

CASUAL EMPLOYMENT HANDBOOK

In the fast-paced world of business, it can be all too easy to bring in a new person and call them a casual for ease and flexibility. In the new era of workplace compliance such an approach can land employers in hot water, leaving you and your business vulnerable to non-compliance liabilities, particular in light of the recent Closing Loopholes changes.

In this handy handbook we look to get things right from day one by walking you through the key obligations on employers throughout the life of employing a casual employee – from start to end.

The changes in this handbook apply from 26 August 2024.



Practical Tip: Some of the obligations in this handbook differ depending on whether or not you're a "small business employer", defined as an employer with fewer than 15 employees. This is the total number of individuals, not the full-time equivalent number. This can include employees who are:

- full-time and part-time employees; and
- casual employees only if they are employed on a regular and systematic basis (similar roster or pattern each time) with a reasonable expectation of ongoing employment



Important: The changes in this handbook only apply to 'national system employers' and 'national system employees. This means that the new laws will not apply to employers that fall outside of the Fair Work system (e.g. those covered by State industrial relations laws in a State that has not referred its IR powers to the Commonwealth)).

This handbook also does not cover the very specific exception to the new casual employee definition which cover fixed term contractors, academic staff or teaching staff at a university. We recommend seeking specific legal advice regarding these specific exceptions if you believe one might apply to your situation.



NEED HELP!

If any of the content in this handbook raises any issues or concerns for you and you would like further assistance or a second opinion, Australian Business Lawyers & Advisors is here to help.

Get in touch with one of the team at:

Website: Ablawyers.com.au

Phone: 1300 565 846

STAGE 1 - CASUAL RECRUITMENT (From 26 August 2024)

Under the Closing Loopholes Bill changes there is a new definition of ‘casual employee’.

The new definition will **only** apply from 26 August 2024 onwards to all new casual employees.

Employers will need to carefully consider how any prospective new employees from this date (26 August 2024) should be employed.



Important: Employees who had already commenced employment as a casual prior to 26 August 2024 are not impacted by the new definition and remain a casual employee.

The New Casual Definition

An employee will meet the new definition of a ‘casual employee’ only where the employees’ employment relationship is characterised by:

- an absence of a firm advance commitment to continuing and indefinite work +
- entitled to a casual loading

When assessing whether an employee meets the ‘casual definition’ we have to consider both:

- the term of the employee’s contract AND
- the real substance, practical reality, and true nature of the employment relationship (i.e. how the parties behave and treat each other after the employment has begun)

Critically, this new definition means to determine whether a worker is a permanent or a casual, it will no longer be sufficient to simply look at the initial offer of employment or the terms of the written contract in isolation.

Instead what will be assessed is ‘real substance, practical reality and true nature of the employment relationship’, including how the contract will actually be performed in practice.



How does an employer tell if a new casual is being engaged properly (i.e. their employment is characterised by an absence of a firm advance commitment to continuing and indefinite work) when first employing them?

The Fair Work Act sets out specific factors which indicate things a Court or Tribunal will take into account in deciding whether an employee has been correctly engaged as a casual.

There are no rules as to the weighting given to each of the factors in the decision-making process, with no one factor necessarily decisive. The factors are a guide, with the ultimate question being whether there is an ‘absence of a firm advance commitment to continuing and indefinite work’.

Casual Factors

Consider whether the terms your contract and any ‘mutual understanding’ or ‘expectation’ between yourself and the prospective employee. Does it indicate the employee is truly being engaged as a casual employee according to the new definition or a permanent employee by considering and weighing up the below factors.



A 'mutual understanding' or 'expectation' does not need to be in the written contract but can be inferred from conduct (e.g. from comments made during the hiring phase or how the performance or conduct of you and the employee is understood to occur after you have entered into the contract with the employee).

