We have grouped together common themes from the questions we received during our webinar on the new law surrounding Casual Employment and have provided answers below.

As we are unable to provide advice (in a public forum) on questions that relate to the specific circumstances of individual businesses, if you do require further help please contact us on 1300 144 120 or book in a [free 1:1 consultation](https://www.employmentinnovations.com/book-a-free-30-minute-hr-consultation/) with one of our HR Experts.

**Q: Who do these new laws apply to? Do they apply to all employers?**

*A: The new laws apply to all employers covered by the national employment system under the Fair Work Act 2009 (Cth) (basically all non-government employers in Australia, excepting certain unincorporated businesses in Western Australia).*

*This includes employers covered by enterprise agreements and modern awards.*

*Any existing casual conversion clauses in modern awards (or enterprise agreements) also continue to apply for the time being, which may mean that employers are under two separate obligations to offer / consider requests for casual conversion to permanent employment. It is likely that casual conversion clauses in modern awards will be removed in the next six months. This will mean that employers will just be obliged to follow the casual conversion provisions now contained in the Fair Work Act (i.e. those covered in our webinar).*

**Q: Who is a small business employer?**

*A: The Fair Work Act defines a small business employer as follows:*

***Meaning of small business employer***

*(1) A national system employer is a small business employer* ***at a particular time*** *if the employer employs fewer than 15 employees at that time;*

*(2) For the purpose of calculating the number of employees employed by the employer at a particular time:*

*(a) subject to paragraph (b), all employees employed by the employer at that time are to be counted; and*

 *(b) a casual employee is not to be counted unless, at that time, he or she has been employed by the employer on* ***a regular and systematic basis****.*

*(3) For the purpose of calculating the number of employees employed by the employer at a particular time, associated entities are taken to be one entity.*

*Particular challenges arise for employers with a seasonal workforce where the numbers of employees actively engaged fluctuates. It may be that an employer is deemed to be a small business at some time of the year and not at others in such circumstances. We recommend seeking advice if it is not completely clear whether or not your business meets the definition of a “small business employer”.*

**Q: What are the number of hours that need to be offered when offering conversion to permanent employment? Is there a minimum number of hours?**

*A: Employees should be offered the same pattern of work (without significant adjustment) that they worked over the previous six months. If the employee did not work a regular pattern of hours then no obligation to offer conversion will arise.*

*The terms of any applicable modern award will need to be considered, but generally:*

* *Full-time employees are engaged for an average of 38 hours per week.*
* *Part-time employees are engaged for an average of less than 38 hours per week.*

*Although the employer’s obligation is to offer a conversion to permanent employment based on the same, or not significantly different, pattern of hours that the casual employee has been regularly working, there would not seem to be an issue in an employer and employee mutually agreeing to more/less hours based on individual circumstances, when entering into the terms of a permanent contract.*

*Employees can be eligible for conversion even if working a small number of hours (e.g. 5 hours per week), so long as these have been worked on a regular basis for 6 months out of the last 12 months of service.*

**Q: Is there any more guidance on what constitutes a regular pattern of work for assessing whether a casual employee is entitled to be offered / request conversion?**

*A:  The new legislation does not define what is meant be a regular pattern of work. In our view, if employees work the same number of hours per week (or per pay period), on the same days and same times, this will be a regular pattern of hours.*

*We still consider they will have worked a regular pattern of hours if there are occasional periods that they don’t work (e.g. when they are on holiday, when they are ill, etc).*

*Where there are fluctuations in the number of hours worked, or the time and days such hours are worked, this may be sufficient to show that they have not worked regular pattern of work, but it will depend on the amount of fluctuation or variation. Similarly, if the employee has regular periods of not working, this may be sufficient to show that the employee did not work a regular pattern of work.*

*The Explanatory Note to the new legislation provides the following example of an employee entitled to be offered conversion:*

***Illustrative example – offer of conversion to eligible employee***

*Marcella commenced work as a casual employee in the fashion retail industry for Très Chic Boutique. On the one year anniversary of Marcella’s employment, Marcella’s employer assesses whether Marcella is eligible to convert under Division 4A. Over the previous six months, Marcella has regularly worked 8 hours on Monday, Tuesday and Friday each week. Marcella’s employer considers that over that period Marcella has worked a regular pattern of hours on an ongoing basis which, without significant adjustment, she could continue to work as a part-time employee. There are no reasonable grounds to not make Marcella an offer to convert.*

