COLEMAN GREIG
LAWYERS

Employment Law Update

The New Temporary Skill Shortage (TSS) Visa

On 18 April 2017, the government announced that the popular Temporary Work (Skilled) Visa (subclass 457) ('457 visa') would be abolished by March 2018, and replaced with a new Temporary Skill Shortage (subclass 482) (TSS) visa. The TSS visa came into effect on 18 March 2018, with its objectives being to improve the quality, contribution and integration of skilled migrants - while ensuring that Australian workers get first preference for jobs.

The following characteristics of the TSS visa are intended to promote those objectives:

- Occupations being split into 2 lists:

  - the Short-term Skilled Occupation List (STSOL) and;

  - the Medium and Long-term Strategic Skills List (MLTSSL).

Employees employed in an occupation on STSOL will only be able to remain in Australia on the TSS visa for up to 2 years and will not have the option of permanent residency under the TSS visa scheme. This means that only employees employed in occupations that are highly skilled and on the MLTSSL have the option of permanent residency.

- More robust Labour Market Testing arrangements will be in place in order for a TSS nomination to be approved. Employers must now provide evidence to show that at least 6 months prior to the lodgement of the TSS nomination application (or 12 months if the application was lodged prior to 18 June 2018), attempts were made to recruit a suitable Australian citizen or permanent resident for the role.

  Acceptable evidence includes a copy of advertisements placed for the role, and receipts for any fees associated with the placement of that role. Department officers will also need to be satisfied that there were no suitable Australian workers for the role, and this will involve demonstrating that the advertisement was published in Australia, and included details of the role such as a title or description of the position, the name of the employer/recruitment agency, annual earnings for the position, and that at least 2 advertisements were published on platforms such as a recruitment website or in print media.

- Visa applicants must have at least 2 years of relevant work experience in the nominated occupation, and the work experience should generally have been undertaken on a full time basis in the last 5 years. Previously, applicants were only required to show that they had the relevant skills for the position, with reference to their employment history in the past 5 years, with full/part time, casual and seasonal work being taken into account. This new requirement may be difficult to meet by many employees currently on working holiday visas (who have a 6 month work limitation for any one employer) and those on student visas (who have a part time work limitation).

- An English Language requirement, higher than was required for the 457 visa, will apply to applicants applying for a TSS visa with an occupation on MLTSSL, with applicants needing to obtain a minimum IELTS (or equivalent) average score of 5, with a minimum score of 5 in each component.

The New Temporary Skill Shortage (TSS) Visa cont.

How will the changes affect you?

Employers

If you are an employer currently sponsoring employees on 457 visas, these 457 visas will continue to be valid until their expiration date.

If you wish to continue to employ these employees once their current 457 visas expire, you will need to lodge a new TSS nomination application, and a new TSS visa application (assuming there is no other visa option available to them, such as a permanent resident visa or the proposed Global Talent Scheme visa). It is important to note that due to changes to the occupation lists since the 18 April 2017 announcements, the occupations under the 457 visa may no longer be on the occupation lists under the new TSS visa. If the employee wishes to change occupations, they will need to lodge a new TSS nomination application, and a new TSS visa application.

Proposed changes to standard business sponsor requirements

To employ overseas workers on a TSS visa, the employing company must be approved as a standard business sponsor (SBS). The requirements to become a SBS are, in essence, the same as those under the previous 457 scheme, with the main difference from a business perspective being the proposed changes to the training benchmark requirements.

Under the current arrangement, SBS's are required to ensure that for the duration of their SBS, they spend 1-2% (depending on which benchmark applies) of their total payroll towards the training of Australian workers. It is important to note that not all training activities count towards this benchmark. If this benchmark is not met for the duration of the SBS, this will present problems at renewal time. For many employers, ensuring compliance with this requirement has been difficult and expensive. Under proposed changes, the training benchmark requirements will be replaced with the Skilling Australians Fund (SAF) levy which will be collected by the Department of Home Affairs and administered by the Department of Education and Training.

The proposed SAF may make it easier for employers to meet the training requirements, as it eliminates the need to keep track of training expenditure throughout the duration of the SBS by replacing this with a one-off levy (ranging between $1,200-$1,800 per year depending on annual turnover), to be paid upon lodgement of the TSS nomination application. Until the SAF legislation is passed, current training benchmarks will continue to apply to SBS applications.

If you need immigration assistance, contact our Employment and Immigration Law Team.

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June 2018

Keeping Up With Modern Awards

The first 4-yearly review of modern awards commenced in January 2014, and whilst it still has some way to go, it is presently intended to be completed by the end of 2018. This review process has been so demanding that the Fair Work Commission has deferred the second 4 yearly review (previously scheduled to begin last January) until the current 4 yearly review is complete and the dust has settled on the changes made to awards as a result of the current review.

