# Casual Employment

## Employer Guide

Australian Chamber of Commerce and Industry

Canberra BUSINESS CHAMBER



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# Contents


1. Introduction 2

2.New definition of casual employment 4

3.Employees to remain as casuals until ‘specified event’ 12

4.Converting a Casual to Full-Time or Part-Time in Practice 14

5.Dealing with Disputes 21

6.Casual Employment Information Statement 24

7. Anti-Avoidance Provisions 27

8.Backpay implications 29

9. Penalties For Breach 30

10.What can employers do to prepare for the changes? 31

Annexure A — Casual Employment Process Checklist 32

# 1. Introduction

1.1 The casual employment reforms were introduced into the *Fair Work Act 2009* (Cth) (**FW Act**) in February 2024 following the passage of the *Fair Work Legislation Amendment (Closing Loopholes No.2) Act 2024* (**Closing Loopholes Act No.2**).

1.2 In broad terms, the reforms involve the following key elements:

a. a new definition of 'casual employee' that will come into effect from 26 August 2024;

b. new mechanisms for the potential conversion of casual employees to full-time or part-time employment;

c. limitations on engaging new employees as casuals from 26 August 2024; and

d. requirements around regularly providing the Casual Employment Information Statement to casuals.

## Key takeaways for employers



From 26 August 2024, the definition of 'casual employee' will change significantly.



Casual employees employed prior to 26 August 2024 will remain casual employees until such time as a 'specified event occurs' or you convert their employment to full-time or part-time.

**Note:** This is even the case where the casual employment relationship may be inconsistent with the new definition of 'casual employee'.



From 26 August 2024 onwards, employers must carefully consider how new employees are engaged (including by having regard to the proposed nature of the relationship and working hours).



It will be unlawful to make misrepresentations to employees that an employment contract is a casual contract when the relationship does not meet the definition of 'casual'.



KEY RECOMMENDATION

Employers should have a new template casual employment contract developed which can be used for prospective casual employees.



KEY RECOMMENDATION

Employers should seek professional advice if an employee makes a request for conversion

## What do employers need to know?

1.3 While this Guide sets out detailed information about the changes, at a high level it is important that businesses understand:

a. how the new definition of 'casual employee' will inform their engagement of new employees as casuals from 26 August 2024;

b. after 6 months of employment (or 12 months of employment in a small business), an employee can elect to notify their employer that they do not consider themselves to be a casual employee, and the employer will be required consider requests to convert casual employees to full-time or part-time employment.

c. employers will have 21 days to respond to an employee notification to convert and can only decline on limited grounds, including where the employee still meets the definition of a casual employee or where there are fair and reasonable operational grounds to do so.

d. that certain casual employees will also have a residual right to request conversion; and

e. that businesses must issue casual employees with a Casual Employment Information Statement according to the following timeline at various points of the casual employee's employment. Please see Section 6.

## The purpose of this Guide

1.4 This guide is intended to help employers understand the scope of the new casual employment laws and to determine what impact the reforms might have on your business, as well as providing some practical suggestions when navigating these laws.

1.5 The guidance in this document was finalised on 6 August 2024 and may be subject to future revision.

IMPORTANT NOTE: The casual employment reforms come into effect from 26 August 2024

1.6 Like most parts of the FW Act, the changes to the definition of casual employment are expressed to apply to 'national system employers' and 'national system employees'. This means that the new laws will not apply to employers that fall outside of the Fair Work system (e.g. those covered by State industrial relations laws in a State that has not referred its industrial relations powers to the Commonwealth).

# 2. New definition of casual employment

## Key takeaways

1. There is a new definition of 'casual employee'.
2. Employers must holistically consider the employment relationship (rather than simply the terms of the employment contract).
3. Employees who have already commenced employment as a casual employee will remain a casual employee until the occurrence of a 'specified event' as set out in section 3 below.

## What is the new definition?

2.1 Subject to a couple of limited exceptions (discussed below), an employee will meet the definition of a 'casual employee' only where both of the following two elements are satisfied:1



The employment relationship is characterised by an absence of a firm advance commitment to continuing and indefinite work; **AND**



The employee is entitled to a casual loading or specific rate of pay for casual employees under the contract of employment

or

would be entitled to a casual loading or a specific rate of pay for casual employees under the terms of a fair work instrument if the employee was a casual employee.

2.2 A key feature of this new definition is testing whether the employment relationship involves a 'firm advance commitment to continuing and indefinite work'. This element will be critical in determining whether an employee meets the definition of a casual employee.

## How is this new test applied?

2.3 Importantly, the new definition of a 'casual employee' is no longer applied based solely on the initial offer of employment or the terms of the written contract between the parties. Rather, the test will be applied based on the 'real substance, practical reality and true nature of the employment relationship'.2

2.4 This involves an objective assessment of the totality of the relationship and not just the terms of the contract of employment to assess whether the employment relationship is characterised by an absence of a firm advance commitment to continuing and indefinite work.3

1 FW Act s15A(1)(a) and (b)
2 FW Act s15A(2)(a)
3 This is consistent with the approach adopted in *WorkPac Pty Ltd v Skene* [2018] FCAFC 131 at [180]




2.5 A firm advance commitment may be determined by examining the 'mutual understanding' or 'expectation' between the parties — irrespective of what the terms of the contract of employment stipulate.4 This means that the mutual understanding does not need to be in a written contract or variation document, but that a mutual understanding or expectation could be inferred from the performance or conduct of the employer and employee after the parties have entered into this employment contract or written agreement.5

## What are the indicators of 'full-time or part-time employment'?

2.6 The FW Act will set out specific 'indicia' that must be taken into account by Courts or Tribunals in deciding whether an employee is a casual or full-time or part-time employment employee.

2.7 The specific indicators of full-time or part-time employment are6:

- There is an inability of the employer to elect to offer, or not offer, work or an inability of the employee to elect to accept or reject work (and whether this occurs in practice)
- Having regard to the **nature of the employer's enterprise, it is** reasonably likely that there will be future availability of **continuing work** in that enterprise of the kind usually performed by the employee
- **There are full-time employees or part-time employee's performing the same kind of work** in the employer's enterprise that is usually performed by the employee
- There is a regular pattern of work for the employee

2.8 The amendment to the casual definition will mean that employers must take into consideration a broader range of matters when determining whether an employee is a casual employee, in the event that an eligible employee seeks conversion to full-time or part-time employment.

