

# EDWARDS

Human Resources

## Changes to Casual Employment: A Practical Guide for Employers



We've put together this **Practical Guide for Employers** to help you navigate the significant changes to casual employment that were introduced to the *Fair Work Act 2009* on 27 March 2021.

This is a [must read](#) for all businesses that employ casuals (or intend to).

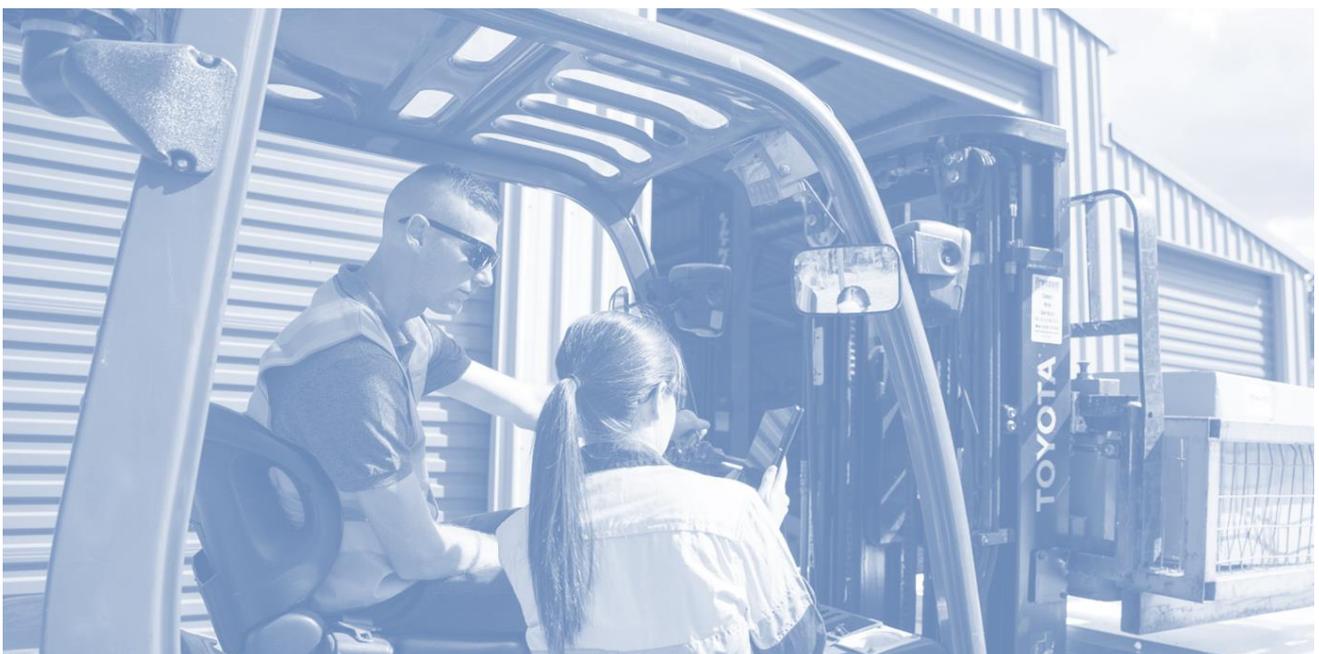
## 1. WHO DO THE CHANGES APPLY TO?

All businesses, of all sizes, in all industries who employ (or intend to employ) casuals. Note that these changes are now in full force, effective 27 March 2021.

## 2. WHY DO I NEED TO KNOW ABOUT THIS?

The changes impose additional obligations on employers and rely heavily on the correct clauses being included in the employment contract (among other things). By not understanding these changes or failing to take appropriate action (such as not updating employment contracts or not assessing casual conversion entitlements), businesses may be at risk of:

- Claims from employees for lost wages, dating back up to 6 years (potentially \$1000's in wages, super, leave entitlements etc);
- Being unable to offset casual loading already paid to employees in lieu of the entitlements of permanent employment (possibly resulting in additional costs);
- Heavy penalties and reputational damage if found to be in breach of the casual conversion provisions (including taking shortcuts, such as reducing work hours in order to avoid obligations).



### 3. SUMMARY OF THE CHANGES

#### a. **A Clear Definition of Casual Employment**

An individual will be considered a casual employee when an offer of employment “*is made on the basis that the employer makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of work...*”.

The person must accept the offer on that basis and be an Employee as a result of acceptance. The assessment of the definition takes place at the offer and acceptance of employment stage and relies on what is noted in the employment contract.

You can read more about ‘firm advance commitment’ below in section 4.

