

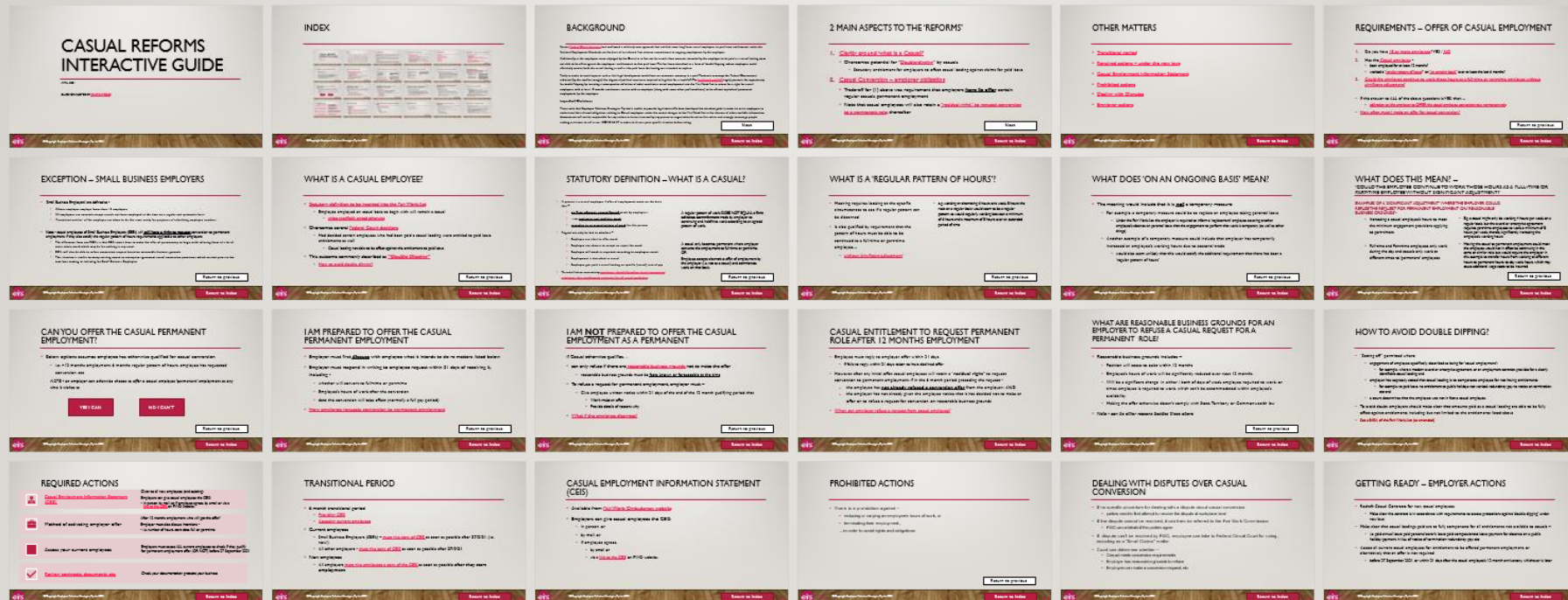
# CASUAL REFORMS INTERACTIVE GUIDE

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APRIL 2021

GUIDE DEVELOPED BY [ER STRATEGIES](#)

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# BACKGROUND

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Recent [Federal Court decisions](#) had confirmed a relatively new approach that entitled some long-term casual employees to paid leave entitlements under the National Employment Standards, on the basis of an inferred firm advance commitment to ongoing employment by the employer.

Additionally, as the employees were adjudged by the Court to in fact not be casuals, then amounts intended by the employer to be paid as a casual loading were not able to be offset against the employees' entitlements to that paid leave. This has been described as a form of 'double-dipping' where employees could effectively receive both the casual loading as well as the paid leave the loading was intended to replace,

Partly in order to avoid imposts such as this legal development would have on economic recovery in a post-Pandemic economy, the Federal Government achieved (by the smallest margin) the degree of political consensus required to legislate for a trade-off. The [legislated trade-off](#) largely prevents the opportunity for double-dipping by inserting a retrospective definition of what constitutes casual employment into the Fair Work Act, in return for a right for casual employees with at least 12 months continuous service with an employer (along with some other pre-conditions) to be offered equivalent 'permanent' employment by the employer.

