



Australian Government
Department of Immigration and Citizenship

Offences and penalties only apply once the Amendment Act commences. Agents will be notified again via the Agents' Gateway of the Amendment Act's commencement date.

Agents' Guide to future Migration Amendment (Employer Sanctions) Act 2007

Introduction

From August 2007 it will be a criminal offence under the *Migration Act 1958* for a person to knowingly or recklessly:

- *allow* an illegal worker to work (sections 245AB and 245AC); or
- *refer* an illegal worker for work with another business (sections 245AD and 245AE).

Individuals who are convicted of these offences face fines of up to \$13 200 and/or two years imprisonment while companies face fines of up to \$66 000 per illegal worker.

Where an illegal worker is also being exploited through slavery, forced labour or sexual servitude, the maximum penalties are five years imprisonment and/or fines up to \$33 000 for individuals and \$165 000 for companies per illegal worker.

The information contained in these pages is primarily intended to be a resource for migration agents who need to advise clients about the operation of the new offences. However, the new offences can potentially apply to migration agents who employ or refer illegal workers for work.

The new offences only apply to employers, labour suppliers and other persons who engage or refer illegal workers on and from the date that the Amendment Act commences. It will not be necessary to check the work rights of existing workers unless their contracts are renewed or extended on or after this date.

Who are illegal workers?

Illegal workers are “unlawful non-citizens” who are working or “lawful non-citizens” who are working in breach of their visa conditions.

The offences in sections 245AB and 245AD of the Amendment Act concern work by unlawful non-citizens while the offences in sections 245AC and 245AE involve work by “lawful non-citizens” who are working in breach of their visa conditions.

Schedule 8 of the *Migration Regulations 1994* sets out the visa conditions that restrict the work that a visa holder can do in Australia. These are conditions 8101, 8102, 8103, 8104, 8105, 8106, 8107, 8108, 8109, 8110, 8111, 8112 and 8547.

Work is defined in section 245AG to mean “any work, whether for reward or otherwise”. This means that the offences can apply where an illegal worker is performing unpaid work.

Who is affected by the new offences?

The offences apply to employers, labour hire companies, employment agencies and other people who allow illegal workers to work or who refer illegal workers for work.

The “allows to work” offences in sections 245AB and 245AC rely upon the definition of “allows to work” in section 245AG(2) which captures a range of work relationships that go beyond traditional employment. These include:

- contracts of service (ie employment);
- contracts for services (ie independent contractor arrangements);
- bailment or licensing of chattels such as taxi cabs to drivers with the intention that they be used to perform a transportation service; and
- leasing or licensing of premises to sex workers with the intention that the premises be used to perform sexual services.

The referral offences in sections 245AD and 245AE apply to businesses that operate a service of referring people for work. This includes members of the Job Network and labour hire companies.

The offences can also apply to businesses that operate informal labour referral services such as backpacker hostels that organise harvest work for backpackers. Migration agents who occasionally refer clients for work with other businesses could also commit the referral offences if the client is an illegal worker. Paragraph 64 of the Notes on Individual Clauses of the Explanatory Memorandum provides that:

“The referral service need not be the exclusive or primary function of a business. For example, if a migration agent whose primary function is to

provide immigration advice occasionally refers clients to other persons for work, that migration agent would operate a service within the meaning of paragraph 245AD(1)(a).”

A migration agent who refers a client to a business to determine whether any job opportunities exist at the same time as advising the client that he or she would need to apply and be granted an appropriate work visa before commencing any work, would not commit the offence in section 245AE. In the department’s view, referring someone to explore the mere opportunity of future work is not a referral for work.

Only businesses that are in a direct legal relationship with an illegal worker, for example by being a party to an employment contract or independent contractor arrangement, can commit the offences of allowing an illegal worker to work in sections 245AB and 245AC.

This means that a head contractor at a building site would not commit an offence if a sub-contractor engages an illegal worker. In this situation the subcontractor would be liable because the subcontractor would be in the contractual relationship with the illegal worker.

Similarly, if a worker is obtained from a labour hire company who remains the legal employer of the worker, the business using the services of the worker will not be liable unless it also has a legal relationship with that worker. In this situation the labour hire company could commit an offence.

What it means to be “reckless”

The offences can only be committed where a person *knows* or is *reckless* to the fact that the worker is either an unlawful non-citizen or is a lawful non-citizen working in breach of their visa conditions.

Section 5.4(1) of the *Criminal Code Act 1995* provides that a person is reckless with respect to a circumstance if he or she is aware of a substantial risk that the circumstance exists and having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

Accordingly, to prove that an employer was reckless to the circumstance that a worker was an unlawful non-citizen, it would be necessary for the prosecution to establish that:

- there was a substantial risk that the worker was an unlawful non-citizen;
- the employer was aware of this substantial risk; and
- having regard to the circumstances known to the employer, it was unjustifiable for the employer to have taken the risk.

