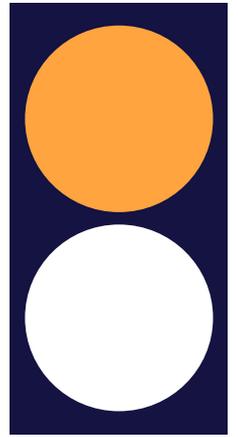


EMPLOYMENT LAW

ARTICLE: GROUNDS TO REQUEST FLEXIBLE WORKING ARRANGEMENTS

AUGUST 2023



Introduction

Requests for flexible working arrangements have previously included requests for changes in work hours, patterns of work and location of work. Requests can be made by an employee who has worked for the employer for at least 12 months, and:

- Is the parent, or has responsibility for the care, of a child who is of school age or younger.
- Is a carer.
- Has a disability.
- Is 55 or older.
- Is experiencing family and domestic violence.
- Provides care or support to a member of their immediate family or household, who requires care or support because the member is experiencing family and domestic violence.

However, from 6 June 2023 a new category of employee will be added to the above list – pregnant employees.

For an employee to make a request for flexible working arrangements, the request must be in writing and must set out the details of the change sought, and the reasons for the change.



1.Process for considering a request for flexible working arrangements.

Currently, an employer can refuse a request for flexible working arrangements on reasonable business grounds.

The changes to the *Fair Work Act 2009* (Cth) mean that an employer will only be able to refuse the request if:

- the employer has discussed the request with the employee and genuinely tried to reach an agreement with the employee and accommodate their circumstances.
- the employer and employee have not reached such an agreement.
- the employer has had regard to the consequences of the refusal for the employee; and
- the refusal is on reasonable business grounds.

2.What are reasonable business grounds?

The Fair Work Act defines reasonable business grounds as including the following:

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

While this list is not exhaustive, the context of the business has to also be taken into consideration in deciding what constitutes reasonable business grounds. For example, a small business may have limited or even no capacity to grant flexible working arrangements due to the number of employees.

3.Written response requirements

After considering a flexible working arrangement request, the employer must give the employee a written response to the request within 21 days, stating whether the employer grants or refuses the request.

If the employer refuses the request, the written response must include details of the reasons for refusal, setting out the employer's particular business grounds for refusing the request and how those grounds apply to the request. For example, if the change is too costly for the business, you need to explain in the letter why this would be the case, providing specific information.

Further, the written refusal must either set out other changes that it is willing to make to the employee's working arrangements, or state that there are no such changes.

The refusal response must also set out the employee's right to challenge the refusal in the Fair Work Commission.

4. Dispute Resolution

Where an employer has refused a request or has not provided a written response to the request within 21 days of it being made, and the parties are unable to resolve the dispute through discussion at the workplace level, the dispute can be referred to the Fair Work Commission for conciliation, mediation or arbitration.

Depending on an employer's reason for refusing the request, discrimination legislation may become relevant, including discrimination and General Protections provisions under the Fair Work Act.

5. Next steps for employers

Employers should update the organisation's Flexible Working Arrangements Policy to include the above. If a policy does not exist, create a policy. Employers should ensure all managers are trained on the policy.

Employers should also understand that while the new regulations only apply to certain categories of employees there could be a flow-on effect, making it easier for other employees to negotiate flexible working arrangements. Employers should be prepared to deal with requests from all employees.

At Ezra Legal, our team of commercial lawyers know that clear and accurate legal advice on HR and employment issues is critical to your commercial success. We provide commercially relevant legal and strategic advice on complex employment decisions, striking the right balance between legal considerations and commercial reality.

Contact Information

For any questions or clarifications, please reach out to:

Damian McGrath

Special Counsel

T: (08) 8231 6100

E: dmcgrath@ezralegal.com.au

Ezra Legal.
we're here to help