## Important Disclaimer

Please note that Employee Relations Strategies Pty Ltd is unable to provide legal advice. We have developed the attached guide in order to assist employers to understand their altered obligations relating to Casual employees under the recent changes to the Fair Work Act, in the absence of other available information. However, we will not be responsible for any actions or losses incurred by any person or organisation based on this advice and strongly encourage people seeking assistance to call us on 1300 55 66 37 in order to discuss your specific situation before acting.

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## 2 MAIN ASPECTS TO THE 'REFORMS'

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### 1. Clarity around 'what is a Casual?'

- Overcomes potential for “Double-dipping” by casuals
  - Statutory entitlement for employers to offset casual loading against claims for paid leave

### 2. Casual Conversion – employer obligation

- Trade-off for (1) above was requirement that employers **have to offer** certain regular casuals permanent employment
- Note that casual employees will also retain a “residual right” to request conversion to a permanent role, thereafter

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# OTHER MATTERS

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- [Transitional period](#)
- [Required actions – under the new laws](#)
- [Casual Employment Information Statement](#)
- [Prohibited actions](#)
- [Dealing with Disputes](#)
- [Employer actions](#)

# REQUIREMENTS – OFFER OF CASUAL EMPLOYMENT

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1. Do you have 15 or more employees? YES / NO
  2. Has the Casual employee -
    - been employed for at least 12 months?
    - worked a “regular pattern of hours” on “an ongoing basis” over at least the last 6 months?
  3. Could the employee continue to work those hours as a full-time or part-time employee without significant adjustment?
- If the answer to ALL of the above questions is YES, then...
    - obligation on the employer to OFFER the casual employee conversion to a permanent role
  - How often must I make an offer for casual conversion?

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# EXCEPTION – SMALL BUSINESS EMPLOYERS

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- ‘Small Business Employers’ are defined as -
  - Where employer employs fewer than 15 employees
  - All employees are counted, except casuals not been employed at the time on a regular and systematic basis
  - ‘Associated entities’ of the employer are taken to be the same entity for purposes of calculating employee numbers
- Note - casual employees of Small Business Employers (SBE’s) will **still have a right to request** conversion to permanent employment, if they also satisfy the regular pattern of hours requirements applicable to other employers
  - The difference from non-SBE’s, is that SBE’s won’t have to make the offer of permanency to begin with, relieving them of a lot of extra admin work which may be for nothing in any event
  - SBE’s will also be able to refuse conversion request based on reasonable business grounds
  - This situation is similar to many existing award or enterprise agreement casual conversion provisions, which existed prior to the new laws coming in, including for Small Business Employers

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# WHAT IS A CASUAL EMPLOYEE?

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- Statutory definition to be inserted into the Fair Work Act
  - Employee employed on casual basis to begin with, will remain a casual
    - unless specifically agreed otherwise
- Overcomes several Federal Court decisions
  - Had decided certain employees who had been paid a casual loading, were entitled to paid leave entitlements as well
    - Casual loading not able to be offset against the entitlement to paid leave
- This outcome commonly described as “Double Dipping”
  - How to avoid double dipping?

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# STATUTORY DEFINITION – WHAT IS A CASUAL?

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- A person is a casual employee if offer of employment made on the basis that –
  - **no firm advance commitment** made by employer...
  - ...to continuing and indefinite work,
  - according to an agreed pattern of work for the person.
- Regard can only be had to whether –
  - Employer can elect to offer work
  - Employee can choose to accept or reject the work
  - Employee will work as required, according to employers needs
  - Employment is described as casual
  - Employee gets paid a casual loading or specific (casual) rate of pay
- To avoid future uncertainty, employers should therefore insert appropriate provisions into employment contracts for all casual employees

A regular pattern of work DOES NOT EQUAL a **firm advance commitment** made by employer to continuing and indefinite work according to an agreed pattern of work.

