



Requests for flexible working arrangements and the National Employment Standards

Australia's new workplace relations system

From 1 July 2009, most Australian workplaces are governed by a new system created by the *Fair Work Act 2009*.

The Fair Work Ombudsman helps employees, employers, contractors and the community to understand and comply with the new system. We provide education, information and advice, investigate workplace complaints, and enforce relevant Commonwealth workplace laws.

Requests for flexible working arrangements form part of the National Employment Standards (NES). As of 1 January 2010, the NES apply to all employees covered by the national workplace relations system, regardless of the applicable industrial instrument or contract of employment.

Terms in awards, agreements and employment contracts cannot exclude or provide for an entitlement less than the NES and those that do, have no effect. An employer must not contravene a provision of the NES. A contravention of a provision of the NES may result in penalties of up to \$6,600 for an individual and \$33,000 for a corporation.

In addition to the NES, an employee's terms and conditions of employment generally come from an award or agreement. All references to an award or agreement in this fact sheet includes modern awards, enterprise agreements, and award or agreement-based transitional instruments.

Overview

The NES include a right for certain employees to request flexible working arrangements (such as changes in hours of work) from their employer. An employer can only refuse such a request on 'reasonable business grounds'.

Who is eligible to make a request for a flexible working arrangement?

An employee who is a parent, or has responsibility for the care of a child, may request a change in their working arrangements.

This request may be made by an employee to assist them to care for their child if the child is:

- under school age (i.e. the age at which the child is required by the applicable State or Territory law to start attending school)
- under 18 and has a disability.

Examples of changes in working arrangements may include:

- changes in hours of work (e.g. reduction in hours worked, changes to start/finish times),
- changes in patterns of work (e.g. working 'split-shifts' or job sharing arrangements)
- changes in location of work (e.g. working from home or another location).

Employees are not entitled to make the request unless they have completed at least 12 months of continuous service with their employer immediately before making the request.

Casual employees are entitled to make a request if:

- they have been employed by the employer on a regular and systematic basis for a sequence of periods of employment of at least 12 months immediately before making the request
- there is a reasonable expectation of continuing employment by the employer on a regular and systematic basis.

What are the requirements for making and approving a request for a change to working arrangements?

The request must be made in writing and set out details of the change sought and reasons for the change.

Employers must give employees a written response to the request within 21 days, stating whether they grant or refuse the request. Employers may refuse the request only on reasonable business grounds. If the employer refuses the request, the written response must include the reasons for the refusal.

What are reasonable business grounds for refusing a request?

The *Fair Work Act 2009* does not provide a definition of what constitutes reasonable business grounds for refusing a request.

However, factors that may be relevant could include:

- the effect on the workplace and the employer's business of approving the request, including the financial impact of doing so and the impact on efficiency, productivity and customer service
- the inability to organise work among existing staff
- the inability to recruit a replacement employee or the practicality or otherwise of the arrangements that may need to be put in place to accommodate the employee's request.

The NES do not require the employer to choose between granting an employee's request in full or refusing the request. Rather, employers and employees are encouraged to discuss their working arrangements and, where possible, reach an agreement that balances both their needs.

Illustrative example

Greg would like to start work at 10am, four days a week, to enable him to take his three year old son to pre-school. He submits a written request to his employer setting out the reasons for requesting the change in hours. His employer considers the request, but is unable to agree, as Greg would miss an important nationwide teleconference each morning.

However, instead of simply refusing the request, Greg's employer discusses the situation with him. They agree to an arrangement where Greg will start work at 10am, four days a week, and participate in the teleconference by phone hook-up before he leaves home. He will attend in person the most important weekly agenda-setting meeting.

Greg's employer gives him a written response, setting out details of the reasons for the refusal of the initial request, as well as a statement of the revised agreed arrangements.

Can a refusal of a request be challenged?

Employers must either approve or refuse an employee's request in writing within 21 days. If the request is refused, the employer must also include reasons for the refusal. It is a contravention of the *Fair Work Act 2009* if an employer does not respond according to these requirements.

There is no requirement for an employer to agree to a request for flexible working arrangements. However, the *Fair Work Act 2009* empowers Fair Work Australia or some other person to deal with a dispute about whether an employer had reasonable business grounds for refusing a request. This generally only happens if the parties to the dispute have agreed in an employment contract, enterprise agreement or other written agreement for that to occur.

In addition, the *Fair Work Act 2009* allows State and Territory laws to continue to apply to employees where they provide more beneficial entitlements than the NES in relation to flexible work arrangements. In Victoria, for example, provisions of the *Equal Opportunity Act 1995* prohibit an unreasonable refusal to accommodate an employee's responsibilities as a parent or carer.

An employee may also have remedies under relevant discrimination legislation, including the discrimination provisions under the *Fair Work Act 2009*, if an employee considers they have been discriminated against by the employer's handling or refusal of their request.

For more information on unlawful workplace discrimination, please see the *Fair Work Ombudsman Fact Sheet – Unlawful workplace discrimination*.

Further information

For further information on developing family-friendly flexible workplace strategies and their benefits, please see the *Fair Work Ombudsman Best Practice Guide – Work & family*.

Flexible working arrangements are provided for by section 65 or the *Fair Work Act 2009*.

The Fair Work Ombudsman has published a fact sheet on each NES entitlement. For further information on a specific NES entitlement, please see the relevant fact sheets at www.fairwork.gov.au.

For further information, visit www.fairwork.gov.au or contact the Fair Work Infoline on **13 13 94**.

Related publications

Introduction to the NES

Maximum weekly hours and the NES

Parental leave and related entitlements and the NES

Annual leave and the NES

Personal/carer's leave and compassionate leave and the NES

Community service leave and the NES

Long service leave and the NES

Public holidays and the NES

Notice of termination and redundancy pay and the NES

Fair Work Information Statement and the NES

Contact us

Fair Work Online: www.fairwork.gov.au

Fair Work Infoline: **13 13 94**

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