

July update of Covid-19 for Temporary Visa Holders

Hospitality and Tourism Industry Migration Fact Sheet
Prepared for the AHA and TAA

July 2020

edupi 

Hospitality Immigration Specialists



Visas



Chef Recruit



Hospitality

Update of Covid-19 for Temporary Visa Holders

Hospitality and Tourism Industries

What has been updated for Temporary Visa holders?

There have been no substantial updates from the Department of Home Affairs since their initial statements at the beginning of the COVID-19 outbreak. They have made the simple statement below regarding Temporary visas:

“We are making a number of changes to temporary visa holder arrangements during the coronavirus crisis in order to protect the health of our community, safeguard job opportunities for Australians, support critical industries, and assist with rapid recovery. Employers are still required to abide by all relevant Australian workplace laws. Overseas workers, including international students, have the same rights under Australian workplace law as all other employees.”

There are a range of issues to cover here, and we are focussing on 457 and 482 (sponsored) employees for this update. We have updated all other visa classes at the end of this fact sheet, as they mostly remain as previously reported.

To refresh, the temporary visas and Departmental advice relevant to the AHA and TAA are:

- SC 600 Visitor Visa Holders – Depart Australia immediately
- SC 500 Student Visa – Stay if able to support yourself through family or employment, depart if you have no support
- SC 417/462 Working Holiday – Stay if able to support, extend if working in a critical sector, depart if no support
- SC 485 Temporary Graduate – Stay if able to support yourself through family or employment, depart if you have no support
- SC 820 / 309 – Your sponsoring partner has declared they have the ability to support you for a period of two years
- SC 407 – Stay if able to support yourself through family or employment, depart if you have no support
- SC 457 / 482 – Stay if able to support yourself through family or employment, depart if you have no support, depart if you have been terminated and not found a new sponsor in 60 days.

Visa types and conditions can be checked via the Department's Visa Entitlement Online System (VEVO) by the visa holder or through your organisation's VEVO account.

We note that this advice is purely from the perspective of the Department of Home Affairs and your obligations as a Sponsor or Employer of an employee who requires a visa to work in your business. We advise you to also seek advice from the AHA and TAA in regard to the IR aspects as they apply to your workers. Any worker on a visa is covered by the Industrial Instrument that is in place in the workplace, be it the award, a flexible arrangement or other registered agreement.

We also note that Schedule J of the Hospitality Industry (General) Award and additional provision recently released apply to Visa holders in your employment. There are no workers on a Temporary Visa that are eligible for Job Keeper, so this would imply that Schedule J applies to all Visa Holders until the 27th September when the schedule expires.

The Department of Home Affairs has not released any comment or policy as to how they view Schedule J and its application to Temporary Visa holders, which makes providing accurate advice extremely difficult. In this light, our advice is general in nature, and your specific circumstances must be addressed individually to ensure compliance with the Award and your sponsorship obligations.

Update of Covid-19 for Temporary Visa Holders Hospitality and Tourism Industries

Temporary Skilled Visa Holders (457 / 482)

Department Statement:

“Temporary Skill Shortage and subclass 457 visa holders who have been stood down but not laid off due to COVID-19, will maintain a valid visa. Businesses will have the opportunity to extend your visa as per normal arrangements.

Businesses will be able to reduce your hours without you being in breach of your visa conditions or the business being in breach of their employer obligations.”

These visa holders were able to access \$10,000 of their Superannuation contributions in the 2019-2020 financial year only, not the current financial year.

Those visa holders who have been laid off due to coronavirus should leave the country in line with existing visa conditions if they are unable to secure a new sponsor. However, should a 4-year visa holder be re-employed after the coronavirus pandemic, their time already spent in Australia will count towards their permanent residency skilled work experience requirements.

The Department states:

If you have been laid off and are currently unemployed, you should find another employer within 60 days or make arrangements to leave Australia, where this is possible.

If you cannot return to your home country, you need to maintain a valid visa and follow Australia’s health advice where necessary.

Holders of temporary work visas currently employed in COVID-19 critical sectors – health care, aged and disability care, childcare, or agriculture and food processing – may be eligible for a Temporary Activity Visa (subclass 408) Australian Government Endorsed Agreement Event stream (COVID-19 Pandemic event visa).

