

FAIR WORK ACT – WHAT’S NEW?

Closing the loopholes legislation continues to amend Australia’s employment law and HR practices, with the newest changes coming into effect from Monday, 26 August 2024.

This latest round of changes include:

- ✚ Updating the definition and assessment of casual workers
- ✚ Amending casual conversion pathways
- ✚ Implementing the ‘right to disconnect’
- ✚ Updating the assessment of employee vs contractor
- ✚ Increasing the powers of the Fair Work Act to resolve disputes

CASUAL EMPLOYMENT

The definition of casual employment has been clarified to assist employers in defining the employment relationship. When engaging an employee as a casual, the following criteria will apply:

- ✚ the employment relationship is characterised by the absence of a firm advance commitment to continuing and indefinite work; and
- ✚ the employee is entitled to casual loading.

Whether there is a ‘firm advance commitment’ needs to be assessed on the real substance, practical reality and true nature of the employment relationship, and several other factors.

The other factors that must be considered include whether:

- ✚ the employer can offer or not offer work to the employee (and whether this is happening)
- ✚ the employee can accept or reject work (and whether this is happening)
- ✚ it's reasonably likely there will be future work available of the kind the employee usually performs in the employer’s business, based on the nature of the business
- ✚ there are full-time or part-time employees performing the same kind of work in the employer’s business as the work the employee usually performs
- ✚ the employee has a regular pattern of work even if it changes over time due to, for example, reasonable absences because of illness, injury or other leave.

The above isn't a full list and other factors may apply.

For this assessment, not all factors need to be satisfied and a single factor won't determine whether a person can be considered a casual or not.

For example, a regular pattern of work on its own doesn't indicate that an employee has a firm advance commitment to ongoing work. An employee who has a regular pattern of work may still be a casual employee if there is no firm advance commitment to ongoing work.

When assessing whether there is a firm advance commitment, you can look at:

- ✚ the contract of employment, or
- ✚ the contract as well as any mutual understanding or expectation between the employer and employee that isn't part of the contract.

The mutual understanding or expectation can be worked out from how the contract is performed, or what the employer and employee do after entering into the contract.

Casual Conversion Pathways

A new pathway will be introduced for eligible employees to change from casual employment to full time or part time (permanent) employment if they want to. This is known as the 'employee choice pathway'.

The 'employee choice pathway' will allow eligible casuals to notify their employer in writing of their intention to change to permanent employment. An employer can only refuse the notice for certain reasons.

These rules replace the current rules for changing to permanent employment.

A casual employee may convert to permanent employment through one of the following pathways:

- ✚ an accepted request for casual conversion
- ✚ conversion through a Fair Work Commission decision
- ✚ in accordance with the terms of an Award or Enterprise Agreement (the Fair Work Commission is currently considering changes to awards as a result of the Closing Loopholes casual employment changes)
- ✚ the employee accepts the offer of alternative employment

*Transitional provisions will apply up until 25 February 2025 for casuals engaged prior to 26 August 2024, where the employer will still be required to assess whether an employee is eligible to convert to permanent employee, as per the current casual conversion obligations.

Casual Employment Information Sheets

New Fair Work Casual Information Sheets will be available from 26 August and will need to be provided to new employees on:

- ✚ Commencement; and
- ✚ After 6 months employment; and
- ✚ After 12 months employment; and
- ✚ Each subsequent 12 months employment.

THE RIGHT TO DISCONNECT

The introduction of an employees 'right to disconnect' is designed to protect personal time and promote a healthy work-life balance, in recognition of the increasing contact and unpaid work being performed outside of typical working hours.

This means that Employees will have the right to refuse to 'monitor', 'read' or 'respond' to contact or attempted contact, outside their working hours (unless the employee's refusal is unreasonable) from the employer or a third party (for example from clients, or members of the public).

The reasonableness of contact outside of work will depend on a number of factors, including (but not limited to):

- ✚ The reason for the contact (for example the level of urgency)
- ✚ the employee's role and level of responsibility
- ✚ whether the employee is compensated or paid extra for:
 - being available to be contacted to perform work within a specific period (for example, on-call arrangements) or
 - working additional hours outside their ordinary hours of work
- ✚ personal circumstances of the employee, including family or caring responsibilities

The Fair Work Commission will be updating all awards to include a 'right to disconnect' term by 26 August 2024. This may mean that specific rules will be added to awards to explain how the new right will apply to different industries and occupations.

Disputes about an employee's right to disconnect should first be discussed and resolved at the workplace level. If that isn't possible, employees or employers can go to the Fair Work Commission (the Commission) to deal with a dispute.

Key Dates:

- ✚ For the majority of employees from Monday, 26 August 2024.
- ✚ For employees working for a small business employer from Tuesday, 26 August 2025.
- ✚ All Modern Awards will contain a 'right to disconnect' term which will apply to an employee covered by an Award as the change comes into effect, which may be before 26 August 2025 for small business employers.

The Fair Work Commission will be providing written guidelines as to how this new right will operate. We will keep you updated as this information becomes available.

Small Business Definition (Fair Work Commission):

A small business employer is an employer with fewer than 15 employees at a particular time. If an employer has 15 or more employees at a particular time, they are no longer a small business employer. When counting the number of employees, employees of associated entities of the employer are included. Casual employees are not included unless engaged on a regular and systematic basis.

INDEPENDENT CONTRACTORS

When determining whether a person is an employee or independent contractor will revert to considering the 'totality' of the relationship. This moves beyond the terms of the contract with a multi-factorial test to determine the real substance, practical reality and true nature of the relationship.

Whether someone is an independent contractor or an employee depends on a number of indicators. These include:

- ✚ the amount of control over how work is performed
- ✚ financial responsibility and risk
- ✚ who supplies the tools and equipment
- ✚ ability to delegate or subcontract work
- ✚ hours of work
- ✚ expectation of work continuing.

Whether a worker is an independent contractor or an employee can be complicated, and will come down to the circumstances of each working arrangement. The Fair Work Ombudsman has provided a table that can assist an employer in reviewing common indicators and provides general examples. <https://www.fairwork.gov.au/>

If you have any questions or would like to discuss any of the above changes in more detail, please reach out to a member of our People & Culture team via hr@ucaqld.com.au or 0408 877 469.