
GOVERNMENT NOTICES • GOEWERMENTSKENNISGEWINGS

DEPARTMENT OF EMPLOYMENT AND LABOUR

NO. 1801

28 February 2022

EMPLOYMENT SERVICES ACT, No 4. Of 2014**DRAFT NATIONAL LABOUR MIGRATION POLICY AND
EMPLOYMENT SERVICES AMENDMENT BILL**

I, Thembelani Wálermade Nxesi, Minister of Employment and Labour, after consultation with Cabinet hereby publish proposed Amendments to the Employment Services Act, No,4 of 2014, Sections 08 and 09 to introduce new provisions on National Labour Migration and related matters for 90 days public comment.

The Draft National Labour Migration Policy is available on the Department of Employment and Labour website www.labour.gov.za

Interested parties are invited to submit written comments on the proposed policy and bill within 90 days after publication notice by: -

- (a) Email comments to NLMP@labour.gov.za
- (b) Enquiries to: Esther.Tloane@labour.gov.za
Mantombi.Bobani@labour.gov.za



MR T.W NXESI, MP**MINISTER OF EMPLOYMENT AND LABOUR**

REPUBLIC OF SOUTH AFRICA

EMPLOYMENT SERVICES AMENDMENT BILL, 2021

*(As introduced in the National Assembly (proposed section 75); explanatory
summary of Bill published in Government Gazette No. 45962 of 28 February 2022)
(The English text is the official text of the Bill)*

(MINISTER OF EMPLOYMENT AND LABOUR)

[B 2021]

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GENERAL EXPLANATORY NOTE:

- [] Words in bold type in square brackets indicate omissions from existing enactments.
- _____ Words underlined with a solid line indicate insertions in existing enactments.
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BILL

To amend the Employment Services Act, 2014, so as to extend the scope of the Act to cover private employment agencies not operating for gain; to regulate the employment of foreign nationals in South Africa in a manner consistent with the objects of the Act, the Immigration Act, 2002 and the Refugees Act, 1998; to expand the scope of the Act to cover employees and workers; to expand the functions of the Employment Services Board and the powers of the Minister to make regulations in respect of matters related to labour migration; to provide for the governance of Supported Employment Enterprises; to provide for the improved enforcement of the Act and other laws regulating work by foreign nationals; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Amendment of section 1 of Act 4 of 2014

1. Section 1 of the Employment Services Act, 2014 (hereinafter referred to as the “principal Act”), is hereby amended—

(a) by the insertion before the definition of “Basic Conditions of Employment Act” of the following definitions:

“**asylum-seeker**” means a person who is seeking recognition as a refugee in the Republic in accordance with the provisions of the Refugees Act;

“**bargaining council**” means a bargaining council referred to in section 27 of the Labour Relations Act”;

(b) by the insertion after the definition of “Board” of the following definition:

“**critical skills**” means skills determined to be critical for the Republic in accordance with the provisions of section 19(4) of the Immigration Act”;

(c) by the insertion after the definition of “Department” of the following definition:

“**digital labour platform**” means an electronic entity that enables the provision of work or services by a person to any other person in the Republic”;

- (d) by the insertion after the definition of “employee” of the following definition:

“**employer**’ means any person who remunerates, or is liable to remunerate, an employee or a worker;

‘**employment**’ means employment as an employee or as a worker”;

- (e) by the substitution for the definition of “foreign national” of the following definition:

“**foreign national**’ means an individual who—

(a) is not a South African citizen or does not have a permanent residence permit issued in terms of the Immigration Act; or

(b) has not been granted recognition as a refugee in terms of the Refugees Act”;

- (f) by the insertion after the definition of “Immigration Act” of the following definition:

“**labour inspector**’ means a labour inspector appointed in terms of section 63 of the Basic Conditions of Employment Act”;

- (g) by the insertion after the definition of “NEDLAC” of the following definition:

“**permanent resident**” means a person who has been issued with a permanent residence permit in terms of sections 25 to 27 of the Immigration Act”;

- (h) by the substitution for the definition of “private employment agency” of the following definition:

“**private employment agency**” means any person who provides employment services **[for gain]**”;

- (i) by the insertion after the definition of “Public Finance Management Act” of the following definitions:

“**refugee**” means an individual who has been granted asylum in terms of section 24 of the Refugees Act;

“**Refugees Act**” means the Refugees Act, 1998 (Act No. 130 of 1998)”;

