

## What to do when the union comes knocking – a handy reference guide with all the basic information you need to know, at a glance!

### **When can a union enter your workplace?**

Union officials (who hold a current right of entry permit) can enter your workplace for three specific reasons:

- to investigate a suspected breach of the Fair Work Act, or a fair work instrument (that is, a modern award, enterprise agreement, workplace determination or Fair Work Commission order) that relates to or affects union members working on the premises (s481);
- to hold discussions with employees who are, or who are eligible to be members of the union, and who wish to participate in those discussions (s484); and,
- to investigate breaches of work health and safety laws (s494).

### **The first reason: to investigate a suspected breach of the Fair Work Act or a fair work instrument**

#### ***While at your workplace, the union can...***

- inspect any work, process or object relevant to the suspected breach;
- interview any person about the suspected breach (subject to that person agreeing and subject to that person being an eligible union member); and,
- inspect or make copies of any record or document (other than a non-union member record or document) that is directly relevant to the suspected breach, and that is kept on the premises and or, that is accessible from a computer that is kept on the premises.

#### ***Later access to a record or document:***

The union:

- can, either on the day of entry or within five days after the entry, by written notice, require you to produce or provide access to a record or document (other than a non-union member record or document) that is directly relevant to the suspected breach on a later day or day, as specified in the notice (the notice cannot require you to produce anything earlier than 14 days after the notice is given); and,
- must have reasonable grounds to suspect the breach and has the onus to prove that.

#### ***Notice to be given:***

- the union must provide a written entry notice, specifying the suspected contravention, during working hours, at least 24-hours (but no more than 14 days) before entry.

## What to do when the union comes knocking – a handy reference guide with all the basic information you need to know, at a glance! cont.

### ***Hours during which the union can attend the workplace:***

- the union can only attend the workplace during working hours.

### ***Location of interviews and discussions:***

- a room or area mutually agreed as suitable by the union and you. If an agreement cannot be reached then any room or area that is provided for meal or other breaks.

### ***Route to location of interview and discussions:***

- you may nominate a particular route to each room and the union must comply, as long as the route requested is reasonable.

### **The second reason: to hold discussions with union members (or potential union members)**

#### ***Notice to be given:***

- the union must provide a written entry notice, during working hours, at least 24-hours (but no more than 14 days) before entry.

### ***Hours during which the union can attend the workplace:***

- the union can only hold discussions during meal times or other breaks.

### ***Location of interviews and discussions:***

- a room or area mutually agreed as suitable by the union and you. If an agreement cannot be reached then any room or area that is provided for meal or other breaks.

### ***Route to location of interview and discussions:***

- you may nominate a particular route to each room and the union must comply, as long as the route requested is reasonable.

### **The third reason: to investigate breach of state or territory OHS rights**

#### ***Notice to be given:***

- If the union wants to inspect or access documents only - it must give at least 24-hours written notice of its intention to enter the workplace and the notice must set out its intention to exercise the right and reasons for doing so.

## What to do when the union comes knocking – a handy reference guide with all the basic information you need to know, at a glance! cont.

- In NSW, under the Work Health & Safety Act, if the union “reasonably suspects” that a breach of the WHS Act has occurred or is occurring, it may enter the workplace without prior notice, for the purpose of investigating the suspected contravention (provided it has union members at the workplace or the workplace employs people who would be eligible members of the union), and can give notice of entry as soon as reasonably practicable after entering the workplace, unless doing so would defeat the purpose of the entry or unreasonably delay the union in an urgent case

### ***Hours during which the union can attend the workplace:***

- the union can only enter during working hours.

Understanding your rights and obligations in any of the above mentioned situations is vital for avoiding penalties and unnecessarily provoking union hostility. If you're faced with one of the above mentioned situations, use the above guide as a starting point to manage the situation and then immediately seek advice from Coleman Greig's Employment Law team in Parramatta and Norwest. We are available to guide you through the process in the particular situation in more detail, to ensure both you and the relevant union comply with the rules:

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## The black economy: not p(l)aying by the rules

We all know that the black economy is alive and well, despite the enforcement activities of the Australian Taxation Office and the Fair Work Ombudsman (FWO). In the last couple of months, I've seen arrangements which are not merely dodgy, but which are unquestionably illegal:

- A bottle shop which pays staff in cash (at a good rate, but no tax, no super), and a slab of beer instead of public holiday penalty rates – really, where do you start?
- Two senior professionals employing a secretary for regular work on condition that she sets herself up as a contractor – sham contracting anyone?