*Two weeks after the 12 month anniversary of Marcella’s employment (within the 21 day timeframe in section 66B(2)(c)), Marcella’s employer sends an email to Marcella making an offer of ongoing part-time employment consistent with the hours Marcella has worked over the previous six month period.*

**Q: How are disputes about casual conversions resolved?**

*A:  If the employer and employee are covered by a modern award / enterprise agreement, this will contain a process for dealing with disputes, including an ability for either party to apply to the Fair Work Commission to resolve the dispute if it cannot be resolved.*

*For other employers / employees the new legislation provides for an ability for applications to be made to the Fair Work Commission to deal with disputes.*

*There is also an ability to make applications to the magistrates court or the Federal Circuit Court which can be dealt with using the simplified “small claims procedure”.*

**Q: When do I need to provide the casual employment information statement to my casual employees?**

A:  For new casual employees who commenced on or after 27 March 2021;

* Small business and non-small businesses – as soon as practicable.

For existing casual employees who commenced on or before 26 March 2021;

* Small businesses - as soon as practicable;
* Non-small businesses - as soon as practicable on or after 27 September 2021.

**Q: When offering conversion from casual employment to permanent employment, is it ok to reduce an employee’s pay rate by 25%?**

*A:  The legislation is silent on this point, but in our view, the employer’s obligation when offering conversion is just to provide the minimum entitlements set out in the Fair Work Act or applicable modern awards or enterprise agreements.*

*Generally this will mean that the minimum wages to be provided will be lower than the minimum wage the employee will have been entitled to as a casual employee, as most casual employees are entitled to a 25% “casual loading” on the minimum base rate of pay.*

*In effect, therefore, a converting casual will in most cases be forfeiting the 25% loading. However, as a permanent employee, the converting employee will now be entitled to:*

* *paid annual leave;*
* *paid personal/carer’s leave;*
* *paid compassionate leave;*
* *payment for absence on a public holiday;*
* *payment in lieu of notice of termination; and*
* *redundancy pay.*

**Q: What are my obligations if an employee declines an offer to convert to permanent employment?**

*A:  Outside of the 6 month “transitional period”, non-small business employers have a one-off obligation to offer an employee conversion to permanent employment (if they meet the necessary requirements) on the employee’s 12-month anniversary. The obligation to offer conversion does* ***not*** *arise every 12 months!*

*If an employee declines an offer of conversion to permanent employment then they still can make a request to convert in the future, but they cannot make a request at any point if in the last 6 months:*

* *they’ve 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; or*
* *their employer has refused a previous request for casual conversion because there was a reasonable ground to refuse the request.*

*Special rules: Employees can still make a request even if their employer has told them in the last 6 months that they won’t be making an offer of casual conversion if the reason they didn’t get an offer was because they hadn’t worked a regular pattern of work in the 6 months period at that time, but they now have.*

**Q: What are reasonable business grounds for not making an offer/declining a request for a casual employee converting to a permanent employee?**

*A:  The legislation includes a non-exhaustive list as follows:*

*(a) the employee’s position will cease to exist in the period of 12 months after the time of deciding not to make the offer;*

*(b) the hours of work which the employee is required to perform will be significantly reduced in that period;*

*(c) there will be a significant change in either or both of the following in that period:*

*(i) the days on which the employee’s hours of work are required to be performed;*

*(ii) the times at which the employee’s hours of work are required to be performed;*

*(iii) which cannot be accommodated within the days or times the employee is available to work during that period;*

*An employer may be able to demonstrate other reasonable grounds depending on the exact facts of their case.*

**Q: What needs to be stated in casual employment contracts to identify the casual loading amount?**

*A:  To take advantage of the new offsetting / anti-double dipping provisions, it is recommended all casual employment contracts state, either a % amount or a dollar figure for the casual loading, for example –*

* *“You will be paid a gross hourly rate for time worked (less applicable taxation) of $28.37 inclusive of a 25% casual loading.”; or*
* *“Your hourly rate of pay is made up of a base rate of $22.70 plus a casual loading of $5.67”.*

*The casual loading should be expressed as being paid in compensation for the employee not having a one or more of the following entitlements;*

* *paid annual leave;*
* *paid personal/carer’s leave;*
* *paid compassionate leave;*
* *payment for absence on a public holiday;*
* *payment in lieu of notice of termination; or*
* *redundancy pay.*

***NOTE:*** *where relevant, the employer may wish to assign a proportion to each of the identified entitlements the casual loading is being paid by way of compensation.*

*The casual loading should also be an identifiable amount on an employee’s payslip.*