

Circular 2021/03: Fair Work Act changes to Casual employment

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Purpose

1. This circular is to inform Australian Government employers of the recent changes to the *Fair Work Act (2009)* (FW Act) with regard to the employment of casual employees.
2. The *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (Amendment Act) has amended the FW Act by providing:
 - a definition of casual employee;
 - a pathway for casual employees to convert to full-time or part-time employment; and
 - an obligation to provide casual employees with a Casual Employment Information Statement (the CEIS).
3. These changes came into effect on Saturday 27 March 2021, and apply to all former, existing and new casual employees, including those who commenced employment before 27 March 2021, provided their initial employment offer meets the new definition of casual employment.^[1]
4. APS agencies covered by the *Public Service Act 1999* (PS Act) are required to apply the APS Employment Principles, including when filling vacancies. A casual employee cannot be offered casual conversion without a competitive selection process having been undertaken. Consequently, offering conversion would usually be inconsistent with the PS Act, and so meets the test of a reasonable ground for not offering casual conversion.
5. Non-APS Australian Government employers, and employers with dual staffing powers, should consider the requirements of their own enabling legislation.
6. The operational impact of these changes will differ between APS and non-APS Australian Government employers. The process for each is detailed below.

Definition of casual employee

7. The FW Act now provides for a definition of a casual employee.
8. Subsection 15A(1) of the FW Act states:
 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.
9. The new definition reflects a key element of the previously relied on common law 'test' of casual employment – that there is an absence of a firm advance commitment to an agreed pattern of work between the parties (e.g. the days or hours the employee is expected to work).
10. The following four factors (and only the following four factors) are used to assess this at the time of offer and acceptance (subsection 15A(2)):
 - 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; and
 - 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.
11. No single factor is determinative, and there is no requirement for all factors to necessarily be satisfied.
12. Importantly, this initial test is not impacted by later conduct by the employer or employee - it is what is agreed at engagement that determines a person's casual status.
13. The new definition also clarifies that the fact that an employee who is engaged to perform a regular pattern of hours does not of itself mean that the employee is not a casual employee (subsection 15A(3)).
14. Agencies should not rely solely on the fact that an employee has been engaged to perform duties on an 'irregular or intermittent' basis as being determinative of casual status, but should consider the factors in the FW Act definition of casual employment in s 15A which are set out at paragraph 8 above.
15. Where an agency intends for an employee to be engaged on a casual basis, this should be communicated clearly at the time of engagement.

Employers not covered by the *Public Service Act 1999* (non-APS Australian Government employers)

Casual conversion

16. Generally, employers must offer to convert a casual employee to full-time or part-time (permanent) employment where the employee:
 - has been employed for 12 months;
 - during the last 6 months has worked a regular pattern of hours; and
 - could continue working those hours as a permanent (full-time or part-time) employee without significant adjustment.
17. A casual conversion offer is not required to be made by the employer where there are reasonable grounds not to do so, either known or reasonably foreseeable. This includes (but is not limited to) where:
 - making the offer would not comply with a recruitment or selection process required by or under a law of the Commonwealth or a state or a territory;
 - the employee's position will cease to exist within 12 months;
 - the hours of work which the employee is required to perform will be significantly reduced in that period; and
 - there will be a significant change in the days or times of work (or both) which cannot be accommodated within the days or times the employee is available to work.
18. Non-APS Australian Government employers, and employers with dual staffing powers, should consider the requirements of their own enabling legislation.
19. Where an offer of casual conversion is to be made, it must be made in writing to the employee within 21 days of the 12 month anniversary of their engagement, or before 27 September 2021 (for existing casual employees as at 27 March 2021).
20. If an employer decides not to offer casual conversion, the employer needs to write to the employee within 21 days of the employee's 12 month anniversary (or before 27 September 2021 for existing casual employees), informing the employee:
 - that they aren't making an offer of casual conversion; and
 - the reasons for not making the offer – either for the reasonable grounds mentioned above, or that the employee hasn't worked a regular pattern of hours on an ongoing basis

for at least the last 6 months which they could continue working as a permanent employee without significant adjustment.

Casual Employment Information Statement (the CEIS)

21. The CEIS (<https://www.fairwork.gov.au/employee-entitlements/national-employment-standards/casual-employment-information-statement>) must be provided to all casual employees.
22. The CEIS provides information to casual employees regarding the right to become a permanent employee.
23. New casual employees employed from 27 March 2021 must be provided with a copy of the CEIS before or as soon as possible after they commence employment.
24. Casual employees who were employed before 27 March 2021 must be provided the CEIS as soon as possible after 27 September 2021.
25. The CEIS need only be provided once in any 12 month period and can be given in person, by mail, or if the employee agrees by email or via link to the CEIS on the Fair Work Ombudsman website.

Actions non-APS Australian Government employers should take

For casual employees who commenced before 27 March 2021

26. Prior to 27 September 2021, agencies must:
 - assess each casual employee's eligibility to receive an offer to convert to full-time or part-time (permanent) employment; and
 - provide either:
 - i. a written offer of casual conversion; or
 - ii. written notice that an offer will not be made, including where it would not comply with a recruitment or selection process under Commonwealth employment legislation.
27. Provide a CEIS (<https://www.fairwork.gov.au/employee-entitlements/national-employment-standards/casual-employment-information-statement>) as soon as possible after 27 September 2021.

For casual employees who commenced on or after 27 March 2021, agencies must:

28. Provide a CEIS (<https://www.fairwork.gov.au/employee-entitlements/national-employment-standards/casual-employment-information-statement>) before, or as soon as possible after, the employee commences.
29. Upon the employee's 12 month anniversary:
 - assess the casual employee's eligibility to receive an offer to convert to full-time or part-time (permanent) employment; and
 - provide either:
 - i. a written offer of casual conversion; or
 - ii. written notice that an offer will not be made, including where it would not comply with a recruitment or selection process under Commonwealth employment legislation.