Termination

If a 457/482 Visa Holder is terminated, you must advise the DHA in writing of their last date of employment. The visa holder then has 60 days to lodge a new nomination with an alternative employer, apply for a different class of visa or depart Australia to avoid cancellation. If they do not act, they will receive a Notification of Intention to Cancel and will generally have 5 days to respond. It is advised they seek professional advice prior to responding to this notification.

Stand Down

The DHA has not updated their previous statements that Sponsors will not be in breach of their Sponsorship Obligations if they have 457/482 Visa Holders stood down. The AHA/TAA have ample resources on what constitutes a stand down.

It is possible to return a portion of the workforce and still keep some employees stood down. This may cause issues if a business is returning workers from other departments/locations that are eligible for Job Keeper at the expense of workers who are not. This has not been addressed by DHA, but we are aware of cases where this has occurred, and visa holders have expressed concern to Fair Work. We are not currently aware of any outcomes from this example.

Update of Covid-19 for Temporary Visa Holders

Hospitality and Tourism Industries

Schedule J

It is apparent that Schedule J does apply to 457/482 visa holders as they have award coverage and are not eligible for Job Keeper.

There are several issues at play when it comes to the application of Schedule J and your obligations as a sponsor. As the DHA has issued no statements in regard to the application of Schedule J and 457/482 visa holders, we advise that you treat your visa holders exactly the same as your Australian Citizen and Permanent Resident employees.

We will address circumstances below that may incorporate the considerations of Schedule J and its application to Temporary Visa holders.

Leave without Pay

Departmental policy that Leave Without Pay (LWOP) may apply to a 457/482 worker for a period of up to three months unless exceptional circumstances apply. COVID-19 Pandemic is considered an exceptional circumstance provided that your business operations are impacted directly by the event.

We suggest that you have a written agreement with your visa holder outlining the LWOP and identify the conditions specific to their circumstances. You may notify the DHA of any workers stood down under this provision, especially if the stand-down is longer than three months.

Direction Order under Schedule J

If you are returning a 457/482 visa holder to work under Schedule J.8.2 Hours of Work – Full-time and part-time employees, it is expected that they will be returned on a minimum of 22.8 hours per week. This would imply that if you are operating under this directive that your options are 0 hours or 22.8 to 38 hours per week. 457/482 employees are not permitted to be engaged Part Time under regulation.

It is not clear if you could, for example, have an agreement with an employee to have 30 hours per week of LWOP and 8 hours of work by a mutually agreed LWOP arrangement. If this is the case, it is recommended that these be a genuine agreement and that it be in writing. We would also advise you seek advice from the legal department at AHA/TAA to ensure award compliance.

Change of Duties under Schedule J

J.8.1 – Classifications and Duties clause allows for an employee to work in a different classification and altered duties. DHA Policy has previously determined that a change in duties will not be a breach of the visa holders' conditions if it does not occur for more than 60 days. Legislation specifies that if a person is making a change in occupation, they will need to lodge a new nomination and sometimes a new visa application. As the DHA has made no further announcements in regard to change in duties, it would be safe to operate under the J.8.1 until further notice.

Visa Renewal

The DHA has advised that 457/482 Visa holders will be able to renew their visas as per normal requirements. This means that in most circumstances, renewals (which are a new application) should not be overtly effected by COVID-19. Sponsors should be aware however of some concerns when renewing a 482 visa.

Update of Covid-19 for Temporary Visa Holders

Hospitality and Tourism Industries

If the employee has not worked full-time in the business for at least 2 years, full Labour Market Testing (LMT) will be required. The writer has results of in excess of 30 recent LMT campaigns and the results are surprising, in that there are only a very limited number of applicants who do not require a visa. This is likely a result of many existing employees still on Job Keeper and new entrants to Job Seeker. It is important to consider the attributes of all applicants for the role prior to applying for a new 482 visa. Seek professional advice to ensure that the correct consideration is shown.

