

Casual Employee Amendments to the Fair Work Act 2009 Take Effect

On 27 March 2021, the casual employment changes to the *Fair Work Act 2009* (FW Act) took effect after the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (the Act) received Royal Assent, following approval by both houses of Australian Parliament.

As members will note from previous IR Bulletins, VACC's submission to the Senate Committee Inquiry was supportive of the need for legislative clarity on casual employment following the contentious *WorkPac Pty Ltd v Rossato* 'double dip' Federal Court decision, provided that the definition was consistent with existing industrial arrangements (e.g. modern awards) and was practical for small businesses and their employees. As the new casual employment provisions broadly achieve this objective, VACC views the amendments as providing a good overall outcome for members.

With the changes to the FW Act now in effect, it is important that members who currently engage, or are considering engaging, casual employees familiarise themselves with the new statutory requirements.

A summary of the key changes is provided below:

New Definition of Casual Employee

Under the new section 15A of the FW Act, a person is a casual employee if:

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

In determining whether the employer has made "*no firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person*" – only the following considerations are relevant, as assessed **at the time** the offer is made:

- whether the employer can elect to offer work and whether the person can elect to accept or reject work;
- whether the person will work 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 (e.g. modern award)

Casual employees who were employed before 27 March 2021 and whose initial employment offer meets the new definition, continue to be casual employees under the FW Act.

Casual Employment Information Statement

Employers must now give **new casual employees** a Casual Employment Information Statement (CEIS) (as well as the updated version of the Fair Work Information Statements (FWIS)) **before, or as soon as practicable after, they commence employment.**

For **small businesses** (fewer than 15 employees*), the CEIS must **also** be given to **existing casual employees as soon as practicable following commencement of the Act on 27 March 2021.**

* Section 23 of the FW Act provides that when counting the number of employees, employees of associated entities of the employer are included – but casual employees are excluded, unless they are engaged on a regular and systematic basis.

For **other employers** (15 employees or more), the CEIS must also be given to **existing casual employees** as soon as practicable after the end of the transition period (i.e. **27 September 2021**).

Employers can give casual employees the CEIS either in person, by mail, by emailing a copy of the statement, or a link to the statement on the Fair Work Ombudsman's website (if the employee agrees). The CEIS can be provided to new casual employees at the same time as an employer provides the FWIS.

Members can access a copy of the new **CEIS** [here](#) and updated **FWIS** [here](#).

Casual Conversion – Small businesses (fewer than 15 employees)

Under the new FW Act provisions, an employer with fewer than 15 employees is **not required to offer** a casual employee the right to convert to a permanent (full-time or part-time) employee. However, if the casual employee **meets the eligibility requirements** (see below) **and makes a formal written request** to convert – the employer must formally respond **in writing** within 21 days, stating whether the employer grants or refuses the request.

The employer may refuse the request on **reasonable grounds** following consultation with the employee – and must include details of the reasons for reasonable refusal in their written response. Where an employer has reasonably refused a request, the casual employee retains a **residual right** to request conversion, provided the casual employee remains eligible and it has been **at least 6 months** since the last request was refused.

If an employer **grants the request**, the employer must within 21 days (and following consultation) give the employee written notice of the following:

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

Casual conversion – Other businesses (15 employees or more)

Under the new FW Act provisions, an employer with 15 or more employees **must offer** a casual employee, in writing, the right to convert to a permanent (full-time or part-time) employee if the employee meets the following **eligibility criteria**:

- they have been employed **at least 12 months**; and
- they have worked **a regular pattern of hours for the last 6 months** on an ongoing basis; and
- their regular pattern of hours could continue as a permanent (i.e. full-time or part-time) employee without significant changes.

Under the transitional arrangements, an employer with 15 or more employees must make a **written offer** to eligible casual employees **before 27 September 2021** (or within 21 days of after the casual employee's 12-month anniversary, whichever is the latter). An employer does **not** have to offer a casual employee conversion if there are **reasonable grounds** not to, or if the casual employee is **not eligible** (i.e. they have been employed for at least 12 months but have not worked a regular pattern of hours for the last 6 months). In both instances, the employer must advise the employee **in writing** that they are not making a casual conversion offer, including details of the reason/s for not making the offer.

Once an employer has made the written offer of conversion to an eligible casual employee, the **employee has 21 days to respond**. If the employee fails to accept the offer in writing within 21 days, the offer is deemed to have been refused.

However, a casual employee retains the **residual right** to request conversion if they continue to remain eligible and it has been **at least 6 months** since the last refusal. If such a request is made, the employer must formally respond in writing within 21 days, stating whether the employer grants or refuses the request – and provide details of the **reasonable grounds** for the refusal in their written response following consultation with the employee.

If an employer **grants the request**, they must within 21 days (and following consultation) give the employee written notice as outlined above.

Note: The above sets out the new statutory requirements under the amended FW Act. For the absence of this does not prevent an employee from otherwise requesting to convert from casual to full-time employment, or prevent an employer from otherwise granting such a request.

Members should further note that under the transitional arrangements, the **Fair Work Commission must review** the relevant casual terms (including casual conversion) of **modern Awards** (e.g. *Repair, Services and Retail Award 2020* and *Clerks – Private Sector Award 2020*) by **27 September 2021** to determine whether the relevant term is consistent with the new statutory requirements and where any uncertainty or difficulty relating to the interaction between the modern Award and the amended FW Act is found. If so found, the FWC must vary the modern Award/s to ensure it is consistent and/or operates consistently with the amended FW Act.

Members seeking further information regarding the casual employment amendments, including how it directly impacts their business, are encouraged to contact the Workplace Relations team at ir@vacc.com.au or 03 9829 1123.

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