

Casual Conversion Series

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This is the third in a series of articles about the recent industrial relations reforms relating to casual employees.

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Casual Conversion



What do I need to do?

The Federal Government recently passed changes to the law (specifically, the National Employment Standards (NES)) relating to casual employees.

In this *Casual Conversion Series*, we have discussed the Casual Employment Information Statement (CEIS) which small business employers now need to give to casual employees ([click here to access this first article](#)); the definition of 'casual employee' and the offset mechanism now included in the *Fair Work Act 2009* ([click here to access this second article](#)).

These topics all relate to the broader topic of casual conversion (that is, the right of a casual employee to become a permanent employee in certain circumstances). This article explains:

- △ the obligations on small business employers relating to casual conversion;
 - △ the obligations employers other than small business employers relating to casual conversion;
 - △ the eligibility requirements for employees, the exceptions that apply and the processes that need to be followed.
- △ **The transition period for existing casuals will be discussed in another article in this *Casual Conversion Series*.**

Why are we even talking about casual conversion, didn't it already exist?

Yes, since 1 October 2018, casual employees who were employed under most Modern Awards were able to request conversion from casual to permanent. Read more about this in [our blog post here](#). So, what has changed?

The main change to note is that employers (other than small business employers) must offer casual conversion to eligible employees. Under the conversion clause in the Modern Awards employees could only request conversion from casual to permanent. There was no obligation on an employer to offer conversion. While this is a step forward for casual employees (who may otherwise be reluctant to engage with the employers on these matters) it does require some adjustment for employers to manage these changes.



Remember that a casual employee can change to full-time or part-time permanent employment at any time if the employer and the employee both agree to it.

Do I need to be scared of casual conversion? What's it going to cost me?

Before we dive into the ins and outs of the new rules, it is worth saying a few things about casual employment up front. **There are some casual employees who it will suit to remain casual.**

One of the great benefits of being a casual is that the employee has the right to accept or decline shifts offered by the employer. This may not suit every casual employee. But it will still suit some.

Also, while a casual employee has no entitlement to paid leave (such as personal leave, annual leave and public holiday leave), they do get paid a casual loading of up to 25%. This significantly increases their take home pay. These conditions, especially the casual loading, are attractive to some casual employees. It may not suit them to convert to permanent employment. If that's the case, that's ok.

If your casual employee does want to convert to permanent, you will usually find that it costs you less as an employer to have a permanent employee once the calculations are done.

What conversion rules apply to my business?

The table below summarizes the conversion rules that apply to small business employers, and other employers. There are similar eligibility requirements for casual employees of both business types.

	Small business employers (less than 15 employees)	All Other Employers (15 or more employees)
Offer or Request?	Under the recent law changes, a small business employer is not required to offer casual conversion to an eligible casual employee. But an eligible casual employee can request their employer convert their employment from casual to permanent . There are some eligibility conditions that need to be met before this can happen.	There are two ways in which a casual employee of an employer (other than a small business employer) can now convert to permanent employment. There are eligibility requirements and exceptions that apply, and processes that need to be followed. (a) Mandatory offer by employer – an employer must make an offer to their casual employee in certain circumstances. (b) Employee request to convert – an eligible casual employee can request their employer convert their employment to full-time or part-time (permanent) in some circumstances.
Eligibility Criteria	To be eligible to request casual conversion, a casual employee of a small business: <ul style="list-style-type: none"> △ must have been employed by the employer for at least 12 months; △ must have worked a regular pattern of hours on an ongoing basis for at least 6 months on the day the request is made; and △ could continue to work as a full-time or part-time employee (as the case may be) without significant adjustment to the hours worked. 	Mandatory offer by employer – a casual employee is eligible if the employee: <ul style="list-style-type: none"> △ has worked for the employer for at least 12 months; △ has worked a regular pattern of hours on an ongoing basis for at least 6 months on the day the request is made; and △ could continue to work as a full-time or part-time employee (as the case may be) without significant adjustment to the hours worked. Employee request to convert – a casual employee is eligible if the employee: <ul style="list-style-type: none"> △ must have been employed by the employer for at least 12 months; △ must have worked a regular pattern of hours on an ongoing basis for at least 6 months; and △ could continue to work as a full-time or part-time employee (as the case may be) without significant adjustment to the hours worked.
Conditions (to minimise the regulatory burden on employers)	An employee will not be eligible to make a request if, in that 6 month period their employer has refused a request for casual conversion (because there was a reasonable ground to refuse the request).	An employee will not be eligible to make a request if, in the relevant 6 month period: <ul style="list-style-type: none"> △ the employee has refused an offer from their employer to convert to permanent employment; △ their employer has told them in writing that they won't be making an offer of casual conversion because there was a reasonable ground not to make the offer; △ their employer has refused a request for casual conversion (because there was a reasonable ground to refuse the request).

How do I determine if my casual employee has worked a 'regular pattern of hours'?

The eligibility criteria listed above all refer to the concept of a 'regular pattern of hours', with the key requirement being that the casual employee must have worked a regular pattern of hours on an ongoing basis for at least six months. As an employer, having to work out which of your casual employees has worked a regular pattern of hours, and for how long, might feel like a hard thing to do in a long list of hard things to do. But it does not need to be.

