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Immigration legislation is updated at regular intervals. This Newsletter is to inform you of changes that are relevant to expatriate employment policy, specifically to Business Sponsorship applications and temporary business visa holders in regards to visa conditions, further temporary stay and applications for employer sponsored migration or permanent residency.

SUMMARY OF NEWS:

- **Changes to the Subclass 457 Visa program.**

Detailed information:

We attended a meeting with senior DIAC officials on 22nd September 2009 covering the new changes on subclass 457 visas which came into force on 14 September 2009. The changes were quite complicated from a legislative drafting perspective and so further clarification from DIAC was a good thing for us and our clients.

The essential theme of the changes is "parity" in the work place. What DIAC is trying to achieve is that employees on 457 visas are treated exactly the same as or no worse than an Australian employee. This is one reason why a number of provisions and definitions from the Fair Work Act have been word for word incorporated into the Migration Act. This relates to rates of pay and conditions of work.

There are some changes which are positive for sponsors and others which will require a little more work on your side. Firstly, all new sponsorship applications will now be for a 3 year period instead of a 2 year period. There will no longer be a limit on the number of nominations you can make. DIAC will still monitor each sponsorship agreement and ensure that the number of nominations is appropriate for the size of sponsor and the number of Australian staff they have. But essentially DIAC want to get to the stage where there is 1 sponsorship agreement per ABN at any time with no nomination limit. This will remove the requirement to lodge additional sponsorship applications if you use up your "limit" within the life time of the sponsorship agreement.

DEEWR is currently still working on training benchmarks, but we are led to believe that they are not far away. In the meantime the previous guidelines are still being followed by DIAC. That is that 1% of payroll is spent on training or a commitment to pay 2% of payroll to an Industry Training Fund. Once we have these benchmarks we will let you know.

A new set of Sponsor Obligations came into force on 14th September 2009. This replaces the previous Sponsor Undertakings. The updated obligations are as follows:

- To ensure equivalent terms & conditions of employment for the primary visa holder;
- To pay return travel costs, when requested in writing by the primary sponsored person and / or secondary sponsored person;
- To pay the Commonwealth for locating and removing visa holders who have overstayed their visa;
- To cooperate with DIAC inspectors;
- To keep certain records in relation to the person's approval as a sponsor and the visa holders they sponsor;
- To provide certain information and records to DIAC;
- To provide information to DIAC when certain events occur;
- Ensure the sponsored person works in the occupation approved in the nomination; &
- The sponsor must not seek to recover certain costs.

I think it is probably best if we address each of these points.

1. A sponsor now must provide terms and conditions of employment no less favourable than those applying to Australian employees. The old Minimum Salary Level no longer exists. The key element now is "Market Rates" of pay. Some guiding principals are that the salary being nominated is the same as for an equivalent Australian worker at that location; the employer determines terms & conditions for the 457 worker in the same way as for an Australian worker. The onus is on the employer to provide appropriate evidence to DIAC. Where there are no equivalent Australian workers, the terms and conditions are no less favourable than those that would be provided to an equivalent Australian worker at that location. So essentially if there are equivalent Australian workers then we now need to provide an employment contract for one of them to show that it is the same within reason. Another option would be to show any Collective Agreements for workers. If there are no equivalent Australian workers then we need to look at other forms of evidence such as Industry surveys or recent recruitment advertising across the industry. Essentially we have to show how we have arrived at the remuneration figure. If an employer cannot show this satisfactorily DIAC will then fall back on ABS data. DIAC believes that this will be higher than actual market rates. In certain instances non – monetary benefits can be included if also available to Australian workers. LAFHA is still allowable.

If the gross salary is above the High Income Threshold (A\$180,000) the equivalent terms & conditions assessment DOES NOT apply.

There is also a minimum level – The Temporary Skilled Migration Income Threshold (TSMIT). If the market rate in the workplace is lower than TSMIT then a nomination will be refused. This amount is currently \$45,220 and will be indexed annually. This is NOT a minimum salary level. Only the Market Rate applies, but if the market rate is less than this amount you cannot up the salary to reach this figure. The Market Rate – whatever that is - will apply. We will have to show evidence of this with every application.

All existing sponsors have until 31/12/2009 to ensure that all 457 visa holders are being paid market rates – not just the minimum salary level as it was prior to 14th September 2009. We will need to work with our clients to ensure that not only this gets done, but that proof is maintained in a file at our office and the client's office in case of DIAC monitoring.

