

Employers to face employee requests for flexibility, under proposed IR laws

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Employees with children will for the first time have a legislated right to request flexibility in their work arrangements, while employers will have a countervailing right to refuse requests on "reasonable business grounds", if the federal government's new industrial relations bill becomes law.

Introducing the [Fair Work Bill 2008](#) to Parliament yesterday, Workplace Relations Minister Julia Gillard said it "seeks to assist employees to balance their work and family responsibilities by providing for flexible arrangements".

The Bill's explanatory memorandum says that while employees will have the new right to make requests, employers "are able to refuse access to these provisions on reasonable business grounds, which will minimise the disruption of these provisions to business".

It recognises that employers might incur "some minor administrative cost" in considering employees' requests for flexible working hours, however it expects this to be offset by "the benefits to employers such as increased staff retention and loyalty".

Indeed, businesses that are able to offer flexible working arrangements may benefit by being viewed favourably as an 'employer of choice', it says.

The Bill does not identify what will be considered "reasonable business grounds" for the refusal of a request under the NES - reasonableness will be assessed in the circumstances that apply when the request is made.

The EM says reasonable business grounds might include, for example:

- 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; or
- 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.

Further guidance on "reasonable business grounds" is expected to be published by Fair Work Australia, the body replacing the AIRC.

Employment standards cover everyone

The Bill's "safety net" for workers comprises the National Employment Standards (NES) and "modern awards".

The NES will apply to all employees and guarantee:

1. **maximum weekly hours of work** - the NES will provide for the same quantum of maximum ordinary hours of work (38 hours for full-time employees) as provided under existing legislation, while also providing for maximum ordinary hours for part-time employees. A modern award or enterprise agreement may provide for averaging of hours of work, and where additional hours worked are based on an averaging arrangement, they will be subject to reasonableness factors;
2. **a right to request flexible working arrangements** - parents and guardians of a child under school age will have a legislated entitlement to request a change in working arrangements to assist with the care of the child. An employer will only be able to refuse this request on reasonable grounds, and the employer's decision will not be subject to review;

3. **parental leave and related entitlements** - both parents will have a right to separate periods of up to 12 months' unpaid parental leave. Alternatively, one parent will have the right to request an additional 12 months of leave, which employers will only be able to refuse on reasonable business grounds;
4. **annual leave** - employees will have the same coverage and quantum of annual leave as under the current laws, however a key change is a simpler manner of accrual and the concept of "service" for calculating the entitlement. Paid annual leave will accrue and then be taken on the basis of an employee's ordinary hours of work;
5. **personal/carer's leave and compassionate leave** - the same quantum of the entitlement to personal/carer's leave and compassionate leave will apply, but the NES also extend unpaid compassionate leave to casual employees. In addition, the number of paid carer's leave days which can be used is no longer capped at 10 per year;
6. **community service leave** - employees will have an entitlement to take unpaid leave to undertake an eligible community service activity such as jury service or voluntary emergency management. Employers will be required to provide make-up payments (up to 10 days) for employees undertaking jury duty;
7. **long service leave** - initially, the NES will draw on current state and territory arrangements for long service leave. Meanwhile, the Government will work with state and territory governments to develop nationally consistent long service leave entitlements;
8. **public holidays** - the Queen's birthday holiday will be prescribed as a public holiday under the NES (it is not currently prescribed under the WR Act). Under the NES, an employer may make a reasonable request for an employee to work on a public holiday, however an employee may refuse to work if they have reasonable grounds;
9. **notice of termination and redundancy pay** - the NES will provide for written notice of termination and redundancy pay. They provide a new entitlement to redundancy pay, depending on the level of continuous service by an employee. This NES does not apply to employees of a small business; and
10. **provision of a Fair Work Information Statement** - from 1 January 2010 an employer will be required to give the Fair Work Australia Information Statement to all new employees. However, unlike the Workplace Relations Fact Sheet, there will no longer be a statutory requirement to give the statement to existing employees.

"High earners" not covered by modern awards

The second arm of the proposed safety net will be "modern awards". These will not apply to employees earning over \$100,000 a year. The Government believes that these workers can negotiate their own arrangements and do not require the same level of safety net protection as lower paid employees, the EM says.

Modern awards will be required to contain:

- an award flexibility term;
- a dispute resolution term;
- terms providing ordinary hours of work;
- terms about rates of pay for pieceworkers (where necessary);
- terms identifying shift workers eligible for five week's of annual leave under the NES; and
- terms facilitating the automatic variation of allowances.

All employees protected from unfair dismissal

Another major change from the Work Choices regime is the proposed protection from unfair dismissal of *all* workers.

The new Bill removes the 100-worker exemption from unfair dismissal protection. Employees of a small business (<15 employees) will be required to serve a qualifying period of 12 months before being eligible to claim for unfair dismissal, while for larger businesses the qualifying period is six months.

"Operational reasons" will no longer be a defence to a claim of unfair dismissal, however a dismissal will not be found unfair if it is for reasons of genuine redundancy.

The Bill also provides for the publication of a *Small Business Fair Dismissal Code* which, if followed, will ensure a dismissal is not found unfair. The Code requires employers to warn employees about poor performance and give them a reasonable opportunity to improve.

An end to "chopping and changing"?

Speaking last Friday at an event hosted by Harmers Workplace Lawyers, IR expert Professor Ron McCallum said it would be a mistake to use Work Choices as the reference point for balance when considering the new legislation, because Work Choices was "so unbalanced and so wrong".

A better measure is whether it addresses the natural imbalance of power in the employer/employee relationship, he said.

McCallum said the new legislation is likely to mark the end of 20 years of "chopping and changing" of industrial laws.

"This 20 years of siege warfare winner-take-all narcissistic politics may be over for a while and we can all get on with the true role of labour relations law - which is to provide a bedrock of rules to allow employees to work fairly for a fair day's pay, for employers to receive their labour and remunerate them with adequacy, fairness and dignity."

McCallum's criticisms of the Bill (prior to its release) include that the \$100,000 cap for award coverage is "extraordinarily low" and that it will capture a large number of people if it includes superannuation and car allowance.

He also said he was unconvinced that the "anti-lawyer bias" in the legislation's unfair dismissal provisions and its "quick fix process" would really advantage employees. However, he welcomed the return of unfair dismissal remedies for most employees under Labor.

Implementation

The Government is seeking to get the Bill through the House of Representatives within a fortnight, before it goes to a Senate inquiry, which is expected to report in February.

The first elements of the legislation, if passed, will take effect from July next year, with most of the remainder taking effect on January 2010.