

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**") and their casual employees, as defined in relation to the Act. These *General Guidance Notes* should not be used to determine the status, rights, or entitlements of casual employees as defined by any industrial instrument.

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**"). The indicators of casual employment consistently stated amongst authorities are irregular work patterns, uncertainty, discontinuity, intermittency of work, and unpredictability.¹ Typically, the 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 nature of their employment, in consideration of the above indicators and features. Where an individual employee's employment is not consistent with the casual employment indicators, they may have the same entitlements as permanent employees under the Act.

Need help? If you are unsure of the correct characterisation of your employee, EMA Consulting can provide you with the means to check, and if required, obtain legal advice.

Status, Rights and Entitlements of Casuals

If an employee is defined as a casual employee (as set out above), there are various provisions of the Act which specifically relate to their employment.

Protection from Unfair Dismissal

The Act extends protection against unfair dismissal to a casual employee only 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.² 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 the National Employment Standards ("**NES**") of the Act specifically excludes casuals.³ This is regardless of whether the casual employee is 'regular and systematic', as defined in relation to their protection from unfair dismissal (above).

¹ *WorkPac Pty Ltd v Skene* [2018] FCAFC 131 [173].

² *Fair Work Act 2009* (Cth) s 384(2).

³ *Fair Work Act 2009* (Cth) s 123(1)(c).

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.

LSL legislation provides an entitlement for all employees who meet the qualifying service criteria in each applicable Act, which may include casual employees. 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. The most recent National Minimum Wage Review requires that award/agreement free casual employees must be paid at least a casual loading of 25% of their base rate of pay.⁴

Awards/Agreements

Most modern awards and enterprise agreements provide their own definitions of casual employment, which dictates the entitlements of a casual employee that come from that award/agreement. However, these definitions and entitlements are separate from the employee's categorisation under the Act – that is, an employee could be defined as a casual employee under a modern award and still have the entitlements of a permanent employee that arise under the NES.

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 and/or relevant industrial instruments, such as leave or protection from unfair dismissal;
- 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.

⁴ Fair Work Commission, *Annual Wage Review 2017–2018*, PR606629, 25 June 2018.