UPDATE

FLEXIBLE WORK AND REASONABLE WORKING HOURS

Understanding the law around flexible work arrangements, and the limits of reasonable additional hours of work, has become increasingly important as the post-pandemic world has normalised remote ways of working and left us more "plugged in" to work than ever before.

This article breaks down key issues for employers when considering requests by employees for flexible work arrangements, and when asking employees to work additional hours. We also look at recent amendments to the law in this space, and further changes that have been proposed to Parliament.

Who can request flexible work?

Employees who have completed at least 12 months' continuous service, including casual employees engaged on a regular and systematic basis, are eligible to request a flexible work arrangement provided they meet one of the following personal circumstances:

- the employee is a **parent** of a child of school age or younger;
- the employee is a **carer** as defined by law;
- the employee has a **disability**;
- the employee is **aged 55 or over**;
- the employee is experiencing **family violence** or is supporting an immediate family member or household member facing family violence; or
- the employee is **pregnant (commencing from 6 June 2023)**.

What does flexible work look like?

Employers are advised to be open-minded when proposing options for flexible work. The list below provides some examples, but these are likely to expand as organisations become more adaptive and accepting of flexible work.

- **time off** - paid or unpaid, ongoing or temporary;
- **additional purchased leave** - salary sacrifice schemes allowing employees to accept less pay across the year in exchange for additional leave;
- **reduced hours** - part-time or fractional work;
- **compressed hours** or **days** - where an employee meets their responsibilities and targets whilst working fewer hours or across fewer days;
- **changed hours or split shifts** - amendments to rosters or ordinary hours of work;
- **job share** - managing part-time work by having two part-time employees share the responsibilities of one full-time role across their work days;
- **remote or hybrid work** - the option to work away from the office, at home or elsewhere.

When can requests for flexible work be refused?

Recent amendments to the *Fair Work Act 2009* (Cth) (**Fair Work Act**) include changes to the process for responding to requests for flexible work. These changes will commence on 6 June 2023.

A refusal will only be possible where:

- the employer and employee have been **unable to reach agreement** after discussing the request;
- the employer has made genuine efforts to identify an **alternative working arrangement** they would be willing to make to accommodate the employee's circumstances;
- the employer has considered the **consequences** of the refusal for the employee; and
- the refusal is based on **reasonable business grounds**.

Employers are required to:

- respond to requests **within 21 days**;
- provide **detailed reasons** for the particular business grounds relied upon in refusing the request and how they apply;
- inform the employee of any **alternative working arrangements** the employer would be willing to make to accommodate the employee's circumstances; and
- inform the employee of the availability of **dispute resolution processes** through the Fair Work Commission.

What are reasonable business grounds?

Possible reasonable business grounds for refusing a request for flexible work include that:

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

It is important to remember that almost all requests for flexible work will result in some cost, loss of efficiency, or repercussions on customer service, but this does not mean there are reasonable business grounds for refusing a request. The Fair Work Commission has stated that employers cannot refuse requests that only have a small impact, or are merely inconvenient, as doing so would be inconsistent with the spirit of the flexible work arrangement scheme.

What happens if a request is refused?

Recent amendments to the Fair Work Act also introduce a new **dispute resolution process** for flexible work requests, commencing from 6 June 2023.

If an employer refuses a request for flexible working arrangements, or the employer fails to respond within 21 days, the employee may apply to the **Fair Work Commission** to conciliate, and if unsuccessful, arbitrate the dispute.

At arbitration, the Fair Work Commission will be able to make **orders** which may:

- confirm that the employer's business grounds for refusal were reasonable; or
- order the employer to grant the employee's request or make specified changes to accommodate the employee.

Either party may refer the dispute to the Fair Work Commission provided they have already attempted to resolve the matter internally.

Hours of work

Under the Fair Work Act, an employer must not request or require full-time employees to work more than **38 hours per week**, unless the additional hours are reasonable.

Although there are civil remedies of up to 60 penalty units (currently $82,500) per breach of this provision for a body corporate, the reality is that the 38-hour work week is largely a theoretical concept. There is a current push for law reform in this area, outlined below.

Reasonable additional hours

Employees are also entitled to refuse requests to work additional hours beyond the 38-hour work week if they are unreasonable.

The factors under the Fair Work Act to consider when assessing whether additional hours of work are reasonable include:

- risk to health and safety;
- the employee's personal circumstances, including family responsibilities;
- the needs of the workplace;
- whether the employee is paid or compensated for additional hours;
- any notice given of the request to work additional hours;
- any notice given by the employee of their refusal to work additional hours;
- usual patterns of work in the industry;
- the nature of the employee's role and level of responsibility;
- averaging of hours under an award or enterprise agreement; and
- any other relevant matter.

The reasonableness of requested additional hours of work will depend on the circumstances of each case. To date, there has been very little litigation or commentary from the courts on the meaning of reasonable hours. As a result, there has been much public interest in the upcoming test case of *Rugg v Ryan*, in which the chief of staff of independent MP Monique Ryan alleges that she was directed or required to work hours that were unreasonable in the circumstances, and that she was unlawfully dismissed for refusing to work additional hours that were unreasonable. Many employers are hoping that the decision in this case will provide further judicial guidance about what may or may not be reasonable.

Next steps

While requests for flexible work arrangements will need to be considered on a case-by-case basis, employers should:

- establish processes for assessing and responding to such requests;
- ensure human resources and/or managerial staff are appropriately trained in how to give genuine consideration to requests for flexible arrangements;
- actively engage in discussions with employees within the 21-day period.

Please get in touch for assistance with reviewing and updating your practices for responding to flexible work requests, or requests for employees to work additional hours.

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