#### b. **New Casual Conversion Requirements & Entitlements**

That is, converting casuals to permanent employment after 12 months of service, in some circumstances. These entitlements are now included in the National Employment Standards (NES).

Note that there are several different aspects to this change. This Guide breaks down the different requirements for all business sizes and we also outline how the existing casual conversion clauses in Modern Awards and Enterprise Agreements interact with the new NES entitlements.

#### c. **Casual Loading Offset** (no more double dipping)

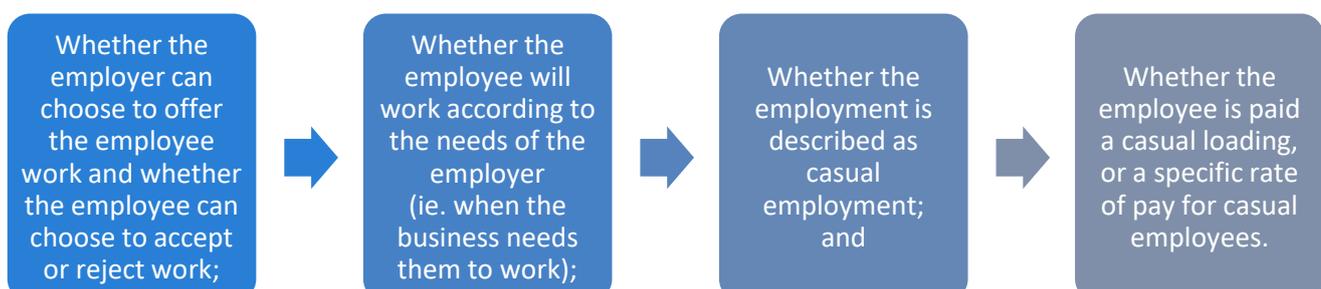
Where a court determines that a casual Employee should have been permanent, any back payments or entitlements owing to them (for annual leave, public holidays etc.), may be reduced (offset) by the 25% casual loading already paid to them. Note that this reduction must be requested and relies on the employment contract containing a suitable set-off clause.

#### d. **New Casual Employment Information Statement**

Must be provided to all new and existing casual Employees in addition to the Fair Work Information Statement you should already be providing. This is available on the Fair Work website – [here](#).

### 4. WHAT IS ‘NO FIRM ADVANCE COMMITMENT’?

The *Fair Work Act 2009* provides four factors that determine whether the employer is making no firm advance commitment at the time the offer of employment is made. They are:



## 5. CASUAL CONVERSION

Casual conversion is the process of converting an individuals' casual employment to permanent employment.

Permanent employment may be full-time or part-time, depending on the number of hours worked by the employee.

Offers should be made and/or accepted in most circumstances if:

- The employee has been employed for 12 months; and
- The employee has worked a regular pattern of hours on an ongoing basis for at least the last 6 months; and
- No significant changes need to be made if the employee is to continue working their hours as a full-time or part-time employee.

Reasonable ground for not offering casual conversion or declining an employees request include that, in the next 12 months:

- The position won't exist;
- The employee's hours of work will significantly reduce;
- The employee's days or times of work will significantly change, and that can't be accommodated within the employee's available days or times for work.

Other reasonable ground include:

- The employer would have to make a significant adjustment to the employee's work hours for them to be employed full-time or part-time;
- Making and offer/declining a request would not comply with a recruitment or selection process required by or under a Commonwealth, State or Territory law.



### REMEMBER

**Employers must not take any shortcuts to avoid having to offer or accept requests for casual conversion.**

**For example,** Employers cannot change hours of work or terminate a casual employee just for the purpose of making them ineligible for casual conversion.

### 5.1. Do employees have to accept an offer to change from casual to permanent?

No, they don't, however, this does not mean an employer is able to ignore their obligations for making a written offer.

Any offer made by the employer and response from an employee should be documented and kept on their personnel/employment file.

**Keep it simple!** Contact Edwards HR for a simple letter you can use for documenting the offer and the employee's response appropriately.

