PRESENTATION NOTES

DISCLAIMER

The wording in this document is written for a verbal presentation, not as a legal document. As such, the presentation notes provided here should be considered general legal information, not legal advice. We always recommend that you should obtain legal advice from a lawyer about your particular situation before acting on any of the information provided here.

You can view the webinar presentations using the following links:

- Tuesday 18 May 2021: https://youtu.be/eTNag4QfUK4
- Wednesday 19 May 2021: https://youtu.be/c-WzhHnMKCU

About the webinar

This webinar has been made possible with financial support from the Victorian Law Foundation.

During this webinar, we may talk about some sensitive topics that may be upsetting for people. If these topics trigger a response from you, please log off briefly and take whatever time you need.

Whenever you feel able to talk about it, we encourage you to JobWatch to discuss your concerns about your work rights and we'll see what we can do to help. You can also contact your GP, Lifeline on 13 11 14 or Beyond Blue on 1300 224 636 for emotional and mental health support. If your employer offers an Employee Assistance Program (EAP), you can always contact them as well.

About JobWatch

JobWatch is a free and confidential employment law community legal centre, delivering legal assistance free of charge to people who wouldn't normally be able to afford legal help.

JobWatch is unique amongst community legal centres, because instead of handling all different types of legal matters, we specialise in one field of law – employment law. We do this through two different services – our Telephone Information Service, known as the TIS, and our Legal Practice.

The TIS is free to call for people in Victoria, Queensland and Tasmania. Every year, we help more than 13,000 people who have questions about their rights at work. Through the TIS, we are able to provide initial legal information relevant to the individual situations of the callers. Our consultants always provide a range of legal options.

We also run a Legal Practice for clients in Victoria, where our lawyers support the most vulnerable people who call to our TIS with further legal representation and advice. This could be anything from writing legal letters on your behalf, to representing you in court – and this will depend on the individual case.

We also run a number of special projects including COVID-19 response, the Dismissed Workers Project, Family Violence project, and an International Students project – these projects work with particular community groups that we've recognised need a little more legal support.

We also do community legal education! This is where we do presentations about rights at work to different community groups. This is a really important service, because we firmly believe that empowering people with information and knowledge is the best way to support workers rights.

Definition of a Casual Employee

Unlike permanent ongoing work where a person's hours or shifts are generally set out in a verbal or written contract of employment, casual work is characterised by its flexibility. Traditionally casual workers are employed on an 'as needs' basis.

Essentially casuals are not obligated to accept any of the shifts offered to them, but they aren't guaranteed hours shift to shift.

Casual workers also only get paid for the hours they work – that means they don't get paid annual leave, personal or sick leave; and in acknowledgement of that, all casual workers are entitled to a 25% casual loading (which means, 25% more than the base rate for part-time/full time work).

Casual workers also don't get notice periods or redundancy pay at the end of their employment. Conversely, they don't owe notice if they wish to end their employment.

Whilst casual work can suit some people who want a higher hourly rate and are in a position where certainty of employment is not their primary concern, casual work can be stressful and confusing for others.

For instance, if you're a student coming into SWOTVAC with lots of exams and papers on the horizon, you're allowed to turn down shifts in those weeks so that you can concentrate on your studies. If you're a working parent who wants to take less shifts during school holidays and more shifts during school term, you can do that as well.

Legal Changes since 27 March 2021

The Fair Work Amendment (Supporting Australia's Job and Economic Recovery) bill as it was initially proposed, included many suggested changes to workplace laws around casual work, wage theft, simplifying Modern Awards, enterprise bargaining and greenfields agreement.

On 26 March this year, only the proposed changes to casual work were passed.

Definition of a Casual Worker

One of the big changes to the law for casual workers is that now there is actually a statutory definition of a casual worker.

Before this, whether a worker was a permanent ongoing employee or a casual worker was determined by the courts weighing up various factors that they had developed over time. Crucially, the courts would look at the nature of the employment. If a person was offered sporadic work, or was paid a casual loading or not given annual leave, they were more likely to be a casual worker.

Now, the legislators have stepped to change the way that courts determine casual employment.

Whilst the new statutory definition follows a lot of the court's previously used factors in weighing up casual employment, the key difference is that whether someone is a casual worker will depend strictly on the moment of offer and acceptance. The classification will not change after that moment of offer and acceptance, unless and until a new offer of employment is made. This means the court can no longer look at the nature of the employment relationship as it develops over time to determine whether someone is a casual worker.

