

COVID-19 & VISAS – FAQ's

We've pieced together some of the most frequently asked questions during this time for both Employers and Visa Holding Employees. Bear in mind this is changing daily, and some information has not been disseminated from the Department. Also bear in mind, this information is from an immigration law perspective, so you need to consider another cross over legislation, such as employment law. This information is generic, so you need to seek advice on your specific circumstances.

FOR EMPLOYERS:

Q. Do the Sponsorship Obligations for 457 or 482 Nominating Employers still apply at this time?

Yes, sponsorship obligations still apply. For temporary employer-sponsored visa holders, they are still required to work in their nominated occupation, with the nominating employer. If work has dried up, an option could be to place the worker on Leave Without Pay (LWOP), Stand down if eligible or redundancy as a last resort.

Refer: <https://immi.homeaffairs.gov.au/visas/employing-and-sponsoring-someone/existing-sponsors/standard-business-accredited-obligations>

Q. What are the legalities regarding standing down employees on 482 visa due to not being able to work due to the COVID-19 pandemic?

- **If mandated by government**
- **Before being mandated by the government**

While we are not employment lawyers, but we can advise on immigration implications. Within the FairWork Act framework, employees can be stood down under several scenarios. <https://www.fairwork.gov.au/leave/annual-leave/directing-an-employee-to-take-annual-leave>
<https://www.fairwork.gov.au/about-us/news-and-media-releases/website-news/coronavirus-and-australian-workplace-laws>

FairWork advice "*employees can be stood down without pay under the Fair Work Act if they can't be usefully employed because of a stoppage of work for any cause for which the employer can't reasonably be held responsible. Employers should exercise the option to stand down cautiously, because if they stand down their employees unlawfully, their employees may be able to recover unpaid wages*".

An alternative could be to agree with the visa holder take Leave Without Pay (LWOP). Refer LWOP below.

Q. How does the Leave Without Pay (LWOP) apply to employer-sponsored visa holders?

Department policy permits LWOP for up to 3 months and should be mutually agreed upon and in writing between the employer and employee. Previous policy under 457 permitted an LWOP provision for up to 1 year, so if the visa holder is on a 457 the extended leave possibility applies to them. It's expected that the Department will apply this policy flexibly, but we've not seen any clarification from the Department yet. LWOP employee is still considered to be employed, are not paid and continue to accrue leave entitlements. This way, the position is still available, and the workers/visa hold still has a job.

Department policy advises that the duration of unpaid leave that is acceptable is reviewed on a case by case basis but generally should not exceed 3 months unless:

- *the sponsor is obliged to provide the leave under Australian workplace laws (e.g. in connection with maternity leave), or*
- exceptional circumstances apply, and the Covid19 pandemic will likely be recognised as an exceptional circumstance.

Q. Can I reduce my visa holders' hours, reduce wages or request they undertake other duties?

The criterion for a 482-nomination approval is a full-time position and working in a specified (per ANZSCO occupation). If a sponsored person's hours were reduced to part-time, the decrease in the terms and conditions of employment may fail for sponsors to meet their obligations under the Regulations 2.79. Generally, part-time for 482 is not possible for most people under current legislation. 457 visa holders may in certain circumstances work reduced hours as long as their terms and conditions remain similar to other Australian staff, and their earnings don't fall below the TSMIT.

However, under the new 482 policy, regulation 2.79 would be considered met where periods of part-time work occur in connection with:

- return from maternity leave;
- sick leave or a work based injury;
- *significant personal reasons.*

And the below following four policy criteria are met:

- the pro-rata hourly rate of the approved nominated salary of the sponsored person does not decrease;
- the role and duties conducted by the sponsored person remain consistent with the position approved at nomination;
- the nominee is not employed under a Labour Agreement which was restricted to full-time arrangements only; and
- this arrangement is mutually agreed upon by the sponsor and sponsored person. Sponsors must maintain written evidence to demonstrate this agreement, and document the reason for the change.

We believe this current pandemic may fall very loosely under “*significant personal reasons*” if the Department apply flexibility. Whatever is agreed between employer and employee should be similar to that of local Australian staff, and in writing on file.

We are awaiting clarification from the Department on how flexible they will be, but in recent announcements, they have advised: “Businesses will also be able to reduce the hours of the visa holder without the person being in breach of their visa condition”.

Note: If salary is reduced long term, or the position is changed a new nomination is required to be lodged and approved (if eligible).

Q. Can we apply for the Job Keeper payment for temporary visa holders (457 482, 407, 500 etc)?

At this stage, these visa holder cohorts are not included in the \$1,500 per fortnight Job Keeper payment. However, all relevant peak bodies are lobbying the Government, so we await the final legislation.

Q. I’ve heard visa holders can access their Superannuation. Is this true?

Those visa holders who have been stood down, but not laid off, will maintain their visa validity and businesses will have the opportunity to extend their visa as per normal arrangements. These visa holders will also be able to access up to \$10,000 of their superannuation this financial year. See Minister Trudge’s announcement:

<https://minister.homeaffairs.gov.au/davidcoleman/Pages/Coronavirus-and-Temporary-Visa-holders.aspx>

Q. We have a nomination/visa lodged with the Department but pending. Are the Department still processing?

Yes, the Department is still processing albeit a bit slower than usual at the moment which is to be expected.

Q. I’ve been forced to terminate my 457/482 visa holder. What now?

One of the sponsors obligations is to inform the Department of employment termination within 28 calendar days.

