



Immigration Update

October 2009

>>457 Visa program: Changes effective 14 September 2009

For employers and employees alike, the process of business immigration is a minefield of issues and bureaucracy.

With increasingly complex legislation and constant changes to regulations and requirements, it is critical that organisations stay informed and well-represented. This newsletter highlights the most recent changes to legislation concerning the 457 Visa program, and provides an overview of the changes that might affect your business.

For further information, contact one of our experienced lawyers in the C&G Immigration team on 02 9635 6422.



Significant further changes to the 457 Visa program came into effect on 14 September 2009. These changes are part of a series of reform measures initiated by the Government in April 2009. The key elements of the 14 September changes are:

1. Re-defined Sponsorship Obligations that operate as a matter of law, with provision for punitive penalties for breaches

All current and new Business Sponsors will be required, by law, to meet a revised set of Sponsorship Obligations. Breaches of the obligations will be subject to a range of administrative and civil penalties.

While the codified obligations mirror to a large extent the old Sponsorship Undertakings, there are some differences. The most notable of these differences are:

- a) the Obligation to ensure equivalent terms and conditions of employment; and
- b) a change in relation to the previous Undertaking relating to health costs.

These two issues are discussed in more detail below.

For information on all of the new Sponsorship Obligations see page 4.

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a) **The Terms and Conditions of Employment for employees on 457 visas are to be equivalent to those of Australian employees**

The nexus between the Sponsorship Obligations and the 457 Visa application requirements is the Obligation to:

Provide terms and conditions of employment to the primary visa holder no less favourable than those applying to an Australian employee.

Under this Obligation, the onus will be on Sponsors to satisfy the Department (DIAC) that the terms and conditions of employment (including nominated salary) for an overseas employee are the same as for an equivalent Australian worker at the same location.

The central mechanism for establishing this is the **market salary rate**. When applying for a 457 Nomination, Sponsors will be required to show that the salary being offered to the nominee is equivalent to the market salary rate payable to an Australian employee working in the same occupation at the same location.

The Sponsor will need to show that this is the case by reference to any relevant industrial instruments (eg Collective Agreement, Award, etc) or, if there are no relevant instruments, by reference to such things as published earnings data, remuneration surveys etc.

The previous **minimum salary level** requirement in relation to 457 Visas has been removed. However, its roles as both an assessment tool at the Nomination stage of the application process, and as a benchmark in relation to monitoring and compliance have been replaced by other mechanisms.

In relation to Nomination assessment, Sponsors will now need to show that the market salary rate for the position is at least the amount specified for the Temporary Skilled Migration Income Threshold (TSMIT).

The TSMIT is currently specified as \$45,220 pa for non-IT occupations and \$61,920 for IT occupations. If the market salary rate for an occupation is lower than the TSMIT, a Nomination **will not be approved**, even if the salary offered is higher than the TSMIT. This is to stop employers artificially inflating salaries to secure approval for positions requiring lower skill levels.

In relation to monitoring, the Sponsor will be required to demonstrate that the overseas employee is being paid the salary levels listed in the Nomination.

Current sponsors have until 1 January 2010 to ensure that the salary paid to currently-approved overseas employees will meet the market salary rate requirement.

b) **A change in relation to Health costs and Health Insurance**

For Sponsorships approved after 14 September 2009, Sponsors will no longer be liable for any costs incurred in the public health system by sponsored employees.

The onus for meeting health costs will now be on the 457 Visa holder and it will be a condition of Visa grant that they hold private health insurance, unless they are covered under a Reciprocal Health Care Agreement that exists between their home country and Australia.

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It is important to note that for any 457 visas issued before 14 September 2009, the sponsoring employer remains liable for health costs and should ensure that appropriate health insurance arrangements are in place to meet any such costs that might arise.

2. Changes to make it simpler for 457 Visa-holders to change employers

Condition 8107, which is the work restriction applying to 457 visas, has also been changed.

The main intent of this change is to allow 457 visa holders to change employers *without* the need for a new visa application. Under the revised arrangements, all that is required for a 457 visa holder to move to a new employer is for the new employer to obtain an approved Nomination for that employee. As soon as the new Nomination is approved, the employee can move to the new employer, subject to meeting normal contractual obligations (eg, period of notice).

