



# Law at Work Report

Devine Law at Work

MAY 2009

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## IN TOUGH TIMES, KEEP AN EYE ON COMPLIANCE



In what is proving to be a challenging year for many in business, it has never been more important to ensure that you are achieving maximum performance from your employees and minimising the risk of legal issues and their associated costs to business. In this article we explore, from a human resources perspective, a range of different ways in which a business might respond to the challenges posed by the Global Financial Crisis (GFC) and consider the legal risks which can arise and how to address those risks.

### Changing work patterns - days and hours of work

It is often said that 'necessity is the mother of invention' and that is evident in Australian workplaces in 2009, with the developments of some very creative ideas in response to the GFC. One of the most popular has been a **change in work pattern** for staff; for example, reducing hours from full-time to part-time. This is a clever strategy as it means that employers can retain staff during uncertain times, retaining corporate knowledge and ensuring that 'all hands are on deck' when business performance improves.

Notably absent from the public discussion of these ideas is an appreciation of the importance of **obtaining the employee's consent** to any changes an employer is proposing to make. When this consent is not obtained, let alone sought, any changes made by the employer are entirely unenforceable. Any attempt by an employer to force changes which the employee does not agree to can amount to a breach of the employment contract and expose the employer to a range of entirely unnecessary legal risks; including breach of contract claims and unfair dismissal claims. Employers and their managers need to bear in mind the fact that the same rules of contract law which applied at the time that the parties entered into the employment contract will apply when any variations to that contract are proposed or a new contract is offered. Accordingly, the focus of discussions with employees needs to be on **consultation and negotiation**, as opposed to making unilateral changes or 'take it or leave it' demands.

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## In tough times, keep an eye on compliance

When an employer proposes changes to any aspect of an employment contract, the proposed variation should be put to the employee and explained, together with sufficient notice of when the change is proposed to take effect. Next, the employer should give the employee an opportunity to think about the proposal and to ask frank questions about how it will impact on them. The employee needs to understand what the alternatives are if the proposal is not accepted by him/her; for example, termination of the employment contract, whether on the ground of redundancy or otherwise. In my observation, employees are often a terrific source of ideas about how things could be done differently/better within a business and so I recommend that employers seek feedback from staff about the proposal and invite ideas from them.

When making changes about matters such as work patterns, it is often a good idea to agree to a trial period and a date for review (e.g. three months, six months). Any agreement reached about changes to work patterns or other variations to an employment contract should be **documented** and signed by all relevant parties.

## REDUCING ANNUAL LEAVE LIABILITY

In addition to changes in work pattern, employers have also been considering a range of ways in which to reduce costs. One of the most popular is the proposed reduction in accrued annual leave liability - times of business downturn are a good opportunity for employees take a break, resulting in benefits for the employer and employee alike.

When considering this option, it is important to bear in mind the limited right under the *Workplace Relations Act 1996* (WRA) to direct an employee to take annual leave. The WRA provides that an employer may direct an employee to take annual leave *if* the employee has excessive accrued annual leave entitlements (i.e. 40 days or more annual leave, the equivalent of two years entitlements for a full-time employee). Even where the employee has accrued 40 days or more, the entitlement to direct the employee to take leave is limited to one-quarter of the accrued entitlement (i.e. 10 days).

Apart from the benefits to the health of an employee in regularly taking leave, where many employees prefer to accrue their entitlements (as a type of nest egg) the consequence for an employer is a very substantial accrued liability. Accordingly, it is good practice in the best and worst of times to have a system in place which ensures that employees take their annual leave entitlements. If employers include the right to direct an employee to take annual leave in the employment contract, they will have a contractual right to require the employee to take annual leave in specific circumstances, making the process of requiring employees to take annual leave much smoother. In the absence of an express contractual right, the employer can of course negotiate with the employee for him/her to take annual leave in order to relieve some of the accrued liability of the employer. If and when any agreement is reached, it should be **documented and signed** by both parties.

## REDUNDANCIES

A more dramatic way of seeking to address issues associated with business downturn is the option of redundancies. While redundancies often appear to be an attractive option to reduce costs, they are often in practice a very expensive one. In addition to the expense and unsettling impact on the morale of the workforce, employers must bear in mind a range of legal obligations when considering the merits of this option.