FACTORS THAT INDICATE A CASUAL EMPLOYEE RELATIONSHIP	FACTORS THAT INDICATE A PERMANENT EMPLOYEE RELATIONSHIP
Contract entitlements	
The employment relationship is described in the contract as 'casual employment'	The employment relationship is <u>not</u> described in the contract as 'casual employment'
The employee is entitled to and will be paid a casual loading or specific rate of pay for casuals under the term of the contract	The employee is not entitled to a casual loading but is entitled to other permanent employee entitlement like annual leave, personal leave, sick leave.
There is no guarantee of future or continuing work being available to the employee under the terms of the contract	The employee is guaranteed future or continuing work under the terms of the contract
Obligation to offer work & perform work	
You, the employer, can elect to offer (or not offer) work (both in the contract and in practice)	You, the employer, cannot elect to offer (or not offer) work to the employee (both in the contract and in practice)
The employee can elect to accept or reject work (both in the contract and in practice)	The employee does not have the right to elect to accept or reject work (both in the contract and in practice)
Roster and work	
The employee will work as required according to the needs of the employer (both as described in the contract and in practice)	The employee's work is <u>not</u> determined by the needs of the employer (e.g. the employee has a fixed schedule and consistent hours that don't change based on the needs of the employer')
The employee will have an irregular pattern of work	The employee will have a consistent pattern of work
The employee is to be rostered on an as needed basis	The employee is to be rostered on set advance schedule e.g. the employee is rostered months in advance
The employees' number of work hours will vary per shift	The employee is guaranteed / required to work a set number of hours or set shifts
The days on which the employee will work will may vary from week to week	The employee must work certain regular days of the week/shifts.
The work to be performed by the employee is different to the work part-time and full-time employee's roles are performing in the workplace.	The work the casual employees will be undertaking is similar to part-time and full-time roles in the workplace.

Examples of the assessment process in practice

Example	Comments
<ul style="list-style-type: none"> Sam has retired from full time work and is on the part pension. Sam is offered casual employment at Parliament House on the basis that his employer expects to be able to offer him shifts on sitting days. The Parliamentary calendar is provided to Sam upon commencement in November for the next year, although it is subject to change. Sam receives no guaranteed hours from the employer, nor a firm advance commitment that he will be offered casual shifts on every sitting day. This flexibility works well for Sam, as it provides him with the autonomy to accept or reject work so as not to impact on his pension. 	<p>Sam is a casual employee upon commencement within the meaning of section 15A.</p>

Example	Comments
<ul style="list-style-type: none"> Charlie accepts a casual position as a security guard at a shopping centre. The contract of employment Charlie receives contains terms to the effect that they will be required to work rostered shifts each Thursday late night and at least one weekend day each week, and will be paid a 25 per cent loading. The contract communicates the firm advance commitment to continuing and indefinite work that Charlie's employer makes to them. Due to the stated requirement for Charlie to work those rostered shifts on Thursday evenings and over the weekend (as opposed to stating an expectation for their availability to work at peak trading times), it does not appear that Charlie has the ability to elect to accept or reject work. <ul style="list-style-type: none"> The contract of employment does not include a term that provides the contract will terminate at the end of an identifiable period, or a term that limits the above requirement to work each Thursday night and one weekend day, to a specified season or period. 	<p>These circumstances indicate that Charlie's employment is most appropriately characterised as permanent part-time and not casual within the meaning of section 15A.</p>

Penalties for misclassifying an employee incorrectly as a casual

The Closing Loopholes changes to the Fair Work Act have introduced new offences related to the intentional misuse of casual employment, including dismissing an employee in order to re-engage them as a casual employee and knowingly making false statement to persuade or influence a person to be engaged as a casual employee.

The penalty for these offences is up to \$93,900 for individuals and \$469,500 for companies per offence.



In addition, employers who misclassify employee should be aware that they may be liable for backpay from the start of the employee's employment for unpaid permanent employee entitlements (e.g. annual leave, personal leave).

STAGE 2 - CASUAL EMPLOYEE ONBOARDING

When onboarding a new casual employee it is important that a number of steps are followed to ensure the employee is properly engaged as a casual and legislative requirements, such as providing the employee with the Casual Employment Information Statement, are followed.



What do you need to do when onboarding a casual employee?

Before the employees first day ensure:	
<ul style="list-style-type: none"> You have clearly advised the employee that they are engaged on a casual basis and the implications of this – no firm advance commitment to continuing work. 	<input type="checkbox"/>
<ul style="list-style-type: none"> You have issued the employee with a contract of employment which clearly states the employee is being engaged as a casual and explicitly outlines terms applicable to their casual employment status <p>(Please refer back to Stage 1 of this Handbook for more information).</p>	<input type="checkbox"/>
<ul style="list-style-type: none"> You have provided the employee with a current copy of the Casual Employment Information Statement. <p> You can obtain a current version of the statement in English and other languages on the Fair Work Ombudsman's website</p>	<input type="checkbox"/>
<ul style="list-style-type: none"> Considered how you will roster the employee? Remembering the employee should typically have the ability to accept and reject work as a casual. <p> Be mindful a regular and systematic rostering pattern may be indicative of a permanent relationship, rather than a casual one, as it may infer that there is an advanced commitment. Please refer back to Stage 1 of this Handbook for more information.</p>	<input type="checkbox"/>

STAGE 3 - DURING EMPLOYMENT: CASUAL EMPLOYMENT INFORMATION STATEMENT

Under the Closing Loopholes Bill changes employers from 26 August 2024 must provide the Casual Employment Information Statement (Casual Statement) at various points during a casual employee's employment (in addition to at commencement) to remind casual employees of their rights and ability to change to permanent work (see Stage 4 of this Handbook for more information further detail on conversion).



