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**CIRCULAR:** GEN/071/NAT/071/18  
**DATE:** Thursday 29 November  
**SUBJECT:** New Award Clause Re: Flexible Working Arrangements  
**ATTENTION:** Chief Executive Officer

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The Fair Work Commission will insert a new model award term in *all* modern awards in relation to flexible working arrangements. The new clause will supplement the NES entitlement to request a flexible working arrangement and will provide further prescription as to how an employer must deal with and respond to such requests. The clause will come into effect on 1 December 2018.

### THE REQUIREMENTS UNDER THE NEW CLAUSE

The entitlement to make a request for a flexible working arrangement will remain under the NES. The new clause provides for additional detail about how employers (who are covered by a modern award) must *respond* to such requests.

Where an employee makes a request for changes in his/her working arrangements, *before responding* to the request, the new model clause will require the employer to discuss the request with the employee and genuinely attempt to reach an agreement which will reasonably accommodate the employee's circumstances have regard to:

- the needs of the employee in their circumstances;
- the consequences for the employee if changes to their working arrangements are not made; and
- any reasonable business grounds for refusing the employee's request.

After such discussions, if the employer refuses the request, (which must be based on reasonable business grounds) the employer must respond in writing and outline the reason/s for refusal. This written response must be provided within 21 days of the request being made and, under the new clause, include:

- details of the reasons for the refusal, including business ground/s and how they apply; and
- if the employer is unable to agree to the request, the response must include any available changes that the employer *can offer* in order to better accommodate the employee's circumstances.

If a different change in working arrangements is agreed to by the employer and the employee, the employer must provide a written response to the request setting out the agreed changes to working arrangements.

Disputes about whether the employer has discussed and responded to a request in the manner required by the model clause will fall under the dispute resolution clause of the relevant modern award.

The model clause is at **Appendix 1**.

If you have any questions or if you require further information, please contact the SIAG National Advisory Service on 03 9644 1400 or 1300 (SIAG HR) / 1300 742 447.

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## APPENDIX 1

### Requests for flexible working arrangements

#### **XA.1 Employee may request change in working arrangements**

Clause XA applies where an employee has made a request for a change in working arrangements under s.65 of the Act.

Note 1: Section 65 of the Act provides for certain employees to request a change in their working arrangements because of their circumstances, as set out in s.65(1A).

Note 2: An employer may only refuse a s.65 request for a change in working arrangements on 'reasonable business grounds' (see s.65(5) and (5A)).

Note 3: Clause XA is an addition to s.65.

#### **XA.2 Responding to the request**

Before responding to a request made under s.65, the employer must discuss the request with the employee and genuinely try to reach agreement on a change in working arrangements that will reasonably accommodate the employee's circumstances having regard to:

- (a) the needs of the employee arising from their circumstances;
- (b) the consequences for the employee if changes in working arrangements are not made; and
- (c) any reasonable business grounds for refusing the request.

Note 1: The employer must give the employee a written response to an employee's s.65 request within 21 days, stating whether the employer grants or refuses the request (s.65(4)).

Note 2: If the employer refuses the request, the written response must include details of the reasons for the refusal (s.65(6)).

#### **XA.3 What the written response must include if the employer refuses the request**

Clause XA.3 applies if the employer refuses the request and has not reached an agreement with the employee under clause XA.2.

- (a) The written response under s.65(4) must include details of the reasons for the refusal, including the business ground or grounds for the refusal and how the ground or grounds apply.
- (b) If the employer and employee could not agree on a change in working arrangements under clause XA.2, the written response under s.65(4) must:
  - (i) state whether or not there are any changes in working arrangements that the employer can offer the employee so as to better accommodate the employee's circumstances; and
  - (ii) if the employer can offer the employee such changes in working arrangements, set out those changes in working arrangements.

**XA.4 What the written response must include if a different change in working arrangements is agreed**

If the employer and the employee reached an agreement under clause XA.2 on a change in working arrangements that differs from that initially requested by the employee, the employer must provide the employee with a written response to their request setting out the agreed change(s) in working arrangements.

**XA.5 Dispute resolution**

Disputes about whether the employer has discussed the request with the employee and responded to the request in the way required by clause XA, can be dealt with under clause Y—Dispute Resolution.