***“It is a good practice in the best and worst of times to have a system in place which ensures that employees take their annual leave entitlements”***



These obligations include:

- the obligation to give **notice** of the termination of employment on the ground of redundancy, or a payment in lieu of notice;
- the obligations in any applicable award and/or workplace/enterprise agreement - most commonly to consult with employees and unions and to make **minimum severance payments** based on years of service;
- the obligation in the WRA to notify relevant unions in the event of redundancies of more than 15 people;
- the obligation in the WRA to notify Centrelink in the event of redundancies of more than 15 people;
- in the case of involuntary redundancies, selection of employees for redundancy on the basis of objective criteria and not in breach of the prohibition against unlawful termination contained in the WRA and the prohibitions against unlawful discrimination contained in Federal and State Anti-discrimination legislation.
- compliance with any contractual entitlements in the event of redundancy, including the content of any applicable Company policy.

While an employee will be ineligible to bring an unfair dismissal claim if his/her employment is terminated for a genuine operational reason, or for reasons including an operational reason, it is very important that the employer does more than simply rely on that ground when terminating the employee's employment. The employer will need to be able to **demonstrate** that the termination is due to a genuine operational reason in the event that an employee brings an unfair dismissal claim and challenges the ground relied upon by the employer for the termination.

Employers also need to bear in mind changes to relevant law which will take effect in the near future. From 1 July 2009 the new unfair dismissal provisions contained in the *Fair Work Act 2009* will take effect. Under those provisions, a dismissal will be unfair *if* Fair Work Australia is satisfied that, among other things, the dismissal was *not* a case of **genuine redundancy**. Under the *Fair Work Act 2009*, a redundancy will be a genuine

redundancy if: the person's employer no longer required the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise; and, the employer has complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy.

Further, from 1 January 2010 *all* employees the subject of the Federal workplace relations system (including employees of Companies) will be entitled to receive minimum redundancy pay entitlements as a consequence of provisions contained in the *Fair Work Act 2009*.

## EMPLOYEE ENTITLEMENTS

In good times and bad, it is essential that employers continue to comply with their obligations in relation to all employee entitlements; including, but not limited to, wages, allowances, penalty rates, overtime rates and leave entitlements. Employees have up to six years in which to sue for unpaid statutory employee entitlements so the fact that a claim is not made in the short term does not mean it won't be made in the longer term. Employers who breach their obligations in relation to employee entitlements may also find themselves at the wrong end of a Workplace Ombudsman investigation and prosecution, which may result in very substantial penalties being imposed and damage to reputation.

## THE IMPORTANCE OF 'HOUSEKEEPING'

When times are good, people in business can often be too busy to attend to business 'housekeeping'. From a human resources perspective, such housekeeping includes ensuring that employment documents (contracts, letters of offer, policies and procedures, job descriptions, performance standards) are up to date and relevant and that managerial and supervisory staff have well developed people management skills and up to the minute knowledge and understanding of the ever changing landscape of employment law.

Whether in good times or tough times, businesses simply can't afford poor employee performance or to incur avoidable legal and other costs.

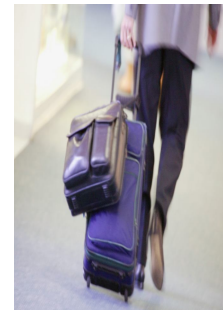


There is no time like the present for businesses to review and improve their workplace practices, systems and internal expertise. By taking these steps, business can deliver better results in performance and (reduced) costs and be in better shape when the economy improves.



## IN FOCUS: 457 VISA EMPLOYEES - AN EMPLOYMENT LAW PERSPECTIVE

How quickly things change! It is not so long ago that a major threat to business success in Australia was the issue of whether there would be sufficient numbers of skilled workers. In this context, accessing skilled workers through the sub-class 457 Visa—Temporary Business (Long Stay) has been a particularly attractive option in recent years. The 457 visa program enables Australian employers to access skilled workers from overseas to provide the skills which those employers cannot access locally. While the spectre of high unemployment figures has emerged along with the GFC, the 457 Visa program remains an important source of skilled labour for Australian companies when in demand skills are hard to find. In this article we examine, from an employment law perspective, the special characteristics of 457 Visa employees and some of the trickier practical issues an employer can face when employing them.



