

Casual employment advice for ‘small business employers’

SUMMARY

This advice about casual employment matters is for employers that meet the definition of a ‘small business employer’ under the *Fair Work Act 2009* (FW Act). Under section 23 of the FW Act, an employer is a ‘small business employer’ at a particular time if the employer employs fewer than 15 employees at that time.

Casual employment advice for employers who are not ‘small business employers’ was provided in Employer Advice [NAT 043/21](#) and [NAT 055/21](#).

The casual employment amendments to the FW Act

The *Fair Work Amendment (Supporting Australia’s Jobs and Economic Recovery) Act 2021* amended the National Employment Standards (NES) in the FW Act to make important changes to casual employment laws in Australia. The amendments were operative from 27 March 2021.

The amendments to the FW Act:

- Define a ‘casual employee’ for the purposes of the entitlements in the NES;
- Protect employers from ‘double-dipping’ claims by casual employees and ex-employees for annual leave and other entitlements of permanent employment;
- Require employers to give each casual employee a copy of a Casual Employment Information Statement; and
- Give casual employees the right to convert to permanent employment in some circumstances.

In some areas, different legislative provisions apply to ‘small business employers’ than those that apply to other employers, including in respect of:

- Casual conversion rights of employees; and
- The timing of when the Casual Employment Information Statement needs to be given to casual employees who were employed prior to 27 March 2021.

What is the definition of a ‘casual employee’ in the FW Act?

A person is a ‘casual employee’ for the purposes of the entitlements in the NES, if:

- (a) an offer of employment made by the employer to the person is made on the basis that the employer makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person; and*
- (b) the person accepts the offer on that basis; and*
- (c) the person is an employee as a result of that acceptance.*

For the purposes of determining whether the above conditions have been met, the FW Act states that regard must be had only to the following four considerations:

- (a) *whether the employer can elect to offer work and whether the person can elect to accept or reject work;*
- (b) *whether the person will work as required according to the needs of the employer;*
- (c) *whether the employment is described as casual employment;*
- (d) *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.*

Importantly, the FW Act clarifies that:

- In determining whether a person is a casual employee this “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 “regular pattern of hours does not of itself indicate a firm advance commitment to continuing and indefinite work according to an agreed pattern of work”; and
- The new definition applies to offers of employment that were given before, on or after the commencement of the legislation.

What wording should be used in employment contracts for ‘casual employees’?

Given the above definition of a ‘casual employee’ in the legislation, employment contracts offered to a person for employment as a casual employee should:

1. State that the offer is for employment as a ‘casual employee’;
2. State that the offer of employment is made by the employer to the person on the basis that the employer “makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of work” for the person;
3. Specify the amount of the casual loading or specific casual rate of pay;
4. State that the employer can elect to offer work and that the employee can elect to accept or reject work;
5. State that the employee will work as required according to the needs of the employer; and
6. Not contain any provisions that are inconsistent with the above points (e.g. should not contain a guarantee of hours of work).

How does the legislation protect employers against ‘double-dipping’ claims by casual employees?

The legislation provides protection to employers against ‘double-dipping’ claims by employees and ex-employees who were engaged and paid as casuals but who later claim they are entitled to annual leave and other benefits of permanent employment. It does this by including a provision which allows the amount of the casual loading (or similar) paid to an employee to be offset against any entitlements that the employee claims to be owed.

The legislation also clarifies that service as a casual employee is not counted for the purposes of redundancy pay, notice of termination and various other entitlements of permanent employment, if the casual converts to permanent employment.

What are the obligations of a 'small business employer' to give casual employees the Casual Employment Information Statement?

The legislation requires the Fair Work Ombudsman (FWO) to publish the Casual Employment Information Statement. The Statement can be downloaded here: [PDF version](#); [Word Doc](#).