Important: The obligation to provide the Casual Statement applies to all current employees (employed before the changes commenced on 26 August 2024) and new employee engaged under the new definition on or after 26 August 2024.



When do you need to provide your current and new casual employees with the Casual Employment Information Statement?

Timing – the statement needs to be provided:	Small Business Employers	Non-Small Business Employers
On commencement	X	X
As soon as possible after 6 months of employment		X
As soon as possible after 12 months of employment	X	X
As soon as possible after every subsequent 12 months of employment (e.g. 24 months, 36, 48 months etc.)		X



Tips from the experts

To help employers with meeting this obligation we recommend:

- Each time you go to provide the Casual Statement to an employee ensure you are providing the employee with the current version by downloading the current version from the Fair Work Ombudsman's website.
- Ensuring you keep a record of how and when you provided the Statement to casual employees.
- Auditing your current casual employees to understand their anniversary dates and when they will need to be providing the Casual Employment Information Statement to them; and
- As the obligation can be quite onerous given many casual employees will have different 6 and 12 month employment anniversaries to track employers should consider ways in which they may be able to provide the Casual Employment Information Statement regularly to casual employee (for example on correspondence that is sent regarding rosters or shifts) in order to ensure they are meeting their obligation to provide the statement as required.

Common Questions?

1. Do employers have to provide the Casual Statement to current employees, who were employed before the Closing Loopholes changes and new casual definition?

Yes! All employees as soon as possible after any applicable employment anniversary (6 months, 12 months, each subsequent 12 months) must be provided with the Casual Statement.

2. How long does an employer have after an employee's anniversary date (after 6, 12 months of employment etc.) to give the employee the Statement?

Employers must give the Casual Statement as soon as practicable after the casual employee's anniversary date (6 months, 12 months, 24 months etc).

3. What if an employer is classified as a small business when a casual employee commences employment but later (for example after 6 month of the casual being employed) the business has grown, and is no longer classified as a small business (employing 15 or more employees) ?

The requirement to provide the Casual Statement applies at the time the obligation arises (e.g. on the casual employee's employment anniversary). This means in the above scenario the employer would be required to give the employee the Casual Statement at 6 months, as at that time when the obligation to provide the Casual Statement arose the business was a non-small business employer.

4. What about casuels who are engaged every seasons, Christmas period or holidays etc? Does an employer have to provide a new Casual Statement every new time they are engaged.

Whilst at common law each occasion a casual employee is engaged is a separate contract of employment, for this section of the Fair Work Act such a notion is more loosely applied. This means a casual employees will be considered to be continuously employed by an employer even where their shifts might be broken up by many days or weeks or even months where they do not work/ have any shifts. The only way a casual employee's employment will be considered to have ended is where there is a clearly discernible significant break. Whilst there is no strict rule as to how long this period might need to be, we are of the view that a break longer than 6 months is likely to be sufficient to have ended the casual employee's employment for the purpose of needing to provide the Casual Statement.

In addition, aside from the obligation on non-small business employers to provide an employee with the Casual Statement at commencement and after a 6-month period, employers are not required under the Fair Work Act to provide the Casual Statement to the same employee more than once in any 12 months period if the employee is employed more than once in a 12-month period.

Practical Examples:

If a casual employee works every school holidays, they would be considered to be continuously for the purpose of calculating the employees' period of employment, as the breaks between their shifts would be approximately 3 months. This means the employer would not need to provide the statement each new holiday period but would be required to provide the employee with the Casual Statement at their employment anniversary (6 months, 12 months, 24 months). Breaks between shifts during non-school holiday period would not break the employee's continuous employment for the purpose of calculating their employment anniversary.

If a casual employee was only engaged each summer school holidays, their employment will be considered to have ended after each summer and recommenced a fresh every new summer holidays as their periods of employment are clearly discernible by a break of ~9 months. This means the employer would need to provide the Casual Employment Information Statement when the employee commences each Summer holidays year and at any employment anniversary (6 months, 12 months, 24 months etc) they reach.

STAGE 4 - EMPLOYEES CHANGING FROM CASUAL TO PERMANENT EMPLOYMENT

The casual conversion arrangements are changing. Under the new system employers no longer have an obligation to proactively offer conversion to regular casual.

Important commencement information

One of the new eligibility criteria to access the new 'employee choice regime' is that the casual employee has been employed for either 6 months in the case of non-small business employers or 12 months for small business employer.