### OBLIGATIONS OF SPONSOR EMPLOYERS

When certain skills are hard to source, 457 employees may appear at first glance to be quite an attractive option. In order to employ a 457 Visa employee, the employer must formally sponsor that employee in addition to employing him/her for a period of up to 4 years. Sponsorship means that the employer must enter into a number of undertakings with the Australian Government and comply with these in addition to its obligations under Australian employment law. What appears below is an outline of the obligations of a Sponsor Employer under immigration law. Readers requiring a more detailed account of the relevant law and the procedure involved in sponsoring a 457 Visa employee should seek expert advice from a specialist in immigration law - please refer to page seven of this issue for details.

Under Australian immigration law, a Sponsor Employer must:

- ensure that the 457 Visa employee is paid a salary of not less than the **minimal salary level** (“MSL”) for the position/occupation or the minimum wage provided for in any applicable Award, whichever is the more generous;
- ensure that the salary paid to the 457 Visa employee does not include any non-salary benefit component if only the MSL is paid – this means that if any non-salary benefits are paid they need to be additional to the MSL;
- ensure that the 457 Visa employee receives monetary compensation for hours worked over and above 38 hours per week which is additional to the MSL;
- ensure that tax is deducted from the salary paid to a 457 Visa employee and any eligible termination payment and that the deducted tax is paid to the Australian Taxation Office;
- ensure that a superannuation benefit which is equivalent to 9% of the salary paid to the 457 employee is paid into an approved superannuation fund in Australia – this superannuation payment is an amount additional to the MSL;
- pay **debts owed to the Commonwealth Government** as a result of the 457 Visa employee or his/her dependants receiving or using Commonwealth benefits or services to which they have no entitlement (e.g. Medicare, social security benefits);
- accept financial responsibility, either directly or through medical insurance, for the **cost of any medical treatment** of the 457 Visa employee *or* any of his/her dependants while in Australia – medical insurance is recommended, however it should be noted that medical insurance may not always cover all forms of medical treatment and accordingly the Sponsor Employer may be liable for medical costs directly if they are not covered by the insurance policy;



- be responsible for the **repatriation costs** of the 457 Visa employee *and* any of his/her dependants, either by the purchase of a ticket or allowance of payment for same in the termination payment – however the Sponsor Employer will not be liable for this cost if the 457 employee is granted another visa;
- comply with Australian laws relating to workplace relations that are applicable to the 457 Visa employee;
- ensure that each 457 Visa employee holds the necessary licence, registration or membership where such is mandatory in order to perform work of that kind in Australia;
- inform DIAC if any 457 Visa employee ceases to be in the employ of the Sponsor Employer, within five days of the termination of the employment - the 457 Visa expires 28 days after the date of termination of employment and the Sponsor Employer's obligations (including the obligation to pay the MSL and to be responsible for medical costs) remains on foot during this period;
- comply with immigration requirements – including that the 457 Visa employee remains lawful (i.e. holds the appropriate visa) while in the employ of Sponsor Employer;
- co-operate with DIAC in the monitoring of the 457 Visa employee, including providing monitoring reports;
- co-operate fully in any audit checking relating to the employment of persons from overseas;
- notify DIAC of any change in circumstances that may affect the capacity of Sponsor Employer to honour its sponsorship obligations or any change in the information provided on the sponsorship form – for example, business restructuring, change of name or address and any operating difficulties.

If a 457 Visa employee remains unlawfully in Australia or applies for a protection visa the Sponsor Employer may be liable for **detention and removal costs**.

Failure to comply with any or all of these obligations can result in the cancellation of the sponsor status of Sponsor Employer. In addition to these matters, a 457 Visa employee will usually have **visa condition 8107** applied to their visa. This condition prohibits the 457 Visa employee from: ceasing to be employed by the Sponsor in relation to which the visa was granted; working in a position or occupation which is inconsistent

with the position or occupation in relation to which the visa was granted; or engaging in work for another person or on the holder's own account while undertaking the employment in relation to which the visa was granted. Failure by the 457 Visa employee to comply with any or all of these requirements can result in the cancellation of the visa and refusal of any application for another visa in the future.