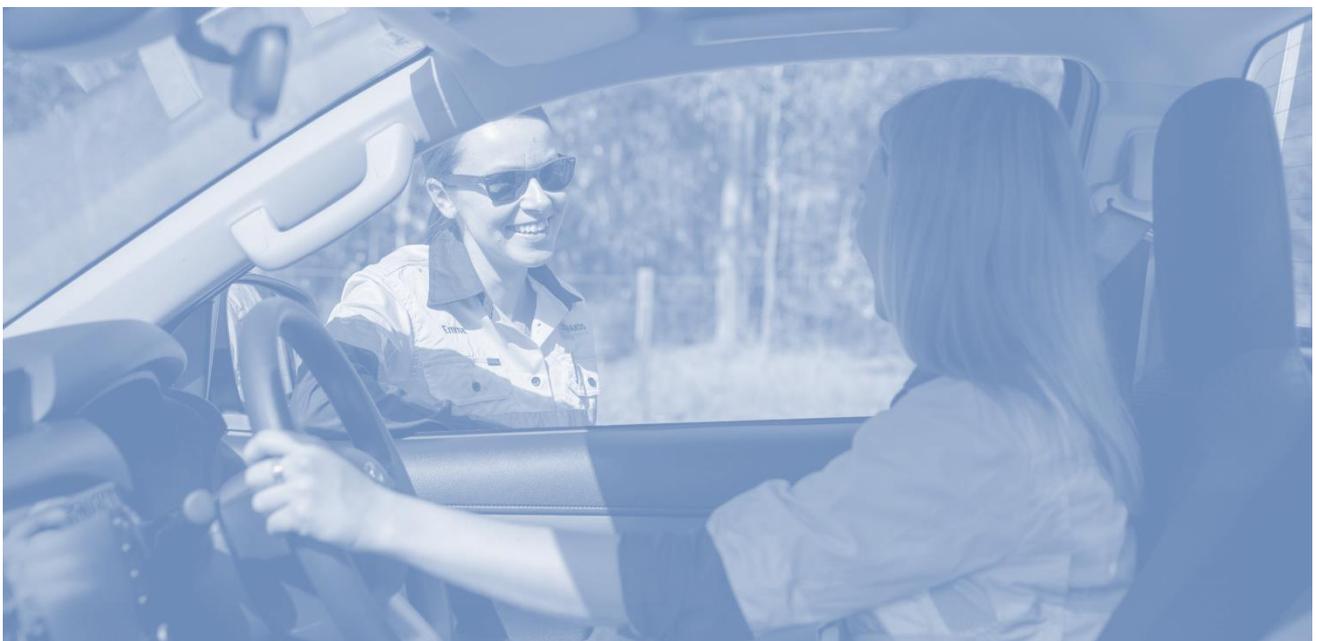
### 5.2. How to determine employee rights when the NES and the Modern Award or Enterprise Agreement say two different things

Some Modern Awards and Enterprise Agreements already contain casual conversion provisions which are different to the new NES provisions. If this is the case, then the provision that is more favorable to the employee applies.

**Example:** The casual conversion clause in the Road Transport & Distribution Award provides employees the right to elect (request) that their employment convert to permanent after 12 months, in some circumstances. However, the new NES provision requires the employer to proactively make such an offer.

As the NES provision is more favourable for the employee, this is the entitlement that applies.

Remember that if more than one Modern Award or Enterprise Agreement applies to your team, different provisions may apply to different employees. You should check the casual conversion provisions of each to be sure you're getting it right.





## 6. NEW REQUIREMENTS - SMALL BUSINESSES (fewer than 15 employees)

As a Small Business (one with fewer than 15 employees), you do not have to offer casual conversion to employees under the new NES entitlements, however casual employees will have the right to request casual conversion. If they meet the criteria listed in section 5 of this Guide, the request should be approved.

### 6.1. How to respond to a Request:

- A response must be provided in writing within 21 days of receiving an employee's request regardless of whether you are accepting or denying the request.
- If denying a request, reasons must be provided as to why the request has been denied.
- An offer cannot be refused in writing until a discussion has happened between you and the employee.

### 6.2. Accepting an Employees request for Casual Conversion:

- If you accept an employee's request to move their employment from casual to permanent, it is important that you discuss the following before the change is made:
  - Whether the employee will be part-time or full-time;
  - The required hours of work;
  - The date the employee will become permanent (which should generally be the following pay period).
- This information must then be provided in writing to the employee, within 21 days after the employee requested casual conversion.
- **Edwards HR recommends issuing a new employee agreement when an employee changes from casual to permanent.**

Be sure to check any Modern Award or Enterprise Agreement that applies to your employees to confirm whether any other provisions apply.

**Documenting these requests and responses can be tricky, so businesses should seek advice about their specific circumstances. The team at Edwards HR can help with all of your casual employment needs and questions.**

## 7. **NEW REQUIREMENTS - BIGGER BUSINESSES** (more than 15 employees)

Businesses with more than 15 employees have different, more rigorous obligations.

### 7.1. Existing Casual Employees

Employers must determine whether any existing casual employees are eligible to be converted to either full-time or part-time employment by 27<sup>th</sup> September 2021 (or within 21 days of reaching their 12-month anniversary, whichever is later).

