Important changes to casual employment laws

SUMMARY

The *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* is operative from 27 March 2021. The legislation amends the National Employment Standards (**NES**) in the *Fair Work Act 2009* (**FW Act**) to make important changes to casual employment laws and arrangements in Australia.

The amendments:

- Define a 'casual employee' for the purposes of the entitlements in the NES;
- Protect employers from 'double-dipping' claims by casual employees and ex-employees who claim they are entitled to annual leave and other entitlements of permanent employment;
- Require employers to give each casual employee a copy of a Casual Employment Information Statement; and
- Give eligible casual employees the right to convert to permanent employment in certain circumstances.

The amendments require the Fair Work Commission (**FWC**), within a six-month period from commencement, to review the casual employment terms in all awards to ensure they operate consistently or effectively with the amendments.

In addition to the casual employment reforms, the original Bill included schedules to reform the laws relating to awards, enterprise agreement-making, greenfields agreements and compliance and enforcement. However, the Bill was amended in the Senate to remove these schedules from the Bill. The Federal Government has not ruled out introducing another Bill into Parliament to deal with these matters if sufficient Crossbench Senators can be convinced to support the provisions.

What is the definition of a 'casual employee'?

Under the new provisions, a person will be a 'casual employee' for the purposes of the entitlements in the NES, 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.

The amendments clarify that for the purposes of determining whether the above conditions have been met, regard must be had only to the following four 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 as required according to the needs of the employer;

(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.

Importantly, the amendments clarify that:

- 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.

What wording should be used in employment contracts for 'casual employees'?

Given the definition of a 'casual employee' in the legislation, employers would be wise to ensure that employment contracts offered to a person for employment as a casual employee:

1. State that the offer is for employment as a 'casual employee';
2. 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;
3. Specify the amount of the casual loading or specific casual rate of pay;
4. State that the employer can elect to offer work and that the employee can elect to accept or reject work; and
5. State that the employee will work as required according to the needs of the employer.

How does the legislation protect employers against 'double-dipping' claims by casual employees?

The legislation provides protection to employers against 'double-dipping' claims by employees and ex-employees who were engaged and paid as casuals but who later claim they are entitled to annual leave and other benefits of permanent employment.

It does this by including a provision which allows the amount of the casual loading (or similar) paid to an employee to be offset against any entitlements that the employee claims to be owed.

The legislation also clarifies that service as a casual employee is not counted for the purposes of redundancy pay, notice of termination and various other entitlements of permanent employment, if the casual converts to permanent employment.

What are an employer's obligations to give casual employees the Casual Employment Information Statement?

The legislation requires the Fair Work Ombudsman (**FWO**) to publish a Casual Employment Information Statement which includes information about the definition of a 'casual employee' and the conversion rights of casual employees.

The Statement has been published by the FWO and can be downloaded here: PDF version; Word Doc.

An employer must give each casual employee the Casual Employment Information Statement before, or as soon as practicable after, the employee starts employment as a casual employee with the employer.

However, if the employer employs a casual employee more than once in a 12-month period, the employer is only required to give the casual employee the Statement once in the period.

An employer (other than a ***'small business employer'***, defined as one that employs less than 15 employees) must give each casual employee who started their employment before 27 March 2021, the Casual Employment Information Statement as soon as practicable after the end of the six-month ***transition period*** (i.e. as soon as practicable after 27 September 2021). An employer can choose to give the Statement at an earlier time.

A 'small business employer' must give each casual employee who started their employment before 27 March 2021, the Casual Employment Information Statement as soon as practicable after 27 March 2021. `

What casual conversion rights are included in the legislation?

The legislation amends the NES in the FW Act to provide casual conversion rights to employees of employers (other than 'small business employers').

Where 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 which without significant adjustment the employee could continue to work as a full-time or part-time employee, the employer must make an offer to the employee for conversion to permanent employment, except 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.

If the employee chooses not to convert to permanent employment, the employee can remain a 'casual employee' indefinitely.

After an eligible casual employee's initial conversion right, the employee has the right to request conversion at a later stage but not if they have requested conversion within the last six months.

What steps must an employer take when a casual employee reaches 12 months of employment?

Subject to the transitional provisions outlined below, when a casual employee reaches 12 months of service, the employer must:

- Assess whether, during at least the last 6 months of the 12-month period, the employee has worked a regular pattern of hours on an ongoing basis which without significant adjustment the employee could continue to work as a full-time or part-time employee; and
- Determine whether there are reasonable grounds for the employer not to offer conversion based on facts that are known, or reasonably foreseeable, at the time of deciding not to make the offer.

