



Important Changes To Casual Employment



-by John Girardi

The rights of casual employees to convert to permanent employment just got stronger

As an employer, you may be aware that the

Federal Government recently passed changes to the law relating to casual employees. These changes mean casual employees now have stronger rights to claim permanency than ever before.

The changes introduced a definition of 'casual employee' into the Fair Work Act 2009, which will override the meaning of 'casual employee' that has evolved over time through the courts. It reflects recent statements made by the courts that the essence of casual employment is the absence of a 'firm advance commitment to continuing and indefinite work according to an agreed pattern of work'. It means that if you intend to have an employee work a regular pattern of work from day one, that employee will not meet the definition of "casual employee".

The rules that apply to small businesses (with less than 15 employees) are slightly different than the rules that apply to businesses with 15 or more employees. When counting the number of employees, you don't count genuine casuals (i.e. those working irregular hours). These differences are outlined below.

When am I required to convert a casual employee to a permanent employee?

Where a casual employee has worked for the same employer for more than 12 months, and they have worked a regular pattern of work for the past 6 months, they are likely to meet the criteria for conversion to permanent employment.

Casual Employee Information Statement

As an employer, you should already be familiar with the Fair Work Information Statement which you are required to give to every new employee before, or as soon as possible after, they start a new job. This helps employees to understand their rights under Australian workplace laws.

You should also give a Casual Employment Information Statement to all existing casual employees.

The Casual Employment Information Statement explains the rights of casual employees to become permanent.

What if I don't want my casual employees to become permanent?

You need a good reason to not make a casual employee permanent, if they meet the criteria for permanency. For example, if you are expecting a downturn in your business, you may be able to justify not converting a casual employee to a permanent employee.

Loss of the 25% casual loading

If a casual employee converts to a permanent employee, the employer will no longer be required to pay the employee a 25% casual loading. The casual loading is an incentive for casual employees to remain casual.

What if the casual employee doesn't want to convert to permanent employment?

Following the recent changes to casual employment, the Fair Work Ombudsman created a new form for casual employees (the Casual Employment Information Statement). This form must be given to all new casual employees and existing casual employees, and it can be found on the Fair Work Ombudsman's website.

Casual employees have a choice. Just because they have a right to convert to permanent employment (if they meet the criteria) it doesn't mean they have to. It may suit many casual employees to remain casual, as converting will mean they will lose their 25% casual loading.

If you are a small business (less than 15 employees)

If you are a small business employer (with less than 15 employees), you need to determine which existing employees were employed by you as casual employees as at 27 March 2021. You then need to give the Casual Employee Information Statement to each of those casual employees as soon as practicable after that date.

Casual employees who work for small businesses, and who meet the criteria for conversion, have a right to request permanency. The employer does not need to make a formal offer of permanency to these employees (unlike employers with 15 or more employees).

If you employ 15 or more employees

If you are not a small business employer (that is, you have 15 or more employees – you don't count genuine casuals, i.e. the ones who work irregular hours), there is a transitional period in place, which ends on 27 September 2021.

Employers (with 15 or more employees) need to make the offer to eligible casual

employees, to convert to permanency, by 27 September 2021. You must make this offer in writing.

After 27 September 2021, there is a mandatory requirement to offer all eligible casual employees permanent employment on their 12 month anniversary date.

If you make a mistake

If you make a mistake (i.e. incorrectly classify an employee as casual, when they should be permanent), an offset mechanism has been introduced into the Fair Work Act. It will allow a court to offset the casual loading amounts paid to an employee (i.e. the 25% casual loading they receive) against any claim made by them for back pay of annual leave, public holidays, and potentially other entitlements. The offset mechanism will provide protection for an employer if an employee is later found not to be a casual employee.

The risk you need to be aware of: poor employment contracts or no employment contracts

I have seen examples of poorly written employment contracts,

that are not clear on the casual employment relationship. There are examples of employees successfully claiming permanent entitlements (such as annual leave and public holidays), because of poorly worded employment contracts. They have received back payments for annual leave and public holidays, on top of what the employer believed was a casual loading to cover the non-payment of these entitlements.

Similarly, if there is no casual employment contract in place, an employee may be able to claim they were employed on a permanent basis, and claim back payments for entitlements (such as annual leave and public holidays).

Employment contracts will play an important role going forward in clarifying the casual employment status of employees, and protecting against claims for back pay.

About John Girardi

John Girardi is a human resources consultant who runs Girardi Human Resources. He works with a number of employers in the automotive industry to provide outsourced human resource support, including providing Fair Work advice, drafting employment contracts, performance management, management training, and recruitment.

You can find out more about Girardi Human Resources here: www.girardi.com.au