## COMMON EMPLOYMENT ISSUES

### *Dual compliance obligations*

457 Visa employees are a category of employee which is quite distinct from an employee who has Australian residency or citizenship. A Sponsor Employer of a 457 Visa employee needs to be fully informed about, understand and comply with both employment law *and* immigration law. Compliance with both of these areas of law is made more complex by the fact that each of the Government departments which administers relevant legislation tends to focus on its own area of law and not apparently appreciate the bigger picture perspective of a Sponsor Employer.

### *The Employment Contract*

In view of the raft of additional obligations a Sponsor Employer must satisfy in order to employ a 457 Visa employee, as opposed to an employee with Australian residency or citizenship, it is critically important that the Sponsor Employer has an **employment contract** which is customised to the special characteristics of a 457 Visa employee. The contract then needs to be kept up to date with changes in Australian immigration law. Having a customised employment contract which has been developed/reviewed by an expert in the relevant law is a key tool in ensuring compliance with both employment law and immigration law.

### *Unpaid Leave*

Under Australian employment law, employees have a statutory entitlement to unpaid leave in two limited circumstances: parental leave; and, carer's leave, when any entitlement to paid carer's leave has been exhausted. In addition to applications for these forms of leave, employees also apply for leave without pay (LWOP). Unless there is a statutory entitlement to it, the granting of LWOP will be a matter of the employer's discretion.

The taking of LWOP by an employee can conflict with his/her key obligation under the employment contract, to make him/herself available to provide the services the employer requires. Accordingly, except where there is a statutory entitlement to unpaid leave there will be a



presumption that the employee will be available to provide those services. In the case of the 457 Visa employee the whole reason for granting the Visa is for the employee to provide his/her in-demand skills to the Sponsor Employer for the period of the Visa (up to 4 years). Accordingly, the taking of any form of unpaid leave by a 457 Visa employee risks breaching his/her obligation under immigration law to not cease being employed by the Sponsor Employer. Further, the grant of any unpaid leave by the Sponsor Employer would conflict with its obligation to pay the MSL for the entire period of employment.

It is our understanding that, as a matter of policy, the Department of Immigration and Citizenship (DIAC) will consider a period of up to three months unpaid leave by a 457 Visa employee to be acceptable. However it does not treat all forms of unpaid leave in the same manner. For example, in relation to parental leave, DIAC's policy material says on the one hand that the taking of such leave by a 457 visa employee would be in breach of the obligation to not cease employment, while on the other hand it says it may not breach the obligation and has to be determined on a "case by case basis".

In the absence of a clear commitment by DIAC to a policy position in relation to the taking of parental leave by a 457 employee, Sponsor Employers are left in a quandary as to what they should do when a 457 visa employee applies for parental leave. If they don't grant the parental leave, they will be in breach of workplace relations legislation. If they grant the leave, they will be in breach of immigration law if they don't continue to pay the employee for the entire period and thereby breach their obligation to pay the MSL; which would have the effect of requiring an employer to provide paid parental leave to 457 Visa employees, thereby treating them more favourably than employees with Australian citizenship or residency. If they decide to terminate the employment of the 457 Visa employee then they may be in breach of anti-discrimination legislation which, among other things, prohibits discrimination on the ground of pregnancy.

Sponsor Employers must therefore tread very carefully when responding to an application for parental leave by a 457 employee. **At no time should a Sponsor Employer deny the application for parental leave.** Because of the potential application of a range of different laws, it is imperative that Sponsor Employers seek advice from a solicitor with an understanding of both employment law and immigration law when dealing with such matters.

Sponsor Employers should also ensure that they have a LWOP policy and procedure, to ensure that a consistent,

non-discriminatory and otherwise legally compliant approach is adopted within the business to LWOP applications.

