

Division 4—Requests for flexible working arrangements

65 Requests for flexible working arrangements

Employee may request change in working arrangements

- (1) If:
- (a) any of the circumstances referred to in subsection (1A) apply to an employee; and
 - (b) the employee would like to change his or her working arrangements because of those circumstances;
- then the employee may request the employer for a change in working arrangements relating to those circumstances.

Note: Examples of changes in working arrangements include changes in hours of work, changes in patterns of work and changes in location of work.

- (1A) The following are the circumstances:
- (aa) the employee is pregnant;
 - (a) the employee is the parent, or has responsibility for the care, of a child who is of school age or younger;
 - (b) the employee is a carer (within the meaning of the *Carer Recognition Act 2010*);
 - (c) the employee has a disability;
 - (d) the employee is 55 or older;
 - (e) the employee is experiencing family and domestic violence;
 - (f) 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 family and domestic violence.
- (1B) To avoid doubt, and without limiting subsection (1), an employee who:
- (a) is a parent, or has responsibility for the care, of a child; and
 - (b) is returning to work after taking leave in relation to the birth or adoption of the child;

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may request to work part-time to assist the employee to care for the child.

- (2) The employee is not entitled to make the request unless:
- (a) for an employee other than a casual employee—the employee has completed at least 12 months of continuous service with the employer immediately before making the request; or
 - (b) for a casual employee—the employee:
 - (i) is, immediately before making the request, a regular casual employee of the employer who has been employed on that basis for a sequence of periods of employment during a period of at least 12 months; and
 - (ii) has a reasonable expectation of continuing employment by the employer on a regular and systematic basis.
- (2A) For the purposes of applying paragraph (2)(a) in relation to an employee who has had their employment changed under Division 4A of Part 2-2, any period for which the employee was a regular casual employee of the employer is taken to be continuous service for the purposes of that paragraph.

Formal requirements

- (3) The request must:
- (a) be in writing; and
 - (b) set out details of the change sought and of the reasons for the change.

Agreeing to the request

65A Responding to requests for flexible working arrangements

Responding to the request

- (1) If, under subsection 65(1), an employee requests an employer for a change in working arrangements relating to circumstances that apply to the employee, the employer must give the employee a written response to the request within 21 days.

- (2) The response must:
- (a) state that the employer grants the request; or
 - (b) if, following discussion between the employer and the employee, the employer and the employee agree to a change to the employee's working arrangements that differs from that set out in the request—set out the agreed change; or
 - (c) subject to subsection (3)—state that the employer refuses the request and include the matters required by subsection (6).
- (3) The employer may refuse the request only if:
- (a) the employer has:
 - (i) discussed the request with the employee; and
 - (ii) genuinely tried to reach an agreement with the employee about making changes to the employee's working arrangements to accommodate the circumstances mentioned in subsection (1); and
 - (b) the employer and the employee have not reached such an agreement; and
 - (c) the employer has had regard to the consequences of the refusal for the employee; and
 - (d) the refusal is on reasonable business grounds.

Note: An employer's grounds for refusing a request may be taken to be reasonable business grounds, or not to be reasonable business grounds, in certain circumstances: see subsection 65C(5).

- (4) To avoid doubt, subparagraph (3)(a)(ii) does not require the employer to agree to a change to the employee's working arrangements if the employer would have reasonable business grounds for refusing a request for the change.

Reasonable business grounds for refusing requests

- (5) Without limiting what are reasonable business grounds for the purposes of paragraph (3)(d) and subsection (4), reasonable business grounds for refusing a request include the following:
- (a) that the new working arrangements requested would be too costly for the employer;

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- (b) that there is no capacity to change the working arrangements of other employees to accommodate the new working arrangements requested;
- (c) that it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the new working arrangements requested;
- (d) that the new working arrangements requested would be likely to result in a significant loss in efficiency or productivity;
- (e) that the new working arrangements requested would be likely to have a significant negative impact on customer service.

Note: The specific circumstances of the employer, including the nature and size of the enterprise carried on by the employer, are relevant to whether the employer has reasonable business grounds for refusing a request for the purposes of paragraph (3)(d) and subsection (4). For example, if the employer has only a small number of employees, there may be no capacity to change the working arrangements of other employees to accommodate the request (see paragraph (5)(b)).

Employer must explain grounds for refusal

- (6) If the employer refuses the request, the written response under subsection (1) must:
 - (a) include details of the reasons for the refusal; and
 - (b) without limiting paragraph (a) of this subsection:
 - (i) set out the employer's particular business grounds for refusing the request; and
 - (ii) explain how those grounds apply to the request; and
 - (c) either:
 - (i) set out the changes (other than the requested change) in the employee's working arrangements that would accommodate, to any extent, the circumstances mentioned in subsection (1) and that the employer would be willing to make; or
 - (ii) state that there are no such changes; and
 - (d) set out the effect of sections 65B and 65C.

