Champions for Change

Flexibility and New Zealand legislation

"You have a legal obligation under the Employment Relations Amendment Act (2014) to consider any employee's request for a flexible working arrangement. All levels of your organisation should understand the legislation on workplace flexibility, understand the benefits of flexibility, and have open, 'good faith' based communication."

RENEE GRAHAM
CHIEF EXECUTIVE, MINISTRY FOR WOMEN

"Not only do we have a legal obligation under the Employment Relations Amendment Act (2014), but it's generally just good for business. We have worked in a flexible working environment for more than 10 years now, and as a result of that we've seen employee engagement results that have just kept going higher and higher."

LIAM O'REILLY
CHAMPION AND CEO, PAYMARK

Overview

Employers have a legal obligation under the Employment Relations Amendment Act (2014) (The Act) to provide a process for any employee to request a flexible working arrangement.

This applies to any permanent full or part-time employee, at any stage of their employment lifecycle and for any reason. Arrangements can involve changes to:

- **flexibility of role** – how a role is performed or divided
- **flexibility of place** – working from alternative locations
- **flexibility of work schedule** – working flexible hours
- **flexibility of leave** – supporting flexible leave arrangements.

The Act provides employers and employees with a process to consider the application and come to a decision. Employers must consider these requests 'in good faith', but don't have to agree to them if there's a good business reason not to.

Why flexibility?

Workplace flexibility is an essential enabler for managing the pace of change in today's world of work.

It allows you, as an employer, to attract and retain top talent (your people), achieve increased productivity (your business), and foster an agile response to changing market needs (your customers and environment).

It's a diverse and in-depth strategy that goes beyond the traditional thinking of 'part-time work for new parents' to an integrated mindset and way of work accessible to all.

Legislation in detail

Changes to flexible working arrangements came into effect under the Employment Relations Amendment Act 2014 on 6 March 2015.

The changes included widening the flexible work provisions to include all workers.

The key changes were:

- extending the statutory right to all employees, to request flexible working arrangements (this must be in writing)
- removing the requirement of six months' prior employment with the employer, so that employees can ask for flexibility from their first day on the job
- removing the limit on the number of requests an employee can make in a year
- reducing the timeframe within which an employer must respond to a request from three months to one (with the response to be made in writing including an explanation of any refusal)
- specifying the grounds on which employers can refuse the request
- providing for reference of the matter to a Labour Inspector, then to mediation, and then to the Employment Relations Authority for remedy, if an employer does not deal with a request in accordance with the process specified in Section 69AA of the Act.

Here's how the process could look

Employee initiated requests

It is the responsibility of the employee to make an application in writing (an email is acceptable) and it must make reference to Part 6AAC of the Employment Relations Act 2000.

The application should:

- explain the working arrangement the employee is seeking and whether it is to be permanent or for a set period of time
- state the date that the employee wants the new working arrangement to start and, if the new working arrangement is for a set period of time, state the date the arrangement is to end
- explain why the employee is requesting a flexible working arrangement (e.g. to provide better care for a family member)
- explain what changes (if any) the employer may need to make to the current business arrangements if the request is approved.

Timings for review

Part 6AAE of the Act requires that employers deal with a request within one calendar month of receiving it and sets out certain grounds on which a request can be refused.

Employees must apply to the ERA:

- within 12 months of the employer's refusal of the request, or
- where the request is not responded to, the employee has 13 months from the date that the employer received the employee's request.

An employer who does not comply with the legislation is liable to a penalty not exceeding $2,000, imposed by the Authority (Part 69AAJ).

Reasons why a request may be declined

- inability to reorganise work among existing staff
- inability to recruit additional staff
- detrimental impact on quality
- detrimental impact on performance
- insufficiency of work during the periods the employee proposes to work
- planned structural changes
- burden of additional costs
- detrimental effect on ability to meet customer demand.

What if the request is declined?

If an employee's request is declined, they should be notified by the employer in writing and reasons for that decision given.

There are provisions under the Act to deal with unresolved flexible work arrangements requests (Part 69 AAG, AAH, AAI):

- Informal discussion between the employee and employer
- A formal complaint
- Third party assistance: they can refer the matter to a Labour Inspector who can assist the parties. If the issue is still not resolved the employee can refer the parties to mediation. If mediation doesn't resolve the matter, the employee may apply to the Employment Relations Authority (ERA).

Things to consider

A flexible work arrangement can be changed

If either the employee or employer wants to change the arrangement, including returning to an original working arrangement, this needs to be discussed and agreed by both parties. Neither an employer nor an employee can change an arrangement, without getting agreement from the other person.

Accurate records are essential

Employers need to keep accurate records of the actual hours worked each day, and the days worked.

As an employer, you must keep wage and time, and holidays and leave records that comply with the Employment Relations Act 2000 and the Holidays Act 2003. In particular, you must be able to show that you've correctly given your employees all minimum employment entitlements such as the minimum wage and annual holidays.

Get your calculations right

Leave calculations must include certain regular and additional payments. Not including these payments often leads to underpayments.

Employers must pay at least the amount identified in the Act. Using a 'standard rate' for any time off work can lead to non-compliance if the rate is lower than prescribed.

Part-time employees entitlements are effectively pro-rated. These employees are not casual workers and are entitled to leave and holidays.

ADDITIONAL INFORMATION AND ACCESS TO TEMPLATES:

Introduction to holidays and leave
Annual leave

ADDITIONAL INFORMATION AND A CALCULATION TOOL:

Keeping accurate records
Holiday tool

FURTHER RESOURCES:

The full legislative provisions are available at Employment Relations Act 2000 No 24 (as at 31 March 2017), Public Act Part 6AA Flexible working – New Zealand Legislation.

Guidance on the process can be found at Employment New Zealand on the Ministry of Business Innovation and Employment website.

MBIE: Introduction to holidays and leave

MBIE: Annual Leave

Employment New Zealand: Keeping accurate records

Employment New Zealand: Holiday tool

GLOBAL WOMEN

Convened and supported by Global Women, Champions for Change is a group of New Zealand CEOs and Chairs from across the public and private sectors who are committed to raising the value of diversity and inclusiveness throughout the wider business community.

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