457 visa program compliance

Why training, policy and procedure reviews and regular audits are critical to ensuring compliance.

By Emma Mackey

Professionals administering 457 visa programs often overlook the importance of compliance with, and risk assessment in relation to, the 457 standard business sponsorship obligations.

Many mistakenly believe that these issues are not important or are a human-resources issue only. But professionals need to be abreast of sponsorship issues to discharge their duties in the compliance and risk management areas.

Recent legislative history

The landscape changed for 457 sponsors on 14 September 2009, when the *Migration Legislation Amendment (Worker Protection) Act 2008* (Amending Act) and associated regulations came into effect. The Amending Act added Subdivisions C (Sponsorship Obligations), D (Enforcement), E (Liability and Recovery of Amounts) and F (Inspectors) to the *Migration Act 1958*. Before this date, sponsors were required only to make sponsor "undertakings", of a much more limited nature, to the Department of Immigration and Citizenship (DIAC).

Despite the importance of the changes, it appears – two years on – that many sponsors are not recognising or meeting the new sponsorship obligations. Nor are they aware of the legal penalties and reputational ramifications that can flow from a breach.

Sponsorship obligations

There are numerous sponsorship obligations enshrined in legislation. Six areas cause most problems.

1. Market salary rates

A significant obligation introduced in 2009 is the requirement to ensure that overseas workers receive terms and conditions of employment which are no less favourable than those for an Australian citizen or permanent resident carrying out the same position in the employer's workplace at the same location.

This obligation requires sponsors, at time of application, to provide evidence of market salary rates being met, before the visa can be issued. However, the obligation is continuing in nature – requiring this issue to be revisited regularly throughout the visa period, up to four years. Many companies have not yet incorporated this requirement into their salary review processes.

2. Sponsored worker only to work in approved occupation

At the time that the 457 visa is granted, the occupation in which the visa holder must work is specified and this role must be occupied for the term of the visa, unless application is made to DIAC to change the occupation.

Many sponsors have inadvertently breached this obligation by promoting 457 visa holders into more senior roles, or restructuring and placing 457 visa holders into different positions after the restructure.

The more serious issue, from DIAC's perspective, is fraudulent applications. Only specified occupations can be accessed by business sponsors under the 457 program unless the sponsor is a party to a labour agreement. These occupations are reviewed and changed from time to time. The occupations are clearly defined with reference to an Australian Bureau of Statistics publication.

To avoid entering into a labour agreement (which does not have occupation restrictions), some sponsors needing workers in non-specified occupations have made applications for workers in positions that they never intend to fill. Once approval is received, the sponsor has then knowingly moved the 457 visa holder into a non-specified role.

The intense national media scrutiny and consequent union attention surrounding a company identified in 2011 as having allegedly falsified applications in this manner undoubtedly caused significant reputational harm and consumed substantial time and cost in the human-resources, legal and governance areas – as well as at board level.

3. Obligation to keep records

There is an obligation to keep and be able to produce records of compliance with all sponsorship obligations – some of which must be capable of independent verification. There are eight specific requirements for a standard business sponsor, in addition to the records that must be kept under other Australian laws. Many human-resource and program managers fail to keep these records because they are outside the scope of standard procedures.

Although DIAC is not yet very active in prosecuting sponsors for sponsorship breaches, a breach of sponsorship obligations can be uncovered by other state and federal agencies – many of which have significant resources for investigation and prosecution. In August 2011, the Fair Work Ombudsman lodged documents in the Federal Magistrates Court in Perth claiming that a Perth business underpaid the wages of a Filipino mechanic employed on a 457 visa. A second breach of workplace law has been alleged – namely that the company failed to keep proper employment records. It is likely that the Fair Work Ombudsman will refer this matter to DIAC for investigation of possible sponsorship breaches as well.

4. Obligation to provide information to DIAC when certain events occur

Many of the parts of this obligation fall squarely within company secretarial practice. DIAC must be advised within 10 working days of any change to information provided to DIAC in the sponsorship application – which includes information relating to change of name of the company, change in business or registered address, appointment of new directors and insolvency events (some examples include the appointment of an official liquidator or administrator, a Court

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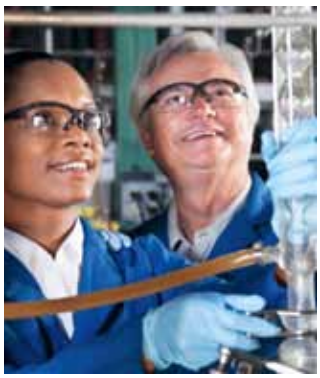

order that a company be wound up, a special resolution to wind a company up voluntarily and deregistration proceedings).

