



Significant Changes to Subclass 457 Visas

Sweeping reforms to the Migration Act and Regulations were introduced on 14 September 2009.

The changes are designed to strengthen the integrity of the Temporary Skilled Visa Program and to ensure that the working conditions of sponsored visa holders meet Australian standards.

It is intended that the reforms will have an impact through four main measures:

- Provision of a structure for better defined and enforceable Sponsorship obligations for employers.
- Introduction of meaningful penalties for sponsors who are found to have failed to satisfy their Sponsorship obligations.
- Improved information sharing across all levels of Government.
- Expanded powers to monitor and investigate possible non compliance by sponsors.

Some of the important features of the changes include:

1. Sponsorship undertakings have been repealed and are replaced by Sponsorship obligations that automatically apply to a sponsor once approved. The obligations apply to all new and existing visa holders and include new obligations that did not exist under the previous sponsorship undertakings.
2. Civil penalties can be imposed for failure to satisfy a sponsorship obligation. In addition, a court may order payment of a debt owed to a person in relation to a sponsorship obligation, eg: if an employer has failed to pay the correct salary to a sponsored worker. Penalties can be up to \$33,000 for a corporation and \$6,600 for an individual for each failure.

3. Provision for the issuing of infringement notices instead of a pecuniary civil penalty for failure to satisfy sponsorship obligations. Penalties that may be imposed are up to \$6,600 for a body corporate, and \$1,320 for an individual for each failure.

4. Maintenance and enhancement of the existing sanction and enforcement tools in relation to sponsorship which include:

- Barring a sponsor from sponsoring more people or from making further applications for approval as a sponsor.
- Cancelling a person's approval as a sponsor.
- Requiring the taking of a security bond or enforcing a security bond.
- Providing that a person to whom the debt is owed in relation to a sponsorship obligation may apply to a court to recover that amount.

5. Establishment of a monitoring regime to promote compliance of sponsorship obligations by the appointment of inspectors with powers to enter the premises and require documents or things in relation to a sponsor's compliance with sponsorship obligation and other requirements.

6. Creation of the means to ensure that personal information regarding sponsored visa holders or former sponsored visa holders and approved sponsors or former approved sponsors can be disclosed to the other party or to prescribed agencies of the Commonwealth, State or Territory.

7. Transitional/application provisions clarifying that the new sponsorship obligations will apply to certain existing approved sponsors of prescribed clients on 14 September 2009 commencement - where the new obligations are imposed, any previous sponsorship undertakings that related to the sponsorship for that visa will cease to be enforceable.

The new sponsorship obligations set out in the Regulations are:

Approved sponsors must:

- Co-operate with inspectors.
- Ensure that the terms and conditions of employment provided to a sponsored person are not less favourable than the terms and conditions they provide, or would provide, to an Australian citizen or an Australian Permanent Resident to perform equivalent work in the person's work place at the same location.
- Pay travel costs upon termination of employment to enable sponsored workers to leave Australia within 30 days of a request in writing from the sponsored worker.
- Pay costs incurred by the Commonwealth to locate and remove sponsored persons who have become unlawful non citizens.
- Keep records, and provide records and information to the Minister when required.
- Provide information to the Department of Immigration and Citizenship where events occur.
- In certain cases, secure an offer of a reasonable standard of accommodation for a primary sponsored person.

- Ensure that the primary sponsored person works or participates in the nominated occupation, program or activity.
- Not recover certain costs from a sponsored person.
- In certain cases, make the same or equivalent position available to Australian exchange participants.

New arrangements were also announced for the payment of health costs for 457 visa holders. From 14 September 2009, all Subclass 457 visa applicants and their dependents are required to satisfy the Department of Immigration that they have made adequate arrangements for health insurance prior to the grant of the visa. All Subclass 457 visas granted on or after 14 September 2009 will be subject to condition 8501 requiring visa holders and their dependents to maintain adequate arrangements for health insurance for the duration of their stay in Australia. Visa holders who fail to comply may have their visa cancelled.

Another change which came into effect on 14 September 2009 is that all primary Subclass 457 visa applicants who are sponsored by a Standard Business Sponsor must demonstrate that they have English language proficiency that is equivalent to an International English Language Testing System (IELTS) test score of at least 5 in each of the four test components of speaking, reading, writing and listening. Prior to 14 September 2009, applications required an average test score of at least 5 across the four test components.

If the nominated occupation requires a high level of English because it forms a part of that occupation's registration, licensing or membership requirement, the visa applicant must have at least that standard of English language proficiency required for the grant of that registration, license or membership.

Another change is that if an employee wishes to change employer it will no longer be necessary to apply for a new visa unless of course the existing visa is about to expire. If transferring to a sponsor with a sponsorship in place, this will greatly facilitate the movement of workers between employers as long as a new nomination is approved in relation to the new sponsor.

The need for employers to pay market salary rates, which was also introduced on 14 September 2009, is likely to have a significant impact on many employers, mainly in trade related occupations and only time will tell whether the introduction of a minimum threshold salary will lead to significant wage increases up to the level of that minimum in occupations where there is significant demand and no supply. There are many trade related occupations on the Migrations Occupation in Demand List which currently do not pay salaries at or above the newly introduced Temporary Skilled Migration income threshold of \$45,200. Even if an employer is prepared to pay an overseas worker this amount, the Nomination will be rejected if it cannot be established that this is the "market rate" for that occupation. It is probably inevitable that with the supply of labour being denied, the demand for such labour will result in the market rate for that labour rapidly escalating to meet the threshold.

As a result of the changes which have come in, the preparation of Subclass 457 visa applications has become more challenging. Employers also need to be very mindful of the undertakings they are subject to once sponsorships are approved, and with the greater emphasis on compliance, need to be comfortable that they can demonstrate to inspectors that they have complied with their ever increasing obligations.

Please feel free to contact David Stratton, Ryan Curtis-Griffiths or Helen Zheng, Lawyers in our Migration Law Work Group, if you require further information in relation to this issue, or if you require legal advice regarding any other migration law matter.

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