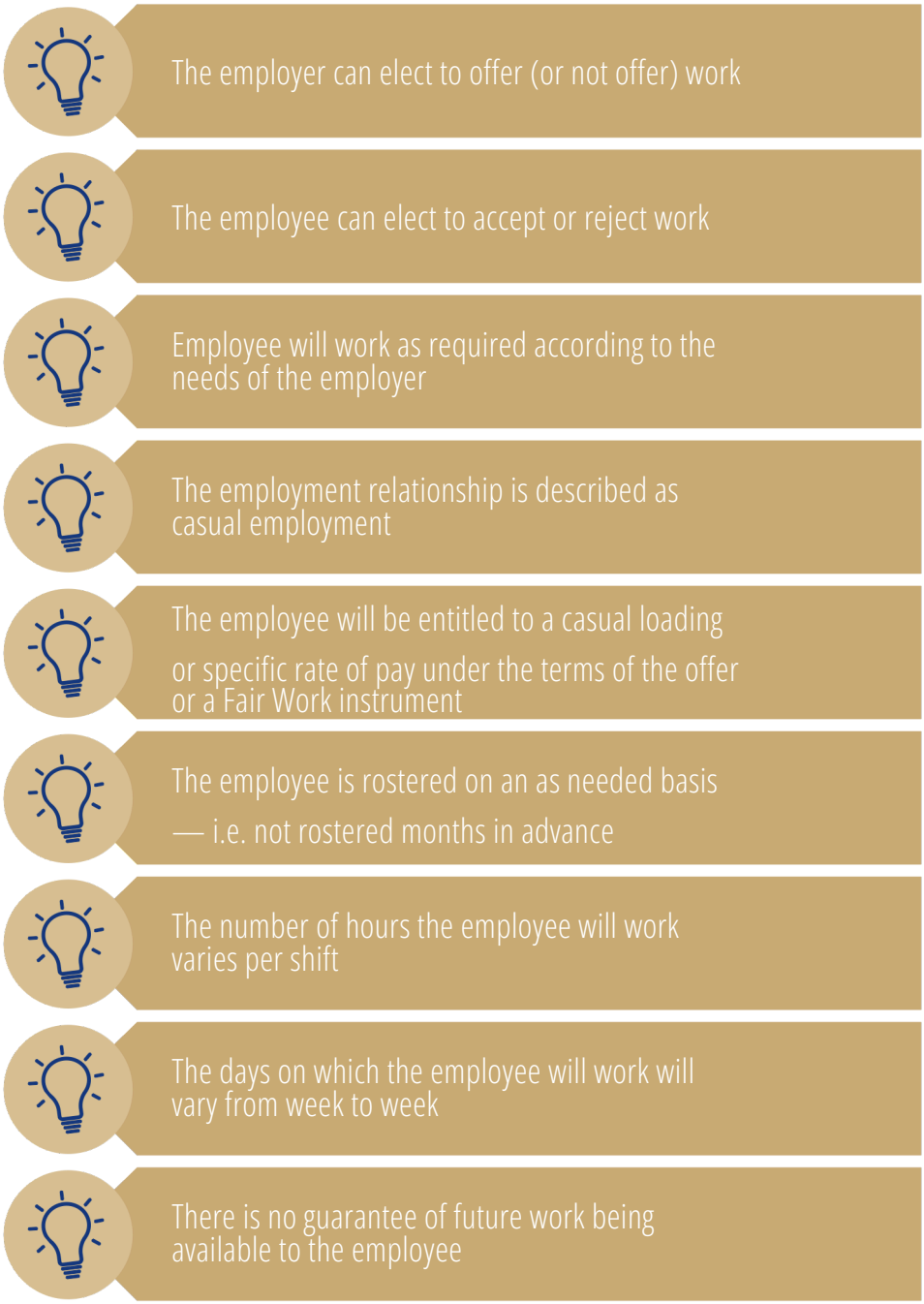
**IMPORTANT NOTE: no single indicator is determinative and not all indicators need to be satisfied.**

2.9 In relation to whether there is a regular pattern of work for the employee, a regular pattern of work may encompass fluctuations or variations over time (such as reasonable absences in the case of illness, injury or recreation).

2.10 The FW Act also includes a note clarifying that a regular pattern of work does not itself indicate a firm advance commitment to continuing and indefinite work. This means that a casual employee who has a regular pattern of work may still be a casual employee if there is no firm advance commitment to continuing and indefinite work.

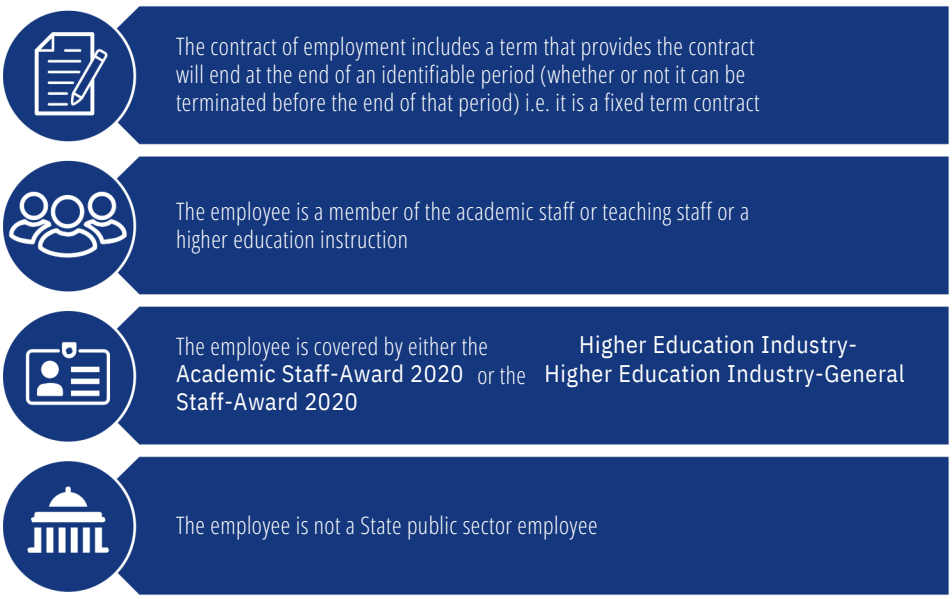
4 Explanatory Memorandum at [290]
5 Explanatory Memorandum at [290]
6 FW Act s15A(2)

## What are potential indicators of casual employment?



## Assessing who is not a casual employee?

2.11 The FW Act also provides guidance on who is not considered to be a casual employee by setting out a number of exceptions to the general rule at section 15A(4) of the FW Act, including if all of the following apply:7




2.12 In addition to the above, further clarification has been made to the interaction between the new casual employment definition and the fixed term / maximum term contract changes. If a person is a casual employee, they are not subject to the fixed term / maximum term limitations introduced by the previous 'Secure Jobs, Better Pay' Act.8

## Recruiting Casual Employees

2.13 Under the Closing Loopholes Bill changes there is a new definition of 'casual employee'.

2.14 The new definition will **only** apply from 26 August 2024 onwards to all casual employees.

2.15 Employers will need to consider how casual employees from this date (26 August 2024) are engaged through the lens of the new definition.

**Important:** Employees who had already commenced employment as a casual prior to 26 August 2024 are not impacted by the new definition and remain a casual employee.

## The New Casual Definition

An employee will meet the new definition of a 'casual employee' only where the employees' employment relationship is characterised by:

- an absence of a firm advance commitment to continuing and indefinite work; and
- an entitlement to a casual loading

When assessing whether an employee meets the 'casual definition' we must consider both:

- the terms of the employee's contract AND
- the real substance, practical reality, and true nature of the employment relationship

(i.e. how the parties behave and treat each other after the employment has begun)

7 FW Act s15A(4)(a)-(d)
8 FW Act 333E(1)

### How does an employer tell if a new casual is being engaged properly (i.e. their employment is characterised by an absence of a firm advance commitment to continuing and indefinite work) when first employing them?

2.16 The FW Act sets out specific factors which indicate factors that will be considered when deciding whether an employee meets the definition of a casual employee.

2.17 There are no rules as to the weight given to each of the factors in the decision-making process, with no one factor necessarily decisive. The factors are a guide, with the ultimate question being whether there is an 'absence of a firm absence of a firm advance commitment to continuing and indefinite work'.

2.18 Employers will be required to assess the type of work they are engaging prospective employees to engage, and whether that work meets the definition of a casual employer. Specific questions an employer should consider are:

- Will the employee be able to accept or reject work? And does that occur in practice?
- Will the employer be able to choose when or if work is offered?
- Considering the business enterprise of the employer, is it reasonably likely that there will be an ongoing future availability of continuing work of a kind usually performed by the employee?
- Are there full- or part-time employees currently performing the same work as the 'casual' employee?
- Will the employee be attending a regular pattern of work?

## Casual Factors

2.19 Consider the terms of the employment contract and/or any 'mutual understanding' or 'expectation' between the employer and the prospective employee. Decide if these factors indicate the employee is truly being engaged as a casual employee according to the new definition, or if they are more indicative of a full-time or part-time employment arrangement by considering and weighing up the below factors.