Steps to take:

- As the employer, you will be required to inform each casual employee if you intend or do not intend to offer casual conversion to a permanent role.
- If you intend to offer permanent employment, the offer must be in writing and should reflect the hours worked by the employee.
- The employee must respond in writing within 21 days of the offer being made to them.
- If no offer is being made, then the employer must still put this in writing with the reasons why the offer isn't being made by no later than the 27<sup>th</sup> September 2021.
- The *Fair Work Act 2009* details the only acceptable reasons for an employer to not make an offer of permanent employment. The reasons are summarised in section 5 of this Guide.

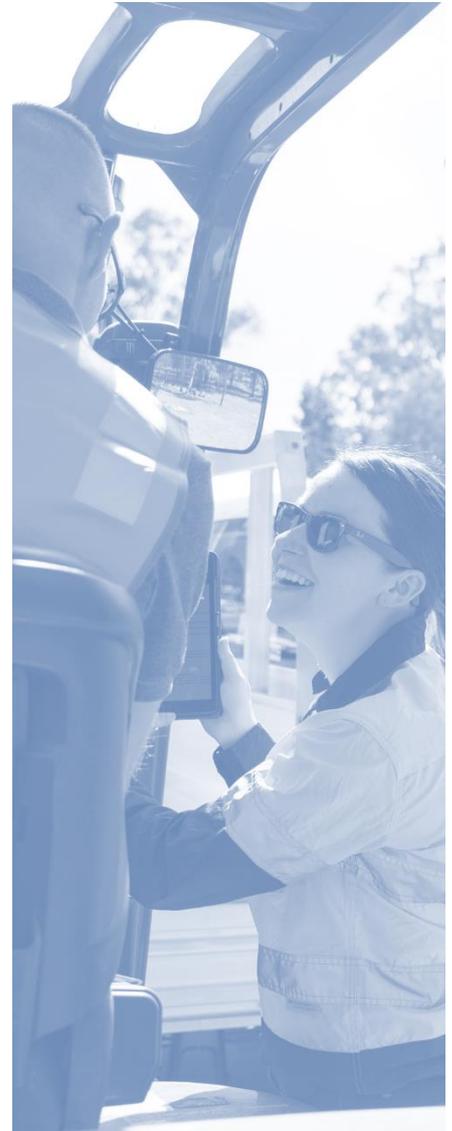
### 7.2. New Casual Employees

For new casuals starting or existing casual employees who commenced after 27 March 2021, written intentions of casual conversion must be made to the employee within 21 days of their 12-month anniversary, in accordance with the steps above.

**Make Things Easy!** Each time a new casual employee starts, create a calendar reminder for when they are approaching their 12-month anniversary, so you can meet your obligations and assess whether an offer of permanent employment will be made or not.

Be sure to check any Modern Award or Enterprise Agreement that applies to your employees to confirm whether any other provisions apply.

**Documenting these offers, requests and associated responses can be tricky, so businesses should seek advice about their specific circumstances. The team at Edwards HR can help with all of your casual employment needs and questions.**



## 8. ACTION EMPLOYERS SHOULD TAKE URGENTLY

There are several actions employers should take with urgency to ensure they are meeting their obligations and mitigating associated risks. As there are different requirements for different business sizes, the following section has been broken in to separate sections.

**Please note that there are many intricacies to these changes that may require guidance or clarification – you should contact the team at Edwards HR for advice specific to your circumstances.**

### 8.1. ALL BUSINESSES (all sizes)

- **Update your current employment agreements** to ensure they are in alignment with the changes, and provide you with adequate commercial protection for your business.

**For example, include the new definition of a “Casual Employee”, an appropriate setoff clause, and clearly itemise casual loading and associated inclusions).**

**Need a hand?** We are offering to update employment agreements previously drafted by Edwards HR, for a simple fixed fee of \$195 +GST. Should you have an existing employment agreement (drafted by anyone other than Edwards HR) which you would like reviewed and updated, please contact us to find out how we can help.

- **Itemise casual loading on payslips.**
- **Investigate and understand your obligations regarding casual conversion.** Further information about this is summarized in section 5 of this Guide.
- **Familiarise yourself with the new [Casual Employment Information Statement](#) and provide a copy to all new casual employees, as soon as possible, after they start their job (along with the existing [Fair Work Information Statement](#)).**

**Also remember** that these documents are regularly updated so try to print them only as you need them or send a link to the employee.

