

Employer Guide

Employer Sanctions Act and checking employee's work rights

The Employer Sanctions Act requires that all employers verify that their employees have the right to work. In 2013, the Act was amended to better address illegal work hire practices, introducing civil and criminal penalties depending on the severity of the breach.

According to the Employer Sanctions Act, an employer is liable if it is found to have allowed a person to work in breach of their work rights. This applies not only to employer-sponsored work visas, but any employee or contractor working at the employer's place of business on a visa. For example, international students, working holiday makers and partners of visa holders would be captured by the Act.

"A person may contravene a civil penalty provision **without knowing or being reckless** as to a foreign national's migration status or visa entitlements relating to work."

If a business is found to have an illegal worker, the Department of Home Affairs can impose civil penalties on the business of up to \$81,000 per worker in breach of their work rights, and \$16,200 per worker on a director or officer of the company. Where the breach was known to the employer or it acted recklessly, then criminal liability can arise up to \$270,000 fines imposed on the business and up to \$54,000 in fines and 5 years jail for directors and officers.

Importantly, liability can apply regardless of the business (or the director or officer) realised or not that the worker was in breach of their visa.

An employer who experiences a breach in their workplace can rely on the statutory defence, and avoid these penalties, by taking **reasonable steps at reasonable times** to check visas.

What can an employer do to protect itself?

Employers must undertake a check of an employee's visa status before they commence employment. However, this alone is not sufficient.

An employee's visa status can change over time, for example a student visa holder can complete their studies and their work rights will change. Or a working holiday visa holder who is entitled to work for 6 months full time with their employer may apply for a student visa and be limited to work a maximum of 40 hours per fortnight.

Employers can minimise their risk by regularly checking the visa status of their employees at appropriate intervals throughout the employee's employment period.

Steps to take for visa holders

- ✓ Seek consent from visa holders to perform Visa Entitlement Verification Online (VEVO) checks to confirm Work Rights status.
- ✓ Ensure employment contracts, particularly of foreign workers, include a clause that requires that they maintain a valid work visa and obtain consent for the employer to perform VEVO checks throughout their term of employment.
- ✓ Have a clear recruitment processes that ensure that the work rights of ALL workers are checked at the time of onboarding. At a minimum, employers should collect:
 - an Australian passport or birth certificate
 - New Zealand passport
 - Foreign passport and VEVO check
- ✓ Periodically check the work rights of foreign workers by performing a VEVO check at “reasonable times”. Generally, this would be every 3 months but in some cases where the visa is subject to change in 28 days or less then more frequent checks should be performed.
- ✓ Maintain records to show a clear audit trail and evidence of compliance.
- ✓ Consider outsourcing your VEVO checking obligations to an external provider, who can notify you of changes to visa status and ensure that compliance activities are conducted as required by law.