

Employment and Industrial Relations Client Alert

5 November 2009

Requests for Flexible Working Arrangements

The National Employment Standards will commence on 1 January 2010 in accordance with the *Fair Work Act 2009* (Cth) ("**FW Act**"). One of the new standards relates to requests for flexible working arrangements.

An employee who is the parent, or who has responsibility for the care of a child under school age or a child under 18 years with a disability, may request a change in working arrangements in order to assist them to care for that child.

The employee must have completed at least 12 months service and must make the request in writing specifying the type of change sought.

An employer must respond in writing within 21 days of receiving such a request. An employer may only refuse a request on "reasonable business grounds". Where an employer refuses a request for flexible working arrangements, it must provide details of the reasons why the request was refused. Written reasons refusing the request should set out the business grounds upon which the employer based its decision and also how these business grounds apply in the circumstances. The FW Act does not define "reasonable business grounds".

Under the FW Act, employees do not have the right to a review of the Employer's reasons for refusing a request, however, employees may have the right to bring a claim if, in making its decision, the employer has been discriminatory, or if the employer has taken adverse action against the employee for making such a request.

As discussed in our Summer 2008/2009 newsletter, from 1 September 2008 the *Equal Opportunity Act 1995* (Vic) ("**EO Act**") imposed similar obligations on employers in relation to employees with responsibilities as a parent or carer. Under the EO Act, an employer must not unreasonably refuse to accommodate an employee's responsibilities as a parent or carer. Unlike the FW Act, there is guidance on what will constitute an unreasonable refusal to accommodate. The EO Act states that all relevant circumstances will be taken into account including the following matters:

- The employee's circumstances
- The nature of the role on offer
- The nature of the arrangements required to accommodate those responsibilities
- The financial circumstances of the employer
- The size and nature of the workplace and the employer's business
- The effect on the work place and the employer's business of accommodating those responsibilities
- The consequences for the employer of making such accommodation
- The consequences for the employee of not making such accommodation

Employers should consider the following before acting on requests for flexible working arrangements:

- Whether the arrangement has been trialled before with other employees
 - If the arrangement has been trialled, was it successful?
 - If the arrangement was not successful, could it be modified?
- Is a trial period required and, if so, how long is required to evaluate its success?

Employers should ensure that all policies are updated with regards to flexible work practices to ensure that they will fulfil their obligations in a consistent, transparent and reasonable manner.

For further information please contact a member of Russell Kennedy's Employment & Industrial Relations Team on (03) 9609 1555

DISCLAIMER

The information contained in this alert is intended as general commentary and should not be regarded as legal advice. Should you require specific advice on this topic, please contact the author directly.