



A-Z OF EMPLOYING

Immigration

Our guide for Employers and Managers

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BUSINESS**

Business**Central** 

Immigration

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This is only a guide. It should not be a substitute for professional advice.

Please seek advice from our Adviceline Team if you require specific assistance.

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Use This Guide To Understand

- ▶ Your legal obligations if you wish to employ people from overseas
- ▶ The legal obligations of employees from overseas
- ▶ Seeking skilled people from overseas
- ▶ Official investigative powers of Police and Immigration Officers under the Immigration Act 2009
- ▶ Licensing requirements for immigration advisors

Employing People From Overseas

In order to employ people from overseas, you need to determine how to get skilled people when you cannot fill a position with a New Zealander, and whether they have the right to work in New Zealand. The law which covers these issues is contained in the Immigration Act 2009 (“the Act”).

In addition you are required to comply with all other employment law whether or not your employees are legally entitled to work in New Zealand.

The Act defines “employee” to include people under a contract for service. Therefore the same requirements under the Act apply to independent contractors in addition to employees in the usual sense.

Legal Entitlement To Work

Offences by employers under the Act carry hefty penalties and there is no defence to a charge of employing a person knowing that they are not legally entitled to work in New Zealand. You are deemed to “know” that a person is not legally entitled to work in New Zealand if you have been informed of that fact in writing by an immigration officer in the previous 12 months.

There is a defence to a charge of employing someone who is not legally entitled to work in New Zealand - you must be able to show that you did not know the person was not legally entitled to work, and that you took “reasonable steps and exercised due diligence” to ascertain whether the person was entitled to do the work.

You should require proof of legal entitlement to work from prospective employees. This could be a passport, birth certificate, or visa. Immigration New Zealand provide a best practice guide for helping you check work entitlements and an online employer enquiry system called [VisaView](#).

VisaView will check against the Department’s database and in most cases provide you with a Yes or No answer, the expiry date of the visa, and any applicable work conditions. It also maintains a history of your enquiries which would be a useful way for you to show you have exercised due diligence.

Non-New Zealanders

This includes persons who are neither New Zealanders (which includes citizens of the Cook Islands, Niue and Tokelau) nor Australians. Australians have the right to enter and work in New Zealand as if they were New Zealanders.

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For a non-New Zealander to legally work in New Zealand they must have at least one of the following:

1. A New Zealand Permanent Residence Visa
2. A New Zealand Residence Visa
3. A Temporary Entry Class Visa
4. An Interim Visa

The holder of a temporary entry class visa may work in New Zealand only if the visa conditions allow and only consistently with those conditions. The conditions may include the type of employment, the employer's name and the location.

Immigration New Zealand may grant an interim visa to a person who holds a temporary visa, and has applied for a further visa to maintain their lawful status while an application is being processed.

Managing Visa Issues

If you become aware that an employee does not have a legal entitlement to work in New Zealand then you are obliged to end that employment relationship.

You should terminate the relationship in accordance with the termination, notice and procedure provisions of the employment agreement. The Immigration Act 2009 clarifies that you can continue to allow an employee to work during a notice period specified in the employment agreement. However an employee who works out a notice period after their visa has expired could be committing an offence. Therefore, ensure that your employee takes independent advice.

You should not terminate an employee without providing a reasonable opportunity to respond to the situation and/or rectify their lack of entitlement to work in New Zealand. What is reasonable will be dependent on the circumstances of the unique situation. Seek advice if you are unclear on this. If there is no written agreement then you will need to consider:

- ▶ Reasonable notice; and
- ▶ Payment for, or in lieu of, the notice

However, where the lack of entitlement to work is due to a "procedural oversight" which can be rapidly corrected, you may consider suspending the employee until Immigration NZ can assure you it will be rectified in a few days. Suspension would be on pay.

You do not have any obligation to liaise with the New Zealand Immigration Service on behalf of your employees or prospective employees. However, where you agree to write a letter in support of a person's application for a temporary or residence visa, it should not contain any misleading information about the nature of the employment relationship.

If a visa specifies that an employee can only work for your business, you should inform Immigration NZ if the employee stops working for you. The employee will have to reapply for another visa if they intend to work for someone else.

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Employee's Obligations

Employees are required to sign a declaration on an IR 330 form stating that they have a legal entitlement to work in New Zealand. While failure to complete that form accurately is not an offence, your employees should understand that government departments are able to exchange information about them. This may have implications for any employee who is not entitled to work or reside in New Zealand.

Employee Protections

A person who works in New Zealand without a legal entitlement still enjoys the same rights and protections under legislation which makes up the minimum code of employment. Therefore you are unable to treat them differently under the law to other employees. Labour Inspectors are also able to act on behalf of employees not legally entitled to work in New Zealand.

Enforcement

In addition to knowingly employing a person who does not have a legal entitlement to work in New Zealand, there are several other offences employers can be charged with. However these relate to more obvious issues such as failing to provide employees with minimum rights, exploitation of immigrants, not complying with requests from an immigration officer, providing false or misleading information, and aiding another person to breach their obligations under the Act.

An offence under the Act may also be a breach of other legislation and liability could arise under both laws. For example, if you knowingly employ a person who is not entitled to work in New Zealand on less than the minimum wage, you could face prosecution under the Act and also an action for breach of the Minimum Wage Act 1983.