Businesses should be able to show they can continue to meet the salary obligations of their business in the medium to long term, as well as showing sufficient resources to support employees in the short term. Each application is treated on its own merits, and it is expected that applications will be accompanied by an explanation as to how the role is required taking COVID-19 into consideration.

There are NO 'extensions' of 457/482 visas available. There are visa options for applicants that are not sponsored visas and they vary from Tourist Visas, Student Visas and the COVID-19 408 visa. We cannot emphasise enough how important it is to seek advice before applying for one of these alternative visas as it may end up with the applicant receiving a less favourable visa or disqualifying themselves from options they may not have been aware of.

New 482 Visa Applications (new employee)

It is advisable if a business is employing new applicants requiring a 482 Visa that LMT be exhaustive and the business has an excellent case to put forward as to why they cannot find an Australian employee to occupy the role.

Circumstances where an applicant has been incumbent in the role on another type of visa may well satisfy this if it can be shown that nobody in the job market has similar skills and knowledge of the specific business.

457/482 Visa Holders Travelling to/from Australia

There are extremely limited reasons for people to be permitted to enter Australia from overseas unless they are;

- An Australian Citizen or Permanent Resident
- An immediate family member of an Australian citizen or Permanent Resident
- You have a compelling or compassionate reason to travel to Australia

Being required to attend work is neither a compelling or compassionate reason regardless of the business case proffered.

It is advisable that any 457/482 visa holders do not leave Australia under any circumstances if they have any future intention of resuming their employment in the next 6 to 12 months.

Temporary visa holders do not need a travel exemption to leave Australia, which has created a false belief that they can return relatively easily. As stated, it is highly unlikely they will be permitted to return until Australia's International Border is largely open.

186 Transitional Permanent Visa Applications

The DHA has not given any indication that COVID-19 will effect 186 PR applications in the Transitional stream (working for 2 or 3 years on a 457/482 visa). Applicants must still complete two or three years employment and LWOP is not counted in this calculation. In many cases, applicants may require a short term (1 year) 482 visa to attain their eligibility.

Update of Covid-19 for Temporary Visa Holders

Hospitality and Tourism Industries

The Genuine Need provisions still apply for this stream and sponsors are advised to ensure the business can continue to meet all of its short and medium-term obligations and can show it still has a genuine need for the employee.

186 Direct Entry Permanent Visa applications should have extensive LMT and a compelling business case as to why there is no local employee available to fulfil the role. Please seek professional advice if you intend on applying for a 186 DE application for your employee, as much dis-information is circulating in the industry at the moment for this visa class.

General Commentary

It is our experience that there is not the influx of potential employees into the industry from other industries and job queues. The industry was experiencing severe skills shortages in all BOH and senior FOH roles prior to COVID and this has not magically changed. If anything, there has been leakage of skills to other industries as employees discovered other opportunities open to them in retail, aged care and other industries relatively unaffected or thriving as a result of COVID-19.

There is a very large shortfall of new entries to the industry with to date over 250,000 Students and Working Holidays not entering Australia in the past 6 months, and at least another 200,000 not entering by years end. Approximately 27% of this cohort report working in the Hospitality and Tourism Accommodation industries, and the reality is the number would be larger than this.

The industry will face a real challenge in the years to come with potential severe shortages in chefs, restaurant managers and hotel managers who might traditionally arrive as students or on a Holiday visa and transfer to a more permanent visa to suit their work arrangements.

We may also see an acknowledgement from Government that with the Net Migration number down 85% of the forecast levels that they may use the immigration program to keep people who are here on Temporary Visas transition more easily to Permanent Visas.

Edupi have received a grant from Sydney City Council to assist our Sydney clients (and others) to manage their visa workers, be that assisting them find opportunities at other venues, assisting their return to Australia if they have inadvertently got stuck offshore or transition to other visa classes. We will keep you informed as to our progress and please don't hesitate to contact us for more information.

Update of Covid-19 for Temporary Visa Holders

Hospitality and Tourism Industries

Status of other Temporary Visas

Visitor Visa Holders

Commentary:

International tourists should return to their home country immediately. We would point out if you are currently on a tourist visa awaiting its expiry for a Bridging A visa to activate, you should stay if you have prospective employment or you have access to financial support on-shore. This especially applies to applicants for SC 820 Partner applications lodged on-shore.