Paragraph 25 of the Notes on Individual Clauses of the Explanatory Memorandum indicates that what a “substantial risk” should be determined by the *possibility* test rather than the probability test.

Whether that possibility exists will need to be considered in light of a range of circumstances including:

- whether the employer operates in an industry where a large number of illegal workers are located;
- whether the department's employer awareness campaign has highlighted the risks in those industries;
- whether the particular employer has been given information about the risks, for example by being given an Illegal Worker Warning Notice and guidance on how to check work rights; and
- whether the illegal worker said anything at their job interview from which a Court could conclude that the employer was aware there was a risk that the job applicant was an illegal worker (eg by mentioning they are visiting Australia from abroad).

Practical guidance on when it would be appropriate to check the work rights of a prospective worker is provided in this document.

How the department can help you and your clients to avoid the penalties

The safest, easiest and quickest way for employers to avoid penalties under the new offences is to check the work rights of all prospective workers using the Entitlement Verification Online system (EVO) or the Work Rights Fax Back Facility. This flowchart explains how to check the work entitlements of your workers.

See: [How do I check a prospective employee's work rights?](#) (49KB PDF file)

If it is impractical for a business to check every new worker, at a minimum a check should be conducted if:

- the business operates in an industry where DIAC locates a large number of illegal workers such as the hospitality, agriculture, manufacturing, construction, transportation, retail or sex industries; AND
- the business has already been given a warning notice for employing or referring an illegal worker; AND
- the business has information which suggests there is a *possibility that a prospective worker could be an illegal worker*.

Further information on how to check work rights through the department's EVO system can be found at www.immi.gov.au/evo

Possibility of prospective worker being an illegal worker

Not all visas allow a person to work in Australia.

Accordingly, the possibility of a prospective employee being an illegal worker will exist whenever there is information to suggest that the person might not be an Australian citizen.

This could include situations where:

- a job applicant mentions they are only visiting Australia;
- a job applicant presents a foreign passport;
- a job applicant provides overseas qualifications; or
- a job applicant claims they are an Australian citizen but refuses to provide any documentary evidence of this fact.

If a job applicant refuses to cooperate in the checking process, an employer should explain that it will not be able to employ them until their work entitlements can be checked.

Avoiding discrimination

It is important not to single out people for work rights checking or to refuse employment simply because a job applicant is not Caucasian or because they don't speak perfect English.

In a multicultural society such as Australia these are not indicators that a person does not have the right to work.

Treating a person less favourably on the basis of these characteristics could breach the *Racial Discrimination Act 1975*.

The safest way of avoiding discrimination would be to check the work rights of all job applicants to ensure everyone is treated equally.

How much time will an employer have to check work rights?

Employers should check if a person has the right to work before they are employed.

However, if an employer does not have immediate access to the internet or a fax machine to check a job applicant's work entitlement's, as a matter of policy the employer will be given a period of 48 hours in which to conduct any checks.

Providing these checks are initiated within 48 hours of an employee starting work and the employer does not actually know the person is an illegal worker, the employer will not be referred for prosecution even if the employee turns out to be an illegal worker.

If an employer discovers an employee is an illegal worker, the work relationship should be ended immediately. Employers will also need to prove when the employee started work to get the benefit of the flexible 48-hour checking period.

Examples of businesses and industries that may be able to make use of the flexible 48-hour checking period are farmers during harvest time and builders in the construction industry where large numbers of workers are employed on site.

Warnings for first time offenders

Most first time offenders will be given a warning notice rather than being referred for prosecution.

The exceptions would be where:

- an employer actually knew the worker was illegal; OR
- the illegal worker is being exploited; OR
- the employer or labour supplier is involved in an organised employment racket.

Higher penalties where illegal worker is being exploited

Where an illegal worker is being exploited through slavery, forced labour or sexual servitude, the maximum penalties are five years imprisonment and fines up to \$33 000 for individuals and \$165 000 for companies per illegal worker.

The terms slavery, forced labour and sexual servitude are defined in the *Criminal Code Act 1995* (Cth).

Forced labour means the condition of a person who provides labour or services (other than sexual services) and who, because of the use of force or threats:

- (a) is not free to cease providing labour or services; or

- (b) is not free to leave the place or area where the person provides labour or services.

Sexual servitude is the condition of a person who provides sexual services and who, because of the use of force or threats:

- (a) is not free to cease providing sexual services; or
- (b) is not free to leave the place or area where the person provides sexual services.

Slavery is the condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, including where such a condition results from a debt or contract made by the person.

Further information

The *Migration Amendment (Employer Sanctions) Act 2007* and its Explanatory Memorandum may be accessed at the Comlaw website:

See: <http://www.comlaw.gov.au> .

Parliament of Australia website:

See: <http://www.aph.gov.au>

Senate Legal and Constitutional Legislation Committee enquiry:

See: [Inquiry into the Migration Amendment \(Employer Sanctions\) Bill 2006](#)

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