If the employee is eligible for conversion and the employer does not have reasonable grounds for not offering conversion, the employer must offer conversion to the employee within 21 days after the employee completed 12 months of employment, as follows:

- Full-time employment must be offered to casual employees who have worked full-time hours during the previous 6-month period;
- Part-time employment must be offered to casual employees who have worked part-time hours during the previous 6-month period. The part-time employment offered must be consistent with the regular pattern of hours that the casual employee has worked during the 6-month period.

If the employer decides that the employee has not worked a pattern of hours that meets the conversion requirements in the FW Act, or decides that there are reasonable grounds not to make an offer to the employee for conversion, the employer must give written notice of this decision to the employee within 21 days after the employee completed 12 months of employment.

Is an employer required to offer conversion every 12 months?

No. After an eligible casual employee's initial conversion right at 12 months of employment, an eligible employee has the right to request conversion at a later stage but not if they have requested conversion within the last six months. In the legislation, this is called the ***Residual right to request casual conversion.***

Unlike the process which applies to a casual employee's initial conversion right, the onus is on the employee to make a request if they wish to exercise a residual right to request conversion. If a request is made, the employer is able to refuse the request if there are reasonable business grounds to do so.

What are the obligations of employers during the 6-month transition period following commencement of the legislation?

A 6-month ***transition period*** applies following commencement of the amendments to the FW Act. By the end of the transition period (i.e. by 27 September 2021), an employer (other than a 'small business employer') must, in relation to all casual employees who started their employment with the employer before commencement, assess each casual employee against the conversion criteria and either:

- Offer conversion to eligible casual employees (unless the employer has reasonable grounds not to); or

- Provide a notice to each casual employee who is not offered conversion that includes the reasons why the employer has not provided the offer.

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

What options do employers and employees have if a dispute arises about the operation of the casual employment provisions in the NES?

If a dispute arises about the operation of the casual employment provisions in the NES (e.g. a dispute about whether an employee is eligible to convert to full-time or part-time employment):

1. If a modern award applies to the employee, the dispute settlement term in the modern award applies;
2. If an enterprise agreement applies to the employee, the dispute settlement term in the enterprise agreement applies;
3. If the employee is covered by a written agreement between the employer and the employee (e.g. a written employment contract) which includes a term which provides a procedure for dealing with a dispute, that term applies;
4. If points 1, 2 and 3 above do not apply, a party to the dispute may notify the FWC. The FWC can conciliate and, if all parties agree, it can arbitrate.

In addition to the above, the Federal Circuit Court in the small claims jurisdiction is able to make orders relating to the eligibility of an employee to convert to permanent employment.

How does the definition of a 'casual employee' and the casual conversion rights in the NES interact with those in modern awards?

Most modern awards define a casual employee as 'one engaged and paid as such', and include provisions which give eligible employees the right to request conversion after a specified qualifying period of 6 or 12 months, with employers having the right to reject conversion requests on reasonable grounds.

The legislation requires the FWC, within a six-month period from commencement (i.e. by 27 September 2021), to review the casual employment terms in all awards to ensure they operate consistently or effectively with the amended NES.

The NES overrides award provisions that are less generous to employees, but not award provisions that are more generous to employees. Therefore, until the FWC reviews and varies each modern award, employers will need to be mindful of the entitlements that employees have under the NES and modern awards. For example:

- The NES casual conversion provisions do not apply to 'small business employers' (i.e. employers who employ less than 15 employees) but most employees of small business employers are covered by modern awards which include casual conversion provisions; and
- The *Manufacturing and Associated Industries and Occupations Award 2020*, and various other awards, provide a right to request casual conversion after 6 months of regular service, whereas the NES provisions require 12 months of regular service.

How does the definition of a 'casual employee' and the casual conversion rights in the NES interact with enterprise agreements?

The NES overrides enterprise agreement provisions that are less generous to employees, but not agreement provisions that are more generous to employees.

The legislation gives the FWC the power to resolve uncertainties and difficulties about the interaction between an enterprise agreement and the definition of a 'casual employee' and casual conversion rights in the NES. The FWC may make a determination varying an enterprise agreement on application by an employer, employee or union covered by the enterprise agreement.

What maximum penalties apply to breaches of the new provisions?

The maximum penalty for a body corporate which breaches the NES, including the casual employment provisions, is $66,600 per contravention or $666,000 for a 'serious contravention'. The maximum penalty for an individual is $13,320 per contravention or $133,200 for a 'serious contravention'.

The casual employment rights in the NES are 'workplace rights' under the general protections in the FW Act. Similar maximum penalties to those outlined above apply to breaches of the general protections.

In addition, accessorial liability provisions in the FW Act enable individuals to be penalised if they are knowingly involved in a breach by a body corporate or other party.

Do you require further advice?

For further information or assistance, please contact Ai Group.

Ai Group has set up a special section on our website to provide access to Ai Group advice and assistance relating to the COVID-19 pandemic and the recovery from the pandemic.

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