

## CASUAL EMPLOYEES

The employment of a casual employee is traditionally characterised as inherently informal and irregular, and in the strictest sense, casuals are engaged when and for as long as work is available. Casual employees receive a casual 'loading' on top of their base rate of pay to compensate for the lack of paid leave entitlements, notice of termination or redundancy payments. However, workplace laws have increasingly recognised the entitlements of casual workers. This guide outlines some of the standard obligations for employers in relation to their casual employees.

### Definition of a casual employee

- (1) A person is a **casual employee** of an employer 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.
- (2) For the purposes of subsection (1), in determining whether, at the time the offer is made, the employer makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person, regard must be had only to the following 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 only as required;
  - (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.

Note: Under Division 4A of Part 2-2, a casual employee who has worked for an employer for at least 12 months and has, during at least the last 6 months of that time, worked a regular pattern of hours on an ongoing basis may be entitled to be offered, or request, conversion to full-time employment or part-time employment.
- (3) To avoid doubt, 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.
- (4) To avoid doubt, the question of whether a person is a casual employee of an employer 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.
- (5) A person who commences employment as a result of acceptance of an offer of employment in accordance with subsection (1) remains a **casual employee** of the employer until:
  - (a) the employee's employment is converted to full-time or part-time employment under Division 4A of Part 2-2; or
  - (b) the employee accepts an alternative offer of employment (other than as a casual employee) by the employer and commences work on that basis.

### What are the entitlements of casual employees?

The National Employment Standards (NES), contained in the Fair Work Act 2009 (Cth), underpin all types of employment in Australia as legislative minimum standards. Employers and employees may negotiate for entitlements over and above these, for example in collective agreements or common law contracts, however the 10 minimum standards in the NES cannot be undercut.

The following Standards apply to casual employees:

## **Maximum Hours of Work:**

An employer must not request or require an employee to work more than the following number of hours in a week, unless the additional hours are reasonable; the lesser of:

- > 38 hours; and
- > the employee's ordinary hours of work in a week.

## **Carer's Leave (unpaid):**

Two days for each 'permissible occasion', where a member of the employee's immediate family, or a member of the employee's household, requires care or support because of:

- > a personal illness, or personal injury, affecting the member; or
- > an unexpected emergency affecting the member.

## **Compassionate Leave (unpaid):**

Two days for each 'permissible occasion', where a member of the employee's immediate family, or a member of the employee's household:

- > contracts or develops a personal illness that poses a serious threat to his or her life; or
- > sustains a personal injury that poses a serious threat to his or her life; or
- > dies.

## **Community Service Leave (unpaid)**

An entitlement to be absent when engaging in an 'eligible community service activity', which is defined as each of the following:

- > jury service (including attendance for jury selection) that is required under a law of the Commonwealth, a State or a Territory; or
- > a voluntary emergency management activity in the event of an emergency or natural disaster, where the employee does so on a voluntary basis and has a member-like association with a recognised emergency management body.

## **Jury Service**

Jury service for casuals in the NES is an unpaid entitlement; however the NES does allow for State legislation to override this, as is the case in Victoria.

Please refer to the applicable State legislation for further information (see also the *NES - Juries Act 2000 (Victoria)* fact sheet).

## **Public holiday (unpaid)**

Entitlement to be absent from employment on a public holiday, unless reasonably requested to work by the employer.

## **Fair Work Information Statement**

Provision of the *Fair Work Information Statement* upon commencement of employment.

## Casual Employment Information Statement

Provision of the *Casual Employment Information Statement* upon commencement of employment.

## Long Service Leave:

Division 9 of the *Fair Work Act 2009 (Cth)* contains the Long Service Leave National Employment Standard. This is a transitional entitlement pending the development of an Australia-wide set of entitlements to be developed in the future.

- > Depending on the state legislation that governs long service leave provisions, casual employees may be entitled to long service leave depending on whether or not they meet the appropriate requirements.
- > In Victoria, as per the *Long Service Leave Act 2018 (Victoria)*. A pre-reform award or a collective agreement may also stipulate long service leave entitlements.
- > For further information on Long Service Leave entitlements in Victoria for casual employees, please refer to the *Long Service Leave Act 2018 (Victoria)* fact sheet.

Furthermore, casual employees who have been employed for at least 12 months by an employer on a regular and systematic basis and with an expectation of ongoing employment are entitled to the following:

- > right to request flexible working arrangements, where the employee has a child under school age; or is under 18 years of age and has a disability
- > parental leave: 12 months unpaid parental leave subject to the notice and evidence requirements prescribed in the NES, specifically Division 5 – Parental leave and related entitlements.

## Casual Conversion

Casual conversion is the obligation to convert a regular casual employee to permanent employment. An employer has to offer their casual employee to convert to full-time or part-time (permanent) when the employee:

- > has worked for their employer for 12 months
- > has worked a regular pattern of hours for at least the last 6 of those months on an ongoing basis
- > could continue working those hours as a permanent employee without significant changes.

Some exceptions apply, including:

- > small business employers
- > if an employer has 'reasonable grounds' not to make an offer to a casual employee for casual conversion.

Employers must make the offer in writing before 27 September 2021 or within 21 days after the employees 12-month anniversary, whichever is later.

## Industrial instrument

Modern awards and enterprise agreements may have additional provisions for casual staff, such as the following:

- > **casual conversion clauses** – under a number of modern awards, a regular and systematic casual employee who has been employed for a specified period of time can request full-time or part-time employment. Some modern awards

also prescribe an **obligation on the employer** to extend such an offer of permanent employment to the casual employee.

- > **minimum engagement period** – most awards contain a clause outlining the minimum engagement period for casuals. A minimum of three hours is common, however be sure to check the relevant award or agreement.
- > **casual loading** – most commonly set at 25%, however transitional provisions (where a different casual loading previously applied) may result in a minimum transitional casual loading of more or less than 25%.

Additional entitlements may also derive from terms in a contract of employment, or in an organisation's policies and procedures.

## Access to unfair dismissal

Under the *Fair Work Act 2009 (Cth)*, casual employees will be protected from unfair dismissal provided they were employed on a regular and systematic basis and had a reasonable expectation of continuing employment. They must have also completed the minimum employment period, which is:

- > 12 months for small business employers; and
- > six months for other employers.

A small business employer is one who *employs less than 15 employees at the time of termination*.

*Casuals are only to be counted in this figure if they are regular and systematic and have a reasonable expectation of continuing employment.*

The employee must also either be covered by a modern award, **or** be covered by an enterprise agreement, **or** earn less than the high income threshold (which is a dollar amount indexed every year on July 1).

In effect, this means that if **one** of these conditions is satisfied, the employee will be protected from unfair dismissal upon completion of the relevant minimum employment period.

## Other legislative coverage

There are a number of other pieces of legislation that apply to casual employees such as the following:

- > Occupational Health and Safety (Occupational Health and Safety Act 2004 in Victoria)
- > Workers Compensation (Workplace Injury Rehabilitation and Compensation Act 2013 in Victoria)
- > Equal Opportunity (Equal Opportunity Act 2010 in Victoria).

## Contacting the Victorian Chamber of Commerce and Industry

The Victorian Chamber's team of experienced workplace relations advisors can assist members with a range of employment, human resources and industrial relations issues.

Our experienced workplace relations consultants can also provide assistance to both members and non-members on a range of more complex matters for a fee-for-service. The consultants can, among other things, provide training to employees, conduct investigations and provide representation at proceedings at the Fair Work Commission.

For assistance or more information, please contact the Workplace Relations Advice Line on **(03) 8662 5222**.

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