For this reason all existing casuals **employed prior to 26 August 2024** will continue to have access to the previous casual conversion regime until they may become eligible to access the new 'employee choice regime'

This means that the obligation on employer to offer casual conversion under the former casual conversion regime continues to apply until:

- **26 February 2025** for casual's employed prior to 26 August 2024 by non-small business employers; and
- **26 August 2025** for casuals employed prior to 26 August 2024 by small business employers

The new 'employee choice' regime will apply to all new casuals employed from 26 August 24.

Overview of the new regime for employee changing from casual to permanent employment

Under the new arrangements employers will no longer have an obligation to proactively offer conversion to regular casual employees at 12 months of employment for all new employees.

Once a casual is correctly employed as a casual, they remain a casual (they cannot simply morph into permanent employees) until:

- the employee is offered permanent employment by their employer, and they accept;
- the employee converts to permanent employment under an applicable award or enterprise agreement; or
- the employee "elects" to converts to permanent employment under what is called the 'employee choice' process.

If none of the above occurs = the employee remains a casual.

The below section outlines the 'Employee Choice' Process and provides a step-by-step checklist to ensure that you are complying with any employer obligations under it.

'Employee Choice' Process (replaces the casual conversion process)

- Certain eligible employees have the right to issue a written notification (e.g. request) that they would like to change to full/part time under the 'employee choice' process. Employers must respond to a notification in writing within 21 days.
- Employers need to be aware that employees can raise a dispute related to the 'Employee Choice' Process to the Fair Work Commission including an employer failing to respond within 21 days and/or challenging an employer's decision to not accept a notification to convert to permanency.
- The below checklists and template letters have been developed in order to assist you in meet your employer obligations should you receive a notification from an employee to convert to permanency.

Step 1 - Is the employee who gave the notification eligible to do so under the Fair Work Act?



Anyone can request to convert to permanent from their employer - but only certain employees have a legal right to give an employer a notification under the Fair Work Act.

- Eligible employees =

- ✓ the employee believes that they no longer meet the casual employee definition (see Stage 1 for further detail about the definition); and
- ✓ in the previous 6 months the employee has not given you a notification to convert to permanence which was not accepted refused or had a dispute involving a notification given to you dealt with by the Fair Work Commission;

Note: If prior to 26 August 2024 you gave written notice to an existing casual employee to not offer the employee conversion, were not required to offer conversion or the employee declined to offer conversion under the former casual conversion process or were not required it will be treated the same for the purposes of this eligibility requirement.

- ✓ the employee does not currently have a dispute before the Fair Work Commission regarding another notification to convert given to you; and
- ✓ the employee has been employed by you for a period of at least 6 months (or 12 months if you are a small business employer) beginning the day the employment started;

Note: If an employee was employed as a casual prior to 26 August 2024 any period work before this date does not count for the purposes of determining whether the employee meets the minimum 6 or 12 month period of employment.



- **If yes to all of the above** = the employee is eligible move to considering their request at step 2.
- **If no to any of the above** = the employee is not eligible not legally entitled to give a notification to convert to permanent employment.
- Of course the employee may still seek to convert to permanency; however, as an employer you are not legally required to comply with the Fair Work Act requirements set out in this checklist when considering their request.

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Step 2 - Considering the notification



- When considering and responding to a notification, employers can decide to do one of two things:
 - Accept the notification and convert the employee to part-time or full-time permanent employment OR
 - Not accept the notification on one or more of the accepted grounds

Consultation



- Before you give a response to an employee you must first consult with the employee about the notification.



- If **accepting** the notification during the consultation you must discuss the following matters (which you will give detail of in your written response to the employee):

- ✓ whether the employee is changing to full-time or part-time employment;
- ✓ the employees' hours of work after the change tasks effect; and
- ✓ the day the change to full-time employment or part-time employment will take effect.



- **Note:** If you accept a notification this does not require you to increase the hours of work of the employee

If **not accepting** the notification you can only do so under the Fair Work Act on one or more of the following grounds.

- ✓ The employee still meets the casual employee definition (see Step 1 for details of the definition);
- ✓ Accepting the notification would **affect compliance** with a recruitment or selection process required under a law of the Cth, a State or Territory;
- ✓ There are **fair and reasonable operational** grounds for not accepting the notification including that;
 - Substantial changes would be required to the way in which your enterprise is organised; or
 - There would be significant impacts on the operations of your enterprise; or
 - *Substantial changes to the employee's terms and conditions would be reasonably necessary* to ensure that you do not contravene a term in a fair work instrument (award, enterprise agreement) that would apply to the employee as a full-time or part-time employee.



