NEW RISKS WHEN EMPLOYING CASUALS

Changes to Modern Awards and a recent Federal Court decision have put rules for casual employees in the spotlight.

WE REGULARLY WARN members that hiring casuals can be fraught with unexpected risk, particularly if those employees end up staying in the business for an extended period of time. For example, a recent Federal Court decision has again highlighted that employees may be entitled to paid leave entitlements under the National Employment Standards (NES), even if they've been appointed as a casual and paid a loading under an applicable Award or Enterprise Agreement. This type of unexpected cost (eg. six years' worth of back pay) can be a big hit for a small business, particularly if multiple employees are affected, or if the Fair Work Ombudsman also prosecutes for non-compliance penalties.

In addition, recent changes to Modern Awards have now introduced a new right for 'regular' casuals to request a transfer to permanent employment, creating another layer of complexity. Employers must also notify casual employees about these new rights. Given these changes, we recommend all private medical practices take the opportunity now to reassess their relationships with casual employees, ensure they comply with the new notification rules, and ensure their casual contracts and systems are up-to-date and appropriate for their business.

WorkPac v Skene

In a decision that has outraged many employer and business groups, the Federal Court recently found that an employee who agreed to work as a casual and was paid a loaded rate, was in fact entitled to back pay for unpaid leave entitlements under the NES. Key to the finding was that the employee didn't have the necessary 'essence' of casualness: for example, he knew his usual roster well in advance, he wasn't truly able to refuse shifts, and he expected his employment to continue indefinitely unless his employer actually sacked him.

Although the Skene case turns on its facts, the general principles considered in the case are not really new: at a basic contractual level, there's no definitive test to determine whether someone is casual or permanent, so you have to look at a range of different features of the relationship, including whether the employee has been given an advance commitment to ongoing work, and whether they work on a regular and systematic basis. The case has, however, directed a lot of fresh attention to casual arrangements, so employers shouldn't be surprised if casual employees start to ask more questions about their entitlements, including whether they're entitled to paid leave.

New right to request permanency

From October 2018, 'regular casual' employees under the Health Professionals and Support Services Award and Nurses Award also have the right to request full-time or part-time work. For the first time, the Awards now include a definition of 'regular casual'

which includes casual employees who, over the preceding 12 months, have worked a pattern of hours on an ongoing basis which, without significant adjustment, the employee could continue to perform as either a part-time or full-time employee. If an employee meets this threshold definition, they can make a written request to their employer, asking to change to part-time or full-time work. If the employer agrees to this, the new arrangement needs to be recorded in writing and will take effect from the next pay cycle. After that, the employee will only be able to convert back to casual employment if the employer agrees.

An employer can only refuse a casual's request to become full- or part-time on reasonable business grounds, after consultation with the employee. Any refusal must also be confirmed in writing, with reasons, within 21 days of the request being made. Reasonable business grounds for refusing a request may include, for example, where it's reasonably foreseeable that the casual position will cease to exist within the next 12 months. However, any such decision would need to be based on facts and, if there's a dispute about whether reasonable business grounds exist, the employee (or employer) can refer the dispute to the Fair Work Commission.

Importantly, there's no right for an employer to require an employee to transfer to permanent employment (even if there's a high risk the employee could be found to be entitled to annual leave under the NES). There's certainly nothing preventing an employer from offering an employee permanency and providing reasonable incentives to persuade them to agree to this (eg. an increased base rate of pay). However, the usual rules about workplace rights still apply, so an employer can't coerce, or use undue influence or pressure on an employee to exercise their casual conversion rights in a particular way; and an employer also can't take adverse action against an employee (eg. sack them, or cut their shifts) because they have this new casual conversion right, or elect to use it, or not use it.

So what should you do next?

Given the new compliance obligations and fresh focus on casual employment, we recommend members follow these key steps.

✔ **Notify existing casuals:**
If you employed any casuals on 1 October 2018, give them a copy of the new casual conversion provisions by the end of 2018. This is a compliance obligation, so keep an email trail, or get them to sign they've received it. You can find a downloadable copy of the new provisions on our employer quick links page: (https://www.amansw.com.au/professional-services/employer-quick-links/)

✔ **Notify new casuals:**
From now on, whenever you hire any new casuals, either give them a copy of the new casual conversion provisions when they start work or set diary reminders before the 12-month anniversary of their first shift. Whether or not they are 'regular casuals', you need to give them a copy of the new provisions within 12 months of their first shift. Again, keep an evidence trail of this, because it's a compliance obligation.

✔ **Respond promptly to conversion requests:** If an existing casual tells you they'd like to convert to full-time or part-time employment, consult with them about what they're looking for, consider your business needs and think about getting some advice before confirming whether you agree to their request or not. If they make a request in writing, ensure you complete the consultation and respond to them in writing no later than 21 days after receiving their request.

✔ **Review your contracts:**
Check the written contracts you have in place with all your casuals now. If you think they may contain provisions that aren't consistent with the essence of a true casual relationship (as articulated in the recent cases), then get some advice and consider updating them or negotiating new arrangements with affected employees. For example, warning signs would include if the contracts: describe an employee as a 'regular' or 'permanent' casual; make reference to any 'usual' or ordinary hours of work; lock employees into particular shifts; or include clauses requiring advance notice of termination, probation periods or similar. We also recommend that contracts clearly identify the amount of the casual loading you are paying (rather than just specifying the fully loaded rate); and include an appropriate 'offset' clause. For comparison, take a look at the template contracts we make available to members here: https://www.amansw.com.au/professional-services/practice-staff-contracts/

✔ **Review your systems and practices:**
No matter how good your contracts are, if in reality you treat your 'casual' employees like permanent employees, there's a real risk a court may decide they're entitled to paid leave (possibly on top of any casual loading you've paid them). There's no simple answer to this, but good systems will help. For example, we recommend you review casual relationships every quarter, to identify employees whose hours are starting to become 'regular or systematic' or who you want to 'lock in' so you can have certainty and predictability. dr.

If you need advice, please contact one of our HR advisors by calling or emailing professionalservices@amansw.com.au.

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