

PROFESSIONAL SERVICES

EMPLOYING CASUALS: a double-edged sword for private practices

OVER THE YEARS, I've seen a lot of employers fall into the trap of hiring 'casual' employees, believing this would be less risky or more flexible for their business than a 'permanent' or 'fixed term' staffing model. Without a doubt, the casual model does have a lot to offer: for both parties. But when used in the wrong circumstances, without a full appreciation of the pros and cons, or without ongoing management oversight, the legal and financial risks can be enormous. Those risks are magnified for small businesses (like most private practices), because they usually have limited in house HR/management expertise, and the financial and disruptive impact of an unexpected legal claim can be much higher!

Uncertainty = Risk

The heart of the problem is uncertainty, and if there is one certainty in life (and in practice management) it is that legal uncertainty equals business risk.

Unfortunately, there is no hard and fast statutory rule about when a particular employment relationship is 'truly' casual, and the law has different tests that apply in different situations. At the most fundamental level, it comes down to a case by case assessment of a range of factors, such as: how you engage with a particular employee, their working patterns and, most significantly, the extent to which their employment is 'regular and systematic' and they expect to keep working for you in the future.

Most workplace relations lawyers could argue for hours about what 'regular and systematic' actually means in a particular case, so expecting a principal doctor or practice manager to work it out for themselves is pretty tough; and if you make a poor judgement call, the law (or the Fair Work Ombudsman) is unlikely to offer much sympathy. As far as the law is concerned, if it looks like a duck and quacks like a duck, it's a duck, even if the duck prefers to be called a goose!

To make things worse, the nature of a particular employee's relationship may change over time (without you consciously doing anything, knowing anything has changed, or knowing when the change occurred). And you won't be able to get a definitive legal answer from anyone unless and until a legal claim is actually made against you and proceeds all the way through to final judgement in court (and who wants to go through all that?).

So how can you protect yourself and your business from the double edged sword of casual employment?

Here are our best tips:

- only use a casual model if your business needs are genuinely uncertain and changeable, with no guarantee/expectation of ongoing work or regular work patterns
- get advice on which model to use before you hire and consider the

Did you know?

- ✓ a court or tribunal may find that your 'casuals' are actually permanent, **even if** they've been employed less than 12 months
- ✓ even 'true' casuals can make termination claims under the Fair Work Act
- ✓ long term 'casuals' are entitled to access unpaid parental leave and long service leave
- ✓ casuals may also be entitled to higher penalty or overtime rates at different times
- ✗ you can't just **agree** that someone will be casual – if they're not, they're not
- ✗ fluctuating days of work, or start and finish times, don't necessarily make someone casual
- ✗ just paying a casual loading doesn't make someone casual
- ✗ even if you pay a casual loading, this may not protect you from paying leave entitlements as well (and/or additional penalties and interest if you don't!)

options carefully – for example, a variety of template contracts and other information is available for members on the AMA (NSW) website

- don't pick a casual arrangement just because you want to 'try before you buy' – remember that permanent employment is usually subject to a probation period of 6-12 months anyway
- don't set and forget – review each casual employee's work patterns regularly (eg, every three months), to see whether your business needs have changed in that time, or their actual work patterns have become more regular and systematic – if something's changed, discuss it transparently and update their contract accordingly
- if you need to keep a valued staff member, don't let them 'stay a casual' just because they like getting a casual loading – manage hiring decisions according to your business needs and, if you need to incentivise a staff member to stay, find something else of value to offer them
- no matter which model you choose, to minimise uncertainty and limit the risks, ensure you have a well drafted, written contract in place before the employee starts work and update or replace it whenever the relationship changes significantly. **dr.**

Disclaimer: The views and information provided in this article are of a general nature only and do not constitute legal advice. It is not tailored for your particular circumstances. If you would like specific assistance with issues raised in the article, please contact our professional services team on professionalservices@amansw.com.au. If we are unable to provide specific advice or legal services to you directly (or to do so within your desired timeframes), we would be happy to refer you to appropriate external providers. In that regard, AMA (NSW) has relationships with preferred providers who will generally provide a free initial consultation to our members.

PS. HERE TO HELP YOU!

WHAT'S NEW IN PROFESSIONAL SERVICES?

New contract templates for private practice employees have now been uploaded to our website, and are available for free download by members.

Our next member education seminar will be in Newcastle on Saturday 25 February 2017. **Check amansw.com.au for further details.**

Save the date!

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