A 'mutual understanding' or 'expectation' does not need to be in the written contract but can be inferred from conduct (e.g. from comments made during the hiring phase, or the performance or conduct of the employer and the employee after the employment contract has been executed).

| ACTORS THAT INDICATE A CASUAL EMPLOYEE RELATIONSHIP | FACTORS THAT INDICATE A FULL-TIME OR PART-TIME EMPLOYEE RELATIONSHIP |
|---|---|
| **Contract entitlements** | |
| The employment relationship is described in the contract as 'casual employment'. | The employment relationship is not described in the contract as 'casual employment'. |
| The employee is entitled to and will be paid a casual loading or specific rate of pay for casuals under the terms of the contract. | The employee is not entitled to a casual loading but is entitled to other full-time or part-time employee entitlements like annual leave, personal leave, sick leave. |
| There is no guarantee of future or continuing work being available to the employee, which may be stated as under the terms of the contract. | The employee is guaranteed future or continuing work under the terms of the contract. |
| **Obligation to offer work & perform work** | |
| The employer can elect to offer (or not offer) work (both in the contract and in practice). | You, the employer, cannot elect to offer (or not offer) work to the employee (both in the contract and in practice). |
| The employee can elect to accept or reject work that is offered (both in the contract and in practice). | The employee does not have the right to elect to accept or reject work (both in the contract and in practice). |
| **Roster and work** | |
| The employee will work as required according to the needs of the employer (both as described in the contract and in practice). | The employee's work is not determined by the needs of the employer (e.g. the employee has a fixed schedule and consistent hours that don't change based on the needs of the employer'). |
| The employee will have an irregular pattern of work. | The employee will have a consistent pattern of work. |
| The employee is to be rostered on an 'as needed' basis. | The employee is to be rostered on a set advance schedule e.g. the employee is rostered months in advance. |
| The employees' number of work hours will vary per shift. | The employee is guaranteed / required to work a set number of hours or set shifts. |
| The days on which the employee will work will may vary from week to week. | The employee must work certain regular days of the week/shifts. |
| The work to be performed by the employee is different to the work part-time and full-time employee's are performing in the workplace. | The work the casual employees will be undertaking is similar to part-time and full-time roles in the workplace. |

| Example | Comments |
| --- | --- |
| Sam has retired from full time work and is on a part pension. Sam is offered casual employment at Parliament House on the basis that his employer expects to be able to offer him shifts on sitting days.<br>The Parliamentary calendar is provided to Sam upon commencement in November for the next year, although it is subject to change. Sam receives no guaranteed hours from the employer, nor a firm advance commitment that he will be offered casual shifts on every sitting day.<br>This flexibility works well for Sam, as it provides him with the autonomy to accept or reject work so as not to impact on his pension. | Sam is a casual employee upon commencement within the meaning of section 15A. |

| Example | Comments |
| --- | --- |
| - Charlie accepts a casual position as a security guard at a shopping centre.<br>- The contract of employment Charlie receives contains terms to the effect that they will be required to work rostered shifts each Thursday late night and at least one weekend day each week, and will be paid a 25 per cent loading. Charlie's contract makes no provision for leave entitlements.<br>- The contract stipulates that while Charlie may be called upon to fill vacant shifts, he is required to attend his Thursday night and weekend shifts ongoing. Charlie's manager let him know that if he were unable to attend his Thursday night or weekend shifts that he would be required to have his absence approved, and may be required to provide evidence for those absences. Due to the stated requirement for Charlie to work those rostered shifts on Thursday evenings and over the weekend (as opposed to stating an expectation for their availability to work at peak trading times), it does not appear that Charlie has the ability to elect to accept or reject work.<br>The contract of employment does not include a term that provides the contract will terminate at the end of an identifiable period, or a term that limits the above requirement to work each Thursday night and one weekend day, to a specified season or period. | These circumstances indicate that Charlie's employment is most appropriately characterised as part-time and not casual within the meaning of section 15A. |

## Onboarding Casuals

2.20 When onboarding a new casual employee, it is important that a number of steps are followed to ensure the employee is properly engaged as a casual, and that legislative requirements, such as providing the employee with the Casual Employment Information Statement, are followed.

### What do you need to do when onboarding a casual employee?

**Before the employee's first day ensure:**

- ☐ You have clearly advised the employee that they are engaged on a casual basis and the implications of this — no firm advance commitment to continuing work.
- ☐ You have issued the employee with a contract of employment which clearly states the employee is being engaged as a casual and explicitly outlines terms applicable to their casual employment status.
  (Please refer back to Stage 1 of this Handbook for more information).
- ☐ You have provided the employee with a current copy of the Casual Employment Information Statement.
  You can obtain a current version of the statement in English and other languages on the Fair Work Ombudsman's website.
- ☐ You have considered how you will roster the employee. Remembering the employee should typically have the ability to accept and reject work as a casual.
  Be mindful a regular and systematic rostering pattern may be indicative of a full-time or part-time employment relationship, rather than a casual one, as it may infer that there is an advanced commitment. Please refer back to Stage 1 of this Handbook for more information.

## Existing Casual Employees

2.21 The new amendments have clarified that an employee who commences employment under the new definition will remain a casual employee unless the employment was misclassified at the outset or any of the following apply:

a. the employment status is changed to full-time or part-time employment by the employee choice or transitional casual conversion pathways in the FW Act;9

b. the FWC makes an order under the new provisions to deal with a dispute about employee choice (or transitional casual conversion) which changes the employment status of the employee from a casual employee to a full-time or part-time employee;10

c. the employment status is changed to full-time or part-time employment under the terms of a fair work instrument that applies to the employee (e.g. a modern award or enterprise agreement);11 or

d. the employer makes an alternative offer of employment (other than casual employment) to the employee and the employee commences work for the employer on that basis.12

9 FW Act s15A(5)(a)
10 FW Act s15A(5)(b)
11 FW Act s15A(5)(c)
12 FW Act s15A(5)(d)

# 3. Employees to remain as casuals until 'specified event'

## Key takeaways

Casual employees remain casual employees until one of the following 'specified events' occurs:

1. The employee converts to full-time or part-time employment under the 'employee choice' (formerly casual conversion) scheme (see section 5 below);
2. The FWC orders that the employee is converted to full-time or part-time employment (see section 5 below;
3. The employee converts to full-time or part-time employment under an applicable industrial instrument; or
4. The employee is offered and accepts full-time or part-time employment with the employer.

## Overview

3.1 A consequence of the new casual definition,13 requiring a broader assessment of the employment relationship, is that 'the real substance, practical reality and true nature of the employment relationship' could change over time from a casual to a full-time or part-time employee.

3.2 In order to overcome this potential uncertainty, the FW Act introduces what is in effect a new and alternative 'casual conversion' process, whereby employees engaged as casual employees remain so until the occurrence of a 'specified event'.14

## What is a 'specified event'?

A 'specified event' [15] is one of the following:

The employee's employment status is changed to full-time or part-time employment in accordance with the employee choice provisions (see section 4 below)

The employee's employment status is changed by order of the FWC under the FW Act's new arbitration powers (see section 5 below)

The employee's employment status is changed to full-time or part-time employment in accordance with the terms of an industrial instrument (i.e. a modern award or enterprise agreement)

The employee is offered and accepts an alternative offer of employment that is not casual employment by the employer and commences work in this role.

13 FW Act s15A FW
14 Act s15A(5) FW
15 Act s15A(5)

3.3 The inclusion of 'specified events' upon which a casual employee is eligible to change employment status creates a degree of certainty when determining when a casual employee is eligible to change their employment status.

3.4 This means that an employee will not 'morph' into a full-time or part-time employee at some unknown point in the employment relationship, rather the employer will have the opportunity to re-classify the employee if or when a 'specified event' occurs.

3.5 However, employers should be aware that they remain liable in the event that an employee is misclassified as a casual employee on commencement of employment. See section 9 below for further advice in respect of backpay liability.

