**Who are Casual Employees?**

A casual employee does not have a firm commitment in advance from an employer as to how long they will be employed for or the days (or hours) they will work. A casual employee also does not commit to all work an employer might offer.

For example, an employee who works to a roster that could change each week and can refuse or swap shifts is casual.

A casual employee:

* has no guaranteed hours of work
* usually works irregular hours
* does not get paid sick leave or annual leave
* can end employment without notice, unless notice is required by a [registered agreement](https://www.fairwork.gov.au/Dictionary.aspx?TermID=2034), award or employment contract.

**Long-term Casual Employees**

Section 12 of the *Fair Work Act 2009* defines a long-term casual employee as one where the “[*employee*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/fwa2009114/s789gc.html#employee) *has been employed by the* [*employer*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/fwa2009114/s789gc.html#employer) *on a regular and systematic basis for a sequence of periods of employment during a period of at least 12 months*.”

Some casual employees work for one employer for a long period of time and become 'long-term casuals'.

Long-term casuals stay as casual employees unless their employment relationship with their employer changes so that there is a mutual commitment to provide ongoing work on an agreed pattern of ordinary hours of work. A long-term casual receives their casual entitlements regardless of how regularly they work or for how long they work.

After at least 12 months of being engaged regularly by an employer on a casual basis, and if it is likely that the employment relationship will continue, a casual employee can:

* request flexible working arrangements
* take parental leave.

**Are long-term casuals entitled to paid leave if they work regularly for a long time?**

In the last two years, two decisions have seen the Federal Court decide when an employee who was hired as a casual and paid the 25 per cent loading worked regular hours over lengthy periods, is to be regarded as part-time or full-time and therefore owed leave entitlements.

In the first decision (*Skene v WorkPac*), the employer failed to enter into a written agreement or contract which specifically stated that the employee received the 25 per cent casual loading instead of paid leave. In the more recent case (*Rossato v WorkPac*), the employer and employee entered a written employment contract that specifically confirmed that the 25 per cent loading was in lieu of paid leave.

In both instances, the Court found that the employees, having received the 25 per cent casual loading, are entitled to paid leave as long-term casuals. In effect, those employees are seen to be ‘double dipping’ because of these two decisions.

The Court, in both instances, also found that the employer could not offset the leave entitlements against the 25 per cent (notional casual loading) or recover it as an overpayment.

Both cases involved the same labour hire company which provided labour in the mining industry. The Employers’ Associations may appeal the decision, or the Federal Government will seek to amend the *Fair Work Act 2009*.

*In the case of the latter, it is encouraged that employers contact their local Federal Member of Parliament and make your views known to assist with amending the Act.*

At this stage, it is too early to be more precise about the impact, but the latest decision is being scrutinised and further updates can be expected.

**What does this mean for employers?**

The cost of unpaid annual leave, personal/carer’s leave and public holidays not worked has the potential for substantial back payments for long-term casuals, for up to six years and estimated at $8 billion dollars, unless the Act is changed or successful on appeal.

Long term casual employees may be able to claim back pay for up to six years.

The Award makes provision to convert from casual employment to either part-time or full-time employment in Sub-clause 10.5.

The cost of casual employment is 25 per cent. The cost of annual and personal/carer’s leave and public holidays not worked is approximately 18 per cent. The difference of 7 per cent is intended to compensate a casual employee for loss of regularity and security of employment.

**What should employers do pending a change in legislation or a successful appeal?**

Review your current arrangements but do not panic just yet. Let us see if the legislation is changed or the decision appealed.

Q. Can I change the employment category of employees?

A. Yes. Review the employees who are long-term casuals first. Can they be invited to convert to full-time or part-time employment?

Q. What do I need to do?

A. Contact the employee and establish if they wish to be converted to part-time (if you can provide less than full-time hours) and offer a similar and regular pattern of working, being the same days and hours. Alternatively, offer full-time work (if you can provide 152 hours work over four consecutive weeks).

Q. How do I offer to a long-term casual the opportunity to convert to part-time or full-time employment?

A. Refer to Clause 10.5 of the *Pastoral Award 2010* at <https://www.fwc.gov.au/documents/documents/modern_awards/award/ma000035/default.htm>.

Q. Is it easier to terminate the employment of a casual employee than a part-time or full-time employee?

A. Not necessarily. A small employer (one with less than 15 employees) should follow the Small Employer Fair Dismissal Code which is accessible at <https://www.fwc.gov.au/about-us/legislation-regulations/small-business-fair-dismissal-code>. An employee of a small employer who follows the code is not entitled to unfair dismissal claims if the termination occurs within the first 12 months of commencing employment.

Q. What about a large employer (more than 15 employees)?

A. If Procedural Fairness Principles are followed, an employee of a large employer does not have unfair dismissal rights during the first 12 months.

Q. Are there any disadvantages in employing a part-time employee rather than a casual employee?

A. Prior to engaging a part-time employee, be sure you agree on fixed days and times when work will be made available and that you have ongoing work.

Q. What if we need to vary the days and hours of work for a part-time employee?

A. Variation to the agreed and fixed times and days of work will result in the changes to be paid at overtime rates. For example, there is to be a written agreement between the employer and employee to work, for example, on a Monday, Tuesday and Wednesday between 7 am and 3 pm. If that employee is asked to work on different days or times, the employee will be eligible for overtime payments for hours worked outside of the agreed days and hours.

Q. Can I avoid paying overtime?  
A. Yes, but seek advice on the options below before you enter any of these arrangements.

1. Individual Flexibility Arrangement Agreement (Clause 7 and Schedule G in the Award) but the employee must be Better Off Overall All
2. Time Off in Lieu of Payment of overtime (Clause 31.5 in the Award)
3. Annualised Wages (Clause 26 C).

Q. Can a written agreement be varied?

A. Yes, but it must be mutually agreed and in writing.