



Workers Protection Act

As advised in our last Migration e-bulletin, as a result of the rapid expansion in the use of the Subclass 457 Visa category, a number of problems which required Government attention came to light.

Over time the range of occupations for which visas were sought had extended to lower skilled occupations with the result that a large number of workers coming into the country had low level English skills. Many of these workers are susceptible to opportunistic employers. In the 2008/09 budget the Federal Government sought to address these problems. \$19.6 million was allocated to improve the processing and compliance of the Temporary Migration Program over a four year period with the aim of clarifying the rights and obligations of employers and workers and thus further protect workers from exploitation. On 16 December 2008, the Workers Protection Act became law. The provisions of the Act will come into effect within nine months of 18 December 2008, or on a day fixed by proclamation, whichever is the sooner.

The Workers Protection Act is designed to restore integrity to the visa program thereby ensuring that overall community support for the program will remain. The four main measures of the Act are:

- Providing a structure to better define sponsorship obligations for employers and other sponsors.
- Improved information sharing access across all levels of Government.
- Expanding of monitoring powers including investigation into possible non compliance by sponsors, and
- The introduction of meaningful penalties for sponsors found to be in breach of obligations.

One of the more contentious aspects of the Act is that much of the operational detail will be left to Regulations which are yet to be finalised. A first draft of the Regulations has now been released and while these should not be taken to be binding, they provide a clear indication of the Government's intent.

One issue to note is the travel costs of overseas workers. Previously it had been suggested that employers should be liable for the full costs of all travel, however the draft Regulations highlight the need to pay necessary and reasonable travel costs to enable sponsored workers to leave Australia. A request from a sponsored person to pay travel costs must be made to the sponsor in writing, provide for travel within a reasonable period and be made while the primary sponsored person is the holder of a Subclass 457 Visa.

While the obligation to pay travel costs ceases if the worker is nominated by another sponsor, or obtains a further substantive visa, this will not protect the original sponsor if payment is made prior to a new nomination or visa coming into effect. Although the draft Regulations are silent on this point, it would seem appropriate that if a request for payment of travel costs is made, the sponsor should be able to seek advice from the Department as to whether a nomination or substantive visa application is pending on behalf of the sponsored worker and if so, the obligation to make payment should be suspended until the outstanding application is resolved. In summary, some of the other important obligations are:

- Obligation to co-operate with inspectors.
- Sponsors must not hinder or obstruct inspectors or conceal or attempt to conceal from an inspector a person, document or thing. It will also be an offence to prevent or attempt to prevent another person from assisting an inspector or to insult, intimidate or threaten an inspector or a person assisting an inspector.

These obligations cease five years after the sponsorship or worker agreement ceases.

Minimum Salary

Sponsors must pay minimum salary levels. A future legislative instrument will specify how this will be determined and paid. The Minister has hinted that this might consist of a minimum wage based on the rate paid to Australian workers employed in similar positions.

Costs Incurred by the Commonwealth Government

If the Government has to locate and remove sponsored persons from Australia, the sponsor will be liable for those costs. This obligation commences on the day of the most recent approval of a nominated occupation and ends at the earliest of:

- The day on which the primary sponsored person is granted another substantive visa.
- The day on which the Minister approves the nomination for sponsorship of the primary sponsored person by another sponsor.
- If a primary or secondary sponsored person no longer holds a Subclass 457 or Bridging B Visa, the day that person leaves Australia.
- If the primary or secondary sponsored person has left Australia and still holds a Subclass 457 or Bridging B Visa, the day on which that visa ceases.

Existing or intending sponsors of overseas workers under the Subclass 457 Visa category need to be aware that the obligations associated with sponsorship are significant, and that it is the intention of the Government that they be strictly enforced. As the following article demonstrates, even under the current regime it is clear that monitoring and compliance activity has increased markedly. Unfortunately, under the existing regime the extent of an employer's obligations are not entirely clear and it is hoped that the new Regulations may go some way towards addressing this uncertainty.

Breach of Obligations - Unauthorised Deductions

A recent MRT case concerned a situation in which an employer deducted \$80.00 a week from an employee's salary for payment of accommodation costs. This was taken to be a breach of the employer's obligations under Regulation 1.20CB (1)(i) which provides that if there is a minimum gazetted salary in force, the employee will be paid at least that salary. In other words, the Department (and the MRT) regard any deductions made from a worker's salary, whether agreed or not, to be a breach of the Regulations if the effect of that deduction is to result in the worker receiving less than the gazetted minimum salary.

Before the Tribunal it was argued that purely for convenience and administrative efficiency, the worker's rental would be deducted from their fortnightly salary and there was no suggestion that the men had been underpaid or disadvantaged.

In order to rectify the breach, the company debited the worker's bank accounts after the salaries had been paid. The same rental was levied, and the men's net financial position remained unaltered. This practice was regarded by the Tribunal and the Department as acceptable. On any view, the breach by the company was technical and quickly remedied simply by altering the timing of the withdrawal. It was unfortunate that the company had to go to the Tribunal in order to avoid a cancellation of sponsorship status. The Tribunal found that although a breach had occurred, having regard to the totality of the circumstances, it was not appropriate that the sponsorship should be cancelled.

This lack of clarity is clearly not helpful to existing or prospective sponsors in trying to determine what their obligations might be.

If you require any further information in relation to this issue please contact David Stratton, Helen Zheng or Ryan Curtis-Griffiths.

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