**Example**

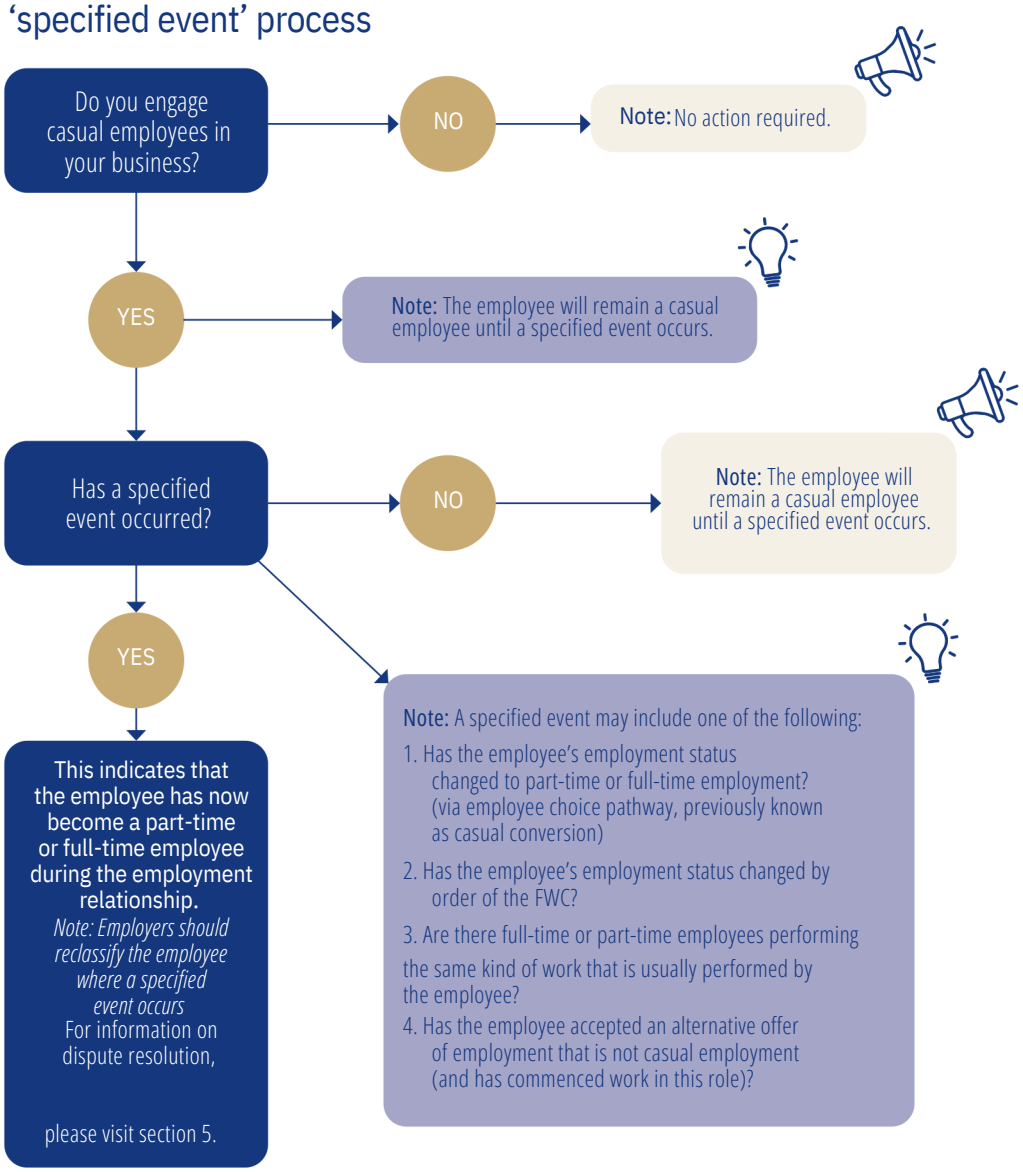
Kate works as a casual Retail Assistant.

Kate has worked 20 hours per week for the last 5 years. Kate rarely takes leave and therefore prefers to receive the 25% casual loading as it increases her take home pay.

Kate has never elected to convert to full-time or part-time employment, rather she has rejected her employers offer to convert to part time employment.

*To date no 'specified event' has occurred and therefore Kate will genuinely remain a casual employee unless a specified event occurs.*

## The 'specified event' process



# 4. Converting a Casual to Full-Time or Part-Time in Practice

## Important commencement information

4.1 One of the new eligibility criteria to access the new 'employee choice regime' is that the casual employee has been employed for either 6 months in the case of non-small business employers or 12 months for small business employers.

4.2 Under the Fair Work Act, an employer is a small business employer if they employ fewer than 15 employees under a headcount measurement.

4.3 All existing casuals employed prior to 26 August 2024 will continue to have access to the previous casual conversion regime until they may become eligible to access the new 'employee choice' regime.

4.4 This means that the obligation on an employer to offer casual conversion under the former casual conversion regime continues to apply until:

- **26 February 2025** for casuals employed prior to 26 August 2024 by non-small business employers; and
- **26 August 2025** for casuals employed prior to 26 August 2024 by small business employers

4.5 The new 'employee choice' regime will apply to all new casuals employed from 26 August 2024.

## Overview of the new regime for employee changing from casual to full-time or part-time employment

4.6 Under the new arrangements employers will no longer have an obligation to proactively offer conversion to regular casual employees at 12 months of employment for all new employees.

4.7 Once a casual is correctly employed as a casual, they remain a casual (they cannot simply morph into full-time or part-time employees) until:

- the employee is offered full-time or part-time employment by their employer, and they accept the offer;
- the employee converts to full-time or part-time employment under an applicable award or enterprise agreement; or
- the employee "elects" to convert to full-time or part-time employment under what is called the 'employee choice' process.

4.8 **If none of the above occurs the employee remains a casual.**

4.9 The below section outlines the 'employee choice' process and provides a step-by-step checklist to ensure that you are complying with any employer obligations under it.

## 'Employee Choice' Process (replaces the casual conversion process)

4.10 Eligible employees have the right to issue a written notification (e.g. request) that they would like to change to full/part time under the 'employee choice' process. Employers must respond to a notification in writing within 21 days.

4.11 Employers need to be aware that employees can raise a dispute related to the 'Employee Choice' Process to the FWC including an employer failing to respond within 21 days and/or challenging an employer's decision to not accept a notification to convert to permanency.

4.12 The below checklists and template letters have been developed in order to assist you in meet your employer obligations should you receive a notification from an employee to convert to permanency.

## Step 1 - Is the employee who gave the notification eligible to do so under the Fair Work Act?

Anyone can request to convert to full-time or part-time from their employer - but only certain employees have a legal right to give an employer a notification under the FW Act

**Eligible employees =**

- ☐ the employee believes that they no longer meet the casual employee definition (see Stage 1 for further detail about the definition); and
- ☐ in the previous 6 months the employee has not received a response from the employer stating a previous notification was not accepted, or had a dispute involving a notification given to the employer dealt with by the FWC;

**Note:** If prior to 26 August 2024 the employer gave written notice to an existing casual employee to not offer the employee conversion, was not required to offer conversion, or the employee declined the offer of conversion under the former casual conversion process, it will be treated the same for the purposes of this eligibility requirement.

- ☐ the employee does not currently have a dispute before the FWC regarding a notification to convert given to the employer; and
- ☐ the employee has been employed by the employer for a period of at least 6 months (or 12 months for a small business employer) beginning the day the employment started;

**Note:** If an employee was employed as a casual prior to 26 August 2024 any period work before this date does not count for the purposes of determining whether the employee meets the minimum 6- or 12- month period of employment.

**If yes to all of the above =** the employee is eligible, move to considering their request at step 2.

**If no to any of the above =** the employee is not eligible not legally entitled to give a notification to convert to full-time or part-time employment.

Of course, the employee may still seek to convert to permanency; however, as an employer you are not legally required to comply with the FW Act requirements set out in this checklist when considering their request.

## Step 2 — Considering the notification

When considering and responding to a notification, employers can decide to do one of two things:

- ☐ Accept the notification and convert the employee to part-time or full-time employment OR
- ☐ Not accept the notification on one or more of the accepted grounds

## C onsult ation

☐ Before you give a response to an employee you must first consult with the employee about the notification.

☐ If **accepting** the notification during the consultation you must discuss the following matters (which you will give detail of in your written response to the employee):

✓ whether the employee is changing to full-time or part-time employment;

✓ the employees' hours of work after the change takes effect; and

✓ the day the change to full-time employment or part-time employment will take effect.

**Note:** If you accept a notification this does not require you to increase the hours of work of the employee

If not accepting the notificiation you can only do so under the FW Act on one or more of the following grounds.

✓ The employee still meets the casual employee definition (see Step 1 for details of the definition);

✓ Accepting the notification would **affect compliance** with a recruitment or selection process required under a law of the Cth, a State or Territory; and/or

✓ There are **fair and reasonable operational grounds** for not accepting the notification including that;

- Substantial changes would be required to the way in which your enterprise is organised; or
- There would be significant impacts on the operations of your enterprise; or
- Substantial changes to the employee's terms and conditions would be reasonably necessary to ensure that you do not contravene a term in a fair work instrument (award, enterprise agreement) that would apply to the employee as a full-time or part-time employee.

