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General Protections: Award of Damages on the Rise

The General Protections provisions of the Fair Work Act 2009 state that an employer must not take any adverse action against an employee (or prospective employee) because of his or her race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

The general protections legislation is broad in nature, as such, has the potential to apply to many workplace decisions and activities. A recent case demonstrates that if a is satisfied the general protections legislation has been breached, it may make any order it considers appropriate.

In the case of Wilkie v National Storage Operations Pty Ltd [2013] FCCA 1056 (9 August 2013) a storage centre manager was recently awarded $32,130 in compensation, after a finding by The Federal Circuit Court that her employer took unlawful adverse action against her.

The Court found that the employer had taken adverse action against the employee in three instances being;

- the employer issued her with a warning letter for leaving early to pick up her son;
- the employer demoted and transferred her employment to a new centre; and
- her ultimate dismissal.

The Court found that the company breached s340 and s351 of the Fair Work Act, as the employee was exercising a workplace right to take personal/carer's leave or unpaid carer's leave due to the "unexpected emergency" relating to her son.

The Court also found that the company's decision to transfer her employment and to demote her status from Manager to Assistant Manager, was partly motivated by her use of personal leave due to medical reasons and/or family responsibilities.

The company's conduct consitutued a breach of the employee's contract which left the former employee with no option other than to accept the breach of contract or resign.

This decision, along with many recent decisions, demonstrates that an employer should take into account their obligations to employees in their decision making process. An employer should carefully consider the validity of the grounds they are relying upon to implement any changes to an employee's position, and be able to explain the lawful reasons for the organisation's conduct. It is essential that employers understand how these types of claims can arise and how best to mitigate the risk of an action against them.

If you have concerns about your rights and obligations please contact:

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Enhanced right to request flexible working arrangements

As many businesses would be aware, a number of legislative changes commenced on 1 July 2013. Expanded rights for employees to request flexible working arrangements and the need for employers to consider those requests and agree when reasonable, are important for employers to understand. It is particularly important to appreciate that where the request is properly made and in writing, the employer must respond to the request in writing within 21 days. Failure to do so may expose the employer to claims by an employee that the flexibility provisions have been breached.

Background

Since the introduction of the National Employment Standards (NES) into the Fair Work Act 2009 (Cth) (Act) in 2010, employees in certain circumstances have had the legal right to request flexible working arrangements from their employers. Initially, this right only applied for an employee who is a parent or has the responsibility for the care of a child, and that child is under school age or under 18 with a disability.

The application of that right to request has been broadened to include a wider range of employees and to clarify the reasons for which employee requests could be refused. These changes were enacted in the Fair Work Amendment Act 2013 and have been in effect since 1 July 2013.

The following is an overview of the current legislation concerning flexible work arrangements.

What are flexible working arrangements

While not expressly defined nor limited, the Act notes that examples of flexible working arrangements include:

- Changes in hours of work;
- Changes in patterns of work; and
- Changes in location of work.

Creative use of the provisions may result in requests for reduced hours, compressed working weeks, adjusted hours and requests to work remotely, including requests to work from home.

Who may apply?

The Act distinguishes between casual employees and employees that are not casual and provides that both are eligible if they satisfy their respective requirements and any one of the circumstances listed below:

- For casual employees – only if the employee is a long term casual employee of the employer and has a reasonable expectation of continuing employment by the employer on a regular and systematic basis.
- For employees other than a casual employee – only if the employee has completed at least 12 months of continuous service with the employer immediately before making the request.

The circumstances in which employees can request flexible arrangements are now as follows:

- the employee is the parent, or has responsibility for the care, of a child who is of school age or younger;
- the employee is a carer (within the meaning of the Carer Recognition Act 2010);
- the employee has a disability;
- the employee is 55 or older;
- the employee is experiencing violence from a member of the employee's family;
- the employee provides care or support to a member of the employee's immediate family, or a member of the employee's household, who requires care or support because the member is experiencing violence from the member's family.

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Enhanced right to request flexible working arrangements cont.

- The employee is a parent, or has the responsibility for the care, of a child, and is returning to work after taking leave in relation to the birth or the adoption of the child.

How are applications made?

The Act provides that the request must be in writing and must set out the details of the change sought and the reasons for same.

What are the employer's obligations?

Employer's Response

The employer must provide a written response to the employee's request within 21 days, stating whether the employer grants or refuses the request and, if the employer refuses the request, the reasons for the refusal.

Reasons for refusal

The Act provides that an employer can only refuse a request on reasonable business grounds. While not limiting these grounds, the Act provides that the following do constitute reasonable business grounds:

- the requested working arrangements would be too costly for the employer;
- there is no capacity to change the working arrangements of other employees to accommodate the requested working arrangements;
- it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the requested working arrangements;
- the requested working arrangements would be likely to result in a significant loss in efficiency or productivity;
- the requested working arrangements would be likely to have a significant negative impact on customer service.

If you would like assistance with adjusting workplace policies in relation to these amendments, or would like assistance in assessing and responding to a request, please contact:.

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Significant Changes to the Subclass 457 Visa Scheme 1 July 2013

Important changes to the 457 program have come into effect as of 1 July 2013 and every employer sponsoring employees should be aware of these reforms.

The impact of the changes which are outlined below, are significant and will change the way businesses have used this program in the past.