- (j) by the insertion after the definition of “registrar” of the following definitions:

“**sector**” means an industry or service or part of an industry or service;

‘sectoral determination’ means a sectoral determination made under Chapter Eight of the Basic Conditions of Employment Act”;

- (k) by the substitution for the definition of “Supported Employment Enterprises” of the following definition:

“Supported Employment Enterprises’ means **[the national government component]** Supported Employment Enterprises established **[in terms of]** by section 42”; and

- (l) by the insertion after the definition of “Unemployment Insurance Act” of the following definition:

“worker’ means any person who works for another and who receives, or is entitled to receive, any payment for that work, whether in money or in kind;

Amendment of section 2 of Act 4 of 2014

2. Section 2 of the principal Act is hereby amended—

- (a) by the substitution in subsection (1) for paragraph (h) of the following paragraph:

“(h) facilitate and regulate the employment of foreign nationals in the South African economy, where their contribution is needed in a manner—

(i) that gives effect to the fundamental rights contained in the Constitution, including the right to fair labour practices contemplated in section 23 of the Constitution;

(ii) that does not impact adversely on existing labour standards or the rights and expectations of South African workers; and

(iii) that does not impact adversely on the availability of critical skills in the South African labour market and promotes work opportunities for and the training of South African **[citizens and permanent residents]** employees and workers”; and

(b) by the deletion in subsection (2) of the term “and” at the end of paragraph (d), the insertion of the term “and” at the end of paragraph (e), and the addition of the following paragraph:

“(f) providing a framework to facilitate and regulate—

(i) the employment of foreign nationals in South Africa;’

(ii) the employment of South Africans abroad; and

- (iii) the reintegration and employment of South Africans residing or working abroad into the South African economy".

Insertion of section 3A in Act 4 of 2014

3. The following section is hereby inserted after section 50 of the principal Act:

"Application of Act to digital labour platforms

50A. For the purposes of this Act, a digital labour platform is an employer and any person who provides work or services in the Republic to another person by means of a digital labour platform is a worker if—

- (a) the payment for, or terms and conditions of, such work or services are determined by digital labour platform; and
- (b) the digital labour platform remunerates the worker.".

Repeal of sections 8 and 9 of Act 4 of 2014

4. Sections 8 and 9 of the principal Act are hereby repealed.

Insertion of Chapter 3A in Act 4 of 2014

5. The following Chapter is hereby inserted after Chapter 3 of the principal Act:

“CHAPTER 3A**EMPLOYMENT OF FOREIGN NATIONALS****Employment of foreign nationals**

- 12A.** (1) No person may employ a foreign national to work within the territory of the Republic of South Africa, unless that foreign national—
- (a) has the right to be so employed in terms of a visa issued under the Immigration Act;
 - (b) has been issued with an asylum seeker visa, in terms of section 22 of the Refugees Act, which is endorsed, with the right to work; or
 - (c) is permitted to work within the territory of South Africa in terms of any other legislation or international agreement binding upon the Republic in terms of section 231 of the Constitution.
- (2) Any person who employs a foreign national to work within the territory of the Republic of South Africa must—

- (a) ascertain that the foreign national is entitled to work in the Republic and is entitled to perform the work in which they are employed;
 - (b) satisfy themselves that there are no persons in the Republic, other than foreign nationals, with the requisite skills to fill the vacancy, before recruiting a foreign national to occupy such vacancy;
 - (c) prepare a skills transfer plan in respect of any position in which a foreign national is employed;
 - (d) employ such foreign national on terms and conditions of employment that are not inferior to those which would be provided to a South African citizen, permanent resident or refugee; and
 - (e) retain copies of all documents reflecting that the foreign national is lawfully entitled to be employed in the Republic.
- (3) The Minister may, if it is consistent with the purpose of this Act, make a determination to exclude the requirement to prepare a skills transfer plan in terms of subsection 2(c) in respect of any category of employers or any category of employees or workers.

(4) A determination in terms of subsection (3) must—

(a) be made on the advice of the Board: and

(b) be issued by a notice in the Gazette.

Quotas for employment of foreign nationals

12B. (1) The Minister, after consulting the Board, may, by notice in the Gazette, specify a maximum quota for the employment of foreign nationals by employers in any sector.