Please be aware that if you do not accept a notification to convert, an employee is still entitled under the law to dispute that decision in the FWC.

## Step 3 — Responding to a notification

Employers must provide a written response to all written notifications to convert to full-time or part-time employment within **21 days**.

### Accepting a notification

If after receiving and considering a notification you decide to approve it, you must

- ☐ confirm in writing to the employee within 21 days that the notification to convert is accepted;
- ☐ state whether the employee is changing to full-time or part-time employment;
- ☐ state the employee's hours of work after the change takes effect; and
- ☐ state the day the change to full-time employment or part-time employment will take effect.

**To help you with an acceptance response see Template Letter A at the end of this handbook.**

### Not accepting a notification

If after receiving and considering a notification you decide to not accept the notificiation you must:

- ☐ Confirm in writing to the employee within 21 days that the notification to convert is not accepted;
- ☐ Include in the response the reason the notification is not accepted on one or more of the following permitted grounds under the FW Act:

- The employee still meets the casual employee definition; and/or
- Accepting the notification would affect compliance with a recruitment or selection process required under a law of the Cth, a State or Territory; and/or
- There are fair and **reasonable operational grounds** for not accepting the notification including that;
  - substantial changes would be required to the way in which your enterprise is organised; or
  - there would be significant impacts on the operations of your enterprise; or
  - substantial changes to the employee's terms and conditions would be reasonably necessary to ensure that you do not contravene a term in a fair work instrument (award, enterprise agreement) that would apply to the employee as a full-time or part-time employee.

**To help you with a non-acceptance response see Template Letter B at the end of this handbook.**

## How to use the template letters

The template letters contain highlighted text which indicate areas where you simply need to replace the writing with what applies to your employee's situation. Explanatory information is shown in blue italics to assist you and should be deleted once you have finalised the letter. **Ensure all highlighted text and explanatory information has been completed or deleted, as appropriate, before issuing a letter to any employee.**

## TEMPLATE LETTER A —
## Acceptance of notification to convert to full-time or part-time employment

<Insert company letter head>
<Insert Date>

Private and Confidential
<Insert employee's full name>
<Insert employee's address>

Dear <Insert name of employee>

RE: Response to your notification to convert to <full-time or part-time> employment

I refer to your written notification dated <Insert date of request> where you gave notice that you wished to convert to <full-time or part-time> employment.

<Insert any relevant details contained in the notification>

<Insert the name of your company> considers notifications on a case-by-case basis and looks to balance our operational requirements with the needs of our employees, clients and team members.

We have carefully considered your notification and I am pleased to advise that your notification to convert to <full-time or part-time> employment has been accepted.

As discussed on <insert date>: you will be changing to <insert either full-time or part-time> employment; and once you convert to <full-time or part-time> employment your hours of work will be <insert details of the employee's hours of work after the change takes effect>.

Please be advised that your rate of pay and relevant entitlements are now:

• <insert details of rate of pay and other relevant entitlements that change due to the conversion>

All other entitlements remain unchanged.

Your new working arrangements as a <insert full time or part-time> employee will take effect on <insert date of commencement>.

Please contact me on <insert your telephone number> if you wish to discuss this matter further.

Yours sincerely

<Insert your name>
<Insert your position>

# TEMPLATE LETTER B — Non-acceptance of notification to convert to full-time or part-time employment

<Insert company letter head>
<Insert Date>

Private and Confidential
<Insert employee's full name>
<Insert employee's address>

Dear <Insert name of employee>

RE: Your request for conversion

I refer to your written notification dated <insert date of request> where you gave notice that you wished to convert to <full-time or part-time> employment.

<Insert any relevant details contained in the notification>

<Insert the name of your company> notifications on a case by case basis and looks to balance our operational requirements with the needs of our employees, clients and team members. We have carefully considered your request.

As discussed on <insert date>, unfortunately on this occasion we are unable to accept your notification for the following reasons:

<insert the specific reason the notification is not accepted, including any further detail or explanation for how those reasons apply to the employees request to convert to <full-time or part-time> employment.

*[Explanatory information:provide sufficient detail to show the non-acceptance is a permitted reason under the FW Act]*

*[Optional paragraph]*We appreciate your willingness to discuss these matters openly and your understanding of the circumstances that have guided our decision-making processes.

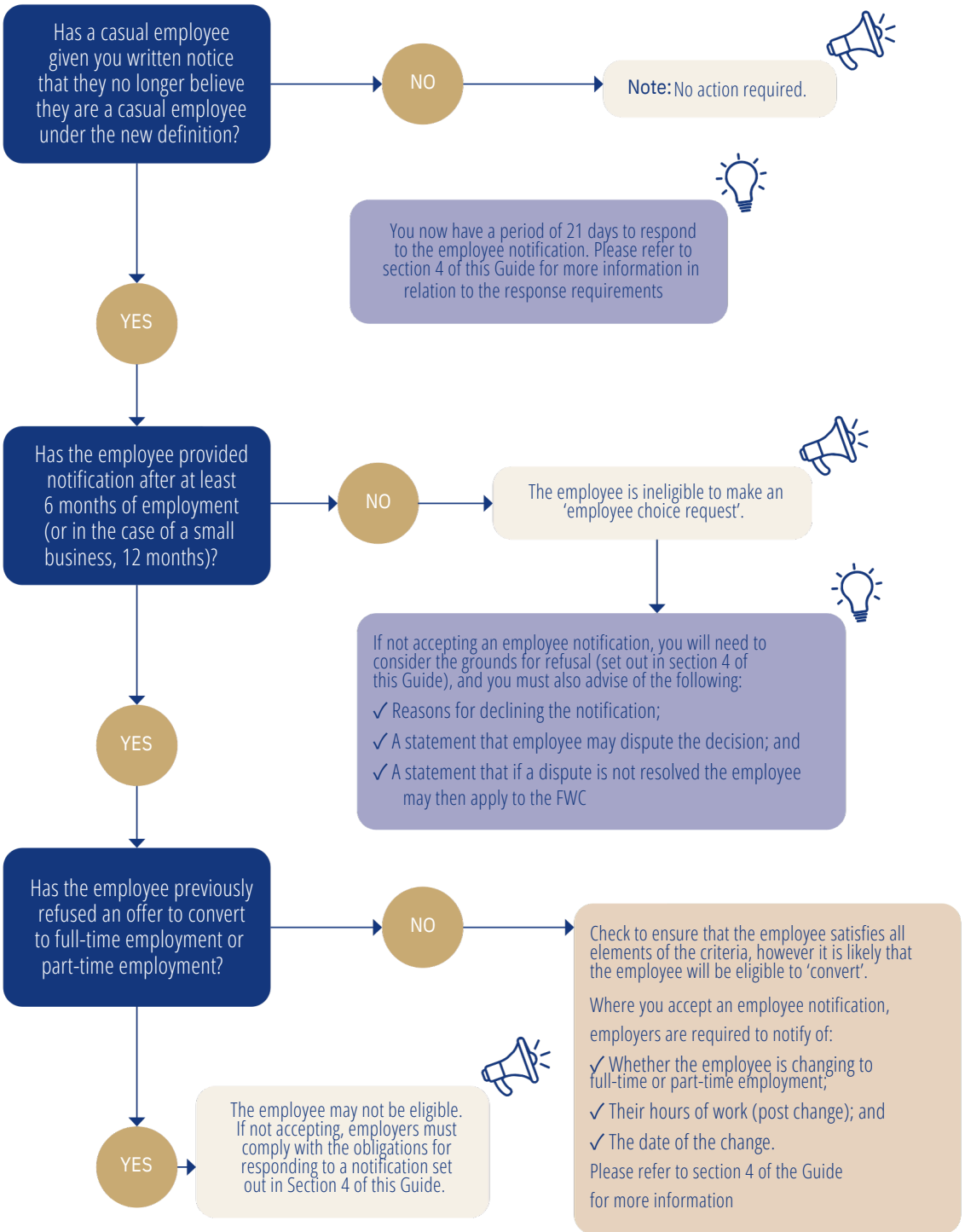
*[Optional paragraph]*Please rest assured that your role with <insert employer name> as a casual employee remains an important and genuinely valued one. While we are unable to accommodate your notification to convert to <full-time or part-time> employment at this time due to the reasons set out above, we hope this decision will not deter you from continuing to engage with your role and we wish to assure you that we remain committed to supporting your career development within the parameters currently available.