A casual only becomes permanent where employer converts the employment to full-time or part-time, OR

Employee accepts alternative offer of employment by the employer (i.e. not as a casual) and commences work on that basis.

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# WHAT IS A 'REGULAR PATTERN OF HOURS'?

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- Meaning requires looking at the specific circumstances to see if a regular pattern can be discerned
- Is also qualified by requirement that the pattern of hours must be able to be continued as a full-time or part-time employee...
  - without 'significant adjustment'
- e.g. working an alternating 6 hours one week, 8 hours the next on a regular basis would seem to be a regular pattern, as would regularly working between a minimum of 6 hours and a maximum of 8 hours over an extended period of time

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# WHAT DOES ‘ON AN ONGOING BASIS’ MEAN?

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- The meaning would include that it is **not** a temporary measure
  - For example, a temporary measure could be to replace an employee taking parental leave
    - Under the Fair Work Act, the employer is required to inform a ‘replacement’ employee covering another employee’s absence on parental leave, that the engagement to perform that work is temporary (as well as other things)
  - Another example of a temporary measure could include that employer has temporarily increased an employee’s working hours due to seasonal trade
    - would also seem unlikely that this would satisfy the additional requirement that there has been a ‘regular pattern of hours’

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# WHAT DOES THIS MEAN? –

‘COULD THE EMPLOYEE CONTINUE TO WORK THOSE HOURS AS A FULL-TIME OR PART-TIME EMPLOYEE WITHOUT SIGNIFICANT ADJUSTMENT?’

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EXAMPLES OF A ‘SIGNIFICANT ADJUSTMENT’ WHERE THE EMPLOYER COULD REFUSE THE REQUEST FOR PERMANENT EMPLOYMENT ON ‘REASONABLE BUSINESS GROUNDS’-

- Increasing a casual employee’s hours to meet the minimum engagement provisions applying to part-timers
- Full-time and Part-time employees only work during the day, and casuals only work at different times to ‘permanent’ employees
- E.g. a casual might only be working 4 hours per week on a regular basis, but the award or enterprise agreement requires part-time employees to work a minimum of 8 hours per week, thereby significantly increasing the employee’s working hours
- Moving the casual to permanent employment could mean the employee would not in effect be continuing in the same or similar role, but would require the employer in this example to transfer hours from working at different hours to permanent hours, to day work hours, which may cause additional wage costs to be incurred

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# CAN YOU OFFER THE CASUAL PERMANENT EMPLOYMENT?

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- Below options assumes employee has otherwise qualified for casual conversion
  - i.e. >12 months employment, 6 months regular pattern of hours, employee has requested conversion, etc

*NOTE - an employer can otherwise choose to offer a casual employee 'permanent' employment at any time it wishes to*

YES I CAN

NO I CAN'T

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# I AM PREPARED TO OFFER THE CASUAL PERMANENT EMPLOYMENT

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- Employer must first **discuss** with employee what it intends to do re matters listed below
- Employer must respond in writing to employee request within 21 days of receiving it, including -
  - whether will convert to full-time or part-time
  - Employee's hours of work after the conversion
  - date the conversion will take effect (normally a full pay period)
- How employee requests conversion to permanent employment

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# I AM **NOT** PREPARED TO OFFER THE CASUAL EMPLOYMENT AS A PERMANENT

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If Casual otherwise qualifies...

- can only refuse if there are reasonable business grounds not to make the offer
  - reasonable business grounds must be facts known or foreseeable at the time
- To refuse a request for permanent employment, employer must –
  - Give employee written notice within 21 days of the end of the 12 month qualifying period, that
    - Won't make an offer
    - Provide details of reasons why
- What if the employee disagrees?

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# CASUAL ENTITLEMENT TO REQUEST PERMANENT ROLE AFTER 12 MONTHS EMPLOYMENT

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- Employee must reply to employer offer within 21 days
  - If fails to reply within 21 days, taken to have declined offer
- However, after any initial offer, casual employees will retain a “**residual right**” to request conversion to permanent employment, if in the 6 month period preceding the request -
  - the employee has **not already refused a conversion offer** from the employer; AND
  - the employer has not already given the employee notice that it has decided not to make an offer or to refuse a request for conversion, on reasonable business grounds
- When can employer refuse a request from casual employee?