- The first step is to identify which casual employees have worked for you for at least 12 months. This is the initial threshold test for an employee to be entitled to casual conversion (whether by way of offer or request to convert).
- Once you have identified those employees, think about which ones have worked a regular pattern of hours. In most cases, you will have a good idea which casual employees have worked a regular pattern of hours without needing to check rosters or work history etc.
- If you are unsure whether a casual employee has worked a regular pattern of hours you may need to review time and attendance records for that employee.

For example*, if an employee has worked shifts of 8 hours each on every Monday and Tuesday for the most recent 9 months of their employment, it will be clear they have worked a regular pattern of hours for the requisite 6 months. Depending on the circumstances of any particular case, the employee may still have worked a regular pattern of hours even with some fluctuation or variation in specific times and days worked, including (for example) if the employee took time away from work when ill or on holiday.

*(Taken from the Revised Explanatory Memorandum to the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020, *Notes on Clauses* - Schedule 1 – Casual employment, para. 27, p8)

To be eligible for conversion the employee needs to have worked a regular pattern of hours during the relevant six month period. You then also need to determine whether the pattern of hours is able to be continued by the employee as a full-time or part-time employee without significant adjustment.

How often can my employees make a request to convert?

A casual employee obtains an initial casual conversion right when they have been employed by the employer for 12 months. At the time of the initial conversion right, the employer may be required to make an offer of casual conversion to the employee, or the employee may choose to request their employment be converted from casual to permanent.

Once that initial casual conversion right has been dealt with, the employee has a residual right to request casual conversion. The **onus is on the employee to make a request** to their employer if they wish to exercise this residual right. The right can be exercised once every six months if the employee is an eligible casual employee.

When can I refuse to make an offer or reject a request for conversion?

For employers (both small business and other employers), there are only two reasons for not making an offer of casual conversion to a casual employee, or not accepting a request for casual conversion.

The **first reason** is because an employee has either:

- △ not worked a regular pattern of hours on an ongoing basis for at least the last six months; or
- △ has worked a regular pattern of hours on an ongoing basis for at least the last six months, but they could not continue working as a permanent (full-time or part-time) employee without significant adjustment.

This corresponds to the eligibility requirements for an employee to be eligible to receive an offer of casual conversion from their employer (for an employee of an employer other than a small business employer) or make a request to their employer for casual conversion.

The **second reason** is that there are reasonable grounds for the employer not to make an offer, or accept a request for conversion.

What are 'reasonable grounds'?

Reasonable grounds include that, in the next 12 months:

- △ the employee's position won't exist;
- △ the employee's hours of work will be significantly reduced; or
- △ the days or times at which the employee will be required to work will significantly change, and that cannot be accommodated within the employee's available days or times for work.

There may be other reasonable grounds on which an employer can decide not to make an offer, or refuse a request to convert, including those specific to the workplace or the employee's role.

You need to assess whether a ground is reasonable taking into account all of the circumstances, including the needs of your business and the nature of the employee's role.

The reasonable grounds must be based on facts that are known or reasonably foreseeable at the time of deciding not to make the offer, or to reject the request to convert.

Example – The Annexure to this article contains an example of a scenario where the employer would not be required to offer casual conversion because of reasonable grounds.

Next steps for employers

△ For all employers –

- *review your workforce* - determine who is casual; work with your accountant to work out what the financial implications of casual conversion are for your workforce.
- *review the performance of your casual employees* - are they meeting your expectations in the workplace, do they need more training, and do they still meet your needs?
- *review your upcoming workflows* – are you expecting a downturn? Can your business afford to retain the casual employee/s for the long-term?

△ For small business employers – if you have not yet given each casual employee a Casual Employment Information Statement, do so.

△ Ask for help! We will be updating our website with resources relating to casual conversion to help you navigate the process. Keep checking in for checklists, flowcharts and articles about the process. And, if you need clarification, please contact us.

We will continue to update our website with resources to help you manage the casual conversion process.



Annexure

Example of Scenario Relating to 'Reasonable Grounds'

(Taken from the Revised Explanatory Memorandum to the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020, *Notes on Clauses* - Schedule 1 – Casual employment, p. 10-11)

Illustrative Example – Notice of No Offer to Convert - Reasonable Grounds

Zeynab is a casual office cleaner at Corporate Clean Pty Ltd, which contracts cleaning services to the Greenspace office building.

On the one year anniversary of Zeynab's employment, her employer assesses her employment against the conversion criteria. Zeynab's employer considers her to be eligible for conversion on the basis that she has worked the same shifts Monday to Friday over the previous six months pursuant to Corporate Clean's contract with Greenspace.

However, her employer is aware that the Greenspace contract will not be renewed beyond the end of the current financial year and without that contract there will be no work available for Zeynab.

Within 21 days after the 12 month anniversary of Zeynab's employment, her employer provides written notice to her that Corporate Clean is not going to offer conversion on the reasonable ground that there will be a significant reduction in her hours of work in the next 12 months, on the basis of the Greenspace contract ending and no other work being available.

If, however, Zeynab does ultimately continue to be employed by Corporate Clean and satisfies the relevant eligibility criteria in future, she may be entitled to request to convert under section 66F (but cannot make such a request until at least 6 months after she was provided with the notice of no offer of conversion).