Thank you for your continued commitment and contribution to our team. Please do not hesitate to contact me on <insert your telephone number> if you wish to discuss this matter further.

Yours sincerely

<Insert your name>
<Insert your position>

## The notification process



# 5. Dealing with Disputes

## Key takeaways

1. An employer's decision regarding 'employee choice' (formerly casual conversion) can be challenged and escalated to the FWC if it is unable to be resolved at the workplace level.
2. Access to the FWC dispute resolution mechanisms is available irrespective of whether an applicable modern award, enterprise agreement or employment contract provides an alternate dispute resolution process.

## Overview

5.1 These reforms repeal the existing dispute procedure provision and replace it with a procedure that must be followed to resolve any disputes about the operation of 'employee choice'. Under these provisions, the parties apply to the FWC to have a dispute dealt with.

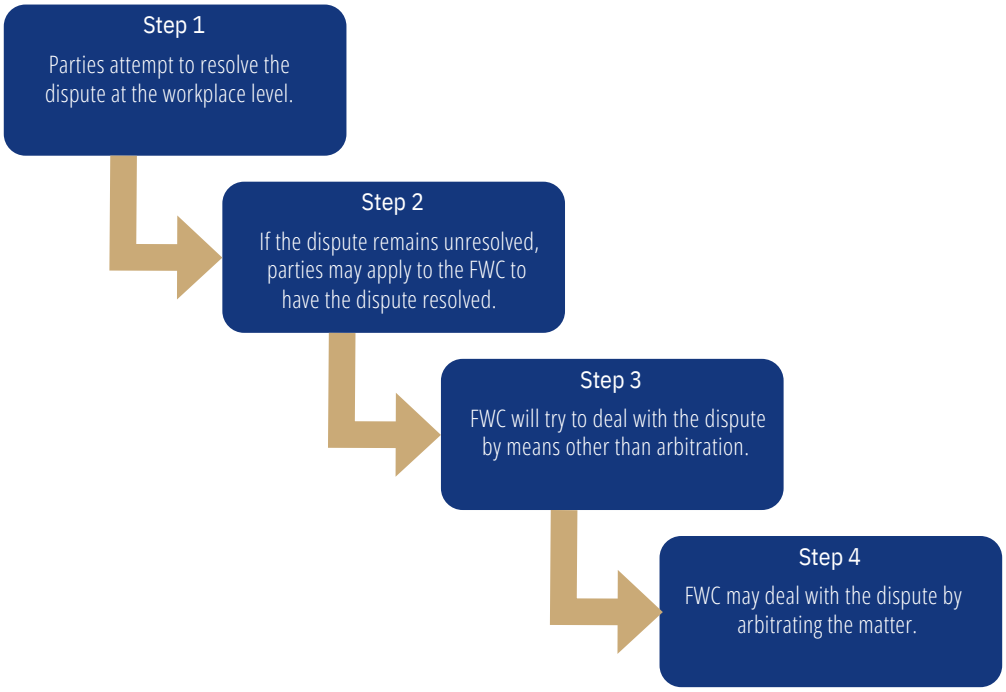
5.2 The dispute settlement procedure is very similar to the types of disputes procedures contained in modern awards or enterprise agreements. The FWC will have the power to deal with disputes as they consider appropriate, including by way of mediation, conciliation, making a recommendation, expressing an opinion and via arbitration (in exceptional circumstances).16 However, the parties to the dispute must have first attempted to resolve the dispute at the workplace level before the FWC is able to deal with the dispute.17

5.3 Disputes may arise between parties in relation to whether or not a casual employee is genuinely a casual employee, and associated compliance with the 'employee choice' provisions.

16 FW Act s66M (5) and s66M(6)
17 FW Act s66M (4)

## Dispute resolution process

5.4 The process for dealing with disputes is outlined in more detail on the following pages.




## What happens if a dispute arises?

### Step 1 — Parties must attempt to resolve the dispute at the workplace level

5.5 In the first instance, the parties involved in a dispute relating to employee choice must first attempt to resolve the dispute at the workplace level, by way of discussions between the parties. This means an employer must discuss the dispute with the employee.18

5.6 The FW Act does not prescribe any specific informal process; it simply requires the parties to 'attempt to resolve the dispute at the workplace level by discussions between the parties'. Accordingly, it is open to the employer and the employee to determine how they may seek to resolve the dispute, provided that the adopted process complies with any dispute resolution procedures set out in applicable modern awards, enterprise agreements, employer policies, or employment contracts.

### Step 2 — Application to the FWC

5.7 If the parties are unable to resolve a dispute regarding employee choice at a workplace level, a party to the dispute may apply to the FWC (by way of an application) to have the dispute resolved.19

### Step 3 — FWC deals with the dispute by means other than arbitration

5.8 Where a party to the dispute has applied to the FWC to have the dispute dealt with, the FWC must first deal with the dispute by means other than arbitration, unless there are exceptional circumstances.20

5.9 The FWC is able to deal with a dispute as it considers appropriate, but typically this would involve conciliation or mediation. At this point, the FWC's function is to play a facilitative role in an attempt to assist the parties to reach an agreement to resolve the dispute.

5.10 The FWC is also able to make a recommendation or express an opinion about the dispute.21

18 FW Act s66M (4) FW Act s66M
19 (5) FW Act s66M (5) and s66M
20 (6) FW Act s66M (6)
21

### Step 4 — FWC deals with the dispute by way of arbitration

5.11 Where the FWC has been unsuccessful in mediating/conciliating the dispute (or there are exceptional circumstances), the FWC may arbitrate the matter.22 This involves the FWC making a determination and imposing that determination on the parties to the dispute. The FWC does not require the consent of both parties in order arbitrate the dispute and make a determination. This means that the FWC is able to make binding orders on the parties in order to resolve the dispute.

5.12 In arbitrating the matter, the FWC may make any order it considers appropriate, including:

a. that the employer shall continue to treat the employee as a casual employee; or

b. that the employer shall treat the employee as a full-time or part-time (depending on the hours worked by the employee in question), from the next full pay period following the order, or such later day as the FWC considers appropriate.23

5.13 Further, when arbitrating the matter, the FWC must have regard to certain matters in considering whether to make, and the terms of, the order.24 Specifically, the FWC must:

a. have regard to whether substantial changes to the employee's terms and conditions would be reasonably necessary to ensure the employer does not contravene a term of a modern award, enterprise agreement, FWC order or a workplace determination that would apply to the employee as a full-time employee or part-time employee;25 and

b. disregard the conduct of the employer and employee that occurred after the employee gave the notification to the employer.26

5.14 However, the FWC must not make an order unless it considers it fair and reasonable to do so (taking into account the objects of the FW Act and relevant division), nor may it make an order that is inconsistent with the FW Act, or a term of a modern award, enterprise agreement, FWC order or a workplace determination that applies to an employer or employee immediately before the order is made.

5.15 Contravening an order made by the FWC under this provision is a civil remedy provision.

22 FW Act s66M (6)(b) and s66MA
23 FW Act s66MA (4) FW Act s66MA
24 (5) FW Act s66MA (5)(a) FW Act
25 s66MA (5)(b)
26

# 6. Casual Employment Information Statement

## Key takeaways

Employers must provide all casual employees with a Casual Employment Information Statement:

1. At the commencement of employment;
2. On the 6-month anniversary of the casual employee's employment (unless the employer is a small business);
3. On the 12-month anniversary of the casual employee's employment; and
4. On each subsequent 12 month anniversary of the casual employee's employment (unless the employer is a small business).

6.1 Currently, employers are required to provide casual employees with a Casual Employment Information Statement (CEIS) (published by the Fair Work Ombudsman) before, or as soon as practicable after, the casual employee commences employment with the employer.

