

# Important changes to casual employment laws

## FAIR WORK ACT 2009

Important changes have been made to Fair Work laws about the employment of casual employees. The changes add a specific new Casual section to the National Employment Standards within the [Fair Work Act](#) (FW Act).

Because the [National Employment Standards \(NES\)](#) are 10 minimum employment entitlements that must be provided to all employees, all businesses should be aware of the changes to ensure they comply.

The new Casual NES consists of two main parts:

- o A new, standard definition of 'casual employee'; and
- o New rules about 'casual conversion' that oblige employers to offer permanent employment to eligible casual employees, in defined circumstances.

Employers will need to comply with the new Casual NES, with different rules and obligations applicable dependent on your business size.

You should contact the **MBV Employment and Industrial Relations team** on (03) 9411 4513 to **seek specific advice** as to how these changes apply to your business.

## THE NEW CASUAL NES - MAIN CHANGES

### Definition of 'casual employee'

The new Casual NES provides that a person will be defined as a 'casual employee' for the purposes of the entitlements in the NES, 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, and
- The person accepts the offer on that basis; and
- The person is an employee as a result of that acceptance.

In determining the above items, the new Casual NES sets out **four criteria** for consideration:

- 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;

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- 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.

The new Casual NES also makes it clear that:

- The above four considerations are exhaustive – meaning that they are the only considerations to which regard should be had and there are no other factors;
- 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.

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 Conversion process

The new rules attempt to standardise the casual conversion process and provide that if an employee:

- 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 such that, without significant adjustment, would allow the employee to continue to work as a full- time or part-time employee.

Then the employer **must offer the employee a right to convert** to permanent employment.

However, this is **not required** where:

- There are reasonable grounds for the employer 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 business grounds include:

- Where the conversion would require a significant adjustment to the employee’s hours of work for the employee to be permanently employed;

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- Where the employee's position will cease to exist in the 12 months after the conversion right arises;
- Where the hours of work which the employee is required to perform will be significantly reduced in the 12 months after the conversion right arises; and
- If there will be a significant change in either the days or times on which the employee's hours of work are required to be performed in the 12 months after the conversion right.

Where an employer determines not to make an offer of conversion, they must give notice of the decision to employees within 21 days of when the right to be offered conversion arose. If an employer fails to give this notice, the employee retains a residual right to request conversion at a later date.

## HOW THE NEW CASUAL NES APPLIES AND WHEN

To comply with the new Casual NES, employers will need to consider a range of factors based on business size.

### For Small Business (fewer than 15 employees)

Small business employers are **exempt from most aspects** of the new Casual NES. However, small business employers must:

- **Give casual employees information about the new Casual NES:** Employers must provide all existing casual employees with a new Casual Employee Information Sheet, published by the Fair Work Ombudsman. This must be given out as soon as reasonably practicable;
- **Apply existing casual rules in an Award or EBA:** Small business employers will still need to meet casual employment rules as set by a Modern Award or Enterprise Agreement. These rules will frequently include obligations for employers to consult and approve or refuse requests for conversion where an eligible casual employee has made a request to convert. These rules and other obligations to casual employees will continue to apply (unless they are inconsistent with the new Casual NES – see 'Important Note' section below).

### Non-Small Business (15 or more employees)

Business with 15 or more employees will be covered by the new Casual NES. There is a transition period of six months, during which an employer (other than a 'small business employer') is required to:

- **Assess existing Casual employees:** Employers must consider the casual conversion criteria against all existing casual employees (those who started employment before the new laws commenced). The employer must then either:
  - Offer conversion to casual employees (if they are eligible) unless there are reasonable grounds not to do so; or
  - Give each casual employee reasons why the offer has not been provided.

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**Note:** These above obligations apply regardless of whether a casual employee has already recently been offered conversion through the terms of a modern award or enterprise agreement.

- **Give casual employees information about the new Casual NES:** Employers must provide all existing casual employees with a new Casual Employee Information Sheet, published by the Fair Work Ombudsman. This must be given out as soon as reasonably practicable at the end of the six-month transition period.

## OTHER IMPORTANT CHANGES

There are a range of other changes in the new Casual NES that employers should understand. These include new rules to:

- **Stop 'double-dipping':** The new Casual NES sets out a clear rule that will prohibit claims from current and former employees for entitlements usually associated with permanent employment, if they have received a casual loading in lieu of those entitlements; and
- **Help resolve disputes about casual employment:** The new Casual NES creates specific processes to resolve disputes about casual conversion.
- **Review Award clauses to ensure consistency with the new Casual NES:** The new Casual NES also requires the Fair Work Commission to look at the casual clauses within all Modern Awards, to ensure they operate effectively with the new rules. This will take place within the six-month transition period.

**Important Note:** It is common for Modern Awards and EBAs to create specific definitions of 'casual' employment and set out criteria under which casual employees have a right to request conversion to permanent employment. These are likely to be different to the definition and criteria for conversion set in the new casual NES. The NES overrides award provisions that are less generous to employees, but not those that are more generous to employees. This means that some employers will need to consider both the new NES and either their Modern Award or EBA entitlements to determine which is more generous to employees.

Contact the MBAV Employment and Industrial Relations team on (03) 9411 4513 for more information about these other changes, or to obtain advice about your specific business circumstances.

## WHAT TO DO NEXT

All employers who have casual employees, or are thinking about engaging casual employees, should:

- Determine if the new Casual NES applies to your business;
- Establish when you need to give all existing and new Casual employees a copy of the Casual Employee Information Statement (Small business: as soon as practicable. All other businesses: as soon as practicable, at the end of the six month transition period);

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- Understand which obligations are necessary to ensure you comply with the new Casual NES.

You should contact MBAV for further advice.

## ALSO CONSIDER

Employers should also consider reviewing relevant employment documentation, including employment contracts offered to a person for employment as a casual employee. It is prudent to ensure they:

- State that the offer is for employment as a 'casual employee';
- 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;
- Specify the amount of the casual loading or specific casual rate of pay;
- State that the employer can elect to offer work and that the employee can elect to accept or reject work; and
- State that the employee will work as required according to the needs of the employer.

## MORE INFORMATION

- Contact the MBAV Employment and Industrial Relations team on (03) 9411 4513
- See the Fair Work Ombudsman [Summary of the new Casual NES](#)
- Download the [Casual Employee Information Statement](#)
- Download the updated [Fair Work Information Statement](#)
- Read the [Fair Work Act](#)