

NATIONAL EMPLOYMENT STANDARDS – FLEXIBLE WORKING ARRANGEMENTS

The provisions of the National Employment Standards (NES) for the right of an employee to request Flexible Working Arrangements is one of the more complex aspects of the *Fair Work Act 2009* (C'th), ("FW Act").

Overview  See *Fair Work Act* s. 65 - 66

Requests for flexible working arrangements form part of the National Employment Standards (NES). The NES applies to all employees covered by the national workplace relations system, regardless of the applicable industrial instrument or contract of employment. **An employer can only refuse such a request on 'reasonable business grounds'.** Applicable State and Territory laws are not excluded by the operation of this standard.

Eligibility

There are certain criteria an employee must satisfy in order to be able to make the request. The employee must have completed at least 12 months of continuous service with their employer immediately before making the request. An employee will be eligible to make a request to a change in their working arrangements if they meet any of the following criteria:

- > 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*);
- > have a disability;
- > 55 years old or older;
- > experiencing violence from a member of the employee's family;
- > providing support to a member of his or her immediate family (please see *Definitions* below) or member of his or her household who requires care/support because the member is experiencing violence from the member's family;

To avoid doubt flexible working arrangements also applies to an employee who:

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

may request to work part-time to assist the employee to care for the child.

Casual employees are entitled to make a request if:

- > they have been employed by the employer on a regular and systematic basis for a sequence of periods of employment of at least 12 months immediately before making the request; and/or
- > there is a reasonable expectation of continuing employment by the employer on a regular and systematic basis.

Definitions

'Immediate family' includes persons related by blood, marriage, adoption, step or fostering and those who usually reside in the household of the employee. The Australian Law Reform Commission (ALRC) has concluded that 'family violence' includes violent or threatening behaviour that coerces, controls or causes that family member to become fearful. This may include physical violence, sexual assault, sexually abusive behaviour, economic abuse, emotional abuse, or psychological abuse.

A **'Carer'** is defined as an individual who provides personal care, support and assistance to another individual who needs it because that other individual:

- > has a disability;
- > has a medical condition (including a terminal or chronic illness); or
- > is frail and aged

'School age' for a child means the age at which a child by a law of the State or Territory in which the child lives to start attending school.

Examples of changes in working arrangements may include:

- > changes in hours of work (e.g. reduction in hours worked, changes to start/finish times)
- > changes in location of work (e.g. working from home or another location)
- > changes in patterns of work (e.g. working 'split-shifts' or job sharing arrangements)

Reasonable Business Grounds

The NES sets out 'formal requirements' relating to requests for flexible working arrangements.

- > The request must be made in writing, setting out the details of the change sought and the reasons for the change. In other words, as well as stipulating the nature of the flexible working arrangements sought, an employee must explain the grounds on which the request is made.
- > Employers must give employees a written response to the request within 21 days, stating whether they approve or refuse the request.
- > Employers may refuse the request only on reasonable business grounds. If the employer refuses the request, the written response must include the reasons for the refusal.

The 'reasonable business grounds' are the reason for the refusal and should be clearly explained.

Making and Approving Requests for a Change

An employer may refuse a request for flexible working arrangement only on reasonable business grounds. The following is a **non-exhaustive** list of what may constitute reasonable business grounds:

- > the excessive cost of accommodating the request;
- > that there is no capacity to reorganise work arrangements of other employees to accommodate the request;
- > the impracticality of any arrangements that would need to be put in place to accommodate the request, including the need to recruit replacement staff;
- > that there would be a significant loss of efficiency or productivity;
- > that there would be a significant negative impact on customer service.

Employers and employees are encouraged to discuss their working arrangements and, where possible, reach an agreement that balances both their needs. The NES do not require the employer to choose between approving an employee's request in full or refusing the request entirely.

Illustrative Example

Anne would like to change her work hours to a start time of 9:30am and a finish time of 5:30pm. This will enable Anne to take her three year old twins to kindergarten. Anne submits a written request to her employer setting out the reasons for requesting the change in hours. Her employer considers the request and agrees that this is a reasonable request.

Anne's employer discusses the situation with her. They agree to an arrangement for a trial period where Anne will start work at 9:30am and finish at 5:30pm for three months. Anne and her employer agree to meet and assess the arrangement following this trial period to determine whether the arrangement will become permanent.

Anne's employer gives her a written response, setting out details of the reasons for the acceptance of the initial request, as well as a statement of the agreed arrangements.

Frequently Asked Questions

How long do I have to respond to an employee's request for flexible work arrangements?

An employer has 21 days to respond to an employee's request for flexible working arrangements. This must be done in writing stating approval or refusal. In the case of refusal an employer must outline the reason for the refusal.

Do I have to approve the request for flexible work arrangements?

No. However, if you refuse the request you must do so within 21 days and provide the reason to the employee in writing. Refusal of the request can only be made on reasonable business grounds. The business should determine whether it can work around the request. Trials are often useful to properly assess the proposed arrangements and have historically been well regarded by the courts. If trialling an arrangement, or implementing an ongoing agreement, it is essential to properly document the arrangements.

Contacting the Victorian Chamber of Commerce and Industry

The Victorian Chamber's team of experienced workplace relations advisors can assist members with a range of employment, human resources and industrial relations issues.

Our experienced workplace relations consultants can also provide assistance to both members and non-members on a range of more complex matters for a fee-for-service. The consultants can, among other things, provide training to employees, conduct investigations and provide representation at proceedings at the Fair Work Commission.

For assistance or more information, please contact the Workplace Relations Advice Line on **(03) 8662 5222**.

Disclaimer

The information contained in this document has been prepared by the Victorian Chamber of Commerce and Industry in this format for the convenience and benefit of its members and is provided as a source of information only. The Victorian Chamber does not accept responsibility for the accuracy of the information or its relevance or applicability in particular circumstances. The information does not constitute, and should not be relied on, as legal or other professional advice about the content and does not reflect the opinion of the Victorian Chamber, its employees or agents. The Victorian Chamber and its employees, officers, authors or agents expressly disclaim all and any liability to any person, whether a member of the Victorian Chamber or not, in respect of any action or decision to act or not act which is taken in reliance, whether partially or wholly, on the information in this communication. Without limiting the generality of this disclaimer, no responsibility or liability is accepted for any losses incurred in contract, tort, negligence, or any other cause of action, or for any consequential or other forms of loss. If you are uncertain about the application of this information in your own circumstances you should obtain specific advice.