

Employment and Industrial Relations Alert

7 October 2009

Right to return to work

Under the *Workplace Relations Act 1996* (Cth), female employees are required to take a minimum period of six weeks leave from the child's date of birth. Employers could seek a medical certificate to confirm the employee's fitness to keep working if the employee wished to work within that six week period prior to the child's birth.

While the *Fair Work Act 2009* (Cth) (the "**FW Act**") allows an employer to request that an employee takes leave six weeks prior to the birth of her child, from 1 January 2010 the FW Act no longer requires an employee to take leave for six weeks after the birth of her child.

An employer can still require an employee intending to return to work after the birth of her child to produce a medical certificate stating that she is fit and capable of returning to work. If the employee fails or refuses to provide the medical certificate to the employer, the employer must consider whether it can reasonably refuse to permit the employee to return to work because of a concern about the employee's health and safety.

If the employer refuses to allow the employee to return to work after either failing to request a medical certificate or after receiving a medical certificate clearing the employee for return to work, the employer may face a claim of discrimination under the State or Federal discrimination legislation, and may also face a claim for adverse action under the FW Act. Adverse action in this instance will occur where an employee receives adverse treatment from her employer (a refusal to permit her to attend work) for exercising a workplace right (that is, the right to return to work after giving birth to a child). The penalties for a claim of adverse action can include a fine of up to \$33,000 for bodies corporate.

It is important that employers ensure that their existing parental leave policies are up to date and compliant with the FW Act prior to 1 January 2010. Equally, if employers have any concerns about an employee wishing to return to work within six weeks after the birth of her child, or if the employer intends to take action over a medical certificate, or failure to provide a medical certificate, it should seek legal advice to avoid claims for discrimination and adverse action.

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.