However, these arrangements at least involve pay. Even worse are arrangements for unpaid work. A common form of this is the “trial period” or “work experience” or “internship.” The FWO and the law are quite clear about this: work in the context of employment must be paid for. While a transitory trial (such as a barista demonstrating coffee making skills, or a candidate working a shift to assess aptitude) may be permissible, and vocational placements (in the context of clinical experience as part of a course of study) and genuine work experience (where the work is not of real value to the employer because of the nature of the work and degree of support and assistance given as training) are also acceptable, extended so-called “work experience,” “internship” and “trials” are not. See the Fair Work website [for more information on unpaid work](#).

A recent report, *Unpaid Work Experience in Australia* examined unpaid work experience, etc and found that although about 70% of respondents felt they gained skills and experience from work experience, placements and internships, 43% of unpaid work experience, trials etc were outside any formal arrangements and open to abuse.

The vulnerability of young unemployed people desperate for a foothold in their preferred line of work is obvious. That abuse occurs is clear from the cases which come before the courts.

For example, in *FWO v Crocmedia* (2014), a media company had engaged students, for no pay for three weeks, acting as producers for late night radio, before engaging them as “volunteers” or “contractors” and paying “expenses” for extended periods. While the students had sought the opportunity to gain work experience, and no doubt benefited from the experience they gained, the work done as work experience was no different to what was done after they were engaged on a paid basis so it was indeed work, and should have been paid.

The work done as “volunteers” or “contractors” was plainly employment, and using misleading titles did not alter that fact. The “expenses” paid were also below award rates. Ironically, as the payments were described as “expenses,” the employer couldn't set them off against the wages due, and was required to pay award wages in full for the whole period of the engagement, as well as penalties of \$24,000.

Private arrangements for work experience or internship are legitimate, but be aware of the shift from something which is genuinely beneficial to the trainee but not to the employer, to something which is beneficial to the employer and constitutes work, which must be paid for.

If you need any advice about unpaid work experience and the like, please call our Employment Law team in Parramatta and Norwest:

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## Employment and immigration – the do's and don'ts of hiring employees on visas

Many Australian businesses have come to rely on the skills of overseas workers and are sponsoring, or are contemplating sponsoring, an overseas worker on a visa - usually the Temporary Skilled (subclass 457) visa, aka "on a 457."

Managing HR related issues or employment law issues can often be one of the most challenging aspects of running a company, and when you throw in the fact that the employee is on a visa, things can get even more complicated. So what are the some of the do's and don'ts when it comes to hiring employees on visas?

The do's

- 1. Make sure the company is able to employ the worker.** Some visas require little to no involvement from the company. Others, such as the 457 visa, require the company to be registered as Standard Business Sponsor. In addition, the company must have lodged an application called a Nomination Application, with the Department of Immigration and Border Protection, and have that application approved by the Department before the employee can commence employment. Make sure you know what's involved before you employ the worker.
- 2. Make sure you know the working rights of the employee.** Different visas have different working rights. For example, student visas only allow the employee to work up to 40 hours a fortnight when their course is in session. Working holiday visas only allow the employee to work up to six months for each employer, and to stay in Australia for up to one year. You don't want to be caught in a situation where the employee's visa has expired and they're no longer lawfully in Australia so it's important that you have a basic understanding of the working rights of your employees.
- 3. Make sure the company is able to, and will, provide the employee with the same working conditions as an Australian citizen or permanent resident performing the same role.** Unfortunately, it has been common for the 457 visa scheme to be exploited by employers who use it as a way to obtain cheap labour. This means that pay offered by all sponsors comes under close scrutiny. Many employees working on visas are afraid to speak out about underpayments for fear of losing their jobs or their visas. Late last year, the Government announced the establishment of a cross agency Migrant Workers' Taskforce headed by Professor Allen Fels AO, to identify and rectify migrant worker exploitation. It is therefore more important than ever that employers provide migrant workers with the same working conditions and pay that they would provide to an Australian citizen or permanent resident performing the same role.
- 4. Get the employment contract right.** Make sure the employment contract provides clearly that employment is conditional on the employee obtaining, and maintaining, a visa that allows them to work in Australia, and for you. Include provisions in the contract putting the onus on the employee to notify you if their working rights change.
- 5. Give them notice of termination.** All employees in Australia, aside from those whose employment is terminated for serious misconduct, or because they are a casual or on a fixed term contract, are entitled to notice of termination. Employees on visas are no different. However, if you are considering terminating the employment of an employee on a visa due to performance issues or redundancy, consider giving them as much notice as possible - once their employment is terminated, they will only have 90 days to find another employer to sponsor them, or face returning to their home country. Therefore, the effect of a termination of employment on a visa holder may be much more dire than usual. If the employee decides to bring a claim for unfair dismissal, the fact that termination meant potentially having to depart Australia, could have an impact on whether the termination is deemed to be "harsh, unjust or unreasonable."