6.2 The Closing Loopholes changes to the FW Act now bolsters this obligation and introduces an additional obligation for employers to provide the CEIS to casual employees. Employers must now provide the CEIS to casual employees:27

a. before or as soon as practicable after their casual employment with the employer commences;

b. as soon as practicable after the employee has been employed by the employer for a period of 6 months beginning the day the employment started (except for small business employers);

c. as soon as practicable after the employee has been employed by the employer for a period of 12 months beginning the day the employment started; and

d. the end of any subsequent period of 12 months for which the employee is employed by the employer (except for small business employers).

6.3 Aside from providing the CEIS on the employee's initial 6-month anniversary, employers are not required to provide the CEIS to the same employee more than once in any 12 months (i.e. if the employer the employee more than once in a 12-month period they are not required to provide the CEIS each time that the employee is re-employed).

### QUICK TIP

Employers need to ensure that they are issuing the most up to date version of the CEIS published by the Fair Work Ombudsman, as the CEIS will be amended from time to time.

**Important:** The obligation to provide the Casual Statement applies to all current employees (employed before the changes commenced on 26 August 2024) and new employee engaged under the new definition on or after 26 August 2024.

When do you need to provide your current and new casual employees with the Casual Employment Information Statement?

27 FW Act s 125B

| Timing — the CEIS needs to be provided: | Small Business Employers | Non-Small Business Employers |
|---|---|---|
| On commencement As | √ | √ |
| soon as possible after As **6 months** of employment | | √ |
| soon as possible after As **12 months** of employment | √ | √ |
| soon as possible after **every subsequent 12 months** of employment (e.g. 24 months, 36, 48 months etc.) | | √ |

## Tips from the experts

6.4 To help employers with meeting this obligation we recommend:

- Each time you go to provide the CEIS to an employee ensure you are providing the employee with the current version by downloading the current version from the Fair Work Ombudsman's website.
- Ensuring you keep a record of how and when you provided the CEIS to casual employees.
- Auditing your current casual employees to understand their anniversary dates and when they will need to be providing the CEIS to them; and
- As the obligation can be onerous given many casual employees will have different 6- and 12-month employment anniversaries, employers should consider ways in which they may be able to provide the CEIS regularly to casual employees (for example on correspondence that is sent regarding rosters or shifts) in order to ensure they are meeting their obligation to provide the CEIS as required.

## Common Questions

6.5 **Do employers have to provide the CEIS to current employees, who were employed before the Closing Loopholes changes and new casual definition?**
Yes! All employees as soon as possible after any applicable employment anniversary (6 months, 12 months, each subsequent 12 months) must be provided with the CEIS.

6.6 **How long does an employer have after an employee's anniversary date (after 6, 12 months of employment etc.) to give the employee the CEIS?**
Employers must give the CEIS as soon as practicable after the casual employee's anniversary date (6 months, 12 months, 24 months etc).

6.7 **What if an employer is a small business (employing less than 15 employees) when a casual employee commences employment but later (for example, after 6-month of the casual being employed) the business has grown, and is no longer a small business?**
The requirement to provide the CEIS applies at the time the obligation arises (e.g. on the casual employee's employment anniversary). This means in the above scenario the employer would be required to give the employee the CEIS at 6 months, as at that time when the obligation to provide the CEIS arose the business was a non-small business employer.

6.8 **What about casuals who are engaged seasonally, e.g. for the Christmas period or holidays etc.? Does an employer have to provide a new CEIS every new time they are engaged?**
Whilst at common law each occasion a casual employee is engaged is a separate contract of employment, for this section of the FW Act such a notion is more loosely applied. This means a casual employee will be considered to be continuously employed by an employer even where their shifts might be broken up by many days or weeks or even months where they do not work or do not have any shifts. The only way a casual employee's employment will be considered to have ended is where there is a clearly discernible significant break. Whilst there is no strict rule as to how long this period might need to be, we are of the view that a break longer than 6 months is likely to be sufficient to have ended the casual employee's employment for the purpose of needing to provide the CEIS.

Aside from the obligation on non-small business employers to provide an employee with the CEIS at commencement and after a 6-month period, employers are not required under the FW Act to provide the CEIS to the same employee more than once in any 12-month period if the employee is employed more than once in a 12-month period.

## Practical Examples:

Erin is a casual employee who works in a small boutique store exclusively during school holidays. Her employer is a small business and employees 4 other casual employees, as well as 3 full-time employees, and 2 part-time employees. Erin was provided the CEIS upon commencement of her role, and again at her 12-month anniversary.

Since Erin's employer is a small business, they were not required to provide her with the CEIS at her 6-month anniversary and are no longer required to provide her with the CEIS at each subsequent 12-month anniversary.

Erin's employer experiences rapid growth in sales and decides to open a new location, which means they have doubled their staff, and introduced a new payroll and bookkeeping position to assist them in managing the workload, bringing their total staff count to 21. Erin's employer is no longer a small business employer under the FW Act and is now required to provide Erin a copy of the CEIS on each 12-month anniversary of her employment.

Erin recently secured a full-time roll elsewhere, but still works at the boutique store over Christmas when the store experiences a high volume of sales and traffic. Due to the substantial breaks in her employment, her employer provides her with the CEIS at each Christmas period, however, they are not required to give Erin a copy of the CEIS more than once in a 12-month period.

# 7. Anti-Avoidance Provisions

7.1 The FW Act now contains anti-avoidance provisions designed to ensure employers do not seek to avoid rights or obligations by:

a. reducing or varying hours of work;

b. changing patterns of work; and/or

c. terminating employment. Importantly, the anti-avoidance provisions are civil remedy provisions which may attract financial penalties.

7.2 In turn, the anti-avoidance measures establish a framework which is intended to deter employers who may take action to avoid the new provisions and bolsters casual employees' rights. The measures are set out in more detail below.

7.3

## What are the anti-avoidance measures?

7.4 There are two new anti-avoidance measures which include:



1. Dismissing to engage as a casual employee



2. Misrepresentation to engage as casual employee

7.5 The first anti-avoidance provision aims to address circumstances where an employer dismisses, or attempts or threatens to dismiss an employee, to engage that person as a casual employee.28 This measure has been modelled on the protections introduced regarding dismissing an employee to engage them as an independent contractor and is designed to implement protections against the intentional misuse of casual employment.29

7.6 An employer must not dismiss, or threaten to dismiss an individual who:30

a. is currently an employee of the employer;31 and

b. performs particular work for the employer in order to engage the person, as a casual employee to perform the same (or substantially the same) type of work.32

7.7 This means that employers cannot dismiss an employee and then shortly thereafter re-engage the individual to perform the same role as what they were engaged to perform (prior to the dismissal).

28 FW Act s359B Under the existing section 358 of the FW Act. See also Explanatory Memorandum
29 at [395] FW Act s359B FW Act s359B(a) FW Act s359B(b)
30
31
32

7.8 The second anti-avoidance measure prohibits employers from making a misrepresentation to a current or former employee of the employer to engage that individual as a casual employee. The employer must not make a statement that:

a. the employer knows is false; and

b. is made in order to persuade or influence the individual to enter into a contract for casual employment under which the individual will perform the same, or substantially the same, work for the employer.

7.9 Enforcement of these provisions will likely turn on the reasons for the actions of the employer — i.e. a person takes action for a particular reason if the reasons for the action include that reason, and the burden of proving the reason for an action will be places on the employer.33

7.10 Penalties for these offences apply, of up to $93,900 for individuals and $469,500 for companies per offence at the date of publication. Penalties may be subject to change.

## What is the impact on employers?

7.11 In light of the anti-avoidance measures, employers should revisit their current employment arrangements to ensure that consideration is given to the characterisation of employment — both in respect of an employee commencing new employment and during the change of casual conversion process as set out above.

33 Explanatory Memorandum at [398]

# 8. Backpay implications

## What is the backpay risk?

8.1 On the critical issue of backpay, the reform is designed so that a casual will only become a full-time or part-time employee upon the occurrence of a 'specified event' (i.e. when the employee qualifies and chooses to become full-time or part-time).

