

August 2009

A FLOOD OF FLEXIBILITY

Introduction

One of the objects of the *Fair Work Act 2009* ("FWA") is to assist *"employees to balance their work and family responsibilities, by providing for flexible working arrangements"*.

The FWA has a number of provisions that go some way in assisting employees to achieve the right balance between their work life and personal life. However, these provisions are often limited in their scope and the employees to whom they apply. There are two principal ways in which the FWA gives employees an opportunity to seek flexible working arrangements. Firstly, through a right to request a change in their working arrangements. Secondly, through the creation of "individual flexibility arrangements". In this Employment Alert, we will briefly review each of these provisions and their limitations. We will then review a recent study which looks at flexible working arrangements and the extent to which they are currently being used in the workplace.

Fair Work Flexibility Provisions

The FWA provides a number of opportunities for employees to achieve flexible working arrangements:-

1. **National Employment Standards**

The right to request flexible working arrangements is one of the 10 National Employment Standards ("NES") found in Part 2.2 of the FWA.

The flexibility standard provides that a person who is the parent or carer of a child under school age, or a child under 18 who has a disability, can request the employer to change their working arrangements in order to assist them in caring for that child. Only employees with at least 12 months service can make a request. The employee must put the request in writing, and the employer must respond within 21 days.

The employer can only refuse a request for flexible working arrangements on reasonable business grounds. There is no appeal mechanism if the employer refuses the request. This right to request will not come into effect until the NES commences operation on 1 January 2010.

2. **Individual Flexibility Arrangements for Award Covered Employees**

The FWA provides that all modern awards must contain a flexibility term that allows an employer and an employee to enter into an individual flexibility arrangement ("IFA"). These arrangements allow the employer and employee to vary the effect of the award as it relates to them in order to meet their genuine needs. The FWA mandates that the employee must be better off overall as a result of an IFA. By their very nature, these arrangements are limited to award covered employees who wish to vary the award provisions that apply to them. The FWA require IFAs to be in writing and signed by the employer and employee. The provisions relating to IFAs

for award employees will not come into effect until the modern awards created under the FWA commence operation on 1 January 2010.

The award flexibility terms currently being inserted into the draft modern awards limit the areas in which IFAs can be entered into, to the following:-

- (a) Arrangement for when work is performed;
- (b) Overtime rates;
- (c) Penalty rates;
- (d) Allowances;
- (e) Leave loading.

The current draft flexibility terms also require employers wanting to initiate IFAs to provide a written proposal to the employee. Termination of IFAs is also provided for, on 28 days notice when initiated by one of the parties, or at any time by written agreement between the parties.

3. Individual Flexibility Arrangements for Employees Covered by Enterprise Agreements

Employees covered by enterprise agreements can also achieve some flexibility in relation to the agreement. All enterprise agreements must include a flexibility term that allows an employer and an employee to enter into an IFA. These arrangements enable the effect of the agreement, as it relates to the individual employee, to be varied. If an enterprise agreement does not contain a flexibility term, then the model clause provided for in the *Fair Work Regulations 2009* will apply. The FWA provides that an IFA varying an enterprise agreement must be about matters that would be permitted in an enterprise agreement and cannot include any terms that would be unlawful if they were contained in an enterprise agreement. These IFAs are limited to employees who are covered by an enterprise agreement and who wish to vary the terms of the agreement as it relates to them.

While the flexibility provisions contained in the FWA are fairly extensive, they are limited in their scope. As can be seen from above, not all employees will be able to achieve flexible working arrangements.

Flexibility Provisions in the Equal Opportunity Act 1995 (Vic)

Changes to the *Equal Opportunity Act 1995* ("EOA") that came into effect on 1st September 2008 mean that an employer must not unreasonably refuse to accommodate the responsibilities that a person has as a parent or carer, in relation to their work arrangements. A complaint can be made to the Victorian Equal Opportunity and Human Rights Commission against an employer who unreasonably refuses to accommodate an employee's parent or carer obligations. For more detail on the EOA provisions refer to our September 2008 [Employment Alert](#).

Flexibility in the Workplace Today

Despite the fact that the FWA flexibility provisions are limited in their scope, and in a large part not yet operational, many employers and employees are entering into flexible workplace arrangements. These arrangements are wide ranging and not necessarily limited to the

categories of employees covered by the FWA provisions. A recent study ¹ of 2,691 workers has shown that 22.4% of employees surveyed had made a request for flexible working arrangements. The study showed that almost twice as many women made requests than men (29.1% compared to 16.3%).

The requests were for a range of reasons including study (15.5%), childcare responsibilities (15.3%) and spending more time with family (11.2%). Most requests from women related to their parenting responsibilities.

The study also showed that employers were generally accommodating their employees' need for flexibility with 83.2% of requests being granted either in full or in part.

Conclusion

The busy lives that employees lead today has heightened the need for flexible working arrangements. The FWA has provided for a number of ways in which an employee can seek to achieve flexible working arrangements. However, the categories of employees to which the legislative provisions apply are limited. The study by Barbara Pocock and others reveals that employers and employees are already entering into a broad range of flexible working arrangements. Many employers have come to realise that in order to keep valued employees they must provide flexible working arrangements in order to allow the employees to achieve a work life balance.

For further advice and guidance on flexible working arrangements, contact the Workplace Relations Department of Moores Legal.

¹ Work, life and workplace flexibility: The Australian Work and Life Index 2009 by Barbara Pocock, Natalie Skinner and Reina Ichii, Centre for Work and Life, University of South Australia - July 2009.

The Moores Legal Workplace Relations Team

For further advice and guidance on any employment issue and how it may impact your business and commercial operations contact the Workplace Relations team at Moores Legal.

Tim Adam
Principal
Tel: (03) 9843 2105
Email: tadam@mooreslegal.com.au

Peter Andrew
Consultant
Tel: (03) 9843 2108
Email: pandrew@mooreslegal.com.au

Frances Anderson
Senior Lawyer
Tel: (03) 9843 2122
Email: fanderson@mooreslegal.com.au

Leanne Tully
Senior Lawyer
Tel: (03) 9843 2127
Email: ltully@mooreslegal.com.au

DISCLAIMER: This Employment Alert is of a general nature only. Specific legal advice should be sought rather than relying on this Newsletter.