Article Information

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Webinar Q&As: Employment relations national seminar series – Casuals: The changes keep coming

Piper Alderman provides the Answers in response to the Questions received during our Employment Relations National Seminar Series – | Casuals: The changes keep coming webinar on 18 August 2021.

To view the on demand webinar, please register via email to events@piperalderman.com.au.

Q1: Would it be best practice that for each assignment provided to a casual that you send a document regarding the content and definition in section 15A of the *Fair Work Act 2009* (Cth) (FW Act)?

A1: In relation to the question of whether an employee is a "casual" under section 15A or not, the focus under the FW Act is on assessing the offer of employment and the acceptance of that offer. In light of that focus, providing a print out of the definition in section 15A is unlikely to be as helpful as ensuring that contracts are in compliance with section 15A and any offer of casual work is made in accordance with that contract.

Q2: My company's enterprise agreement provides for an employee to be classified as a "regular casual" employee. Under my company's particular enterprise agreement, the employee is essentially guaranteed their regular hours of work, must be notified in writing if they are to be "stood down" when no work is available, and must be paid redundancy benefits if no work is available long term. Could this indicate a "firm advance commitment" of work?

A2: From the limited information you have provided, it appears that there could potentially be an inconsistency or interaction difficulty created by the new amendments to the FW Act and your enterprise agreement content that you have described. Based on the information you have provided, we recommend seeking advice about whether your enterprise agreement does actually provide casuals with a firm advance commitment of ongoing work.

A secondary issue for you may be to consider whether you wish to make an application to the Fair Work Commission for a variation under clause 45 in Schedule 1 of the FW Act. Please contact your usual Piper Alderman ER lawyer or call my number below if you wish to discuss this issue further.

Q3: Where a company engages casuals via an external third party such as a recruitment agency, I understand that the "employer" is the agency. Is this likely to change in your view? There seems to be a risk based on the company not knowing what the agency is saying, or potentially promising, to its employees?

A3: This situation normally hinges on whether the agency is a recruiter or labour hire provider providing a temporary worker. Temporary agency workers will often be employed by the agency. However, recruiters normally work to provide direct employees for the entity that is a client of the recruiter.

Whenever an agency employee will be provided on a labour hire basis or on-hire basis, it is necessary to ensure that the local labour hire licensing scheme is complied with (if applicable). Furthermore, it is important to ensure that the contracts between the parties do not generate confusion about the identity of the direct employer. Labour hire was already a high risk relationship if contracts did not adequately establish that the employee was a direct employee of only the labour hire

agency. The need to manage these risks is an ongoing issue that has not been substantially changed by the new framework for casuals in the FW Act.

Q4: What constitutes regular hours or regular shifts. For example, would working every Friday morning constitute "regular"?

A4: This really needs to be assessed based on all the circumstances, including how it is rostered week-to-week and period-to-period. We recommend assessing all the circumstances holistically. That said, the example you have given does look like a circumstance that may require an offer of casual conversion if it has continued for 12 months. Please reach out if you require any further advice in relation to your specific circumstances.

Q5: As a labour hire company we cannot offer permanent work. Do we have to influence our clients to offer permanent roles?

A5: Depending on all the circumstances, the capacity of an employer to provide a commitment of ongoing work will be a relevant factor to consider when assessing whether the offer of casual conversion needs to be made. Where the employer has no guarantee of ongoing demand from clients, and a high probability of a downturn in demand, that situation may support an argument there were reasonably foreseeable circumstances justifying not offering casual conversion under the FW Act. We recommend seeking specific advice if you are uncertain in light of the new framework for casual conversion in the FW Act.

Q6: In relation to the requirement to offer casual conversion in certain circumstances under the amendments to the FW Act, could we use a clause in the employment contract to effectively leave the ball in the employee's hand?

A6: No. If an offer for casual conversion is required to be made at a particular time under the FW Act, then that offer must be made as required by the FW Act. An employer cannot use the original contract of employment to contract out of later making an offer of casual conversion where that offer is required under the FW Act scheme.

Q7: Does the conversion need to be for the same role and salary level?

A7: If you could lawfully deny conversion under the *Fair Work Act 2009* (Cth) framework, such as if their role is not going to continue, then you would be able to elect to offer an alternative role. However, where the duty to offer casual conversion applies, it will likely be interpreted to mean offering the same job that the employee has been performing. However, as part of their casual role they will be receiving a casual loading which would not need to be maintained in the remuneration package for the permanent role.

Q8: Based on the updated definitions in the FW Act, does this support the ability for employers to not pay casual employees even if a casual shift is cancelled with no notice?

A8: This is likely to be an issue governed by a modern award or enterprise agreement. The Fair Work Commission has expressed the view that it considers requirements relating to minimum engagements, etc., will be retained in modern awards. This may also extend to requirements to provide a minimum notice when a shift is cancelled. However, the final outcome of stage 2 in the casual terms review will need to be examined in detail when it is published.

Q9: Can the offer of conversion to the employee be via a verbal meeting with them or do employers need to have the offer in writing?

A9: Where a mandatory offer is required under section 66B in the FW Act, then that offer needs to be made in writing.

Q10: Do you have to give casuals both a casual information statement and a general information statement, or just one?

A10: Every new casual employee needs to be provided with a copy of the general Fair Work Information Statement and also the Casual Employment Information Statement.

Q11: Is a letter required to all casuals even those that are not regular and systematic?

A11: Yes, if the casual employee has been engaged for 12 months.

Q12: Our Award's definition of "casual" includes the phrase "*does not include an employee who could properly be engaged as a full-time, part-time or sessional employee*". Is it reasonable to assume the contract now needs to explain why the employee cannot properly be engaged full-time, part-time or sessional under that Award?

A12: This sort of provision is similar to the residual category described during the seminar and in the Fair Work Commission's decision in Stage 1 of the Casual Terms Review. The residual category identified in that Stage 1 decision was a category for anyone who fell outside the definition of full-time or part-time employment. From the Stage 1 decision, it appears likely such a casual definition will be replaced with a reference to section 15A in the *Fair Work Act 2009* (Cth), or a new tailored definition for that Award. If your Award is being considered as part of Stage 2, the Fair Work Commission has expressed provisional views to date. Those may be subject to change in the final decision. It will be necessary to review what the Fair Work Commission and party submissions have said about your particular modern award. Please reach out if you require any further advice in relation to this issue.

Q13: Tim made an interesting comment about maximum term contracts not being inconsistent with section 15A in the FW Act. Does this mean that such contracts should include similar wording to a casual contract, i.e. no firm advance commitment?

A13: The Fair Work Commission expressed the view that a maximum-term category of employment in a modern award would not be captured within the definition of "casual" in section 15A of the FW Act. However, the Fair Work Commission noted that it reached this view based on a purposive and contextual interpretation of section 15A. This is an issue that could potentially be the subject of a future court decision. If you have a large number of maximum term employees, we recommend reviewing how their contractual terms and conditions compare to the definition of "casual employment" in section 15A. Please reach out if you require any further advice in relation to this issue.

Q14: Given the current COVID situation and lockdown, is the transition process for casual conversion relevant for businesses?

A14: Employers will still need to comply with any applicable deadlines in the FW Act. However, employers will need to assess their circumstances. It may be that at the present time, uncertainty around further lockdowns or Government restrictions mean that an employer will fall within the scope of the exception that permits an employer to not offer casual conversion. However, such an employer may still need to give written notice to the employee in accordance with section 66C(4) in the FW Act.