Upcoming changes to state employment laws in WA

Flexible working arrangement requests

A new minimum condition providing employees with an entitlement to request a flexible working arrangement is being introduced in the state industrial relations system.

The new provisions in the *Minimum Conditions of Employment Act 1993* (MCE Act) and the *Industrial Relations Act 1979* (IR Act) have been introduced by the *Industrial Relations Legislation Amendment Act 2024* and will commence on 31 January 2025.

This fact sheet outlines how employees can make requests, how employers should respond, and what happens if employees and employers cannot reach agreement.

Who can make a request?

A written request for a flexible working arrangement can be made by an employee with at least 12 months' continuous service immediately before making the request. This includes a casual employee where they have been employed on a regular and systematic basis for at least 12 months and there is a reasonable expectation that this will continue. A request for a change in working arrangements can only be made because of and in relation to specific circumstances, and the circumstances must exist at the time the request is made. The specified circumstances are:

- the employee is pregnant;
- the employee is the parent of, or has responsibility for the care of, a child who is of school age or younger;
- the employee is a carer (as defined in the *Carers Recognition Act 2004*);
- the employee has a disability;
- the employee is 55 years of age or older;
- the employee is experiencing family and domestic violence; or
- the employee provides care or support to a member of the employee's family or household who requires care or support because the member is experiencing family and domestic violence.

State employment laws are changing

This fact sheet is part of a suite of information on the changes to state employment laws that will commence on 31 January 2025. For details on the changes visit www.demirs.wa.gov.au/new-employment-laws.

What can an employee request?

A flexible working arrangement request may include (but is not limited to) changes to the employee's:

- hours of work, including working on fewer days or for fewer hours, or both; and/or
- pattern of work, including working on different days or at different times, or both; and/or
- location of work.

A request must be in writing and set out:

- the flexible working arrangement sought; and
- the reasons for seeking that arrangement; and
- which of the specified circumstances apply to the employee.

How must an employer respond?

The employer must give the employee a written response within 21 days. The response must:

- state that the employer grants the request; or
- if, following discussions, the employer and employee agree to alternative changes to the employee's working arrangements from those set out in the request – set out the agreed changes; or
- state that the employer refuses the request and:
    - include details of the reasons for the refusal; and
    - set out the employer's particular business grounds for refusing the request and explain how those grounds apply to the request; and
    - either set out any alternative changes in the employee's working arrangements that the employer would be willing to make, or state that there are no such changes; and
    - advise the employee of the flexible working arrangement dispute settlement process, including referral rights to the Western Australian Industrial Relations Commission (WAIRC).

An employer may refuse a request only if:

- the employer has discussed the request with the employee and genuinely tried to reach an agreement about making changes to the employee's working arrangements to accommodate the employee's circumstances; and
- the employer and employee have not reached such an agreement; and
- the employer has considered the consequences of the refusal for the employee; and
- there are reasonable business grounds for refusing the request.

What are reasonable business grounds?

Reasonable business grounds for refusing a flexible working arrangement request include the following:

- the requested arrangement would be too costly for the employer;
- there is no capacity to change the working arrangements of other employees to accommodate the requested arrangement;
- it would be impracticable to change the working arrangements of other employees, or recruit new employees, to accommodate the requested arrangement;
- the requested arrangement would be likely to result in a significant loss to the employer's efficiency or productivity;
- the requested arrangement would be likely to have a significant negative impact on customer service.

An employer may also refuse a request if agreeing would contravene an applicable industrial instrument. For example, where a WA award or industrial agreement sets a daily span of hours and provides for the payment of overtime or an allowance for the performance of work outside of those hours, an employer and employee cannot make a lawful agreement for the employee to start or finish work outside of the span of hours without payment for overtime or the allowance.

What happens if an employee and employer can't reach agreement?

If an employer fails to respond to an employee's request within 21 days, or an employer refuses an employee's flexible working arrangement request, the employer and employee must make reasonable attempts to resolve the dispute by discussions at the workplace level. The employer and employee may authorise another person or organisation (such as a union or employer organisation) to support or represent them in these discussions.

If:

- an employer failed to respond to an employee's request within 21 days, or an employer has refused an employee's request for a flexible working arrangement; and
- the employer and employee have made reasonable attempts to resolve the dispute at a workplace level,

the dispute can be referred by the employee, employer or an organisation to the WAIRC for conciliation and arbitration. If the WAIRC arbitrates a flexible working arrangement dispute, it may:

- order an employer to respond to an employee's request;
- declare that the grounds on which an employer refused a request are, or are not, reasonable business grounds;
- order an employer to grant the flexible working arrangement request;
- order the employer to make a change in the employee's working arrangements other than that requested to accommodate the employee's circumstances.

The WAIRC may only make an order if it is satisfied that there is no reasonable prospect of the dispute being otherwise resolved and, in making an order, the WAIRC must take into account fairness between the employer and employee.

An employer must comply with any flexible working arrangement order made against them and may be subject to civil penalties, be required to pay compensation to the employee and/or be required to comply with the flexible working arrangement order if the order is contravened.

Enforcement of minimum condition in the Industrial Magistrates Court

Alternatively, an employee could make an application to the Industrial Magistrates Court (IMC) claiming a contravention of the minimum condition of employment relating to flexible working arrangement requests. The IMC can impose civil penalties on an employer for a contravention of a minimum condition and make any other order it thinks appropriate for the purpose of preventing any further contravention of the minimum condition.

If an employee commences proceedings in the IMC regarding a flexible working arrangement request, the onus is on the employer to prove that their refusal of the employee's request complied with the MCE Act, including that the refusal was on reasonable business grounds.

Restriction on multiple actions

An employee has a choice of referring a flexible working arrangement dispute to the WAIRC or making an application to the IMC claiming a contravention of the flexible working arrangement request minimum condition. However, an application to the IMC cannot be made if proceedings related to the same request have been commenced in the WAIRC, unless the proceedings before the WAIRC are withdrawn or fail for want of jurisdiction. Similarly, a dispute cannot be referred to the WAIRC if an application relating to the same matter has commenced in the IMC, unless the proceedings before the IMC are withdrawn or fail for want of jurisdiction.

Disclaimer