3. Enhanced monitoring and compliance arrangements

DIAC will conduct monitoring in three main ways from now on:

- exchanging information with other Commonwealth, state and territory government agencies, including the Department of Education, Employment and Workplace Relations and the Australian Taxation Office;
- written requests to the sponsor to provide information in accordance with the obligation to provide records and information;
- site visits, usually to the sponsored business premises, with or without notice.

Monitoring may also include investigations being conducted by Commonwealth officers called Inspectors. Inspectors have certain investigative powers under the Migration Act 1958 and a failure to cooperate with inspectors is a breach of sponsorship obligations. As a result, the department may take action against the sponsor.

Sanctions for failing to satisfy sponsorship obligations

If the standard business sponsor fails to satisfy a sponsorship obligation, the Minister may take one or more of the following actions.

Administrative actions:

- bar the sponsor, for a specified period, from sponsoring more people under the terms of one or more existing approvals as a sponsor for different kinds of visas;
- bar the sponsor, for a specified period, from making future applications for approval as a sponsor in relation to one or more classes of sponsor;
- cancelling one or all of the sponsor's existing approvals as a sponsor;

Civil actions:

- apply to a Court for a civil penalty order of up to AUD33,000 for a corporation and AUD6,600 for an individual for each failure;
- issue an infringement notice of up to AUD6,600 for a body corporate and AUD1,320 for an individual for each failure;
- require and take a security; or
- enforce a security already taken.

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The abovementioned changes to the 457 Visa Program are significant in terms of both their impact on current Sponsors and the requirements that new Sponsors will need to meet to gain approval to sponsor overseas employees.

The complexity of the requirements and the potential to incur substantial penalties for breaches of Obligations make it important for both current and prospective sponsors to seek professional advice. Our Immigration Team will be happy to provide such advice and can be contacted on phone 02 9635 6422.

>>457 Visa program: Changes effective 14 September 2009 - Obligations

Significant changes to the 457 Visa program came into effect on 14 September 2009 which include the introduction of re-defined Sponsorship Obligations which will operate as law.

The new Obligations include:

a) Obligation to cooperate with inspectors

The standard business sponsor must cooperate with inspectors appointed under the Migration Act 1958 in determining whether a sponsorship obligation is being, or has been, complied with.

This obligation starts to apply on the day the standard business sponsorship is approved. It ends five years after the day on which the person ceases to be an approved sponsor.

b) Obligation to ensure equivalent terms and conditions of employment

The standard business sponsor must ensure that the terms and conditions of employment provided to a primary sponsored person are no less favourable than the terms and conditions the person provides, or would provide, to an Australian citizen or Australian permanent resident to perform equivalent work in the person's workplace at the same location.

This obligation starts to apply on the day the primary sponsored person is granted a subclass 457 Visa, unless he or she already holds a subclass 457 Visa in which case the obligation starts to apply on the day the nomination for the primary sponsored person is approved.

This obligation ends on the day the primary sponsored person ceases employment with the sponsor or on the day the primary sponsored person is granted a further substantive Visa (other than a subclass 457 Visa). If the primary sponsored person is granted another subclass 457 Visa in order to continue to work for the sponsor, the obligation continues.

c) Obligation to pay travel costs to enable sponsored persons to leave Australia

The standard business sponsor must pay reasonable and necessary travel costs to enable the sponsored persons to leave Australia if the costs have been requested in writing by the Department or the sponsored persons, and the costs have not already been paid by the sponsor in accordance with this obligation.

The costs will be considered reasonable and necessary provided they:

- include travel from the primary sponsored person's usual place of residence in Australia to the place of departure from Australia;

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- include travel from Australia to the country (for which the person holds a passport) specified in the request to pay travel costs; and
- are paid within 30 days of receiving the request; and
- are for economy class air travel or, where unavailable, a reasonable equivalent.

This obligation starts to apply on the day the primary sponsored person is granted a subclass 457 Visa, unless he or she already holds a subclass 457 Visa in which case the obligation starts to apply on the day the nomination for the primary sponsored person is approved.

