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SWEEPING CHANGES TO SPONSORED TEMPORARY EMPLOYMENT RELATED VISAS INCLUDING 457 VISAS

With effect from 14 September 2009, the 457 visa program and 11 other temporary work visa programs will be overhauled and restructured. The changes are the culmination of DIAC's sponsorship compliance agenda following the Deegan Review and passage of the Worker Protection Act in late 2008. The Government has stated the changes are designed to ensure that workers from overseas are not exploited while at the same time ensuring that Australian workers are not disadvantaged. New regulations issued on 19 June 2009 and 12 August 2009.

Significantly, the new law places a greater onus on the sponsor to self assess and certify that they meet requirements – with a heightened sanctions regime including civil penalties and infringement notices if they get it wrong. Key changes:

- introduce new criteria for approval as sponsor of 457 visas including meeting training benchmarks, attestation of a commitment to employ local labour and anti-discriminatory employment practices – these replace current criteria
- enable sponsors to vary the terms of their existing approval
- include 11 temporary work visas – Exchange visa as well as Occupational Trainees, Visiting Academics, Medical Practitioners, Religious Workers and Domestic Workers – in the revamped sponsorship regime

- define sponsorship obligations in greater detail and give clarity around when they start and end – these will apply to sponsors, including existing sponsors, from 14 September 2009
- set out the circumstances in which approved sponsors may be barred or have their approval as a sponsor cancelled, and the criteria which the Minister must consider before taking such action
- introduce new criteria for approval of nominations for 457 visas including terms of employment no less favourable than those provided to Australian workers, certification that the nominated position includes a significant majority of duties as set out in the Australian Standard Classification of Occupations and that the applicant has the skills necessary to perform the occupation and demonstrate for each new nomination that there is no adverse information about the sponsor
- enable existing 457 visa holders to change employer without the need for a new visa application
- make it a requirement for all sponsored employees to provide evidence they have adequate arrangements in Australia for health insurance before visa grant
- require all 457 visa applicants (not otherwise exempt) to demonstrate that they have scored in an IELTS test at least 5 on each of 4 test of components.
- add to visa condition 8107 the exception that 457 visa holders may work out a notice period under an existing contract and not breach

their obligation to work only for their approved sponsor

- clarify that 457 visa holders have 28 days in which to find a new sponsor following termination of employment
- introduce 3 new eligibility requirements for Occupational Trainee visas in place of current criteria.

TWILIGHT SEMINAR – ARE YOU READY?

If you missed our first one, attend our next complimentary Twilight Seminar on Thursday 27 August 2009 to find out more about the biggest changes to 457 visas in over a decade.

Register your interest at seminars@malyonlaw.com

A seminar for sponsors, HR professionals, corporate counsel, risk managers and payroll officers. Topics include:

- training benchmarks
- new sponsorship obligations including records that must be kept
- market rates of pay for new and existing 457 visa holders
- new DIAC notification requirements and corporate governance
- review of contracts of employment
- FBT implications of the changes to health insurance obligations

Speakers include Katie Malyon, Matthew Gardiner and Rae Ni Corraidh from Accountants HLB Mann Judd, Wendy Phelps from Australian Health Plans International Medical Assistance Network and Llinos Healy from Human Resource Management at Energy Australia.

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Staff members Catherine Winks, Sanja Janjic and Ross Ahmadzai at the start of the City-to-Surf on 9 August 2009

SWEEPING CHANGES *continued*

There is industry concern about the complexities and rushed introduction of the changes – some of the changes introduced on 19 June 2009 have been amended by changes introduced on 12 August 2009.

Additionally, some details such as the new training benchmarks to be published by the Department of Education, Employment and Workplace Relations (DEEWR) as well as market rates of pay are yet to be announced in legislative instruments.

With increasing complexities and uncertainty arising due to the 457 program changes, sponsors should seek migration professional advice early to strategically plan the 457 visa process and commencement of an assignment to Australia and avoid unnecessary delays, complications and expense.

NEW OBLIGATIONS

Sponsorship obligations for all sponsors of new and existing 457 visa holders will require businesses to:

- cooperate with inspectors monitoring compliance with sponsorship obligations
- provide equivalent terms and conditions of employment ensuring sponsored workers are employed at market rates
- pay reasonable and necessary travel costs to repatriate sponsored workers
- pay costs incurred to locate and remove unlawful sponsored workers
- keep comprehensive records of sponsored workers (pay, benefits, duties, work locations) and persons in equivalent positions
- provide records and information to DIAC
- inform DIAC of sponsor's changes in circumstances including changes to training benchmarks and termination of a sponsored worker's employment within 10 working days
- ensure sponsored workers only work in the nominated occupation
- not recover or seek to recover recruitment or visa costs from sponsored persons.

SWITCHING FROM GSM TO ENS

Employers with expatriate employees who have applied individually for permanent residence in the General Skilled Migration (GSM) (points tested) program may nominate the expatriate's position under the ENS program for a permanent appointment.

This will enable the expatriate employee to transfer their GSM visa application for processing in the ENS program to fill the nominated role. The expatriate will avoid GSM processing delays of 2+ years.

With priority processing of ENS and RSMS applications since 1 January 2009, employers may more quickly retain skilled expatriate employees in permanent roles and, at the same time, bring to an end their sponsorship obligations in the 457 visa program for that employee.

SKILLS ASSESSMENT FOR 457 APPLICANTS IN TRADES OCCUPATIONS

Since 1 July 2009, DIAC has been progressively introducing formal skills assessments for 457 visa applicants from some countries in trade occupations and chefs. Skills assessments will be administered by Trades Recognition Australia and will involve assessment of skills against relevant qualifications from the Australian Qualifications Framework. Initially, skills assessments will be required in the following occupations:

- welder (first class)
- motor mechanic
- chef / cook
- fitter
- metal fabricator (boilermaker)

where the visa applicant is a national from Brazil, China, India, Philippines, PNG, South Africa, Thailand, Vietnam, Zimbabwe.

Skills assessments follow changes in April 2009 increasing the English Language proficiency requirements and will add to the cost and preparation and DIAC processing time for 457 visas for 457 visa applicants for all trades occupations.

CONTACT US

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TIP

Ensure managers are familiar with inspectors rights of entry, what they can ask and the risks for managers if they do not cooperate

:: TIP

Review employment arrangements for all current 457 visa holders for compliance with the new sponsor obligations

:: TIP

Make enquiries now about health insurance for prospective sponsored employees

:: TIP

Consider facilitating permanent residence under the ENS scheme for valued expatriate employees who have applied independently for General Skilled Migration and bring to an end sponsorship obligations

Under Australian law, anyone who uses knowledge of immigration law or procedures to offer advice or assistance to a person wishing to sponsor or nominate an expatriate for residence or to obtain a visa to enter or remain in Australia must be registered with the Migration Agents Registration Authority.

Disclaimer: This material is produced by Katie Malyon & Associates, Lawyers. It is intended to provide general information in summary form on legal topics, current at the time of first publication. The contents do not constitute legal advice and should not be relied upon as such. Formal legal advice should be sought in particular matters.

