



## THE RETURN-TO-WORK ACCELERATION: NAVIGATING EMPLOYEE RIGHTS, LEGAL COMPLIANCE, AND WORKPLACE TRENDS

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### RTO MANDATES – LEGAL COMPLEXITY IN A CHANGING WORKFORCE

The re-emergence of return-to-office (**RTO**) mandates across Australian workplaces reflects a strategic shift by employers seeking to restore face-to-face collaboration and reinforce organisational cohesion. According to Adecco Australia, approximately 70% of employers now adopt hybrid working models, with two to four days per week in the office increasingly becoming the “norm”. However, this recalibration is occurring within a radically altered legal and cultural environment. Flexible work is no longer viewed as a discretionary privilege, but rather an embedded feature of modern employment. Employers must now balance commercial imperatives against heightened statutory scrutiny, evolving employee expectations, and legal obligations arising under contract, enterprise agreements, modern awards, and statute. Rigid or generalised mandates that disregard individual circumstances are unlikely to withstand legal scrutiny.

### LAWFUL AND REASONABLE DIRECTIONS: UNDERSTANDING THE LEGAL TEST

Under the common law, an employer may issue directions that are both lawful and reasonable to their employees. This test is conjunctive and context specific.

A direction is:

1. Lawful if it does not contravene any law including, but not limited to, the terms of a contract, industrial instrument and/or statutory provisions.

2. Reasonable if it is proportionate, factually grounded, and appropriate in the context of an employee’s duties.

In the RTO context, directions are more likely to be reasonable where:

- The role necessitates in-person attendance;
- Documented performance concerns exist; or
- Remote work demonstrably compromises operational efficiency.

Conversely, RTO mandates may be unreasonable where:

- The employee has consistently met performance expectations while working remotely;
- The role is not inherently site-based;
- The mandate is applied uniformly without consideration of personal circumstances.

Directions that contravene the *Fair Work Act 2009* (Cth) (**Fair Work Act**) or the *Disability Discrimination Act 1992* (Cth) (**Disability Discrimination Act**) – for instance, by failing to reasonably accommodate a flexible work request or refusing reasonable adjustments – may not be lawful or reasonable.

We explore below the key obligations arising under the Fair Work Act and the Disability Discrimination Act, which are among the most commonly engaged legislative frameworks in the context of RTO mandates. However, these are not exhaustive. Employers must also be mindful of obligations arising under state and territory anti-discrimination laws, industrial instruments (such as modern awards or enterprise agreements), and work health and safety legislation, all of which may be relevant depending on the circumstances.



## FLEXIBLE WORK REQUESTS UNDER THE FAIR WORK ACT 2009 (CTH)

From 6 June 2023, the Fair Work Act introduced more robust obligations for employers in relation to flexible working requests. Pursuant to section 65 of the Fair Work Act certain employees have the right to request flexible working arrangements including arrangements to work remotely if they:

1. Have at least 12 months of continuous service with the employer to whom the request is made (or be a long-term regular casual with a reasonable expectation of continuing work); and
2. Are a parent/carer, a person with a disability, aged 55 or older, experiencing family violence, or caring for someone who is.

Following a flexible work request, employers must:

- Respond in writing within 21 days;
- Genuinely consult before refusing a request; and
- Only refuse on reasonable business grounds, which is defined under s 65A of the Fair Work Act to include matters such as significant cost, impracticality, or impact on productivity or service.

Critically, reasons for refusal must be tailored to the specific role and circumstances. Generalised or blanket refusals are unlikely to meet the statutory threshold of reasonableness.

The Fair Work Commission (**FWC**) has reinforced the importance of a documented, consultative, and evidence-based process. Employers must move beyond policy preference and support any refusal with clear, role-specific justification. For example, in *Ridings v FedEx Express Australia Pty Ltd* [2024] FWC 1845, Mr Peter Ridings, a Clearance Classifier, requested to work from home full-time to care for his wife and two children, each

of whom lives with disability. FedEx refused the request based on broad operational concerns but failed to consult meaningfully or provide evidence specific to Mr Ridings' role. The FWC found the refusal deficient and imposed a hybrid arrangement – three days remote, one day in-office – subject to review. A detailed analysis of this decision is available in our client alert published [here](#).

## A DEVELOPING TREND: PROPOSED WORK FROM HOME CLAUSE IN THE CLERKS AWARD

The FWC is currently considering a proposed work-from-home clause for inclusion in a modern award, namely the *Clerks – Private Sector Award 2020*. If adopted, it would introduce structured consultation and approval processes for remote work, applicable to award-covered clerical employees, regardless of eligibility under section 65 of the Fair Work Act. This development reflects a broader move towards codifying flexible work entitlements and regulating remote arrangements beyond managerial discretion.

## ANTI-DISCRIMINATION RISK: REASONABLE ADJUSTMENTS UNDER THE DISABILITY DISCRIMINATION ACT 1992 (CTH)

Employers should be mindful of their obligations under the Disability Discrimination Act, particularly where rigid RTO mandates may adversely affect employees with disabilities.

The Disability Discrimination Act prohibits both direct and indirect discrimination, and requires an employer to provide reasonable adjustments unless doing so would result in unjustifiable hardship.

In the context of RTO mandates, this may include:

- Allowing continued remote or hybrid work;
- Adjusting required hours or physical attendance expectations; and/or
- Implementing technological or environmental adjustments to facilitate performance.



## LOOKING AHEAD: EMBEDDING LEGAL AWARENESS INTO WORKPLACE STRATEGY

Employers should not only assess legal risks of RTO mandates, but also recognise the significant cultural shift in employee expectations and what remote work represents for many employees. For many employees, remote work has facilitated better work-life balance, reduced commuting time and associated costs, and/or enabled them to better meet their family/personal responsibilities, whilst simultaneously allowing them to perform the duties of their role. Recognition of the benefits of remote or hybrid work, and taking a balanced and careful approach, rather than a one size fits all approach to RTO, may have significant retention and attraction benefits and ensure the organisation attracts and retains the best talent. Achieving the right balance requires a careful, consultative and legally informed approach.

## KEY ACTION POINTS FOR HUMAN RESOURCES AND IN-HOUSE COUNSEL

Employers considering RTO mandates may consider taking the following steps to mitigate their legal risk:

1. **Audit RTO mandates and policies for legal compliance:** ensure consistency with employment contracts, industrial instruments, and statutory rights. Avoid blanket or inflexible directives.
2. **Apply the lawful and reasonable direction test:** assess whether the direction is both legally valid and reasonably suited to the specific role and operational setting.
3. **Comply with section 65 of the Fair Work Act:** respond to eligible requests within the required timeframe, consult meaningfully, and ensure any refusal is well-evidenced and tailored.
4. **Monitor developments in award-based remote work regulation:** stay abreast of potential changes to the Clerks Award and other modern awards that may

introduce binding consultation and approval processes for work-from-home arrangements.

5. **Implement reasonable adjustments under the Disability Discrimination Act:** proactively assess and document possible adjustments where disability-related issues are raised.
6. **Maintain contemporaneous records:** keep detailed documentation of consultations, decisions, and rationale to support any future defence.
7. **Educate HR and managers:** provide training on legal requirements, the evolving concept of “reasonableness,” and how to manage flexible work requests lawfully and fairly.

If you require legal advice or assistance, please contact Harmers Workplace Lawyers team on + 61 2 9267 4322.

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