Court Proceedings	Criminal Court Proceedings
Fault Element	None	None	Knowledge or Recklessness	Knowledge or Recklessness
Fine - Corporate	$18,900	$94,500	$126,000	$315,000
Fine - Individual	$3,780	$18,900	$25,200	$63,000
Other			Up to 2 years' imprisonment	Up to 5 years' imprisonment

Note that these penalties apply for **each offence** - if a number of workers are detected working illegally, the fines could be very significant indeed.

Current Methods of Checking Visa Conditions

Businesses currently check an employee's work rights by either:

- Viewing the employee's passport and checking the visa label there; or
- Using the Department of Immigration's VEVO system

The Department of Immigration is moving to a "label free" system which means that employees will increasingly not have visa labels in their passports.

Instead, employers will be expected to check employees' immigration status on the Department of Immigration's VEVO system. This requires the employee's name, date of birth, passport number and nationality to be entered each time a check is conducted.

Many employers check visa status and work rights before an employee commences employment. However, this does not guarantee that the employee continues to have work rights on an ongoing basis - for instance:

- The employee's visa may be **cancelled** meaning that they no longer have work rights - this is particularly common for international students
- For bridging visa holders and temporary partner visa holders, the employee's main visa application may be **refused**, in which case work rights also cease
- An employee may move onto a visa with **less favourable work rights** - for instance a working holiday maker may be able to work full time, but can only work for 40 hours per fortnight if they move onto a student visa

Unless visa checks are being conducted regularly, a business may unknowingly be breaching the Migration Regulations by engaging workers without proper work rights.

Generally, the results of visa checks are kept in paper format in files which cannot be instantly retrieved or accessed across different work sites. This exposes the business to significant risk if the files go missing, or if there is turnover of HR staff.

Too often, employers do not keep good records of the expiry dates of their staff's visas. Panic ensues when the business realises that a visa is about to expire and needs to be extended immediately. Or worse, the visa may expire without anyone being aware of this, exposing the business to liability under the new legislation.

How vSure Protects Your Business

vSure is an all-in-one immigration compliance package. It not only protects your business from the new penalties, but gives you a better handle on the immigration status of your entire workforce.

vSure gives you the following benefits:

Check your entire workforce with a single click.

Using the Department of Immigration's VEVO system, you would need to manually enter the biographic details of an employee each time you need to make a visa check. Using parallel processing, vSure can conduct a complete workforce check in a matter of seconds. A similar check may take hours using VEVO.

Keeps a Paper Trail of Checks

vSure allows you to access the original VEVO result backing up the vSure visa check. This is stored on the system for later reference, and can be used to avoid liability under the new legislation.

As permanent records of visa checks are kept, this gives your business an "institutional memory" of the immigration status of your staff, protecting your business if HR staff are on leave or otherwise unavailable.

Automated checks alert you about any problems

vSure automatically checks your entire workforce weekly and sends you a report via email. This report tells you which employees have an issue and what to do about it. For instance, if

an employee's visa is cancelled or if they move onto a visa with no work rights, you will know and be able to take the necessary corrective action.

Take the Guesswork out of Immigration Compliance

It can be difficult to interpret VEVO checks issued by the Department of Immigration. A vSure visa check gives you easy-to-understand information on what each visa is and how each visa condition works.

Because there is a record of the visa held by each employee, you always know for sure what the immigration status is of each employee. When things change, you receive an alert so that you can verify that the employee can continue working for you.

Reminders Allow You to Manage Your Workforce Proactively

You can configure the vSure system to send you notifications well ahead of critical dates such as visa expiry. This gives you enough advance warning to take the necessary action - for instance obtain a further visa for the employee.

Cloud-based solution – Access anywhere

You can access vSure through any commonly used device - PC, tablet, Mac, iPad or mobile. This allows you to check your staff's status from remote locations any time you wish.

It also facilitates use of the system from multiple sites or branches which is particularly important in maintaining immigration compliance across a network.

Conclusion

The Migration Amendment (Reform of Employer Sanctions) Act 2013 significantly raises the immigration compliance requirement for businesses.

The new civil penalties operate on a "no-fault" basis - as a result, businesses can face fines unless they regularly check the immigration status of their workers.

The infringement notice scheme means that Immigration can impose fines much more easily, without going to court, up to a maximum of $18,900 for corporations and $3,780 for individuals.

Recruitment consultants and labour hire companies must thoroughly check the immigration status of all the candidates they refer.

Not only are there issues if a direct employee does not have appropriate work rights, businesses face possible liability if contractors are working in breach of visa conditions.

Directors and company officers must review the immigration compliance systems of their businesses to ensure that they meet the requirements of the new legislation, or potentially face personal liability for breaches of the Migration Act.

Please contact vSure at support@vsure.com.au or by phoning 02 8203 5433 if you would like a demonstration of the package or if you have any questions about the Employer Sanctions Act.