Genuinely trying to reach an agreement

- (7) This section does not affect, and is not affected by, the meaning of the expression “genuinely trying to reach an agreement”, or any variant of the expression, as used elsewhere in this Act.

65B Disputes about the operation of this Division

Application of this section

- (1) This section applies to a dispute between an employer and an employee about the operation of this Division if:
- (a) the dispute relates to a request by the employee to the employer under subsection 65(1) for a change in working arrangements relating to circumstances that apply to the employee; and
 - (b) either:
 - (i) the employer has refused the request; or
 - (ii) 21 days have passed since the employee made the request, and the employer has not given the employee a written response to the request under section 65A.

Note 1: Modern awards and enterprise agreements must include a term that provides a procedure for settling disputes in relation to the National Employment Standards (see paragraph 146(b) and subsection 186(6)).

Note 2: Subsection 55(4) permits inclusion of terms that are ancillary or incidental to, or that supplement, the National Employment Standards. However, a term of a modern award or an enterprise agreement has no effect to the extent it contravenes section 55 (see section 56).

Resolving disputes

- (2) In the first instance, the parties to the dispute must attempt to resolve the dispute at the workplace level, by discussions between the parties.

FWC may deal with disputes

- (3) If discussions at the workplace level do not resolve the dispute, a party to the dispute may refer the dispute to the FWC.

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- (4) If a dispute is referred under subsection (3):
- (a) the FWC must first deal with the dispute by means other than arbitration, unless there are exceptional circumstances; and
 - (b) the FWC may deal with the dispute by arbitration in accordance with section 65C.

Note: For the purposes of paragraph (a), the FWC may deal with the dispute as it considers appropriate. The FWC commonly deals with disputes by conciliation. The FWC may also deal with the dispute by mediation, making a recommendation or expressing an opinion (see subsection 595(2)).

Representatives

- (5) The employer or employee may appoint a person or industrial association to provide the employer or employee (as the case may be) with support or representation for the purposes of:
- (a) resolving the dispute; or
 - (b) the FWC dealing with the dispute.

Note: A person may be represented by a lawyer or paid agent in a matter before the FWC only with the permission of the FWC (see section 596).

65C Arbitration

- (1) For the purposes of paragraph 65B(4)(b), the FWC may deal with the dispute by arbitration by making any of the following orders:
- (a) if the employer has not given the employee a written response to the request under section 65A—an order that the employer be taken to have refused the request;
 - (b) if the employer refused the request:
 - (i) an order that it would be appropriate for the grounds on which the employer refused the request to be taken to have been reasonable business grounds; or
 - (ii) an order that it would be appropriate for the grounds on which the employer refused the request to be taken not to have been reasonable business grounds;
 - (e) if the FWC is satisfied that the employer has not responded, or has not responded adequately, to the employee's request

under section 65A—an order that the employer take such further steps as the FWC considers appropriate, having regard to the matters in section 65A;

- (f) subject to subsection (3) of this section:
- (i) an order that the employer grant the request; or
 - (ii) an order that the employer make specified changes (other than the requested changes) in the employee's working arrangements to accommodate, to any extent, the circumstances mentioned in paragraph 65B(1)(a).

Note: An order by the FWC under paragraph (e) could, for example, require the employer to give a response, or further response, to the employee's request, and could set out matters that must be included in the response or further response.

- (2) In making an order under subsection (1), the FWC must take into account fairness between the employer and the employee.
- (2A) The FWC must not make an order under paragraph (1)(e) or (f) that would be inconsistent with:
- (a) a provision of this Act; or
 - (b) a term of a fair work instrument (other than an order made under that paragraph) that, immediately before the order is made, applies to the employer and employee.
- (3) The FWC may make an order under paragraph (1)(f) only if the FWC is satisfied that there is no reasonable prospect of the dispute being resolved without the making of such an order.
- (4) If the FWC makes an order under paragraph (1)(a), the employer is taken to have refused the request.
- (5) If the FWC makes an order under paragraph (1)(b), the grounds on which the employer refuses the request are taken:
- (a) for an order made under subparagraph (1)(b)(i)—to be reasonable business grounds; or
 - (b) for an order made under subparagraph (1)(b)(ii)—not to be reasonable business grounds.

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Contravening an order under subsection (1)

- (6) A person must not contravene a term of an order made under subsection (1).

Note: This subsection is a civil remedy provision (see Part 4-1).

66 State and Territory laws that are not excluded

This Act is not intended to apply to the exclusion of laws of a State or Territory that provide employee entitlements in relation to flexible working arrangements, to the extent that those entitlements are more beneficial to employees than the entitlements under this Division.