

Recent changes relating to the employment of overseas workers

The past 12 months or so has seen a flurry of activity in relation to the Subclass 457 Visa category, culminating in a series of significant changes to the Regulations governing the terms and conditions upon which overseas skilled workers may be employed in Australia - with more changes yet to come.

It is imperative that employers of any workers on S/c 457 Visas be aware of the changes and how they might affect them in the conduct of their day to day operations. For example, of particular concern to employers will be the prospect of civil fines for those who fail to meet their Sponsorship and employment obligations. Unfortunately, from an employer's perspective – particularly in relation to salary levels – it may not always be easy to determine whether or not a breach has occurred.

In an economy which is, and has been, at near full employment for some time, the S/c 457 Visa has been seized upon by many employers as a means of alleviating staff shortages. It has been estimated that at its peak, around fifty seven thousand visa holders were working in Australia on S/c 457 Temporary visas of up to four years duration.

In recent times the visa scheme has been subject to considerable scrutiny, largely as a consequence of reports of abuse of the visa and some of the workers brought to Australia under this category.

On 6 December 2006, a Parliamentary enquiry was established to investigate the adequacy of the S/c 457 Visa scheme, and the recommendations of that committee were published late last year. Following that, the rules relating to labour agreements for on – hire workers were substantially changed, and on 17th February this year, the Minister for Immigration and Citizenship, Mr Chris Evans, announced the formation of an External Reference Group made up of industry experts charged to examine how selected temporary skilled migration measures can help ease labour shortages in the medium to long term.

While the S/C 457 visa scheme continues to be subject to scrutiny and possible future amendment, important legislative changes have also occurred. A summary of the more important changes is as follows:

1. Changes to English language requirements

From 1 July 2007 certain S/c 457 Visa applicants must demonstrate proficiency in English language to an average band score of 4.5 across the four test components in the International English Language Testing System (IELTS) test. Applicants will have to meet a higher level of English proficiency where this is required for licensing or registration in their nominated occupation. There are limited exceptions to the new requirements. These are:

- if the applicant's first language is English and he/she holds a passport from Canada, New Zealand, The Republic of Ireland, The United Kingdom or the United States of America.
- the nominated occupation is within the highly skilled major groups 1- 3 of the Australian Standard Classification of Occupations comprising Managers, Administrators, Professionals and Associate Professionals.
- if an applicant is to be paid at least a salary of \$75,000 excluding all deductions.
- if the applicant has completed at least five years of continuous full time secondary and/or Tertiary education at an Institution where at least 80% of instruction was conducted in English.

Note that current visa holders will not be required to demonstrate their English skills while on their existing visa, or if they apply for a new visa while the existing one is valid. Applicant's who do not meet the requirement will need to make arrangements to depart Australia.

2. Employment of Illegal Workers

From August 2007, it has become a criminal offence under the Migration Act for a person to knowingly or recklessly

- allow an illegal worker to work or,
- refer an illegal worker for work with another business.

If convicted of these offences, the fines can be significant; for individuals the fines can be up to \$13,200 and/or two years imprisonment, while companies face fines of up to \$66,000 per illegal worker.

It quite frequently occurs that a S/c 457 worker wishes to move to another employer and often that move occurs at the same time the necessary paper work is being done – in other words, prior to the formal approval being obtained. Workers in this situation would now appear to fall within the definition of an “illegal worker” as the definition of that term includes “persons who are working in breach of their visa conditions”, and as their existing visa is not linked to the new employer, they are in breach.

Business owners who have no further need for the services of a temporary worker need to be most careful when discussing possible options with that worker, and should be most circumspect about “*passing on leads*” regarding potential job opportunities with other employers, as this could be regarded as referring an illegal worker for work with another business. However, the Department of Immigration has indicated that referring someone to explore the mere opportunity of future work is not a referral for work. If employers are likely to engage in this sort of activity, it is probably best to ensure that any advice to the worker is in writing and has been checked to ensure compliance with the Act and Regulations.

Having regard to the penalties which an employer may incur, the cautious view may well be to terminate the employment and ensure that the sponsored worker makes arrangements to leave the country without first making any inquiries as to whether alternate employment can be found.

3. Minimum salary levels

On the 10 October last year, the Minister for Immigration and Citizenship issued a Statutory Instrument concerning the minimum salary levels and occupations for the S/c 457 Visa. One of the effects of this instrument was to clarify the methodology for calculating the level of salary for the purposes of defining the minimum salary level. This includes a formula to cover situations where employees work in excess of 38 hours per week, and incorporates illustrative examples so as to assist employers in verifying whether or not the level of salary paid to a particular employee is appropriate.