The penalty for an offence under the Immigration Act 2009 may be a fine up to \$100,000, or, imprisonment for a term up to 7 years, or both. And in some circumstances an employer who has been convicted of an offence will be ordered to pay the costs of removal of the employee from New Zealand.

Immigration Officers

An Immigration Officer or a member of the Police may enter your business premises to inspect registers or lists (including wage and time records) if they believe on reasonable grounds that the register or list is kept there and that it contains information that relates to any person who is in New Zealand unlawfully or who is not entitled under the Act to work in New Zealand or for you. Immigration Officers may enter at any time of day when work is being carried out on the premises, and without a warrant. They may copy any part of any document which is evidence. The Police may enter any premises where they have reasonable grounds to believe that a person who is employed unlawfully and whose name is on a removal warrant is present.

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Employers Seeking Skilled Employees From Overseas

The New Zealand Immigration Service administers a number of different schemes designed to assist migrants to New Zealand into employment, and employers in New Zealand to fill skilled vacancies.

The Service also oversees the Work to Residence and Essential Skills work policies that can assist both employers and employees.

If you need to recruit a person from overseas because you are unable to employ a suitable New Zealander, then you must provide evidence that there is no New Zealand citizen or resident available that is:

- ▶ Suitably qualified by training and experience to do the job offered, or
- ▶ Readily able to be trained to do the job.

The Service may also require you to provide evidence and/or confirmation of past and future compliance with New Zealand employment law.

The Service may also need to be satisfied that job offers made to foreign workers are both genuine and sustainable for the duration of the proposed employment relationship. More information on New Zealand Immigration Service policies and schemes may be found at: <http://www.immigration.govt.nz>.

Immigration Adviser Licensing

The Immigration Advisers Licensing Act 2007 requires that all immigration advisers who provide immigration advice about New Zealand be licensed.

Employers who employ immigration advisers will need to ensure that their advisers are licensed. Also there may be some employers who have staff who may provide immigration advice as part of their wider role. Some Human Resource managers/advisers may fall into this category. It will depend on whether those employees provide “immigration advice” which is defined as:

Using, or purporting to use, knowledge of or experience in immigration to advise, direct, assist or represent another person in regard to an immigration matter relating to New Zealand, whether directly or indirectly and whether or not for gain or reward.

Immigration advice does not include:

- ▶ Providing information that is publicly available or that is prepared or made available by the Ministry of Business, Innovation and Employment; or
- ▶ Directing a person to the Minister or the Ministry or an immigration officer, a visa officer, or a list of licensed Immigration Advisers; or
- ▶ Providing information that is publicly available or that is prepared or made available by the Ministry; or
- ▶ Directing a person to the Minister or the Ministry or an immigration officer, a visa officer, or a list of licensed Immigration Advisers; or
- ▶ Carrying out clerical work, translation or interpreting services, or settlement services.

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When determining whether an employee needs to be licensed it may be useful to ask whether the employee adds anything from their own knowledge or experience to publicly available information. If they do, they may need to be licensed. However, these categories of people are exempt from having to be licensed:

- ▶ People who provide immigration advice in an informal or family context only, so long as the advice is not provided systematically or for a fee;
- ▶ Current members of Parliament and their staff who provide immigration advice within the scope of their job;
- ▶ Foreign diplomats and consular staff accorded protection under certain Acts;
- ▶ Public service employees who provide immigration advice within the scope of their job;
- ▶ Lawyers;
- ▶ People working (either employed or volunteers) for community law centres, where at least one lawyer is involved with the centre;
- ▶ People working (either employed or volunteers) for citizens advice bureaux;
- ▶ People who provide immigration advice offshore who advise on student visa and permit applications only;
- ▶ People exempted by Regulations.

For information about applying for Immigration Advisor licensing see the immigration Advisers Authority website [Immigration Advisers Authority](#)

Offences and Penalties

Persons convicted of providing immigration advice unless licensed or exempt may be liable to imprisonment for up to 7 years or a fine not exceeding \$100,000, or both. It is also an offence to knowingly employ or contract an unlicensed or non-exempt person as an immigration adviser. Fines of up to \$10,000 can be imposed in this case. An employer must exercise all reasonable care and due diligence to ensure that a person is licensed, or that they are not providing immigration advice.

Conclusion

Employing people from overseas can enrich your organisation in a multitude of ways. Understanding your obligations and the obligations of others can make the process of employing that much easier and safer. The Government's immigration policy changes often in response to international events and domestic labour market demands domestically, so it is always wise to kept abreast of the those policy changes. The New Zealand Immigration Service offers a comprehensive range of products and services to assist you in understanding what you can and cannot do in respect of employing non-New Zealanders.

Business Central Advice can help you to keep up to date with the legislative environment in which you employ employees and engage contractors, and assist you with the drafting of policies and contracts that ensure you are on the right side of the law. Call our AdviceLine team for a referral to our Business Partners Malcolm Pacific who are Immigration Specialists.

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Remember:

- ▶ Always call AdviceLine to check you have the latest guide (refer to the publication date below).
- ▶ Never hesitate to ask AdviceLine for help in interpreting and applying this guide to your fact situation.
- ▶ Use our AdviceLine employment advisors as a sounding board to test your views.
- ▶ Get one of our consultants to draft an agreement template that's tailor-made for your business.
- ▶ Visit our website www.businesscentral.org.nz regularly.
- ▶ Attend our member briefings to keep up to date with all changes.
- ▶ Send your staff to Business Central Learning courses and conferences designed for those who manage employees.

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