



Small business

What has changed?

The Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 amends the *Fair Work Act 2009* (the Act) to provide a range of measures that apply to businesses of all sizes.

Fact sheets covering all amendments can be found on the [Department of Employment and Workplace Relations' website](#). Amendments of particular interest to small business are summarised below.

Small businesses can also seek information and advice from the Fair Work Ombudsman, including through the [Small Business Showcase](#), and the [Employer Advisory Service](#).

Casual employment

- **Additional definition-based employee choice pathway to convert:** Employees in a small business must have completed 12 months service before they can notify their employer that their working arrangements have changed and, at that point in time, they believe they no longer meet the definition of casual employee and seek permanent work. In larger businesses, an employee can notify of a status change after 6 months service.

The process to change status is entirely employee-driven and an employer's obligation to respond will only arise if the employee provides a notification.

- **The existing casual conversion pathway will remain:** Small businesses (fewer than 15 employees), will continue to be exempt from the requirement to offer casual conversion to their employees. Under this pathway, their employees will still be entitled to request conversion where they have been employed for 12 months and have had a regular pattern of work for at least 6 months. Reasonable grounds for refusing a request will remain.

Closing the labour hire loophole

- This measure will not apply where the **host is a small business employer** (fewer than 15 employees).
- Where the Fair Work Commission is satisfied the host is a small business employer, it will not have the power to make an order switching on entitlements and obligations under this measure.

Compliance and enforcement: Criminalising wage theft, civil penalties and sham contracting

- **Criminalising wage theft:** The new wage theft offences will cover intentional underpayments, not honest mistakes. There will be pathways to safe haven for small businesses who have tried to correct mistakes with paying their workers:
 - Small businesses that may have underpaid employees will not be referred for criminal prosecution of the wage theft offence if they can show compliance with the new Voluntary Small Business Wage Compliance Code. The Code will be developed by government in partnership with employer and employee groups.
 - The Fair Work Ombudsman may also enter into a cooperation agreement with a person, including an employer, if they disclose that they have engaged in conduct that may amount to the commission of the wage theft offence. The Fair Work Ombudsman may agree not to refer the conduct for prosecution, after assessing the employer against a non-exhaustive list of factors.
- **Civil penalties:** The maximum level of civil penalties are being increased, and serious contraventions of the Act will now include reckless conduct. The Court will still have discretion to award lesser penalties having regard to the circumstances of the breach, including the size of the business and the amount of the underpayment.
- **Sham contracting:** Employers who have allegedly misrepresented employment as an independent contractor arrangement will now need to show that they reasonably believed they were correct in classifying a worker as an independent contractor. Courts will be required to have regard to the size and nature of an employer's business in assessing whether an employer had a reasonable belief that the worker was an independent contractor.

Enhancing delegates' rights

- Small businesses will not be required to provide reasonable access to paid time for workplace delegate training. All other parts of this measure will apply equally to all employers.

When will these changes 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>