8.2 As a consequence, backpay is only likely to arise when an employer incorrectly classifies an employee as a casual from the start of their employment. At the start of their employment, in order to determine the 'real substance, practical reality and true nature of the employment relationship', a written contract is likely to be the most important piece of relevant information to assess.

## Is there a retrospective risk of backpay?

8.3 Importantly, all employees who were under the existing FW Act provisions considered to be casuals at the commencement of these reforms will be deemed to be casuals until a specified events occurs.34 However, the reforms do not have retrospective effect and therefore only come into effect from 26 August 2024. This means that the current definition for casual employment will continue to be the relevant definition for events prior to 26 August 2024. For this reason, we expect that most businesses will have some (albeit low level) exposure in respect of backpay claims arising prior to commencement of the reforms for misclassifying a casual incorrectly under the old definition, however, the extent of any such liability will depend on the specific of the specific circumstances e.g. the terms of the contract between the employer and employee.

8.4 Accordingly, whilst there may be exposure to backpay under the current framework and the reforms, such exposure is likely limited.

34 Pursuant to FW Act s15A

# 9. Penalties For Breach

9.1 It is important that businesses familiarise themselves with the new changes as the FW Act imposes civil penalties for non-compliance with the changes to casual employment.

9.2 Civil penalties can be imposed in a range of circumstances, including (but is not limited to) where:35



A party contravenes an order made by the FWC during arbitration (including any orders relating to the employee choice)

An employer dismisses (or threatens to dismiss) an individual who is an employee of the employer and who preforms particular work for the employer in order to engage the individual as a casual employee to perform the same (or substantially the same) work

An employer engages in misrepresentation — i.e. where the employer engages an individual to perform particular work other than as a casual employee and makes a statement that the employer knows is false, or where the employer makes a statement that is mad in order to persuade or influence the individual to enter into a contract for casual employment under which the individual will perform the same (or substantially the same) work for the employer

9.3 For the circumstances outlined above, employers may face civil penalties of up to 300 penalty units per breach (equivalent to $93,900 for individuals and $469,500 for companies, at the time of publication).36

9.4 Contraventions concerning the reforms relating to casual employment under the FW Act do not attract criminal penalties.

35 FW Act s66MA(8), FW Act s359B, FW Act s359C
36 FW Act s539

# 10. What can employers do to prepare for the changes?

### Step 1 — Appropriately Classify Employees

10.1 It is important that prior to the reforms commencing on 26 August 2024, businesses ensure that their onboarding processes are set up to ensure that the appropriate engagement is selected when a new employee is engaged at the outset (i.e. casual, part-time, or full-time employment).

10.2 Ensuring that new employees are appropriately classified moving forward will mitigate the risk that the business will receive an underpayment claim from an employee.

### Step 2 — Review Contracts

10.3 Review and update your template casual employment contract (which can be used for new employees).

### Step 3 — Casual Employee Information Statement

10.4 Ensure that you are issuing the CEIS;

a. at the commencement of employment;

b. on the 6-month anniversary of the casual employee's employment (unless the employer is a small business); and

c. on the 12-month anniversary of the casual employee's employment; and

d. every subsequent 12-month anniversary (unless the employer is a small business)

### Step 4 — Stay up to date with information

10.5 The definition of a 'casual employee' will likely be the subject of disputation in the FWC. In order to be best informed, employers are advised to actively seek additional information from reliable sources.

10.6 The Fair Work Ombudsman has provided an overview of casual employment changes.

10.7 The Department of Employment and Workplace Relations has provided a factsheet relating to casual workers.



Refer to our Casual Employee Checklist set out at Annexure A, to ensure that you are compliant

# Annexure A — Casual Employment Process Checklist






## Before the employment commences (i.e. Recruitment and Onboarding)

☐ 1. Have you considered whether the employee is in fact a casual employee per the new definition? i.e. is there an absence of a firm advance commitment to continuing and indefinite work and would the person be entitled to a casual loading?
*Please refer to section 2 of this Guide for more information*

☐ 2. Have you advised the employee that they are engaged on a casual basis and the implication of this (e.g. no firm advance commitment to continuing work)?

☐ 3. Has the employee been issued with a contract of employment and a copy of the current Casual Employment Information Statement?

☐ 4. Have you considered how you will roster the employee? And whether the employee has the ability to accept and reject work?
*Be mindful as a regular and systematic rostering pattern may not be indicative of a casual relationship, and may infer that there is an advanced commitment. Please refer back to Section 2 of this Guide for more information.*

## During the employment relationship

☐ 5. Consider: has a specified event occurred? i.e. has any of the following taken place:
- Has the employee converted to full-time or part-time employment under the 'employee choice provisions' (formerly the casual conversion scheme)?
- Has the FWC made an order determining that the employee is to be converted to full-time or part-time employment?
- Has the employee converted to full-time or part-time employment under an applicable industrial instrument (i.e. modern award or enterprise agreement?)?
- Has the employee offered and accepted full-time or part-time employment within your business?

*Please refer to Sections 3 and 4 of this Guide for more information.*

☐ 6. If a specified event has occurred, have you considered whether you need to re-classify the employee?
*Please refer to Section 3 of this Guide for more information.*

☐ 7. If an employee has been misclassified during the employment relationship, have you considered where there is any backpay exposure?
*Please refer to section 9 of this Guide for more information. If you have concerns regarding misclassification or concerns regarding backpay, it is recommended that you seek legal advice.*

## In the case of 'Employee Choice'

- [ ] 8. Has the employee provided you with written notification?
  *Please refer to Section 5 of this Guide for more information.*
  Have you considered whether the employee satisfies the casual employment definition?
- [ ] 9. *Please refer to Section 2 of this Guide for more information.*
- [ ] 10. Have you considered the employee's length of service with the business to ensure that they satisfy the requirements to be eligible for the 'employee choice' pathway? i.e. the required length of service is 6 months service, and 12 months service for small business employers.
  *Please refer to Section 2 of this Guide for more information.*
- [ ] 11. Have you consulted with the employee about their notification and to discuss the relevant matter?
  *Please refer to Section 5 of this Guide for more information.*
- [ ] 12. If the business is refusing the employee notification, have you considered the grounds for refusal?
  *Please refer to Section 5 of this Guide for more information. Please also consider any specific processes which are set out in any dispute resolution procedure, modern award, enterprise agreement or employer policy/employment contract.*
- [ ] 13. Have you given the employee a written response within 21 days which contains the required content?
  *Please refer to Section 5 of this Guide for more information.*

## What happens if an employee raises a dispute?

- [ ] 14. Do you have a detailed plan for preventing and resolving a dispute within your business already e.g. a Grievance Policy or dispute resolution related provisions in an applicable contract or industrial instrument (modern award or enterprise agreement)?
- [ ] 15. Have you attempted to resolve the dispute at the workplace level initially? i.e. by having a discussion with the employee and complying with and grievance/dispute procedures?
  *Please refer to Section 6 of this Guide for more information.*
- [ ] 16. If a party has made an application with the FWC, and the FWC deals with the dispute by way of conciliation/mediation, have you taken all necessary steps to participate in this process meaningfully to mitigate the risk that the dispute will be arbitrated?
  *Please refer to Section 6 of this Guide for more information.*
- [ ] 17. If a party has made an application with the FWC, and the FWC deals with the dispute by way of arbitration (i.e. the dispute does not resolve during the conciliation process), and where the FWC has made a binding order, have you complied with the terms of this order?
  *Please refer to Section 6 of this Guide for more information.*
- [ ] 18. Have you kept records concerning the dispute and have you maintained confidentiality throughout the process?

## Casual Employment Information Statement

- [ ] 19. During casual employment, have you provided the employee with a Casual Employment Information Statement at the relevant time periods? (i.e. at commencement, on the 6-month anniversary of the employee's casual employment, on the 12-month anniversary of the employee's casual employment and on each subsequent 12-month anniversary of their casual employment?
  *Please refer to Section 7 of this Guide for more information regarding the obligations of employers.*
- [ ] 20. Have you checked the Fair Work Ombudsman website to ensure that you have the most up to date version of the CEIS to provide to the employee?
  *Please refer to Section 7 of this Guide for more information regarding the obligations of employers.*
- [ ] 21. Have you kept a record of when the CEIS was provided to the employee?

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