

All roles flex across borders

Making it work – Immigration, work permits and visas



Immigration is an important consideration for employers looking to allow staff to work remotely overseas. Flexible work arrangements are generally not catered for under current immigration laws, so employers should consider the local policies in the employee's country of residence to understand any implications for themselves and the employee.

Flexibility in Australia

With more employers embracing flexible work practices, there may be an increase in employees wanting to work temporarily from Australia. This new flexible model is not currently catered for under the two existing temporary work visas (subclass 400 and subclass 457) and, as business visitors and tourists have a 'no work' condition placed against their visa, any flexible arrangement should be closely assessed to ensure compliance.

While not expressly covered under the current legislation, the Department of Immigration and Border Protection's (DIBP) Policy Section has previously advised that a visitor visa may, in certain circumstances, be a suitable option. The Policy Section has advised that an applicant who wishes to continue working remotely for an offshore employer from Australia (where that work is incidental to a holiday) would be unlikely to be found in violation of their 'no work' visa condition, given they would be unlikely to be taking a job opportunity away from an Australian.

While this is indicative of a more flexible view by the Department, it is important to note that this only reflects an interpretation of current legislation and policy. As such, the frequency and duration of any visits to Australia must be evaluated carefully to ensure that any individual entering Australia under a flexible working arrangement is not in breach of Australian immigration laws.

Key highlights

- Most countries do not specifically cater for flexible working arrangements in their immigration programs.
- Employers should review the available visa options in the destination country at the outset to formulate a compliant immigration strategy.
- For highly mobile workforces, a tracking/travel clearance tool should be considered to minimise risks from immigration non-compliance.

Working Visas (subclass 400 & subclass 457)

Not all individuals seeking to enter Australia under flexible work arrangements would be eligible to access a working visa. This is because, rather than entering Australia for the specific purposes of commencing in a full time role onshore, or to perform short-term work with an Australian company, they may be seeking to enter Australia for other reasons (ie holiday) but with the intention of continuing their overseas employment during their period of stay, either on a full time basis or intermittently.

Another important consideration is for Australian employers who sponsor 457 visa holders within their business. These visas holders have a condition which states that they must not cease working for their business sponsor for more than 90 consecutive days. Any requests for flexible working arrangements which are made by a sponsored 457 visa holder must be considered against this requirement where the request may relate to an extended period of leave without pay or a short break in the employment arrangement.

Further consideration needs to be given to the impact any ongoing flexible arrangement may have on the salary paid to the 457 visa holder and working hours, to determine what notification needs to be made to the Department.

Flexibility overseas

Flexible and remote working currently falls into a regulatory “grey area” in most countries. If an employer has an affiliated partner or a client located in the proposed country of residence, often the simplest option is for this company to sponsor a work visa for the employee in that country. However where an affiliate or client company does not exist or is unwilling to act as sponsor, there may not be a visa category that is immediately suitable to the employee.

Careful consideration of the range of visa options available in the proposed country of residence is required in order for employers to formulate an immigration strategy that will accommodate the remote work arrangement. This could include usage of business visas, which can permit short term remote work in some locations, for short periods of intermittent work or temporary work permits options for longer periods of remote work.

It is essential to be proactive in understanding the proposed country’s views and policies around remote working in advance as there are potential repercussions for an individual found to be working without appropriate permission. In some instances, where the policy is unclear, it may be possible to seek an opinion from the relevant immigration authority in that country.



Conclusion

- Changes to visa framework and the introduction of new visa categories can be a lengthy process and it may take some time before current immigration frameworks can specifically cater to flexible working.
- Until then, employers and employees need to carefully consider which visa or permit the individual should hold before starting a flexible working arrangement.
- Employers should, as a duty of care, be satisfied that an employee has appropriate immigration authorisation to perform his or her work duties in the destination country and have measures in place to track any visas appropriately.

Governance

Employers with a mobile employee population should consider its compliance footprint and the impact this could have on individual travellers and the company itself. It is important for employers and employees to understand the scope and limitations of the visas it uses and whether a proposed travel pattern increases the risk of immigration non-compliance.

Scrutiny at border control is on the increase, and questions on arrival around frequency of travel and activities to be performed are commonplace. It is becoming increasingly important for employers to track the whereabouts, travel patterns and activities of its employees to keep on top of immigration compliance management and limit reputational damage with immigration authorities worldwide.



Possible implications of holding the incorrect visa include:

- Monetary fines
- Detention
- Deportation and bar from re-entry.

To discuss further how we can help your organisation navigate through the complexities of implementing ‘All roles flex’ to ensure success, please reach out to Carter, Stacey, Selina, Tim or your usual PwC contact.



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