A 'small business employer' must give each casual employee the Casual Employment Information Statement before, or as soon as practicable after, the employee starts employment as a casual employee with the employer. However, if the employer employs a casual employee more than once in a 12-month period, the employer is only required to give the casual employee the Statement once in the period.

Employers can give the Statement to employees in person, by mail, by email or by emailing a link to the Statement on the FWO's website or on the employer's Intranet.

Providing the Casual Employment Information Statement to each casual employee is in addition to the employer obligation to provide the Fair Work Information Statement to each new employee.

Under transitional provisions in the FW Act, a 'small business employer' must give each casual employee who started their employment before 27 March 2021, the Casual Employment Information Statement as soon as practicable after 27 March 2021.

Failure to provide the Casual Employment Information Statement or the Fair Work Information Statement is a contravention of the NES and may result in financial penalties, as outlined below.

What casual conversion rights are included in the legislation for employees of 'small business employers'?

Where an employee of a 'small business employer' has been employed by the employer for a period of 12 months and, during at least the last 6 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 or part-time employee, the employee can **request** conversion to permanent employment.

If the employee makes such a request, the employer must give the employee a written response to the request within 21 days, stating whether the employer grants or refuses the request. The employer must not refuse the request unless:

- the employer has consulted the employee; and
- there are reasonable grounds to refuse the request; and
- the reasonable grounds are based on facts that are known, or reasonably foreseeable, at the time of refusing the request.

If an employee's request for conversion is reasonably refused by the employer, the employee cannot make a subsequent request for conversion for at least six months.

What options do employers and employees have if a dispute arises about the operation of the casual employment provisions in the NES?

If a dispute arises about the operation of the casual employment provisions in the NES (e.g. a dispute about whether an employee is eligible to convert to full-time or part-time employment):

1. If a modern award applies to the employee, the dispute settlement term in the modern award applies;
2. If an enterprise agreement applies to the employee, the dispute settlement term in the enterprise agreement applies;
3. If the employee is covered by a written agreement between the employer and the employee (e.g. a written employment contract) which includes a term which provides a procedure for dealing with a dispute, that term applies;
4. If points 1, 2 and 3 above do not apply, a party to the dispute may notify the Fair Work Commission (FWC). The FWC can conciliate and, if all parties agree, it can arbitrate.

In addition, the Federal Circuit Court in the small claims jurisdiction is able to make orders relating to the eligibility of an employee to convert to permanent employment.

How do the casual employment provisions of the FW Act interact with those in modern awards?

The legislation requires the FWC, within a six-month period from commencement (i.e. by 27 September 2021), to review the casual employment terms in all awards to ensure they operate consistently or effectively with the provisions in the FW Act.

The FWC's Casual Terms Award Review 2021 is underway and Ai Group is heavily involved in the proceedings. At this stage, the Commission has not determined the variations that will be made to the casual employment provisions in any award.

Record-keeping and pay slip requirements for casuals

Employers should ensure that they are aware of, and comply with, the requirements of the FW Act and *Fair Work Regulations 2009* regarding pay records and pay slips. A summary of various records that are required to be kept was set out in Employer Advice [NAT 055/21](#).

With regard to casual employees who are paid a casual loading, the loading is required to be separately identified in pay records and on pay slips.

Maximum penalties

The maximum penalty for a breach of the FW Act is \$66,600 per contravention, or \$666,000 for a 'serious contravention'.

A reverse onus of proof applies if an employer fails to comply with the pay record and pay slip requirements in the FW Act. In such circumstances, if an employee makes a claim for unpaid entitlements, the employer will be required to disprove the employee's claim in Court, rather than the employee bearing the onus of proof.

Do you require further advice?

For further information or assistance, please contact Ai Group.

Ai Group has set up a [special section on our website](#) to provide access to Ai Group advice and assistance relating to the COVID-19 pandemic and the recovery from the pandemic.

A handwritten signature in black ink, appearing to read 'S. Smith'.

Stephen Smith
Head of National Workplace Relations Policy