



## **457 Visa Scheme: recent changes and what they mean**

Recent adverse publicity to the 457 Visa Scheme has resulted in a number of amendments to the rules, some of which involve criminal sanctions for breach. Employers need to be aware of how those changes might affect them.

One of the casualties of the heightened union and media attention to the Subclass 457 Visa Scheme over the last twelve months may be the large body of employers who have been utilising the scheme in good faith.

As a result of sustained adverse publicity regarding the visa scheme, changes that impose greater obligations on employers were made to the Migration Regulations. Some of the changes involve the possibility of criminal sanctions being imposed.

Because of the complexity of the Migration Regulations, an employer may not even be aware that it is in breach. One example is salary levels; in October last year an instrument was published which for the first time clarified how the Department of Immigration requires overtime payments to be calculated for overseas employees working in excess of thirty-eight hours per week. Prior to this instrument there was no guidance in relation to how overtime should be dealt with, and it is almost certainly the case that many employers have paid their workers less than what the formula contained in the instrument dictates.

If employers are faced with an audit, salary payments will be one of the first things the compliance officers will want to look at. If a breach is detected, it could result in the revocation of the Sponsorship Agreement, or such other sanction as determined by the Investigating Compliance officer to be appropriate in the circumstances.

Employers wishing to sponsor overseas workers must agree to pay as a minimum either the award wage or the minimum salary level (MSL) gazetted by the Department of Immigration and Citizenship, whichever is the higher. From the 1 July 2006 the MSL has been set at \$57,300.00 for Information and Communications Technology occupations, and \$41,850.00 for other gazetted occupations for a thirty-eight hour week. A ten per cent concession can apply to workers employed in regional areas. The MSL will increase by 3.8 per cent from 1 August 2008.

Remember that when assessing whether the MSL has been met, the following items must be excluded:

- Overtime payments for work performed above thirty-eight hours in a week.
- Penalty payments, unless forming part of an ongoing shift arrangement based on a thirty-eight hour week.
- Leave loading payments.
- Any allowance relating to the employment (tool allowance, casual employment allowances etc.)
- Salary packaged items.
- Accommodation rental assistance, board, upkeep, meals and entertainment.
- Incentives, bonuses and commissions.
- Shares and bonus shares.
- Travel and holiday payments.
- Healthcare/Insurance.
- Vehicles or vehicle allowances.
- Communications packages.
- Living away from home allowance.
- Superannuation contributions (either voluntary employee or compulsory employer).
- Any other non salary benefit or salary deductions not included in the above.

From 1 July last year all visa applicants are required to demonstrate English language proficiency to an average band score of 4.5 across the four test components in the International English Language Testing System Test (IELTS). In some cases, a higher standard may be required if necessary for licensing or registration in the nominated occupation.

The exceptions to the English language proficiency requirement are:

- If the applicant's first language is English and they hold a passport from Canada, New Zealand, the Republic of Ireland, United Kingdom or United States.
- Where the nominated occupation is within the highly skilled major groups 1 – 3 of the Australian and Standard Classification of Occupations, comprising managers, administrators, professional and associate professionals.
- If an applicant is to be paid a salary of at least \$75,000.00 excluding all deductions.
- If the applicant has completed at least five years of continuous full time secondary and all tertiary education at an institution where at least eighty per cent of instruction was in English.

Employers who are contemplating re-employing existing 457 Visa holders at the end of their visa period need to be aware of these changes and how they may affect their employees' prospects of obtaining a new visa. Unless the employee is covered by one of the exceptions listed above, an IELTS test will be required. It is necessary to book early, as there are lengthy delays in obtaining appointments.

One of the obligations an employer enters into with the Commonwealth Government at the time of signing a Sponsorship Agreement is the undertaking to be responsible for the cost of medical treatment and repatriation (if required) for the visa holder and any dependents. In some cases employers pay for the cost of medical cover as part of the salary package; in other cases the employees are responsible. If medical cover is not obtained and the worker is uninsured, even the simplest of medical treatments can end up costing the employer thousands of dollars. It is important that arrangements are in place which enable the employer to be confident that medical insurance is paid during the term of the visa.

From July 2007 it has become a criminal offence for employers and labour suppliers to allow or refer illegal workers to perform work. To be liable it is necessary to show that the employer or labour supplier knew that the person was an illegal worker or was reckless to that fact. Engaging in reckless behaviour might include an employer having a mere suspicion that a worker had no

work rights and not checking their work rights entitlements. It might also include employing a worker in breach of a work restriction on the worker's visa.

Fines for such offences can be up to \$13,200.00 and or two years imprisonment and companies face fines of up to \$66,000.00 per illegal worker.

On a more positive note, the Immigration and Citizenship Minister, Senator Chris Evans recently announced that the Department has commenced work on implementing fourteen of the sixteen recommendations made to it by an External Reference Group established to improve Australia's Temporary Skilled Migration program.

A key measure will be the establishment in Sydney, Melbourne and Perth of specialised teams or "Centres of Excellence" to facilitate and process 457 Visa applications from July.

Another key recommendation is to establish an accreditation system in which "low risk" employers with a good track record of compliance with immigration and industrial relations laws can have 457 visa applications fast tracked by the Department.

**David Stratton**

LAWYER

Accredited Migration Specialist

email: [dstratton@nevettford.com.au](mailto:dstratton@nevettford.com.au)



**Melbourne office**

Level 42 South Tower Rialto  
525 Collins Street  
Melbourne Victoria 3000

**Ballarat office**

40 Armstrong Street North  
Ballarat Victoria 3350

**Bacchus Marsh office**

127 Main Street  
Bacchus Marsh Victoria 3340

T 03 9614 7111

F 03 9614 3192

email:

[melbourne@nevettford.com.au](mailto:melbourne@nevettford.com.au)

T 03 5331 4444

F 03 5333 2694

email:

[ballarat@nevettford.com.au](mailto:ballarat@nevettford.com.au)

T 03 5367 1033

F 03 5367 4991

email:

[bacchusmarsh@nevettford.com.au](mailto:bacchusmarsh@nevettford.com.au)

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