

Factsheet

Casual employees and reforms to the Fair Work Act

Definition of 'casual employee'

With the passing of The Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2021 (**Bill**) a statutory definition of 'casual employee' will be introduced into the *Fair Work Act 2009* (Cth) (**Fair Work Act**). The term casual employee was not previously defined in the Fair Work Act, with its meaning developing over an extended period through case law.

A person will now be defined to be a 'casual employee' if:

- the employer makes an offer of employment on the basis that there is 'no firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person';
- the person accepts the offer on that basis; and
- the person becomes an employee as a result of that acceptance.

In determining whether at the time the offer is made, the employer makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of work, the following considerations are taken into account:

- whether the employer can elect to offer work and whether the person can elect to accept or reject work;
- whether the person will work only as required;
- whether the employment is described as casual employment; and
- whether the person will be entitled to a casual loading or a specific rate of pay for casual employees under the terms of the offer or a Fair Work instrument.

A regular pattern of hours will not, of itself, indicate a firm advance commitment to continuing and indefinite work according to an agreed pattern of work.

The question of whether a person is a casual employee is to be assessed on the basis of the offer of employment and the acceptance of that offer, not on the basis of any subsequent conduct of either party.

A person who commences employment as a result of acceptance of an offer of casual employment will remain a casual employee of the employer until:

- the employee's employment is converted to full-time or part-time employment through the casual conversion process; or
- the employee accepts an alternative offer of employment (other than as a casual employee) by the employer and commences work on that basis.

Obligation on an employer to offer casual conversion

In addition to the existing casual conversion rights in some modern awards and enterprise agreements, the Bill introduces a statutory obligation for employers to offer eligible casual employees the ability to convert to full or part-time employment.

Requirements for conversion offer

An employer must make an offer to a casual employee (as defined – see above) if:

- the employee has been employed by the employer for a period of 12 months from the day the employment started; and
- during at least the last six months of that period, the employee has worked a regular pattern of hours on an ongoing basis which, without significant adjustment, the employee could continue to work as a full-time employee or a part-time employee (as the case may be).

In those circumstances a written offer of conversion must be given by the employer to the employee within 21 days after the end of the 12 month period.

Acceptance or rejection

An employee must respond in writing to any such offer within 21 days, and where an employee fails to respond, then they are taken to have rejected the offer.

If an employee accepts the offer, the employer must within 21 days of the acceptance, give written notice to the employee of the following:

- whether the employee is converting to full-time employment or part-time employment;
- the employee's hours of work after the conversion takes effect; and
- the day the employee's conversion to full-time employment or part-time employment takes effect.

Prior to giving that notice following acceptance, the employer must first discuss those matters with the employee concerned.

Reasonable business grounds for not offering conversion

Importantly an employer is not required to make an offer of conversion if there are reasonable business grounds not to do so, based on facts that are known, or reasonably foreseeable, at the time of deciding not to make the offer. Those reasonable business grounds include:

- the employee's position will cease to exist in the next 12 months;
- the hours of work which the employee is required to perform will be significantly reduced in the next 12 months;
- there will be a significant change in the next 12 months to the days on which the employee works and/or the hours of work, which cannot be accommodated within the days/times the employee is available to work; or
- making the offer would not comply with a recruitment or selection process required by or under a law.

Where an employer decides to not make an offer of casual conversion to an eligible casual employee, then the employer must advise the employee in writing of that decision and include details of the reasons for not making the offer.

Right of employee to request conversion

There is also a residual right of conversion in certain circumstances for employees who have not received or accepted an offer to convert from their employer

Requirements for conversion request

A casual employee may make a conversion request to an employer if:

- the employee has been employed by the employer for a period of at least 12 months;
- the employee has in the period of six months worked a regular pattern of hours on an ongoing basis which, without significant adjustment, the employee could continue to work as a full-time employee or a part-time employee (as the case may be);
- the employee has not refused a conversion offer in the last 6 months;
- the employer has not given the employee a notice that a conversion offer will not be made on reasonable business grounds in the last 6 months;
- the employer has not responded to a previous employee request in the last six months; and
- the request is not made during the period of 21 days of the employer's offer (which was refused).

Any employee request must be given in writing and the employer must grant or refuse the request in writing within 21 days.

Grant or refusal

An employer must respond in writing to any such request within 21 days of receipt, stating whether it grants or refuses the request.

An employer may only refuse an employee request after the employer has consulted with the employee, and on the basis of reasonable business grounds (see above) based on facts that are known, or reasonably foreseeable, at that time. Any refusal must be in writing and include details of the reasons for refusing the request.

If an employer grants the request, the employer must within 21 days (or at the same time as granting the request) give written notice to the employee of the following:

- whether the employee is converting to full-time employment or part-time employment;
- the employee's hours of work after the conversion takes effect; and
- the day on which the employee's conversion to full-time employment or part-time employment takes effect.

Prior to giving that notice following acceptance, the employer must first discuss those matters with the employee concerned.

The commencement day must be the first day of the employee's first full pay period after that notice is given, unless agreed otherwise.

<p>Casual loading and double dipping</p>	<p>In the event that an ongoing employee is misclassified as a casual, the Bill provides for a casual loading amount to be offset against claims for leave and other entitlements in certain circumstances, to better address any potential for 'double dipping' when recognising the employee's correct classification.</p> <p>Where:</p> <ul style="list-style-type: none"> • a person is employed by an employer in circumstances where the employment is described as casual employment; • the employer pays the person an identifiable amount (the loading amount) to compensate them for not having one or more relevant entitlements (see below); • during that period the person was not a casual employee (such as determined by a Court); and • the person makes a claim to be paid an amount for one or more of the relevant entitlements with respect to the employment period, <p>then a Court must reduce (but not below nil) the claim amount by an amount equal to the loading amount paid.</p> <p>Importantly, such a reduction will be guided by various considerations, including whether the employment contract specifies the proportion of the loading amount attributable to each entitlement. Employers will need to update their current contract templates to ensure that they are in line with these new provisions and they can properly rely on this new right.</p> <p>In this context a 'relevant entitlement' includes an entitlement under the National Employment Standards, a Fair Work instrument or a contract of employment in relation to annual leave, personal/carer's leave, compassionate leave, absence on a public holiday, a payment in lieu of notice of termination, and redundancy pay.</p>
<p>Casual Employment Information Statement</p>	<p>The Bill also requires casual employees to be provided with a Casual Employment Information Statement, which is to be published by the Fair Work Ombudsman. This statement will focus on the right of casual employees to convert.</p> <p>A statement must be given to each casual employee before or as soon as practicable after they commence employment, but only has to be provided once in any 12 month period.</p>

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