The new definition can be found in the Fair Work Act 2009 – our principal source of workplace rights in Australia -- at section 15A. Someone is a casual employee if:

1. They are offered a job that does not include a firm advance commitment that the work will continue indefinitely with an agreed pattern of work
2. they accept the offer
3. and from that point they become an employee.

The law now also gives strict guidance to the courts in determining whether there was a 'firm advance commitment' at the start of the employer-employee relationship. Courts must *only* look at the following things:

1. Whether the employer can elect to offer work and whether the person can elect to accept or reject work;
2. Whether the person will work only as required;
3. Whether the employment is described as casual employment; and
4. Whether the person will be entitled to a casual loading or a specific rate of pay for casual employees under the terms of the offer

We note that this could result in employers establishing, at the moment of offering a worker a job, a casual working arrangement but then after that moment of acceptance, a worker could then be expected to work in ways that looks more like a permanent worker, but without the benefits of annual leave and paid sick leave entitlements. They would then have no recourse in court to have their work reclassified as permanent work, unless they argue that there was a new agreement made for permanent work at some point during their employment. The law does try to address this issue with the new obligations to offer casuals permanent positions if certain conditions are met after 12 months.

Additionally, if the employer *doesn't* set up casual employment properly according to the law in that offer and acceptance phase, but then treats their worker as a casual, there will be ways for the workers to have this rectified.

The question outstanding is: does this new definition of 'casual work' mean that in lieu of meeting the requirements for establishing casual work, is the new default for work permanent work? These matters will need to be litigated.

Casual Employment Information Statement

Another change to the legislation is that all employers must now provide new casual employees with a 'Casual Employment Information Statement' when they start work. This is in addition to the Fair Work Information Statements that they already need to provide to all employees.

Hopefully this change will help casual employees better understand their rights and entitlements when it comes to casual conversion.

If you are already working casually, then your employer has an obligation to provide you with this statement. If you work for a small business, you should have received this "as soon as possible" after 27 March of this year. For all other employers, they have until "as soon as possible" after 27 September of this year to provide the statement to their casual employees.

You can find a copy of this statement on the Fair Work Ombudsman website: https://www.fairwork.gov.au/employee-entitlements/national-employment-standards/casual-employment-information-statement

Casual conversion to permanent employment

The largest and most significant change to the law involves adding a new entitlement to the National Employment Standards that give casual employees a pathway to become a permanent employee – full-time or part-time. This is known as 'casual conversion'.

The National Employment Standards are minimum employment entitlements that must be provided to all employees. Modern awards and enterprise agreements must provide conditions that are equal to or better than the National Employment Standards – they can't leave employees worse off. Similarly, if you are on a Common Law Contract, you cannot contract out your entitlements under the National Employment Standards. If you are interested in the minimum entitlements under the Standards, you can find out more on the Fair Work Ombudsman's website: https://www.fairwork.gov.au/employee-entitlements/national-employment-standards

Casual conversion is now considered a workplace right under the general protection provision of the Fair Work Act, and extend to all National System Employees, not just employees who are covered by a Modern Award. The law now states that employers must proactively offer casual employees conversion to a permanent role (full or part time, depending on what hours they have previously worked), if**:**

1. they have been employed for a 12 month period; and
2. in the last 6 months of that employment, they have worked:
    a. a regular pattern of hours on an ongoing basis; and
    b. the employee could continue to work this pattern of hours as a part-time or full-time employee, without significant adjustment.

This offer must be made in writing within 21 days following their 12 months of employment, and must reflect the hours that they've worked. Employees then have 21 days to accept or reject the offer – and if you don't respond, it's taken as a rejection. Employers are not allowed to reduce or vary an employee's hours, or terminate them, to avoid this obligation.

Employers are not required to make this offer if there are reasonable business grounds based on facts that are known or reasonably foreseeable to not make that offer. This might include:

1. whether the employee's position will cease to exist in the following 12-month period;
2. the hours of work which the employee is required to work will be significantly reduced;
3. there will be a significant change in the days or times that the employee hours of work are required and the employee cannot make themselves available to work these days / times; and
4. making an offer would not comply with a recruitment or selection process required under State or Commonwealth Law.

However, if they have decided not to make an offer, they still need to notify the employee in writing within 21 days of the reasons why they are not being offered or not entitled to casual conversion.

