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Let's Get Flexible…

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New Flexible Working Arrangement Provisions

The newly amended flexible working arrangement provisions under s.65A of the Fair Work Act 2009 (Cth) will take effect on 6 June 2023. The "Secure Jobs" amendments will now empower the Fair Work Commission (FWC) to deal with disputes about requests for flexible working arrangements as it considers appropriate, including by arbitration.

The Fair Work Act 2009 has not previously provided an avenue for employees to challenge refusals of flexible work arrangement requests on reasonable business grounds, (unless provided for in employment contracts or an enterprise agreement (s.739)).

However, changes introduced by the "Secure Jobs" amendments mean the FWC is now empowered to deal with a dispute about whether an employer did, in fact, have reasonable business grounds to refuse the request, including by arbitration (s.65C), in certain circumstances.

The amendments also expand the circumstances in which an employee can make a request for flexible working arrangements to include where an employee is pregnant, or is experiencing, or providing care or support to a member of their immediate family or household who is experiencing, family or domestic violence.

What Does This Mean for Employers?

The flexible working arrangement provisions are part of the National Employment Standards (NES). All employees in the national workplace relations system are covered by the NES regardless of the award, enterprise agreement or employment contract that applies.

Once an employer receives a request for a flexible working arrangement, they must provide a written response to the employee within 21 days. However, the amendments now mean the content of what needs to be included in an employer's response, and the steps the employer must go through before providing that response, is more prescriptive.

The employer has three options when they receive a request:

- Agree to the employee's request for a flexible working arrangement
- Discuss the request with the employee and genuinely agree with them on a modified flexible working arrangement
- After attempting discussions, and after having regard to the consequences of the refusal for the employee, provide the written response that sets out the reasons why the request is refused on reasonable business grounds

What Are Reasonable Business Grounds?

"Reasonable business grounds", as detailed in s.65A(5) include, but are not limited to:

- That the new working arrangements requested 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
- That it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the new working arrangements requested That the new working arrangements requested would be likely to result in a significant loss in efficiency or productivity
- That the new working arrangements requested would be likely to have a significant negative impact on customer service

The Involvement of the FWC

If the employee does not accept the compromise or the refusal on reasonable business grounds, they must continue to attempt to resolve the request at the workplace level. If the parties are unable to resolve their differences at the workplace level, then they can refer their dispute to the FWC. Notably, there is no time limit for an employee to refer a dispute to the FWC.

Unless there are "exceptional circumstances", the FWC must first deal with the dispute by means other than arbitration, such as by mediation or conciliation. Where mediation or conciliation has failed to resolve the dispute, or where exceptional circumstances exist, the new provision (s.65B(4)) will empower the FWC to arbitrate the dispute without the parties' consent.

The FWC will now have the power to order employers to grant requests or change working arrangements to accommodate the employee's circumstances, or it can order them to take further steps if the parties have not responded adequately. The amendments have also introduced very similar provisions in relation to regarding requests to extend unpaid parental leave for a further period of up to a year.

Importantly, the FWC may only arbitrate if it is satisfied that there is no reasonable prospect of the dispute being resolved without the making of such an order. In addition, in making any arbitration order, the FWC must consider fairness between the employer and employee.

Previously, the provisions regarding requests for flexible working arrangements and extensions of unpaid parental leave were expressly excluded from provisions of the NES for which parties could seek civil remedies if contravened.

This exclusion has now been removed. This means that if there is a contravention of the NES provisions or an FWC order relating to requests for flexible working arrangements (or extensions to unpaid parental leave), civil remedy proceedings can now be pursued against the contravener (under Pt 4-1). Legal representation for the parties in these disputes is allowed with the permission of the FWC.

Key Takeaways

- Employers must give a written response to an employee's request for flexible working arrangements within 21 days from the request being received by the employer.
- Employers should firstly discuss the request with the employee and assess if the request can be accommodated in the original or a modified form.
- Where an agreement cannot be reached, the employer will need comprehensive reasons for why they cannot accommodate the request that is capable of review and scrutiny of the FWC.

Our Labour & Employment team offer representation and pragmatic advice to assist in resolving flexible working arrangement disputes and would be happy to discuss any queries you may have on this topic.

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