

Casual Employees (National System Employers)

These *General Guidance Notes* apply to national system employers who are governed by the *Fair Work Act 2009* (Cth) ("**Act**").

The Notes are general in nature, and are designed to bring to your attention to matters that you may not have considered before and/or are outside of the scope of advice you requested from us. They provide a general overview of the key considerations relating to casual employment that might be relevant to your situation, but they do not constitute specific advice.

If you have specific queries regarding casual employees, we recommend that you contact us for advice that is particular to your circumstances.

Who is a casual employee?

The legal history of casual employment is complex. There is no specific definition of 'casual' in the *Fair Work Act 2009* (Cth) ("**Act**"). However, some indicative features of casual employment are that the employee:

- is engaged to work flexibly according to the employer's need and the employee's availability;
- does not have an expectation of continuing employment; and
- does not have an expectation of regular employment.

In determining whether an employee is in fact a casual employee, regard must be had to the specific terms of awards, enterprise agreements, and the contract of employment. Casual employment has recently become more precisely regulated by various instruments, which in some cases have confirmed that a casual employee might still be a casual employee even though they are employed on a regular and systematic basis. Most Modern Awards provide a specific definition, criteria and any associated limitations. Different awards might have different provisions, so it is important to check.

Need help? If you are unsure of where to check, EMA Consulting can point you in the right direction. Alternatively, we can find and analyse your relevant industrial instruments for you and determine whether the employee is in fact defined as a casual.

Status, Rights and Entitlements of Casuals

Once an employee is defined as a casual employee (as set out above), their rights and entitlements are those of the various instruments that regulate the employee's employment. However, various provisions within the Act apply to casual employees in differing ways, depending on whether they are truly casual in nature, or are classified as casual based on a definition in an applicable industrial instrument. Some examples are set out below.

Protection from Unfair Dismissal

The Act extends protection against unfair dismissal to a casual employee if he or she has worked (for the minimum engagement period) on a regular and systematic basis and had a reasonable expectation of continuing employment by the employer on a regular and systematic basis.¹ The tribunals have taken a wide view of 'regular and systematic' – a roster is often considered to be compelling evidence of systematic employment for this purpose.

Exclusion from Redundancy Provisions

Redundancy provisions in most awards and enterprise agreements specifically exclude casuals, or simply refer to the National Employment Standards ("**NES**"), which also specifically excludes casuals.² 'Casual' for this purpose means a casual as determined by the analysis of the industrial instruments as set out above, even if the employee is regular or systematic.³

¹ *Fair Work Act 2009* (Cth) section 384(2).

² *Fair Work Act 2009* (Cth) section 123(1)(c).

³ *Telum Civil (Qld) Pty Limited v CFMEU* [2013] FWCFB 2434 (22 April 2013).

CASUAL EMPLOYEES (NSE)

Exclusions from Paid Leave

With the exception of long service leave ("LSL"), casuals rarely qualify for any form of paid leave, including for public holidays not worked. The NES specifically excludes them. They are usually also expressly excluded from paid leave in awards and enterprise agreements. It is of course necessary to check this in any particular circumstance.

LSL legislation provides an entitlement for 'long term casuals' who meet the qualifying service criteria in each applicable Act. It will be necessary to check the specific provisions in the relevant State or Territory.

Right to Take Unpaid Leave

The NES provides the right for all casual employees to take unpaid carer's leave, unpaid compassionate leave, parental leave and community service leave, subject to qualifying criteria.

Casual Loading

A casual loading applies to the employment of casuals, to compensate for the lack of certain entitlements (such as paid leave (other than LSL), notice of termination and redundancy pay) and the discontinuous nature of employment. Casual employees must be paid the relevant casual loading under the award or enterprise agreement. The default casual loading in most modern awards is 25%. The National Wage Decisions have confirmed that the default casual loading for an award free employee is currently 25%.

Right to Convert to Permanent Employment

Some awards and enterprise agreements provide the right for a casual who has been employed for a qualifying period to convert to permanent employment. The specific details of that entitlement and how it may be exercised (and the employer's obligations in regards to it) vary widely. Therefore it is important to check the specific terms that could apply in any particular circumstance.

Need help? EMA Consulting can provide advice in relation to any aspect of casual employment, or assist you to:

- calculate accurate minimum rates of pay for casual employees;
- determine entitlements under the Act or relevant industrial instruments, such as leave or casual conversion;
- draft contracts of appointment or letters of offer for casual employees.

Require further information/assistance?

These General Guidance Notes are not a comprehensive treatment on the topic of casual employment. If you require further information or advice, please contact your local Consultant at either our Adelaide or Melbourne offices.