This deferment has been actioned so that all relevant parties have the chance to review how the amended modern awards operate in practice, and has come as a relief to pretty much everyone involved in the process.

The Fair Work Commission has been amending awards as various streams of the process have been completed. Generally, this occurs with a model term being developed to be inserted into most awards - although there are many instances wherein individual awards have a variation of the model term, due to different considerations for particular industries or occupations (such as patterns of work, or established custom) which the FWC has taken into account.

Taking the above into consideration, it is imperative for those people responsible for companies' HR and payroll to stay vigilantly aware of any and all changes within 'their' awards, and to implement any changes to their organisation's current practice necessary in complying with the relevant changes. There is no substitute for reviewing the applicable awards and noting any changes which have come about in the last 4 years, as these will generally have derived from the 4-yearly review.

Particular changes and issues to consider include:

- Excessive annual leave accruals: The model term includes a detailed process for employees insisting on taking, or employers directing employees to take, accrued annual leave in excess of two years' worth of leave (8 weeks, or 40 days for a full-time employee). The model also includes limits on when and how much leave an employee can be directed to take. This is intended as a last resort following discussion between the employer and employee regarding the reduction of accrued leave by consensus.
- Other annual leave changes: The annual leave amendments also include a process to allow the limited cashing out of accrued annual leave. Amendments also affect the granting of leave in advance, and have mandated the payment of leave to be on a pay period by pay period basis, rather than being received as a lump sum at the beginning of the leave, as was traditional. This is thanks to the near-universal use of EFT for payment of wages.
- Casual conversion: Although not yet completely finalised, casual conversion clauses are on their way. The model clause permits an employee with 12 months of service to request conversion to either part or full-time employment, if the employee's actual pattern of work would fit the definition of part or full-time employment without any significant adjustment.

In turn, the employer can refuse the employee's request where:

- the employee's pattern of work would not fit the definition of part or full-time employment without any significant adjustment;
- it is expected that the hours of work will change significantly within the next 12 months;
- the position will cease to exist;
- there are other reasonable grounds for refusal.

Keeping Up With Modern Awards cont.

The routine obligation on employers is to notify a casual employee, within the first 12 months of their engagement, of the potential right to convert to part or full time employment, by advising the employee of the content of the casual conversion clause.

This is something which Coleman Greig suggests will need to be set up to happen systematically, perhaps at the same time as the Fair Work Information Sheet (FWIS) is provided at the commencement of employment.

- Minimum engagement requirements for casuals have been added to modern awards, or have been modified where they already existed.
- Overtime provisions for casuals are under review. There may be further amendments to standardise just how awards deal with work outside the span of hours, or in excess of 38 hours.
- Overtime: Time Off In Lieu (TOIL) provisions have been either added or standardised, generally providing for TOIL Agreements (a template agreement is available in the award), taking into consideration each TOIL agreement, and with the time off to be taken within 6 months, and if not, or if requested instead of TOIL, to be paid at the overtime rate. TOIL is generally to be taken at the ordinary time rate (time for time), except for where existing award provisions have provided for TOIL to be taken at the overtime rate.
- Payment of wages: The model clause provides for the pay period to be either 1 or 2 weeks, or alternatively 1 month - with rules concerning changes from weekly or fortnightly to monthly payments by agreement with the majority of employees. There may also be some possible restrictions with regard to whether this can apply to lower award classifications. These amendments are yet to be finalised.
- Annualised salary clauses: This is part of the review, and may result in annualised salary clauses being introduced to a broader range of awards than we are currently seeing.
- Domestic violence leave: After a very involved process, the FWC has decided that awards should contain a standard term providing 5 days unpaid leave for an employee suffering the impact of family or domestic violence, with respect to activities that are impractical to take part in out of work hours (e.g., court attendances, moving house, changing children's school arrangements etc.).

The 5 days is an annual entitlement, accruing on the anniversary of official employment, and does not accumulate (thus it is not paid out on termination). This leave is available in full to part-time and casual employees, not pro-rated.

The employee is required to provide evidence of the activity to be undertaken, such as police, court, family violence service documents, or a statutory declaration. The clause should be finalised by the end of June 2018, and should appear in most awards at that point.

- Still proceeding are enquiries into rationalising public holiday provisions in awards, and additional provisions relating to family friendly working arrangements and flexibility requests.

If you require any assistance to understanding the changes to those awards relevant to your business, please don't hesitate to get in contact with our Employment Law Team. We can help you to identify the changes to the awards that are relevant to you, and what they may mean in practice.

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