

Flexible Work Arrangements under the Equal Opportunity Act 1995 (Vic)

January 2009

Employers must accommodate responsibilities

The *Equal Opportunity Act 1995* (Vic) ("**EOA**") was amended with effect from 1 September 2008 to prohibit employers, in relation to work arrangements, from unreasonably refusing to accommodate the responsibilities that an employee, or prospective employee, has as a parent or carer. A similar prohibition applies to a principal in respect of workers hired through a labor hire firm and, also, in respect of a partner, or a person invited to be a partner, of a firm of 5 or more partners.

Employees have an extended definition under the EOA to include contractors.

The change should cause employers to review their policies and practices to ensure compliance – in effect, the change imposes an obligation on employers to accommodate reasonable requests for flexible arrangements by parents and carers. This is quite different in concept to other obligations under the EOA which prohibit direct or indirect discrimination on the basis of an attribute, such as sex or disability.

A failure to comply with the legislation exposes an employer to orders for compensation and for injunctive relief.

Unreasonable refusal by employers

In assessing what is reasonable, all relevant facts and circumstances are considered, including:

- the person's circumstances, including the nature of his or her responsibilities as a parent or carer;
- the nature of the role that is on offer;
- the nature of the arrangements required to accommodate those responsibilities;
- the financial circumstances of the employer;

- the size and nature of the workplace and the employer's business;
- the effect on the workplace and the employer's business of accommodating those responsibilities, including:
 - the financial impact of doing so;
 - the number of persons who would benefit from or be disadvantaged by doing so;
 - the impact on efficiency and productivity and, if applicable, on customer service of doing so; and
- the consequences for the employer of making such accommodation; and
- the consequences for the person of not making such accommodation.

Parent or carer

A parent includes a biological parent, a step-parent, adoptive parent, foster parent and guardian. Carer means a person on whom another person is wholly or substantially dependent for ongoing care and attention, other than a person who provides that care and attention wholly or substantially on a commercial basis.

Guidelines

A document entitled "Building Equality in the Workplace: Family Responsibilities – Guidelines for Employers and Employees" has been published by the Victorian Equal Opportunity and Human Rights Commission and Industrial Relations Victoria. The Guidelines outline the changes and offers information of relevance for both employers and employees.

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The Guidelines suggest that flexible working arrangements may include:

- working part-time or working agreed hours over fewer days;
- job sharing;
- starting and finishing earlier or later;
- working from home;
- changing hours of work, break times, rosters or timing of meetings;
- extending unpaid leave where paid leave entitlements have been exhausted;
- changing the need for work travel and the need for overnight stays; or
- allowing an employee to work additional hours to make up for time taken for parental or carer reasons without loss of pay.

Policies

To manage legal risk arising from the changes it is advisable for employers to develop policies on flexible work arrangements and train employees on their implications. The policies should cover at least:

- the obligations of the employer;
- how requests for flexible work arrangements may be made;
- how requests will be processed, including the provision of information and consultation;
- if the request is granted, how the arrangement will be recorded and reviewed;
- how co-workers will be informed about the arrangements;
- how work will proceed, including changes to communications, under any new arrangements, and
- processes to ensure that the affected employee is involved in workplace communications and activities, including means of facilitating attendance at meetings and training.

National Employment Standard (NES)

The Federal Government has introduced into the Parliament the Fair Work Bill 2008 which, if passed, will introduce a National Employment

Standard (NES), with effect from 1 January 2010, enabling parents and carers to request flexible working arrangements in relation to children. The Fair Work Bill 2008 will cover most Victorian employers.

However, the scope of the proposed Standard is narrower than the provisions in the EOA. In particular, the proposed NES:

- only applies in respect of the care of children under school age;
- will only be available to full-time or part-time employees who have completed at least 12 months continuous service or a long-term casual employee who has a reasonable expectation of continuing employment on a regular and systematic basis.

Because of the more limited operation of the NES, most Victorian employers will principally have regard to the broader obligations under the EOA in dealing with flexible work arrangements of parents and carers.

Other Obligations

In managing work arrangements, employers should also have regard to any contractual obligations, and any prohibited direct or indirect discrimination under the EOA or Federal anti-discrimination legislation on the basis of an attribute, such as family responsibilities, sex, parental status or status as a carer.

Implications

Victorian employers need to be sensitive, more so now than ever before, to ensure that requests for flexible working arrangements are carefully considered and, if refused, that there are defensible grounds on which to do so.

Employers should ensure that their policies and procedures are updated to reflect the changes, and that staff have been appropriately trained.

For further information, assistance with policies and training, or advice contact:

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