International Students

Current Student visa conditions:

The DHA is taking a flexible approach where COVID 19 restrictions have prevented student visa conditions being met. You will not be in breach of your student visa conditions if you:

- have an approved course deferral
- are studying online.

You are also temporarily allowed to work more than 40 hours per fortnight if you are:

- employed in the health sector, enrolled in a health-related course (such as nursing or medicine) and are directed by a health official to assist in the effort against COVID 19
- employed in aged care by an Approved Provider or Commonwealth-funded aged care service provider
- employed by a registered National Disability Insurance Scheme program.

Working Holiday & Work and Holiday Visa Holders

Current 6 month work limitation:

Working holiday makers can do any kind of work during their stay in Australia, but this is generally limited to six months' work with any one employer, unless the Department has given permission to work with the same employer for longer than six months.

Working holiday makers working in critical sectors, including agriculture, food processing, health care, aged care, disability care and child care have permission from the Department to work for the same employer for longer than six months.

They may be eligible for a second or third Working Holiday (subclass 417) visa or Work and Holiday (subclass 462) visa. Find out if you are eligible and how to apply on the Department's website:

- Second Working Holiday (subclass 417) visa
- Third Working Holiday (subclass 417) visa
- Second Work and Holiday (subclass 462) visa
- Third Work and Holiday (subclass 462) visa

You must apply for a new visa before your current visa expires. You may be able to be granted a bridging visa that will keep you lawful until a decision is made on your visa application.

Update of Covid-19 for Temporary Visa Holders

Hospitality and Tourism Industries

Graduate Visa Holders, Trainee Visa Holders and other Special Purpose Visa Holders

Commentary:

There are 185,000 other temporary visa holders in Australia. They are advised to return home unless they can support themselves through family or employment. Visa conditions restricting Training Visa holders to the sponsoring employer apply.

New Zealanders on 444 visas

Commentary:

New Zealanders and Australians have reciprocal arrangements whereby we can each stay and work in each other's country. There are more than 672,000 New Zealanders in Australia on a subclass 444 visa.

Access to Funds:

New Zealanders who are on 444 visas and arrived before 26 February 2001 will have access to welfare payments and the JobKeeper payment.

444 visa holders who arrived after 2001 have access to the JobKeeper payment. Those who have lived in Australia for 10 years or more have access to JobSeeker payments for six months.

Bridging Visas

Working on a Bridging Visa:

They may be allowed to work in Australia depending on your Bridging visa conditions. You can check by:

- using the VEVO service, or
- accessing your visa conditions through your ImmiAccount.

If their Bridging visa does not let them work, or has restrictions on working, they may be able to apply for another Bridging visa that lets them work. This is only available in some circumstances and you will usually have to demonstrate that you are in financial hardship.

If you do not meet the requirements for work, and you are still eligible for a Bridging visa, DHA will grant you a new Bridging visa with the same conditions that were on your previous Bridging visa.

Update of Covid-19 for Temporary Visa Holders Hospitality and Tourism Industries

Assistance in Returning to your Home Country

If you are a temporary visa holder (e.g. 457, 482, Bridging Visa) or hold no visa, and you are unable to support yourself while in Australia, you can get some help in returning to your home country.

Usually, the first port of call is to contact your local diplomatic mission (embassy, consulate, or high commission), however, if you are unable to contact them or if they are unable to render assistance to you in this situation, there are still other options.

- Homeward Return Program: <https://www.assistedreturns.com.au/>
- International Organisation for Migration Assisted Voluntary Return and Integration Program: <https://australia.iom.int/assisted-voluntary-return-and-reintegration-program>

As always, Edupi Migration are happy to take any enquiries from members of the AHA and TAA whether you are a client or not and available on 02 9235 0919 or at justin@edupi.com.au



Hospitality Immigration Specialists

Edupi Migration

Suite 402, 191 Clarence Street,
Sydney, NSW, 2000

p: 02 9235 0919

w: www.edupi.com.au

e: info@edupi.com.au

MARN: 1169631