- Please be aware that if you do not accept a notification to convert, an employee is still entitled under the law to dispute that decision in the Fair Work Commission.

Step 3 – Responding to a notification



Employers must provide a written response to all written notifications to convert to permanent employment **within 21 days**

Accepting a notification

- If after receiving and considering a notification you decide to approve it, you must
- ✓ confirm in writing to the employee within 21 days that the notification to convert is accepted;
- ✓ state whether the employee is changing to full-time or part-time employment;
- ✓ state the employees' hours of work after the change takes effect; and
- ✓ state the day the change to full-time employment or part-time employment will take effect.



To help you with an acceptance response see **Template Letter A** at the end of this handbook.

Not accepting a notification

If after receiving and considering a notification you decide to not accept the notification you must:

- ✓ Confirm in writing to the employee within 21 days that the notification to convert is not accepted;
- ✓ Include in the response the reason the notification is not accepted on one or more of the following permitted grounds under the Fair Work Act:
 - The employee still meets the casual employee definition; and/or
 - Accepting the notification would **affect compliance** with a recruitment or selection process required under a law of the Cth, a State or Territory; and/or
 - There are **fair and reasonable operational** grounds for not accepting the notification including that;
 - *substantial changes* would be required to the way in which your enterprise is organised; or
 - there would be significant impacts on the operations of your enterprise; or
 - *substantial changes to the employee's terms and conditions* would be *reasonably necessary* to ensure that you do not contravene a term in a fair work instrument (award, enterprise agreement) that would apply to the employee as a full-time or part-time employee.



To help you with a non-acceptance response see **Template Letter B** at the end of this handbook.



How to use the template letters

The template letters contain **highlighted** text which indicate areas where you simply need to replace the writing with what applies to your employee's situation.

Explanatory information is shown in *blue italics* to assist you and should be deleted once you have finalized the letter.

Ensure all highlighted text and explanatory information has been completed or deleted, as appropriate, before issuing a letter to any employee.



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TEMPLATE LETTER A – Acceptance of notification to convert to permanent employment

<Insert company letter head>

<Insert Date>

Private and Confidential

<Insert employee's full name>

<Insert employee's address>

Dear <Insert name of employee>

RE: Response to your notification to convert to permanent employment

I refer to your written notification dated <Insert date of request> where you gave notice that you wished to convert to permanent employment.

<Insert any relevant details contained in the notification>

▪

<Insert the name of your company> notifications on a case-by-case basis and looks to balance our operational requirements with the needs of our employees, clients, and team members.

We have carefully considered your notification and I am pleased to advise that we have decided to accept your notification to convert to permanency.

As discussed on <insert date>:

- you will be changing to <insert either full-time or part time> employment; and
- once you convert to <full-time or part time> employment your hours of work will be <insert details of the employee's hours of work after the change takes effect>

Your new working arrangements as a <insert full time or part-time> employee will take effect on <Insert date of commencement>.

Please contact me on <Insert your telephone number> if you wish to discuss this matter further.

Yours sincerely

<Insert your name>

<Insert your position>

TEMPLATE LETTER B – Non-acceptance of notification to convert to permanent employment

<Insert company letter head>

<Insert Date>

Private and Confidential

<Insert employee's full name>

<Insert employee's address>

Dear <Insert name of employee>

RE: Your request for flexible working arrangements

I refer to your written notification dated <Insert date of request> where you gave notice that you wished to convert to permanent employment.

<Insert any relevant details contained in the notification>

▪

<Insert the name of your company> notifications on a case-by-case basis and looks to balance our operational requirements with the needs of our employees, clients, and team members. We have carefully considered your request.

As discussed on <Insert date>, unfortunately on this occasion we are unable to accept your notification for the following reasons:

- <insert the specific reason the notification is not accepted, including any further detail or explanation for how those reasons apply to the employees request to convert to permanent employment.>

[Explanatory information: provide sufficient detail to show the non-acceptance is a permitted reason under the Fair Work Act]

[Optional paragraph] We appreciate your willingness to discuss these matters openly and your understanding of the circumstances that have guided our decision-making processes.

[Optional paragraph] Please rest assured that your role with <insert employer name> as a casual employee remains an important and genuinely valued one. While we are unable to accommodate your notification to convert to permanent employment at this time due to the reasons set out above, we hope this decision will not deter you from continuing to engage with your role and we wish to assure you that we remain committed to supporting your career development within the parameters currently available.

Thank you for your continued commitment and contribution to our team. Please do not hesitate to contact me on <Insert your telephone number> if you wish to discuss this matter further.

Yours sincerely

<Insert your name>

<Insert your position>