(2) A quota specified in any notice that is issued in terms of this section may apply to the employment of of employees or workers—

(a) in one or more sectors specified in the notice;

(b) in one or more occupational categories specified in the notice;

(c) nationally; or

(d) to one or more regions specified in the sector.

- (3) A notice issued in terms of this section must—
- (a) specify the period within which existing employers must comply with the quotas in the notice;
 - (b) specify the period within which newly established employers must comply with the quotas within a notice;
and
 - (c) exclude small employers, as defined in that notice, from complying with the quotas specified in the notice.
- (4) A draft of any notice that the Minister proposes to issue in terms of this section must be published in the *Gazette* and interested parties must be permitted at least 30 days to comment on the draft notice.
- (5) For the purpose of determining a quota under this section, the Minister may take into account any relevant factor and must take into account—
- (a) the purpose of the Act, as set out in section 2(1)(h);
 - (b) the availability of the requisite skills, including critical skills, among South African citizens, permanent

residents or refugees who are available to work in the sector; or

(c) the Republic's obligations to permit foreign nationals to work in terms of any international agreement, which is binding upon the Republic in terms of section 231 of the Constitution.

(6) An employer may only employ a greater percentage of foreign nationals as employees or workers in its workforce or in any occupational category than are permitted in terms of a quota that is applicable to it in terms of this section if—

(a) a foreign national is employed to fill a position in respect of which critical skills are required; or

(b) in respect of any other position, the employer has applied, in the prescribed manner, for an exemption from the applicable quota or prohibition and such exemption has been granted by the Minister.

Regulations on employment of foreign nationals

12C. (1) The Minister may, after consulting the Board, make regulations concerning the employment of foreign nationals, which regulations may include the following:

- (a) The measures that employers must take to satisfy themselves that there are no other persons in the Republic with suitable skills to fill a vacancy, before recruiting a foreign national;
- (b) requirements for employers to make use of public employment services or private employment agencies to assist employers to recruit suitable employees or workers who are South African citizens, permanent residents or refugees;
- (c) requirements for the preparation of a skills transfer plan by employers in respect of a position in which a foreign national is employed;
- (d) the criteria and procedure for applying for an exemption by the Minister in respect of any provision of this Chapter; and

- (e) the records that employers are required to keep in respect of foreign nationals in their employment.
- (2) A regulation made in terms of this section may—
- (a) include any other requirement, which is consistent with the Immigration Act or the Refugees Act, and is necessary to implement the provisions of this Chapter; and
- (b) differentiate between different categories of visas or permits issued in terms of the Immigration Act or the Refugee Act, different sectors or areas, different categories of employees and different occupational categories.

Employees employed in contravention of Chapter

- 12D.** (1) An employee or worker who is employed in contravention of this Chapter is entitled to enforce any claim that they may have in terms of any statute, collective agreement or contract against his or her employer or any person who is liable in terms of the law.

- (2) A claim contemplated by subsection (1) may be enforced on behalf of an employee or worker by a labour inspector or a bargaining council agent.

Prohibited acts in respect of foreign nationals

- 12E.** (1) An employer may not require or permit a foreign national—
- (a) to perform any work that such foreign national is not authorised to perform in terms of his or her visa or permit; or
- (b) to engage in work contrary to the terms and conditions of such foreign national's visa or permit, or any statute.”

Amendment of section 22 of Act 4 of 2014

6. Section 22 of the principal Act is hereby amended by –

- (a) the insertion after paragraph (d) of the following paragraph-

“(dA) any matter concerning—

- (i) the recruitment and employment of foreign nationals to work in South Africa;

- (ii) the recruitment and employment of South Africans residing or working abroad to work in South Africa, and their integration into the labour market;
 - (iii) the recruitment of South Africans to work in other countries; or
 - (iv) the collation and collection of data in respect of the facilitation and regulation of work by foreign nationals in South Africa;”
- (b) the substitution for paragraph (f) of the following paragraph -
- “(f) the publication of an annual employment services report, which must include a section on the facilitation and regulation of the employment of foreign nationals;”

Amendment of section 23 of Act 4 of 2014

7. Section 23 of the principal Act is hereby amended by the substitution in subsection (2) for paragraph (b) of the following paragraph:

- “(b) the establishment and functioning of [a] committees of the Board, including an executive committee, and committees to deal with—
- (i) the provision of public employment services and the regulation of private employment services; and

- (ii) the facilitation and regulation of work by foreign nationals and any other matter contemplated by section 22(dA)”.