This obligation ends on the day:

- on which a nomination by another sponsor in relation to the primary sponsored person is approved;
- on which the sponsored person is granted a further substantive Visa (other than a subclass 457 Visa). If the primary sponsored person is granted another subclass 457 Visa in order to continue to work for the sponsor, the obligation continues;
- the sponsored person has left Australia and no longer holds a visa.

d) Obligation to pay costs incurred by the Commonwealth to locate and remove unlawful non-citizen

The standard business sponsor must pay the costs incurred by the Commonwealth in locating and/or removing the primary or secondary sponsored persons from Australia, if the Minister has requested the payment by written notice.

The sponsor is liable to pay the Commonwealth the difference between the actual costs incurred by the Commonwealth (up to a maximum of AUD10,000) and any amount already paid under the obligation to pay travel costs to enable sponsored persons to leave Australia (see above).

This obligation starts to apply on the day on which the primary sponsored person or secondary sponsored person becomes an unlawful non-citizen.

This obligation ends five years after the sponsored person leaves Australia. However, the sponsor is only liable for costs up to the point at which the sponsored person leaves Australia.

e) Obligation to keep records

The standard business sponsor must keep records of their compliance with the obligations.

All of the records must be reproducible and some must be capable of verification by an independent person. For a complete list of the records that must be kept, including the manner in which the records should be kept, see www.immi.gov.au/skilled

This obligation starts to apply on the day the standard business sponsorship is approved.

This obligation ends two years after the concurrence of the following two events:

- the approved standard business sponsorship ceases; and
- there is no primary or secondary sponsored persons in relation to the sponsorship.

However, no record need be kept for more than five years under this obligation.

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f) Obligation to provide records and information to the Minister

The standard business sponsor must provide records or information on request, and in the manner and timeframe requested by the Minister, that goes to determining whether:

- a sponsorship obligation is being, or has been, complied with; and
- other circumstances, in which the Minister may take administrative action, exist or have existed (see below);

This obligation starts to apply on the day the person is approved as a standard business sponsor.

This obligation ends two years after the concurrence of the following two events:

- the approved standard business sponsorship ceases; and
- there is no primary or secondary sponsored persons in relation to the sponsorship.

g) Obligation to provide information to the department when certain events occur

The standard business sponsor must provide certain information to the Department when certain events occur. This information must be provided by registered post or e-mail, to a specified address and within certain timeframes of the event occurring. For a complete list of the information, events and time periods, see www.immi.gov.au/skilled

This obligation starts to apply on the day the standard business sponsorship is approved.

This obligation ends two years after the concurrence of the following two events:

- the approved standard business sponsorship ceases; and
- there is no primary or secondary sponsored persons in relation to the sponsorship.

h) Obligation to ensure primary sponsored person works or participates in the nominated occupation, program or activity

The standard business sponsor must ensure that the primary sponsored person does not work in an occupation other than the occupation that is the subject of the most recent approved nomination for the person.

If a sponsor wants to employ a primary sponsored person in a different occupation, the sponsor must lodge a new nomination in respect of that occupation for the primary sponsored person. The standard business sponsor must also ensure that they do not engage the primary sponsored person's services other than as an employee.

This obligation starts to apply on the day the primary sponsored person is granted a subclass 457 Visa, unless he or she already holds a subclass 457 Visa in which case the obligation starts to apply on the day the sponsor's nomination for the primary sponsored person is approved.

This obligation ends on the day:

- on which a nomination by another sponsor in relation to the primary sponsored person is approved; or

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- on which the person is granted a further substantive Visa (other than a subclass 457 Visa). If the primary sponsored person is granted another subclass 457 Visa in order to continue to work for the sponsor, the obligation continues;
 - the person has left Australia and no longer holds a visa.
 - i) **Obligation not to recover certain costs from a primary sponsored person or secondary sponsored person**
- associated with becoming or being a sponsor or former approved sponsor.
 - This obligation starts to apply on the day the sponsor is approved as a sponsor and ends on the concurrence of the following two events:
 - the approved sponsorship ceases; and
 - there is no primary or secondary sponsored persons in relation to the sponsorship.

For more information on the 457 Visa program contact the Coleman & Greig Immigration team on tel: 02 9635 6422

The standard business sponsor must not recover, or seek to recover, from the primary or secondary sponsored person, all or part of the costs (including migration agent costs):

- that relate specifically to the recruitment of the primary sponsored person;

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