## Employment and immigration – the do's and don'ts of hiring employees on visas cont.

### The don'ts

- 1. Don't make promises about employment, before you have obtained all required grants from the Department.** If the employee needs you to sponsor them for a 457 visa, make sure that you don't make promises about their employment (such as promises that you will hire them or that you will hire them for a certain position for a certain amount of time) before you obtain all the relevant approvals and grants from the Department. Making promises before you can deliver could put you in a situation where you have offered a contract that you can't uphold.
- 2. Don't make employment contingent on them paying for visa costs.** Sections 245AQ and 245AS of the Migration Act prohibit companies from offering to provide an employee sponsorship in exchange for a benefit. A benefit can include a payment of money, a deduction of an amount, real or personal property, an advantage, a service, or a gift. Therefore, it would be unlawful for Company A to offer to sponsor employee B, in exchange for B paying \$X to Company A. Similarly, it is unlawful for B to offer to pay Company A \$X in exchange for Company A agreeing to sponsor employee A. Recently, a Domino's Pizza franchise was revealed to have contravened these provisions by offering to sponsor an employee in exchange for \$150,000. Penalties for executive officers include up to two years imprisonment, fines of up to \$64,800 or both. For others involved in the payment exchange, including the migrant worker, penalties range up to a maximum fine of \$43,200.
- 3. Don't change the terms and conditions of employment without considering whether you need to notify the Department first.** If the Department has granted a 457 visa for the employee to work in a particular role for a particular company, this means that they are only allowed to work in that particular role, for that particular company, while on that 457 visa. If you're employing someone on a 457 visa and wish to change the terms and conditions of their employment (for example, switching roles or employing entity, or reducing their pay), don't do this without first considering whether you need to notify the Department of the change. If the role is to be changed to an entirely different role, you may need to seek approval of the Department to do this, which could involve lodging a new nomination application for the new role.
- 4. Don't promise that you will sponsor them for permanent residency.** Often the next step for a 457 visa holder is to obtain permanent residency by applying for the Employer Nominated Scheme (subclass 186) visa. Often employers will promise a 457 visa holder that they will sponsor them for a subclass 186 visa. However, business needs change over time and it's best to avoid making such promises, so that you avoid having to have a difficult conversation with the employee if circumstances change.
- 5. Don't fall into bad habits when it comes to your employment records and paperwork.** With any employment relationship, whether the employee is a 457 visa holder or not, it's important for businesses to keep adequate records and paperwork. However, if you're employing 457 visa workers this is even more important. One of the obligations of a Standard Business Sponsor is that they produce documents upon request by the Department. Therefore, to make life easier if the Department comes knocking, it's important to keep up to date with your record keeping and paperwork.

For more information on hiring migrant employees, please contact our Registered Migration Agent 1681285:

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## Enterprise bargaining: change to basic form

It is well established that employers must adhere strictly to the form of Notice or Representational Rights mandated by the Fair Work Regulations.

Changes to the Regulations introduce a new form, which means that all forms of NERR used previously will be out of date, and that use of an outdated form will place the ensuing enterprise agreement at risk of not being approved by the FWC, so that the parties will have to begin the whole formal process of notice, bargaining, agreement and ballot again.

The changes relate to the places an employee may seek information (now both the FWC and the FWO) and a minor change to a reference to the legislation.

The changes will apply from 3 April 2017: do not use the new form before then, and do not use old forms afterwards. After that date, check the Fair Work Regulations for the revised form.

The Federal Government is proposing changes to the Fair Work Act to allow trivial errors in the NERR (and other part of the EA process) to be disregarded, if they do not disadvantage employees. If that passes Parliament, life may get a little easier in this area.

If you need help with this or any other issues about EAs, contact Stephen Booth or Anna Ford.

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