

CASUAL EMPLOYMENT REFORMS

The Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2021 (Bill) was passed by Parliament on 22 March 2021 and the Act came into effect on 27 March 2021

The Bill was stripped back and amended before being passed. The remaining provisions are those related to casual employment.

Provisions related to award flexibility including hours for part time employees; streamlining and improving the enterprise agreements process; strengthening compliance and enforcement including for wage theft; and measures to support more efficient Fair Work Commission processes were dropped.

Meaning of casual employee

The term 'casual employee' is not currently defined in the Fair Work Act 2009. The Act provides a definition of casual employee. A person will be a casual employee if:

- 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;
- the person accepts the offer on that basis; and
- the person is an employee as a result of that acceptance.

The definition provides that the only considerations in determining whether no firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person is made are:

- 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 according to the needs of the employer;
- 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 does 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, 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 remains a casual employee until:

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

Casual conversion

In addition to existing casual conversion clauses in some Awards, the Act provides a statutory obligation for employers (other than small business employers) to offer casual employees the ability to convert to permanent employment if:

- they have been employed for a period of 12 months; and
- during at least the last six months of that period, they have 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).

However, an employer will not be required to make an offer if there are reasonable grounds not to make the offer and the reasonable grounds are based on facts that are known, or reasonably foreseeable, at the time of deciding not to make the offer. Reasonable grounds for deciding not to make an offer include the following:

- the employee's position will cease to exist in the period of 12 months after the time of deciding not to make the offer;
- the hours of work which the employee is required to perform will be significantly reduced in that period;
- there will be a significant change in either or both of the following in that period:
 - o the days on which the employee's hours of work are required to be performed;
 - o the times at which the employee's hours of work are required to be performed;
 which cannot be accommodated within the days or times the employee is available to work during that period; and



- making the offer would not comply with a recruitment or selection process required by or under a law of the Commonwealth or a State or a Territory.

The Act provides notice requirements for making, accepting and refusing an offer.

Orders relating to casual loading (ie. to prevent double dipping)

In the event an employee is misclassified as a casual and makes a claim for relevant entitlements (eg. paid annual, personal and compassionate leave, payments for public holidays, payment of notice in lieu of termination and redundancy pay), the Act requires a court to reduce the amount payable to the employee for the relevant entitlements by an amount equal to the casual loading amount.

There are also provisions for the court to reduce the claim by an amount equal to a proportion of the loading amount. For example, the contract of employment may specify the portion of the loading amount attributable to a relevant entitlement.

Small claims

The Act allows for disputes related to casual employment (including eg. casual conversion) to be dealt with as small claims proceedings.

Information Statement

The Act requires the Fair Work Ombudsman (FWO) to publish and employers to provide to their casual employees a Casual Employment Information Statement.

The Statement can be found on the FWO website. This article is intended for information purposes only and should not be regarded as legal advice. Please contact Employer Assist for advice.

AAAA Member Benefits

Employer Assist can provide advice to members on employment law matters.

If you require assistance, we encourage you to contact Employer Assist on 1300 735 306 or at aaaa@employerassist.com.au