



Stand up for casual workers

The proposed amendments will make the legislative definition of casual employee fairer so that the practical reality of the employment relationship is relevant, not just the contractual description. This will mean in addition to the existing casual conversion process in the National Employment Standards there will be a new employee choice pathway to change from casual to permanent employment.

What is proposed?

A fair, objective definition of casual employee

The Fair Work Legislation Amendment (Closing Loopholes No. 2) Bill 2023 would amend the definition of casual employee in section 15A of the *Fair Work Act 2009* (the Act).

The Act will retain the established concept that a casual employee is someone who has *no firm advance commitment to continuing and indefinite work*. In addition to having no firm advance commitment to continuing and indefinite work, a casual employee must also be entitled to a casual loading or specific rate of pay for casuals.

The existing definition explicitly requires the assessment of whether an employee is casual to be based only on the initial offer of employment. The proposed definition will allow consideration of the practical reality of what is going on in the workplace, not just what was in the employment contract on day one.

When assessing whether an employee has a firm advance commitment to continuing and indefinite work, employers and employees must consider:

- the ability and actual practice of offering and accepting (or rejecting) work;
- whether continuing work is reasonably likely to be available given the nature of the business;
- whether part-time or full-time employees are undertaking similar roles;
- whether the employee has a regular pattern of work.

The existence of a regular pattern of work does not itself indicate a firm advance commitment to continuing and indefinite work. In fact, no single consideration is determinative of an employee being casual or not. Employees engaged as casual employees remain casual until an event occurs, underpinned by employee choice, to change their status.

Clear pathways to change to permanent work

Employees who have worked for 6 months (or 12 months in a small business) will be able to choose to notify their employer where their working arrangements have changed and, at that point in time, they believe they no longer meet the definition.

This new employee choice pathway will be the way for an employee to initiate a change from casual to permanent employment, and the existing employee request process will be repealed. Employers, except small business employers, will still be required to consider a casual employee's employment status after 12 months and offer eligible employees conversion, or otherwise provide reasons why conversion is not being offered.

The Fair Work Commission (the Commission) will be able to help resolve disputes, including by arbitration as a last resort. Employees' rights continue to be protected, including by prohibiting the dismissal of an employee to engage them as a casual employee. The Bill will also prohibit making a misrepresentation to a current or former employee to engage them as casual employee. Employers making honest mistakes, including on engagement, will not be subject to civil penalties.

Under the amended definition, employment status will not change automatically. Status will only change if one of the following events occurs:

- The employee and employer agree to status change under pathways described in the Act.
- The Commission resolves a dispute by ordering that the employee be treated as permanent.
- The employee and employer agree to status change under processes set out in the instrument that sets terms and conditions of employment such as an enterprise agreement.
- The employee and employer agree to status change outside of the pathways described in the Act.

Clear information to support employee choice

The Casual Employment Information Statement (Statement) will be updated, and all employers must continue to provide the Statement as soon as practicable after a casual employee starts work. There will be a new obligation to provide the Statement to casual employees after 12 months of employment, to make sure employees are reminded of their rights and ability to change or convert to permanent work.

What will it mean?

Status change from casual to permanent (part-time or full-time) will only happen where an employee wants to change. If an employee wants to remain casual, nothing will force them to become permanent.

However, for those employees who are effectively working like a permanent employee, they will have a clear and simple way to choose to change to permanent work. For employees that make this choice, they will no longer be entitled to the casual wage loading and instead receive paid leave and job security that permanent work provides.

Status change will be forward looking and there will be no backpay for permanent employee entitlements where an employee is correctly classified on day one. This will provide certainty for employers and employees as to status, rights, and entitlements at all times.

When will it come into effect?

The proposal is subject to the passage of legislation.

For more information on the Closing Loopholes legislation, visit: <https://www.dewr.gov.au/workplace-relations>