- **Understand the actions employees can take** by visiting the Fair Work Ombudsman website and reading about '[Legal Action in the Small Claims Court](#)'. **This will help you to understand why you should understand these changes and take action!**

- **Consider a HR Health Check or tailored Compliance Audit by Edwards HR.**

More than 95% of businesses we speak with have at least two HR practices that are non-compliant with Australian employment legislation or a Modern Award. Let us help you understand your obligations and get back on track. Read more [here](#) or contact us today.



### 8.2. SMALL BUSINESSES (fewer than 15 employees)

- Provide a [Casual Employment Information Statement](#) to all new and existing casual employees. This should be done as soon as possible.
- **Investigate and understand your obligations regarding casual conversion.** As a Small Business, you do not have to offer casual conversion to employees under the new NES entitlements, however casual employees will have the right to request casual conversion in some circumstances. Additionally, the Modern Award or Enterprise Agreement/s that apply to your business may contain different provisions. **Refer to section 5 of this Guide for further information.**

### 8.3. BIGGER BUSINESSES (more than 15 employees)

- **Provide a [Casual Employment Information Statement](#)** to all existing casual employees as soon as possible after 27 September 2021.
- **Investigate and understand your obligations regarding casual conversion.** Remember that the Modern Award or Enterprise Agreement/s that apply to your business may contain different provisions to those in the new NES entitlements. **Refer to section 5 of this Guide for further information.**
- **Update your HR processes** to ensure that you are alerted each time a casual Employee approaches 12-months of employment, in order to assess whether a permanent offer of employment should be made within the required timeframe (if not, comply with the separate notification requirements summarized in section 7 of this Guide).
- **Consider the Business Partner Package offered by Edwards HR** which provides you with unlimited access to a dedicated, on-call HR Business Partner to support your business. Plus, we will take care of your compliance requirements and establish a solid HR foundation tailored to your needs. Read more about our premium, outsourced HR solution [here](#).

## 9. IF YOU INTEND TO EMPLOY CASUALS IN FUTURE

**If you intend to employ casuals in future, these changes will also apply to you.**

Edwards HR recommends the following in your circumstances:

- Have an employment agreement professionally drafted to ensure it is compliant with the changes and provides adequate commercial protection for your business. **Contact the team at Edwards HR for assistance.**
- Investigate and understand which Modern Award/s apply to your team.
- Investigate and understand your obligations regarding casual conversion.
- Consider the other recommendations made in this Guide and action them appropriately (as applicable to your business size).

## 10. OTHER CONSIDERATIONS & EMPLOYEE RIGHTS

**Casual employees have a workplace right to convert to permanent employment in some circumstances** (in accordance with the NES and/or the Modern Award or Enterprise Agreement that applies to their employment), and may therefore be protected against adverse action by an employer.

Employers must not take any shortcuts to avoid having to offer or accept requests for casual conversion.

**For example, Employers cannot change hours of work or terminate a casual employee just for the purpose of making them not eligible for casual conversion.**

Employers should be aware that heavy penalties will apply if employers are found to be in breach of the casual conversion provisions or their obligations.

## 11. CONSIDER A HR HEALTH CHECK

**The HR Health Check (audit) by Edwards HR is one of our most popular services.**

It's a compliance and best practice assessment of your current systems, practices and documents relating to 8 priority areas including pay/entitlements, contracts, recruitment/induction, contractors, policies, training, record keeping and injury management – and yes, it includes the casual obligations detailed in this Guide!

We also offered tailored audit services if there are specific areas you want to assess. For example, wages, Award and NES compliance.

For a simple, fixed fee, we'll meet with you to conduct the assessment and provide plenty of practical guidance. Afterwards, you'll receive a written findings report, including our detailed recommendations.

**It's a very small price to pay when compared with the fines, disgruntled employees and reputational damage that come with getting it all wrong.**

**Contact Emma on 0459 818 011 to find out more and secure your spot!**

## 12. CONSIDER AN OUTSOURCED HR SOLUTION

There are many obligations and laws that employers need to be aware of – it's a headache – we know!!

Our Business Partner Package makes HR & workplace relations **easy** and will ensure you are meeting your employer compliance obligations while also working towards achieving HR best practice. You will also have unlimited access to a dedicated, on-call HR Business Partner to support your business. **It's the complete outsourced HR solution.**

And what's even better - on average, our fees will be 80% less than the cost of hiring an internal HR resource! It is a very cost-effective solution!

Read more about our premium package [here](#) or contact us to find out how we can support your business.

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For more guidance about how these changes apply to you, or to find out how Edwards HR can support your business, contact our team today!

**EDWARDS**  
Human Resources

Contact Us Today!

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