There are exceptions to this rule. If the business has 15 or fewer employees, they don't have to proactively offer conversion after 12 months – however the employees can still request casual conversion. To request casual conversion, you must satisfy the eligibility criteria discussed earlier, and additionally you must:

1. have not refused an employer's offer for casual conversion in the past 6 months; and
2. the employer has not given you notice that they have decided not to order conversion based on reasonable business grounds; and
3. the employer has not refused a previous request during the period; and

4. the request has not been made within the 21 days after the employer has made an offer pursuant to the 12-month-offer requirement.

Your employer then has 21 days to provide a written response either accepting or declining the request.

That's a lot of changes to casual conversion, so in response, there is a new avenue to resolve some disputes about casual conversion through the Federal Circuit Court. The Court will be able to help with disputes about whether:

1. a casual employee meets the requirements for their employer to make an offer for them to become a permanent employee
2. the employer has reasonable grounds not to make an offer or refuse a request for casual conversion
3. a casual employee meets the requirements to make a request to their employer for casual conversion.

The Fair Work Commission also has capacity to deal with disputes under s 66M of the Fair Work Act and under enterprise agreements and modern awards.

Here's a few examples of how casual conversion might work.

EXAMPLES

Sarah has been working regular hours as a casual at an online gift hamper company for the past two years. It's a small business, so her employer isn't obligated to offer her casual conversion, but Sarah wants the stability of permanent work. She puts a request for casual conversion in writing to her employer, and as there are no reasonable business grounds to deny her request (the online gift hamper company is booming during COVID!), her employer accepts Sarah's request, confirming in writing. Starting from the next pay period, Sarah is now a permanent part-time employee, working the same hours she did as a casual. She now no longer receives the casual loading, however, she does now receive paid annual leave, paid personal leave, redundancy entitlements and more.

Michael has been a casual checkout operator at Coles for 18 months. He's offered the opportunity to convert to permanent part-time employment by Coles before the deadline of 27 September, and he chooses to accept the offer. He now has confirmed shifts every week and guaranteed income, and is eligible for paid annual leave, paid sick leave, redundancy pay, and more.

Taylor has been working casually in a call centre for 12 months. They are looking forward to receiving a letter from their employer offering casual conversion because they have been working regular hours during their employment. However, they receive a letter letting them know that they are not being offered casual conversion on 'reasonable business grounds', because the company is planning on outsourcing their call centre overseas in the next six months. Taylor didn't know this was going to happen, and decides to start looking for a new job before the move happens.

George has been working at the Bunnings Garden Centre for the past 18 months. He actually retired two years ago, but chose to go back to work casually because he missed interacting with the public. He's offered the opportunity to convert to permanent employment by Bunnings before the deadline of 27 September, but he chooses to turn it down as he prefers the flexibility of being able to pick and choose his shifts – he has to fit it in around his golf in retirement! He continues as a casual at Bunnings.

Offset of Entitlements Against Casual Loading

The changes to the Fair Work Act also include a clause where if an employee has been misclassified as a casual, their employer can use the 25% loading they have paid to the employee as a casual to offset any entitlements they may owe that employee, upon discovering they are indeed a permanent employee.

In this scenario, a court must reduce any amount payable by the amount of casual loading that had been paid during that same time, and can also reduce the claim amount by a proportion of the casual loading as well where the claim amount is for only some of the entitlements compensated for by the loading.

EXAMPLE

Sam was working as a receptionist at a hotel for a year, and was being paid as a casual. He was let go during COVID-19, and he's now put in a court claim asking for his entitlements as a part-timer rather than a casual.

In his claim, he's saying that he's has been misclassified as a casual, and as a part-timer he's actually owed $10,000 worth of annual leave, payment in lieu of notice of termination, and redundancy pay.

Under this new legislation, a court can now say to Sam, "yes, we agree that you should have been classified as a part-timer instead of a casual. However, you received 25% loading as a casual, so we're going to calculate what that is and take it off the amount of entitlements."

In the end, Sam is paid $7,000 worth of entitlements, instead of the $10,000 he asked for – because the court has offset the casual loading payments he received against the amount owed.

Again, like the first change in the law around the definition of casuals, this change has not yet been tested in court, so it will be interesting to see how this will be applied.

[Q&A discussion here]

Conclusion

You can find information sheets relevant to a lot of the topics I have covered on the JobWatch website at www.jobwatch.org.au.

Remember - if something bad happens to you at work, don't wait to seek help. Because there are time limitations on things like filing an Unfair Dismissal claim with the Fair Work Commission (within 21 days), you really must act quickly.

Call the JobWatch TIS on (03) 9662 1933 immediately for free and confidential legal information, and our phone consultants can give you information on what to do next.