# WHAT ARE REASONABLE BUSINESS GROUNDS FOR AN EMPLOYER TO REFUSE A CASUAL REQUEST FOR A PERMANENT ROLE?

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- Reasonable business grounds includes –
  - Position will cease to exist within 12 months
  - Employee's hours of work will be significantly reduced over next 12 months
  - Will be a significant change in either / both of days of week employee required to work, or times employee is required to work, which can't be accommodated within employee's availability
  - Making the offer otherwise doesn't comply with State, Territory or Commonwealth law
- *Note - can be other reasons besides those above*

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# HOW TO AVOID DOUBLE DIPPING?

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- “Setting off” permitted where:
  - engagement of employee specifically described as being for ‘casual employment’;
    - for example, where a modern award or enterprise agreement, or an employment contract, provides for a clearly identifiable casual loading; and
  - employer has expressly stated that casual loading is to compensate employee for not having entitlements
    - for example, to paid leave, no entitlement to public holidays not worked, redundancy pay, no notice on termination, etc; and
  - a court determines that the employee was not in fact a casual employee.
- To avoid doubt, employers should make clear that amounts paid as a casual loading are able to be fully offset against entitlements including, but not limited to, the entitlements listed above
- See s.545A of the Fair Work Act (as amended)

# REQUIRED ACTIONS



## Casual Employment Information Statement (CEIS)

Given to all new employees (and existing)

Employers can give casual employees the CEIS:

- in person, by mail, or if employee agrees, by email or via a [link to the CEIS](#) on FWO website.



## Method of activating employer offer

After 12 months employment, who will get the offer?

Employer must also discuss intentions -

- i.e. number of hours, start date, full or part-time



## Assess your current employees

Employers must assess ALL current employees to check if they qualify for permanent employment offer (OR NOT) before 27 September 2021



## Review contracts, documents etc

Check your documentation protects your business

# TRANSITIONAL PERIOD

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- 6 month transitional period
  - [Providing CEIS](#)
  - [Assessing current employees](#)
- Current employees
  - Small Business Employers (SBE's) – [must give copy of CEIS](#) as soon as possible after **27/3/21** (i.e. now!)
  - All other employers - [must give copy of CEIS](#) as soon as possible after **27/9/21**
- New employees
  - All employers [must give employees a copy of the CEIS](#) as soon as possible **after they start employment**



# CASUAL EMPLOYMENT INFORMATION STATEMENT (CEIS)

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- Available from [Fair Work Ombudsman website](#)
- Employers can give casual employees the CEIS:
  - in person, or
  - by mail, or
  - if employee agrees,
    - by email or
    - via a [link to the CEIS](#) on FWO website.

# PROHIBITED ACTIONS

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- There is a prohibition against –
  - reducing or varying an employee's hours of work, or
  - terminating their employment,...in order to avoid rights and obligations

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# DEALING WITH DISPUTES OVER CASUAL CONVERSION

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- If no specific procedure for dealing with a dispute about casual conversion
  - parties need to first attempt to resolve the dispute at workplace level
- If the dispute cannot be resolved, it can then be referred to the Fair Work Commission
  - FWC can arbitrate if the parties agree
- If dispute can't be resolved by FWC, employee can take to Federal Circuit Court for ruling, including as a "Small Claims" matter
- Court can determine whether –
  - Casual meets conversion requirements
  - Employer has reasonable grounds to refuse
  - Employee can make a conversion request, etc

# GETTING READY – EMPLOYER ACTIONS

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- Redraft Casual Contracts for new casual employees
  - Make clear the contract is in accordance with requirements to access protections against ‘double dipping’ under new laws
- Make clear that casual loadings paid are to fully compensate for all entitlements not available to casuals –
  - i.e. 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; redundancy pay; etc
- Assess all current casual employees for entitlement to be offered permanent employment, or alternatively that an offer is not required
  - before 27 September 2021, or within 21 days after the casual employee’s 12 month anniversary, whichever is later



# CONTACT DETAILS

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