Those parts of this obligation that fall within human-resources responsibilities include advising DIAC when a 457 visa holder's employment ceases or is expected to cease, a change to the 457 visa holder's duties, that the sponsor has paid the return travel costs of a 457 visa holder or family members (in accordance with another obligation – to pay return travel costs) or that a child has been born to a 457 visa holder.

There is a specific DIAC notification procedure that must be followed to advise of changes.

Company policies and procedures often fail to reflect these requirements, which are then overlooked – placing the sponsor in breach.

5. Cooperation with inspectors appointed under the *Migration Act 1958*

The introduction of inspectors to undertake workplace visits and an obligation to cooperate with DIAC inspectors is a significant one, commencing at the time the business sponsorship is approved and ceasing five years after the sponsorship ceases.

Before 14 September 2009, DIAC sent monitoring forms to employers asking for information about compliance with the then sponsorship undertakings, in most cases.

The power of inspectors is wide and includes the power to enter business premises or another place, without force, if the inspector reasonably believes that there are relevant records at the place or accessible from a computer at that place. The visit may be during business hours or at any other time if the inspector believes it reasonably necessary. "Another place" could include the office of a Registered Migration Agent.

While on business or other premises the inspector has the power to inspect any work, process or object, interview any person, require a person to tell the inspector who has custody of, or access to, requested records or documents and to require the person with custody or access to produce the record or document either immediately or within a specified time.

The inspector may also inspect and make copies of documents and records. The inspector can require a person to give their name and address if the inspector reasonably believes that the person has contravened a civil penalty provision.

There is an obligation to cooperate with an inspector. A person is not excused from producing a record or document on the ground that the production of the record or document might tend to incriminate the person or expose the person to a penalty.

Many sponsors do not have procedures in place to assist their staff to meet the obligation, should an inspector come calling.

6. Training benchmarks

Sponsors that have been trading for at least 12 months are required, at application stage, to prove that the business has been providing training to Australian citizens and permanent residents (not visa holders) related to the purpose of the business. The training provided must meet either Benchmark A or Benchmark B.

Benchmark A involves having allocated funds equivalent to two per cent of payroll in the previous 12 months to an industry training fund to train Australian citizens and permanent residents related to the purpose of the business. There is also a commitment to maintaining expenditure to that level each year for the term of the sponsorship approval.

Benchmark B involves providing evidence, at application stage, that the business has in the previous 12 months spent the equivalent of one per cent of payroll on training Australian citizen or permanent resident employees of the business in purposes related to the business. Expenditure for this purpose can include payment to external providers to deliver relevant training, employment of apprentices and trainees, employment of an internal training provider, paying for a formal course of study for employees or for TAFE or university students or funding a scholarship in a formal course of study approved under the Australian Qualifications Framework.

Businesses operating for fewer than 12 months are required to submit an auditable plan detailing planned compliance with either of the training benchmarks.

Many companies fail to appreciate that meeting a training benchmark is an ongoing requirement throughout the period of the sponsorship. Further, some companies are not centralising their training records, making it time-consuming to substantiate compliance with training benchmark B, when requested by DIAC.

Monitoring, breaches and penalties

DIAC continues to monitor sponsorship compliance, but with greater powers and resources since 14 September 2009.

Sponsors found to be in breach of obligations face a number of possible penalties, which include sponsorship approval being cancelled, sponsors being barred from obtaining sponsorship status, issuing of infringement notices and application for civil penalties under Part 8D of the Migration Act, which at present attract fines of $33,000 per breach for corporations.

DIAC figures show 137 sponsors were sanctioned in the year ending 30 June 2011. DIAC has not released any other information about these sponsors. The writer is unaware of DIAC having taken action against a sponsor for civil penalties at this time. However, there is obvious pressure on the 457 visa system from several quarters, including parts of the union movement.

Reality checklist

1. Sponsors should review their human resources and governance policies and procedures to ensure compliance.
2. Appropriate personnel should be provided with training.
3. A regular audit of policies, procedures, documentation and training by a Registered Migration Agent who is also a legal practitioner (for legal professional privilege) is important.