The issue of overtime and how to calculate what is owing has always been a difficult one, and although some clarity has now been provided, one question that remains is how the Compliance Section of the Department of Immigration will deal with it for the period prior to the date of the Instrument. Because the approach set out in the Instrument appears to be contrary to the popularly accepted notion that overtime can be as agreed between employer and employee, it is probably the case that many employers have unwittingly paid their workers less than the Department believes they should were an audit to be conducted.

It should be noted that when assessing a salary for the purposes of determining whether it complies with the minimum salary level, the following items must be excluded:

- Salary packaged items;
- Accommodation rental assistance, board, upkeep, meals or entertainment; or
- Incentives, bonuses or commissions;
- Shares or bonus shares;
- Travel, holidays, health care/insurance;
- Vehicles or vehicle allowances;
- Communications, packages;
- Living away from home allowance;
- Superannuation contributions (either voluntary employee or compulsory employer contributions);
- Overtime payments for worked performed above 38 hours in a week;
- Penalty payments, unless forming part of an ongoing shift arrangement based on a 38 hour week.
- Leave loading payments.
- Any allowances relating to the employment (such as tool allowance, casual employment allowances etc);
- Any other non salary benefits or salary deductions not included in the above.

Pending changes – Migration Amendment (Sponsorship Obligation) Bill 2007

The above mentioned Bill was before Parliament immediately prior to the last election and had the support of all parties. It is highly possible therefore that it may be re-presented in the near future and if passed, will introduce a range of obligations to be met by employers who are approved sponsors of S/c 457 Visa holders. Failure to comply with the new requirements may result in the imposition or significant sanctions and penalties.

It is important to note that these changes purport to effect both future and existing sponsors. It is not clear what steps, if any, the Government proposes to take to alert existing sponsors to the new obligations which they are deemed to have assumed. Having regard to the consequences for non compliance, it would be hoped that a substantial communications program will be embarked upon. By way of observation, we have doubts about the powers of the Government to unilaterally change the terms of an agreement it has previously entered into with a sponsor by replacing those terms with more onerous and more expensive obligations and accordingly, we believe that the legality of some of the changes will be challenged at some stage.

There are eight new obligations which will be imposed on employers.

The first obligation is to pay visa holders at least a minimum salary level which is set out in legislative instruments from time to time. This obligation also acknowledges the fact that Australian employers must look first to employing and training Australians, and that the S/c 457 Visa program will not be used to erode salaries and conditions of Australian employees.

The second obligation is not to employ a visa holder in a position that requires lesser skills than the position in respect of which the visa was granted. This obligation protects against the S/c 457 Visa program being used to bring overseas workers to Australia to carry out unskilled jobs.

Other obligations include:

- Paying the return travel costs from Australia of overseas workers and their family;
- Paying certain medical costs on behalf of the overseas worker and his or her family which may involve the employer taking out insurance on their behalf;
- Paying any fees that may be paid for the overseas worker to work in the nominated activity and any other fees associated with recruitment and migration agents;
- Keeping adequate records of compliance with these obligations and providing information to the Department of Immigration when requested in writing;
- Paying any costs of locating, detaining and removing a sponsored person – the Regulations may prescribe a limit for each of the costs;
- Provision of information that is to be used by the Secretary or Minister for the purpose of administration of the Act or the Regulations. Failure to comply with a Notice involves a fine of \$6,600 for individuals and \$33,000 for Corporations.

The Bill also gives the Department of Immigration greater investigative powers, including the power of Officers of the Department to enter – unannounced and without force – any place of business or any other place which they have reasonable cause to believe there is information, documents or any other thing, relevant to monitoring the approved sponsor's compliance with the obligations.

The Minister will continue to have the power to cancel Sponsorship approvals or to bar sponsors where they have failed to comply with a new obligation.

Where the Department has identified a breach of an obligation, the court, in addition to imposing a civil penalty on the employer, has the power to order the employer to pay a person monies owed under an obligation. In addition, persons owed money under an obligation may also independently

seek restitution, so that if for example, a worker has been paid less than the minimum salary level, he or she may pursue an order for the amount of the underpayment.

Summary

The changes which have taken place, and those which are likely to take place, to the S/c 457 regime will have a substantial impact upon a number of employers. In particular, many employers may find that the imposition of the proposed new sponsorship obligations make it uneconomic to continue employ an overseas workers. Because of the penalty provisions it will be very important for employers to very quickly determine whether their current arrangements might place them in breach of their obligations and if so, immediate action should be taken, particularly bearing in mind that the Government has also allocated substantial extra funds for monitoring and compliance activities.

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