Amendment of section 42 of Act 4 of 2014

8. Section 42 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) Supported Employment Enterprises is hereby established [**as a national government component contemplated in section 7A of the Public Service Act, 1994 (Proclamation No. 103 of 1994),]** as an entity within the Department to promote work and employment opportunities for persons with disabilities.”.

Substitution of section 43 of Act 4 of 2014

9. The following section is hereby substituted for section 43 of the principal Act:

“Functions of Supported Employment Enterprises

- 43.** (1) The functions of Supported Employment Enterprises are to—
- (a) facilitate supported employment;
 - (b) provide work opportunities for persons with disabilities;

- (c) develop and implement programmes that promote the employability of persons with disabilities, including persons with permanent disablement as defined in the Compensation for Occupational Injuries and Diseases Act, 1993 (Act 130 of 1993), in the light of their evolving needs in a changing economy; and
- (d) perform any other function as may be prescribed by the Minister.

(2) Subject to the approval by the National Treasury, Supported Employment Enterprises may perform any of the functions of a trading entity, as contemplated by the Public Finance Management Act.”

Repeal of sections 44 and 45 of Act 4 of 2014

10. Sections 44 and 45 of the principal Act are hereby repealed.

Amendment of section 46 of Act 4 of 2014

11. The following section is hereby substituted for section 46 of the principal Act:

“Staff of Supported Employment Enterprises

46. The Minister may create the post structures necessary for the functioning of Supported Employment Enterprises **[after consultation with the Minister of Finance]** in accordance with the Public Service Act, 1994 (Proclamation No. 103 of 1994).”

Amendment of section 47 of Act 4 of 2014

12. The following section is hereby substituted for section 47 of the principal Act:

“Finances of Supported Employment Enterprises

47. (1) Supported Employment Enterprises are financed from—
- (a) money appropriated by Parliament for this purpose;
 - (b) income earned from services rendered by it;
 - (c) grants or donations made to it; and
 - (d) money received from any other source.
- (2) The Director-General must ensure that the Supported Employment Enterprises is administered in accordance with the requirements prescribed in terms of the Public Finance Management Act, 1999 (Act No 1 of 1999).”

Amendment of section 49 of Act 4 of 2014

13. Section 49 of the principal Act is hereby amended—

(a) by the substitution for subsection (2) of the following subsection:

“(2) The Labour Court may, on application by the Director-General, impose a fine not exceeding **[R50 000]** R 100,000 on a person **[an employer]** that contravenes any of the provisions listed in Schedule 3.”;

(b) by the addition of the following subsections:

“(4) The Minister may authorise a labour inspector in accordance with the provisions of section 63 of the Basic Conditions of Employment Act to monitor and enforce the provisions of this Act.

(5) The Minister and the Minister of Home Affairs may conclude an agreement in terms of which labour inspectors, who are designated in terms of section 63 of the Basic Conditions of Employment Act to enforce Chapter 3A of this Act, may enforce the provisions of section 38 of the Immigration Act and, for that purpose, exercise such powers in terms of the Immigration Act as are identified in that agreement.”.

Amendment of section 50 of Act 4 of 2014

14. Section 50 of the Act is hereby amended by the deletion of subsections (4) and (5).
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Amendment of section 52 of Act 4 of 2014

15. Section 52 of the principal Act is hereby amended by the deletion in subsection (1) of the word “or” after paragraph (f) and by the insertion after paragraph (f) of the following paragraphs:

(fA) the criteria and procedure for applying for an exemption from any provision of this Act or the regulations made under this Act;

(fB) the recruitment and placement of persons residing outside of South Africa to work within the territory of South Africa;

(fC) the recruitment and placement of persons residing in South Africa to work in other countries;

(fD) measures to promote and regulate the recruitment and reintegration of South Africans residing or working in other countries into the South African labour market;

(fE) a procedure for work seekers and employers to lodge complaints about the operation of public employment services;

(fF) any matter necessary for the administration and functioning of Supported Employment Enterprises, including any requirement necessary for its approval and operation as a trading entity in terms of the Public Finance Management Act; or”

Amendment of Schedule 3 of Act 4 of 2014

16. Schedule 3 to the principal Act is hereby amended by the insertion before the first item of the following item:

“Any contravention of a provision of section 12A, section 12B(8) or section 12E.”.

Short title and commencement

17. This Act is called the Employment Services Amendment Act, 2021, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.