## A BALANCING ACT

In determining whether or not to sponsor and employ a 457 Visa employee a prospective Sponsor Employer should assess the benefit to be gained from an employee with hard to find skills and contrast this with the very substantial additional costs and complexities associated with such employees. The clear message from the rules which apply to employment of 457 Visa employees is that in return for obtaining the benefit of the skills offered by these employees, Sponsor Employers must be prepared to take on quite onerous additional obligations and the expenses associated with them.

### Changes to the 457 Visa Program

On 1 April 2009 the Federal Government announced the following changes to the 457 Visa program:

- the **indexation of the MSL** for all new and existing 457 visa holders by 4.1% on 1 July 2009;
- the implementation of a **market based minimum salary** for all new and existing 457 Visa holders from mid-September 2009;
- **increasing the minimum language requirements** for 457 Visa applicants in trade occupations and chefs —this took effect on 14 April 2009 and only applies to applications made on or after that date;
- introducing **formal skills assessment** from 1 July 2009 for visa applicants from high risk immigration countries in trade occupations and chefs;
- introducing a **requirement that employers have a strong record of, or demonstrated commitment to, employing local labour and non-discriminatory employment practices**;
- the development of **training benchmarks**;
- the extension of the labour agreement pathway to all ASCO (Australian Standard Classification of Occupations) 5-7 occupations - ensuring that employers satisfy obligations on local training and employment.

This information is contained in the Media Release issued on 1 April 2009 by the Minister for Immigration and Citizenship, which is available online at [www.minister.immig.gov.au](http://www.minister.immig.gov.au)



## ABACUS VISA IMMIGRATION LAWYERS

To ensure that our clients have the benefit of specialist expertise in both employment and immigration law, Devine Law at Work partners with Abacus Visa Immigration Lawyers in providing advice in relation to 457 Visa employees. Led by the dynamic and savvy Linda McCreath, Abacus Visa Immigration Lawyers provides specialist advice in immigration law and is also a Registered Immigration Agent.

You can find out more about immigration law and about Abacus Visa Immigration Lawyers at [www.abacusvisa.com.au](http://www.abacusvisa.com.au) and you can contact Linda on +61 2 9262 6244 or by email at [linda.abacusvisa.com.au](mailto:linda.abacusvisa.com.au)

## THE ROLE OF LEGAL EDUCATION IN ENSURING LEGAL COMPLIANCE

Australian employment law is a complex jigsaw puzzle of the common law of contract, a raft of Federal and State legislation and a myriad of industrial instruments. Add to that mix the ever changing content of key employment laws and it is no wonder that employers often feel confused and even overwhelmed by the task of staying on top of legal compliance.

In our experience, employers are most at risk of legal issues and their associated costs when managerial and supervisory staff are either unsure of what to do or have an incorrect or incomplete understanding of the law. Accordingly we have identified that legal education is the key to our clients not only minimising legal risks in the workplace but also enhancing the professional development of managerial staff and improving the performance and accountability of all employees—better that the expertise resides within the business rather than outside of it. The knowledge that we share with our clients and their staff in our legal education workshops and seminars delivers the certainty that managers and internal advisers need to make decisions which are right for the business.

We work closely with our clients to deliver a learning experience for their people which is clear, relevant and above all enjoyable. Participants leave our workshops “buzzing” with enthusiasm, as they have gained that all important confidence from the skills developed and knowledge acquired during the course of workshop.

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*Elizabeth Devine is an outstanding public speaker. Her knowledge of employment law issues is extensive and her ability to impart the information to our delegates is impressive. Delegate feedback is always extremely positive.*

**Denise Tanner**

*Conference Producer – Team Manager  
Legalwise Seminars*

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Devine Law at Work is in the business of *helping people work together for better results*. We are a law firm and consultancy which specialises in Australian workplace law and workplace relations.

We are a multi-disciplinary practice which integrates skill and expertise in: workplace law; legal education; communication (including negotiation, conflict resolution and facilitation); workplace systems and business development.

We provide services in: legal advice; legal education; legal representation; negotiation; conflict resolution; systems development; legal health checks and workplace investigations.

We invite you to find out more about Devine Law at Work from our website **www.devinelaw.com.au**