Q. Can New Zealand Citizens access the JobKeeper program?

New Zealand citizens in Australia on the special category visa (Subclass 444 visas) and who arrived before 26 February 2001 are eligible to access Australian welfare payments and the JobKeeper payment. New Zealanders who arrived after 26 Feb 2001 have access to the JobKeeper payment.

Those who have lived in Australia for 10 years or more also have access to JobSeeker payments for six months.

FOR VISA HOLDERS:

Q. I'm in Australia, and my visa is about to expire but I cannot leave Australia and not sure what to do?

Make sure you apply for another visa of some form (*even if this has to be a tourist visa*). Do not let your visa expire without another visa application as go unlawful. Once you apply for a new visa you will obtain a Bridging Visa to keep you lawfully in Australia until a decision on your new visa application.

Q. My visa has a "No Further Stay Condition (8503, 8534 or 8535)" but I cannot leave Australia due to travel bans, what can I do?

A No Further Stay condition prevents the visa holder from lodging another visa application while onshore in Australia. However, due to the current travel bans, you may request a waiver of this condition. It's suggested you apply at least 2 months before visa expiry to get approval and permission to lodge another visa onshore.

Q. I'm currently offshore and my visa has expired. Can I return?

You will need to apply for a new visa to return to Australia. There are many Bridging Visa B holders who got stuck offshore and could not return within the specified timeframe. You will need to apply for a new visa to return to Australia (once travel bans lifted) and possibly reinstate your Bridging Visa A. Contact us, to assist to endeavour to get you to work rights as quickly as possible once you return as you may be granted a 3-month tourist visa obviously with no work rights.

Q. I am a Permanent Resident Visa Holder currently outside Australia and wondering if I can return to Australia?

Yes, Australian citizens, permanent residents, and New Zealand citizens (usually resident in Australia). Check the Dept of Home Affairs Travel Restrictions page: <https://covid19.homeaffairs.gov.au/coming-australia>

Q. I am a 482 (or 457) visa holder stuck offshore due to the travel restrictions. Do any exemptions apply?

There are some very limited exemptions to permit travel to Australia. Refer to:

<https://immi.homeaffairs.gov.au/help-support/departmental-forms/online-forms/covid19-enquiry-form>

Q. I have a pending application and the Department of Home Affairs have requested I undertake medicals within 28 days, but I cannot travel to attend a centre, what do I do?

You can request an extension from the Department.

Q. I'm on a temporary work visa Subclass 482 (or 457) and was just about to lodge a permanent ENS visa, but my employer has just terminated my employment. What can I do?

Firstly, you may wish to look at trying to find a new employer to take over your current visa by way of lodging a new nomination. This may be difficult in the current environment, so visa holders may have to be more flexible on their location preferences, (i.e. consider regional areas who may still have shortages). You may also wish to look at other alternative visa options such as Skilled Independent (Subclass 189), State/Territory Nominated (Subclass 190) or Skilled Regional (Subclass 491) visas. These may be options but timeframes to obtain a relevant skills assessment, English test, invitations may also be a barrier on these. Contact us to discuss individual circumstances.

Q. I'm a 482 (or 457) visa holder and been let go, how long do I have to find a new employer to transfer my visa?

482 visas have a condition 8607 attached which states:

"If the holder ceases employment, the period during which the holder ceases employment must not exceed 60 consecutive days". Again, the Department has not advised how flexible they will be on this condition, so we await further updates. In the meantime, try not to breach this visa condition. Note: For 457 visa holders who were granted their visa on or before 19th Nov 2016, the time limit is 90 days.

Q. I'm a 482 (or 457) visa holder and have been either terminated, stood down or on LWOP. Can I work for another employer?

No, as visa condition 8607 still applies to your visa. Condition 8607 states: "visa holder must only work in their nominated occupation for which their TSS visa was granted". If you find another employer and a nomination transfer is approved, then you can work for that new employer.

Q. My 482 visa has been approved, but I am offshore and I need to enter Australia and commence within 6 months?

There is no 'enter by' date on a 482 visa. You may, therefore, enter Australia once the travel ban has been lifted, assuming the position remains available.

Q. My visa has expired, what do I do?

So you are now unlawful. Don't panic...but contact us urgently so we can assist make you lawful again. Initially, we will assist in applying for a Bridging Visa E and evaluate your options.

Q. I'm a student visa holder, and I have heard I can work more than the 40 hours a fortnight. Is this true?

Condition 8105 attached to primary student visa holders permits work up to 40 hours per fortnight while your study term is in progress. During the COVID-19 pandemic, the Department has relaxed the condition for certain student visa cohorts:

- Student visa holders enrolled in a nursing course can undertake work in the health care facilities
- Student visa holders already in their existing roles working in major supermarkets such as Coles and Woolworths, stocking shelves
- Student visa holders working in an aged care facility

Students need to contact their employers who are either already accredited to utilise this scheme or can apply to utilise this.

Q. Can student visa holders access their superannuation?

Students who have been here longer than 12 months who find themselves in financial hardship will be able to access their Australian superannuation.

Q. What is COVID Visa?

In response to the COVID-19 pandemic, the Department has announced a new stream within the Temporary Activities Visa (Subclass 408) to provide a pathway for certain former and current holders of temporary visas to lawfully remain in Australia and who would otherwise be required to depart Australia who, but for the COVID-19 pandemic, are unable to leave Australia. Certain criteria must be met and applicants must be part of the response to workforce shortages during the COVID-19 pandemic concerning areas including, but not limited to, agriculture, aged care and public health. This visa also allows holders of temporary visas who are engaged in or have the relevant skills to undertake critical work relating to the supply of essential goods and services.

Prepared by Fred Molloy, *MARN 0853698*

[Contact Us](#) for more information