

> Requests for Flexible Working Arrangements

4 January 2010

Introduction

As part of the introduction of the Fair Work Act, the National Employment Standards (NES) came into force on 1 January 2010. It is vital that employers understand their obligations in relation to employee requests for flexible working arrangements.

The new provisions under Division 3 of the NES create a legal right for employees to request flexible working arrangements and employers should understand the ramifications if requests are refused without proper consideration.

Flexible working arrangements

An 'eligible' employee is an employee who is a parent, or has responsibility for the care of a child. The employee must:

- Have completed 12 months continuous service with their employer immediately before making the request; or
- be a casual employee that:
 - has 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
 - has a reasonable expectation of continuing employment by the employer on a regular and systematic basis, and
- must have care of a child who is either:
 - under school age (ie. the age at which the child is required by the applicable State or Territory law to start attending school)
 - under 18 and has a disability.

Making the request

Employees must make the request in writing and set out details of the change sought and the reasons for the change.

'Flexible working arrangements' are not defined by the NES and consequently there is no limit or restriction on the type of flexible arrangements that might be agreed upon by an employer and employee. Examples of flexible working arrangements include:

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- changes in hours of work such as part-time work
- changes in patterns of work such as changes to start or finish times
- a change in location of work such as working from home.

The employer must respond to the request

The employer must give the employee a written response to the request within 21 days, stating whether the request has been granted or refused. If the request is refused the written response to the employee must include details of the reasons for the refusal.

Refusing the request

A request for flexible working arrangements can only be refused on reasonable business grounds. It is not acceptable to refuse on the basis that 'this doesn't suit us'.

Reasonable business grounds are not exhaustively defined by the NES, however, factors that may be relevant in defining reasonable business grounds could include:

- the effect on the workplace and the employer's business of approving the request, including the financial impact of doing so and the impact on efficiency, productivity and customer service
- the inability to organise work among existing staff
- the inability to recruit a replacement employee
- the practicality or otherwise of the arrangements that may need to be put in place to accommodate the employee's request.

Discrimination Legislation and General Protections

What is unlawful workplace discrimination?

Unlawful workplace discrimination occurs when an employer takes adverse action against a person who is an employee or prospective employee because of the following attributes of the person:

- race
- colour
- sex
- sexual preference
- age
- physical or mental disability
- marital status
- family or carer's responsibilities
- pregnancy
- religion
- political opinion
- national extraction or social origin

Where an investigation finds that the employer has (or had) discriminatory practices that are linked to adverse actions for employees or prospective employees, the Fair Work Ombudsman may take enforcement action.

Who is covered by these protections?

It is unlawful for an employer, regardless of size, to discriminate against an employee. This includes full time, part time and casual employees, probationary employees, apprentices and trainees, and individuals employed for fixed periods of time or tasks.

It is also unlawful to refuse to hire a prospective employee based on one of the attributes listed above.

What is 'adverse action'?

Adverse action can include action that is unlawful if it is taken for a discriminatory reason. The Fair Work Act 2009 describes a number of adverse actions.

Adverse action taken by an employer includes doing, threatening or organising any of the following:

- dismissing an employee
- injuring an employee in their employment
- altering an employee's position to their detriment
- discriminating between one employee and other employees
- refusing to employ a prospective employee
- discriminating against a prospective employee on the terms and conditions in the offer of employment.

Treating someone differently is not necessarily unlawful discrimination. In terms of the *Fair Work Act 2009*, an action is only considered adverse action if it occurs due to one or more of the above attributes (race, sex, age, disability, etc as mentioned above). If this is not the basis of the action, it may not be considered an act of unlawful discrimination.

The Fair Work Act 2009 also provides that in some circumstances, an action may not be considered discrimination.

This includes where the action:

- is permissible under State or Territory anti-discrimination laws
- is based on the inherent requirements of the particular position concerned
- is taken against a staff member of an institution run in accordance with religious beliefs, and the action is taken in good faith and to avoid injury to those religious beliefs.

What should employers do?

Employers should:

- Review current practices and develop appropriate procedures to deal with requests for flexible working arrangements that comply with the NES

- Provide refresher training to supervisors and managers about their obligations when dealing with requests for flexible working arrangements
- Give proper consideration to requests made by employees for part time work or changes to their normal working arrangements because of their responsibilities as carers.
- Contact the Office for Employment Relations for assistance.

Further References:

Fair Work Act

National Employment Standards

State and Federal Discrimination legislation