Employers covered by the *Public Service Act 1999* (APS employers)

Casual conversion

30. After considering their obligations under the FW Act and PS Act, APS agencies will need to write to all casual employees either offering casual conversion, or providing reasonable grounds not to offer conversion.
31. Employers are not required to offer a casual employee permanent or ongoing employment where making the offer would not comply with a recruitment or selection process required by or under a law of the Commonwealth or a State or a Territory. This is a reasonable ground provided by the FW Act to not offer a casual employee permanent employment.
32. APS agencies covered by the PS Act are required to apply the APS Employment Principles when filling vacancies. Offering ongoing employment to casual employees without a competitive selection process would be inconsistent with this requirement.
33. Thus, the obligation for an APS agency to comply with the merit principle meets the test of a reasonable ground for not offering casual conversion.
34. The only limited circumstances in which an offer of casual conversion will comply with the merit principle will be when each of the following is satisfied:
 - a vacancy does in fact exist in the agency;

- the casual employee had been assessed as suitable for the same or similar vacancy in the agency which had been notified in the Government Gazette in the previous 12 months;
- the Agency Head is satisfied that the casual employee is at least equal in merit to any other eligible employee; and
- the other criteria of the FW Act for casual conversion have then been considered (in the same way these apply for other employers- see the non-APS Australian Government employers section above).

35. Should these circumstances exist, and only if these circumstances exist, the agency should provide casual conversion to the employee under the FW Act.

36. For the avoidance of doubt, outside of casual conversion under the National Employment Standards (NES), casual employees may be offered ongoing employment where the requirements of the APS Employment Principles are met, consistent with current practice under the PS Act. The APSC is able to provide further advice on this.

Casual Employment Information Statement (the CEIS) - APS employers

37. APS employers are also required to provide a CEIS to casual employees.

38. New casual employees employed from 27 March 2021 must be provided with a copy of the CEIS before or as soon as possible after they commence employment.

39. Casual employees who were employed before 27 March 2021 must be provided the CEIS as soon as possible after 27 September 2021.

40. Information to accompany the CEIS will be provided to APS agencies by the APSC to assist casual employees in understanding the operation of casual conversion in the APS context.

41. Agencies may wish to highlight other opportunities to apply for ongoing employment in the APS.

Actions APS agencies need to take

For casual employees who commenced before 27 March 2021

42. Prior to 27 September 2021, agencies must:

- consider whether offering the casual employee conversion to permanent employment would be consistent with the APS Employment Principles;
- assess each casual employee's eligibility to receive an offer to convert to full-time or part-time (permanent) employment; and

- provide either:
 - i. a written offer of casual conversion; or
 - ii. written notice that an offer will not be made, including where it would not comply with a recruitment or selection process under PS Act.

43. Provide a CEIS (<https://www.fairwork.gov.au/employee-entitlements/national-employment-standards/casual-employment-information-statement>) and accompanying APSC information as soon as possible after 27 September 2021.

For casual employees who commenced on or after 27 March 2021, agencies must:

44. Provide a CEIS (<https://www.fairwork.gov.au/employee-entitlements/national-employment-standards/casual-employment-information-statement>) and accompanying APSC information (when available) before, or as soon as possible after, the employee commences.

45. Upon the employee's 12 month anniversary:

- consider whether offering the casual employee conversion to permanent employment would be consistent with the APS Employment Principles;
- assess the casual employee's eligibility to receive an offer to convert to full-time or part-time (permanent) employment; and
- provide either:
 - i. a written offer of casual conversion; or
 - ii. written notice that an offer will not be made, including where it would not comply with a recruitment or selection process under the PS Act.

All employers (APS and non-APS)

Other changes

46. For information on employees' right to request casual conversion, and employer obligations in response, see the Fair Work Ombudsman (<https://www.fairwork.gov.au/employee-entitlements/types-of-employees/casual-part-time-and-full-time/casual-employees/becoming-a-permanent-employee>) website.

47. Amendments have also been made with regard to offsetting casual loading amounts when assessing back payment claims for employees who were paid as a casual, but who are later found not to have been a casual employee.

Actions all Australian Government employers should take

48. The engagement and use of casual employees is particular to each agency in the Commonwealth.
49. Agencies should review their casual arrangements and practices to establish processes that ensure compliance with the FW Act, as amended. Agencies should also ensure casual conversion is offered only when consistent with the requirements of their enabling legislation.
50. This should include reviewing letters of offer, terms contained in contracts of employment including the definition of casual employment, and the payment of casual loadings.
51. As a matter of good practice, agencies should regularly review the makeup of their workforce, to ensure it meets their contemporary requirements and workforce strategies.

Further information

52. The Fair Work Ombudsman has published information about these changes to the FW Act on its [website \(https://www.fairwork.gov.au/about-us/news-and-media-releases/website-news/reforms\)](https://www.fairwork.gov.au/about-us/news-and-media-releases/website-news/reforms).
53. Information relevant to casual conversion disputes as dealt with by the [Fair Work Commission \(https://www.fwc.gov.au/disputes-at-work/casual-conversion-disputes\)](https://www.fwc.gov.au/disputes-at-work/casual-conversion-disputes) has also been updated.
54. Agencies with questions on these issues are encouraged to contact their APSC relationship manager or the Workplace Relations inbox at workplacerelements@apsc.gov.au (<mailto:workplacerelements@apsc.gov.au>).

[1] The changes will not apply in relation to a person if a court made a binding decision before 27 March 2021 that the person is not a casual employee of the employer, or if the person converted the employment before 27 March 2021 to some other type of employment under a term of a fair work instrument or contract of employment.