For applications lodged prior to 1 July 2013 that have not been decided upon:

Nomination applications that have been lodged prior to the new changes to legislation, but have not yet been decided upon, will not be exempt from having to satisfy some of the new requirements as outlined below.

Significant increases to application fees as of the 1 July 2013

Item	Old Fee	New Fee
SBS Approval	$420	$420
457 Nomination	$80	$330
457 Visa	$455	$900
457 Dependent (Over 18)	$0	$900
457 Dependent (Under 18)	$0	$255
Onshore Extension (per applicant)	$0	$700
Total	$955	$3,505

Additional charges apply for each dependent family member; $900 for a spouse or dependent over 18 and $225 for any children under 18.

Where applying onshore, a surcharge of $700 may apply for each applicant. Whether this applies depends on which visa is held and whether that visa was applied for onshore.

Standard Business Sponsorship

Sponsorship Cap

Previously, Standard Business Sponsors were able to sponsor an unlimited number of employees for 457 visas.

From 1 July, sponsors are required to justify the number of workers to be sponsored for 457 visas as part of the sponsorship approval process. The Department of Immigration will decide how many workers the sponsor will be able to sponsor. Once this cap is reached, the employer must apply to have the terms of the sponsorship altered to allow sponsoring of further employees.

Newly Established Businesses

Previously the Standard Business Sponsorship validity period lasted for 3 years, and businesses were able to sponsor subclass 457 visa holders for up to 4 years.

From 1 July 2013, newly established businesses which have been in operation for less than 12 months will be approved as a sponsor for only 12 months. The 457 visa granted to a start-up business will be valid for only 12 months.

Sponsorship Training Requirements

The training obligation for sponsors will now apply for each 12 month period from the approval of sponsorship (Previously sponsors were required to satisfy the obligation each financial year).

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Significant Changes to the Subclass 457 Visa Scheme 1 July 2013 cont.

Employers need to keep records of training activities to meet the obligation. If an employer does not meet the training benchmark, they may not be approved for an extension or variation of their sponsorship and could face fines or cancellation of their approval.

The training benchmarks remain the same - either 1% of payroll spent on recent training of Australians in the business, or contribution of 2% of payroll to a training fund.

Nomination

Threshold salary levels have increased as of 1 July as follows:

Salary Level	Previous	Current
TSMIT (Minimum Salary)	$51,400	$53,900
English Language Waiver	$92,000	$96,400
Market Rate Salary Waiver	$180, 000	$250, 000

For applications lodged prior to 1 July 2013 that have not been decided upon:

Case officers are currently requesting new documentation (i.e contracts and new market salary data) with respect to meeting the new increased TSMIT of $53,900.

For applications lodged prior to 1 July 2013 that have not been decided upon:

Case officers are currently requesting evidence demonstrating that the position associated with the nominated occupation is genuine.

Hospitality Occupations

Due to the rise in the number of positions sponsored in the hospitality industry, the government has now established limitations on sponsorship of Cooks, Chefs and Cafe/ Restaurant Managers. Such nominees cannot be sponsored to fill positions in fast food or takeaway restaurants.

Visa Applicants

English Language Requirements

Previously, English language testing for 457 applicants was only required for licensing and registration purposes or for trade and technician occupations.

From 1 July, **all** 457 applicants will be required to demonstrate their English language ability, unless they fall under one of the exemptions listed below:

- Holders of valid passports from the UK, Ireland, USA, Canada or NZ;
- Base Salary is at least $96,400; or
- The applicant has completed 5 consecutive years of study where the classes were taught in English (secondary or higher education level).

English language tests must be conducted prior to lodgement of the 457 visa application. The usual test is the International English Language Testing systems (IELTS) test, and a score of 5 in each of the 4 components of IELTS is required.

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Significant Changes to the Subclass 457 Visa Scheme 1 July 2013 cont.

Existing 457 visa holders will need to meet the English requirement if they are nominated again for a 457 visa - either when extending their 457 with the current employer or transferring to a new employer.

Skills Assessments

Previously, skills assessments were required only for certain trade occupations.

From 1 July, skills assessments are required for two occupations of concern to the Department:

- Program and Project Administrator; &
- Specialist Manager Not Elsewhere Classified.

Work Condition 8107

There are a number of changes to the work condition 8107 which applies to 457 visa holders:

- They must commence work within 90 days of arrival in Australia;
- If they leave employment with the current sponsor, they have 90 days to be sponsored by a new employer before they will be considered in breach of the 8107 condition (increased from the previous 28 days); &
- If required by their occupation, the 457 holder must have the necessary licensing professional membership or registration in Australia.

Further Changes

There are also a host of additional changes including:

- All 457 applications must be lodged electronically online;
- Greater powers for Fair Work Australia to inspect workplaces for compliance;
- Requiring sponsors to pay for the cost of obtaining approval as a business sponsor, rather than having these be paid by the 457 applicant or another person;
- Possibility of refusal of a nomination on the basis that it is "not genuine"; &
- Requiring employers to retain employment contracts to demonstrate that they are not engaging in de facto labour hire arrangements.

The most significant changes are still to come, particularly the introduction of Labour Market Testing for 457 visa applications which has passed through Parliament in the form of the Migration Amendment (Temporary Sponsored Visas) Bill 2013.

For more information on changes to the 457 visa applications please contact:

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