



FACT SHEET

Flexible Work Requests

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The National Employment Standards ('NES'), as enshrined in the *Fair Work Act 2009* (the 'Act') provide certain employees the right to request flexible work arrangements.

For those eligible employees, the NES describes the circumstances in which an eligible employee is entitled to make a request for flexible work arrangements, as well as detail as to what constitutes reasonable business grounds when refusing a flexible work request, and the entitlement for employees returning from parental leave to request part-time work.

THE ENTITLEMENT

Division 4 of the NES provides that, an employee who has completed 12 months' continuous service with an employer, and, in the case of a casual employee, has been working on a regular and systematic basis with a reasonable expectation of continuing employment, may request a change in their working arrangements if any of the following circumstances apply:

- the employee is the parent, or has responsibility for the care, of a child who is school age or younger;
- the employee is a carer* (within the meaning of the *Carer Recognition Act 2010*);
- the employee has a disability;
- the employee is 55 or older;
- the employee is experiencing violence from a member of the employee's family;
- the employee provides care or support to a member of the employee's immediate family**, or a member of the employee's household, who requires care or support because the member is experiencing violence from the member's family.

*In accordance with the *Carer Recognition Act 2010*, 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; or
- has a medical condition (including a terminal or chronic illness); or
- has a mental illness; or
- is frail and aged.

An individual is not a carer in respect of care, support and assistance he or she provides:

- under a contract of service or a contract for the provision of services; or
- in the course of doing voluntary work for a charitable, welfare or community organisation; or
- as part of the requirements of a course of education or training.

An individual is not a carer merely because he or she:

- is the spouse, de facto partner, parent, child or other relative of an individual, or is the guardian of an individual; or
- lives with an individual who requires care.

** Immediate family, as defined in the *Fair Work Act 2009* includes:

- a spouse, de facto partner, child, parent, grandparent, grandchild or sibling of the employee; or
- a child, parent, grandparent, grandchild or sibling of a spouse or de facto partner of the employee.

The NES also provides that 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.

An employee's flexible work request must be in writing and detail the changes sought as well as the reasons for the change they are seeking. The NES provides some examples of the types of changes in working arrangements which an eligible employee may request including: changes in hours of work, changes in patterns of work and changes in location of work.

On receipt of a request, an employer must give genuine consideration to the request and provide a written response within 21 days of receiving the request. An employer can only refuse the request for flexible work arrangements on **reasonable business grounds**. If the request is refused, the employer must include the reasons for the refusal in the written response.

WHAT ARE 'REASONABLE BUSINESS GROUNDS'?

The NES provides employers with guidance as to what are considered reasonable business grounds. The Act provides that reasonable business grounds include, but are not limited to, the following:

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

In reaching a decision regarding a flexible work request which is based on reasonable business grounds, employers must focus on the specific circumstances of the request and the employee from whom the request has been received. Applying a policy 'across the board' to all requests without considering the individual circumstances is unlikely to be viewed as reasonable. While it is recommended to have a policy on Flexible Work Arrangements, the policy should be used as a guideline only for both employers and employees, rather than a checklist for decision making. While there are no grounds for prosecution under the *Fair Work Act 2009* for refusing a flexible work arrangements request not based on reasonable business grounds, such a decision could expose the employer to either discrimination or adverse action claims.

QHA recommends that the following factors should be considered when considering a request for flexible working arrangements (and therefore making a reasonable decision):

- What are the employee's duties?
- How will those duties be delivered or affected if the request is granted? For example, will the request prevent the employee from carrying out the inherent requirements of their position?
- What impact will there be on other employees? For example, increased workload, unsupervised.
- How much (if anything) will it cost in time, resources and lost productivity if the request was granted?
- Are there already arrangements in place to accommodate similar requests?

- How long does the employee want the arrangements in place? For example, is this a short term request or a permanent arrangement?
- Does the employee have a special history which indicates that the request can or cannot be accommodated? For example a history of poor performance may suggest that work from home arrangements would be unsuitable.
- How much notice has the employee given? Too much or too little may have an impact on whether the request can be granted at that time.
- Would a trial period be beneficial before making a commitment to implementing the arrangements?
- How have other employees with similar requests been treated?
- Is there evidence to support the business grounds which have led to the request being refused? Documented evidence will assist in substantiating the reasons for refusal.
- Is more information required before being able to respond to the employee? The employee is required to outline the specific details and reasons for the request – have they complied with this requirement?

APPROVING A REQUEST

Where there are no reasonable business grounds to refuse the request and the flexible work arrangement sought can be accommodated, it is recommended that the arrangements be documented as an agreement between the employee and employer and kept with the employee's employment record. In addition, it is recommended that a review date and an end date (where applicable) be included in the documented agreement, with the proviso that the agreement is subject to ongoing business requirements.

REFUSING A REQUEST

Where there are reasonable business grounds to refuse a request, written notice of the refusal must be provided to the employee within 21 days of receiving the request.

The notice must specify the reasons for the decision. That is, the specific business grounds which have prevented the request from being accepted must be advised in the request response, remembering to be cautious to not provide any admissions which could expose the employer to discrimination or adverse action claims.

It may also be possible to offer an alternative arrangement as a compromise should it not be possible to approve the request in its entirety. For example, it may be possible to approve the arrangements for a 3 month period, rather than a 6 month period due to a project deadline which falls in 6 months' time. If this is the case, the request has still been refused despite an alternative being available, therefore the employer is still obliged to comply with the requirement to respond, in writing, within 21 days, outlining the reasons for the refusal, as well as putting forward the alternative the employer can provide.

Further Assistance

Financial QHA members are encouraged to contact the QHA's Employment Relations Department (refer the contact details at the bottom of this page) for a confidential discussion about the information in this Fact Sheet, or to discuss any queries relating to specific workplace matters.

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