2. All existing and new sponsors now **MUST** pay the return travel costs of sponsored people, including domestic travel. The costs are for economy class airfares. Costs are to be paid within 30 days of receiving a written request by either the visa holder or DIAC. If you never receive a written request then this does not have to be done. The visa holder needs to be in Australia to make such a request. This is a stricter version of the previous undertaking in that sponsors now **MUST** pay for return travel.
3. The standard business sponsor must pay costs incurred by the Commonwealth in locating and/ or removing the sponsored person from Australia if DIAC has requested the payment in writing. These costs are capped at \$10,000 and will be less any amount paid under the travel costs obligation.
4. DIAC inspectors now have expanded powers. They are now able, without force, to enter any business premises or another place to inspect any work, process or object; to interview any person; require a person to tell the whereabouts of a record or document; require a person to produce the record or document and make copies of it. They can also by notice require a person to produce a document or record. A person is not excused from producing a record or document on the ground of self-incrimination. DIAC monitoring is viewing its role as that of enforcement.
5. Sponsors must keep records of their compliance with all other obligations. All records must be reproducible and some must be capable of verification by an independent person. DIAC is going to provide a list of what will be required "soon". This obligation starts on the day a sponsorship is approved and ends 2 years after a person ceases to be a sponsor and there are no visa holders in relation to that sponsor.
6. Sponsors must provide records or information that goes to determining whether a sponsorship obligation is being, or has been, complied with & other circumstances in which DIAC may take administrative action exist or have existed. These need to be provided on request and in the time frame requested by the Minister. This obligation operates for the same time period as above.
7. Sponsors must provide certain information to DIAC when certain events occur. Previously this related to informing DIAC if a subclass 457 visa holder ceased work with you within 5 working days. This time frame has been extended to 10 working days. A list of information, events and time frames will be made available by DIAC "soon".
8. The sponsor must ensure that the primary sponsored visa holder does not work in an occupation other than the one approved in the Nomination. If their occupation does change then a new Nomination needs to be lodged. A sponsor has to certify at the Nomination stage that a significant amount of the time spent on the job is spent on the main duties of that occupation. You cannot have a situation where someone performs the duties of a position as per ASCO definitions for 40% of the time and then does low skill level work for the rest of the time. It is important to keep this in mind as employee's roles change and develop.
9. A sponsor must **NOT** recover, or seek to recover, all or part of the costs of employment from the visa holder. This relates to recruitment costs and migration agent costs. This does not mean that a Sponsor has to pay these costs. A potential 457 visa holder can opt to use an agent and pay them directly, but a sponsor can not pay these fees up front and then try to claim them back from the employee. Any relocation costs etc are not included in this. Some of our clients have terms in employment contracts stipulating that if an employee leaves their employ within a certain time frame then certain costs will be recoverable. This is

still OK as long as it does not relate to recruitment and visa costs for a 457 visa holder.

The issue of health costs is one that is in fact better for the sponsor. For all new visa applications lodged after 14 September 2009 the responsibility for health costs shifts to the visa applicant. It is now a condition of a 457 visa that the visa holder has and maintains private medical cover for the life of the visa. We can advise any potential applicants on who to speak to about overseas cover. Some countries – eg the UK – have reciprocal health cover with Australia. But since this is not automatic visa applicants will need to have some insurance in place for their arrival which can then be allowed to lapse when they take up the reciprocal health cover in Australia. This could be medical insurance or even travel insurance. Evidence of having taken out insurance needs to be provided now before a visa will be issued.

All existing 457 visa holders are still the responsibility of the sponsor as per the previous undertakings. This will continue for the life of their current 457 visa. Even if you take on an existing 457 visa holder from another sponsor these undertakings will apply to you for the life of their visa. It will be important to keep track of this as some 457 visa holders will be responsible for their own health costs and other could ultimately be the sponsor's responsibility. It is our advice to insist that all 457 visa holders who can not get access to reciprocal health arrangements should take out private medical insurance.

There are also some changes as to how the application process works. If you will be sponsoring an existing 457 visa holder you will only be required to lodge a nomination application. They will not need to lodge a visa application as well. Their 457 visa will be transferred to your sponsorship. It will though only be valid for the life of the existing visa and not another 4 years. When that visa expires then you will need to lodge another nomination and visa application. More work will now be required to satisfy the nomination – i.e. market rates etc – but the applicant will not have to apply for a visa and re-do medicals.

DIAC has now instituted a frame work for punitive penalties for sponsors not doing the right thing. It is a 2 tiered approach. Firstly, administrative where sponsorships can be cancelled or barred. Secondly, infringements where DIAC can levy fines - \$660 for an individual and \$3300 for a body corporate – for the first offence. Any subsequent offence the fine is double. Lastly, civil penalties can be imposed by a court if the matter reaches that point. For failing to satisfy sponsorship obligation or non compliance with an inspector fines of \$6600 for an individual and \$33,000 for a body corporate. A sponsor will always be given the chance to rectify errors or breaches and to answer any concerns. But DIAC will be monitoring more sponsors and coming down harder on those that don't do the right thing. There is also now more official information sharing between Federal and State/ Territory agencies including: ATO, Industrial Relations, fair Trading, Workplace Safety, & Registration and Licensing. As a result DIAC will be monitoring 100% of sponsors on the question of salary as they will be able to cross match information with the ATO. From this they will then decide if any further action needs to be taken.

So you can see that some quite substantial changes have been made to the 457 program and process. For most of our clients they will not really affect how you operate, but it is important to be aware of these changes and ensure your comply with them. It is now even more important that we work together to ensure all records are in place and that we prepare for the possibility of a monitoring audit. DIAC has beefed up it's monitoring powers and we need to ensure everything is in place. We can provide a service to our clients in preparation for this.

If you have any questions or would like to discuss this in more detail please contact our office.

