K&L GATES

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HR Perspective: Closing the Loopholes – Are you ready for 26 August?

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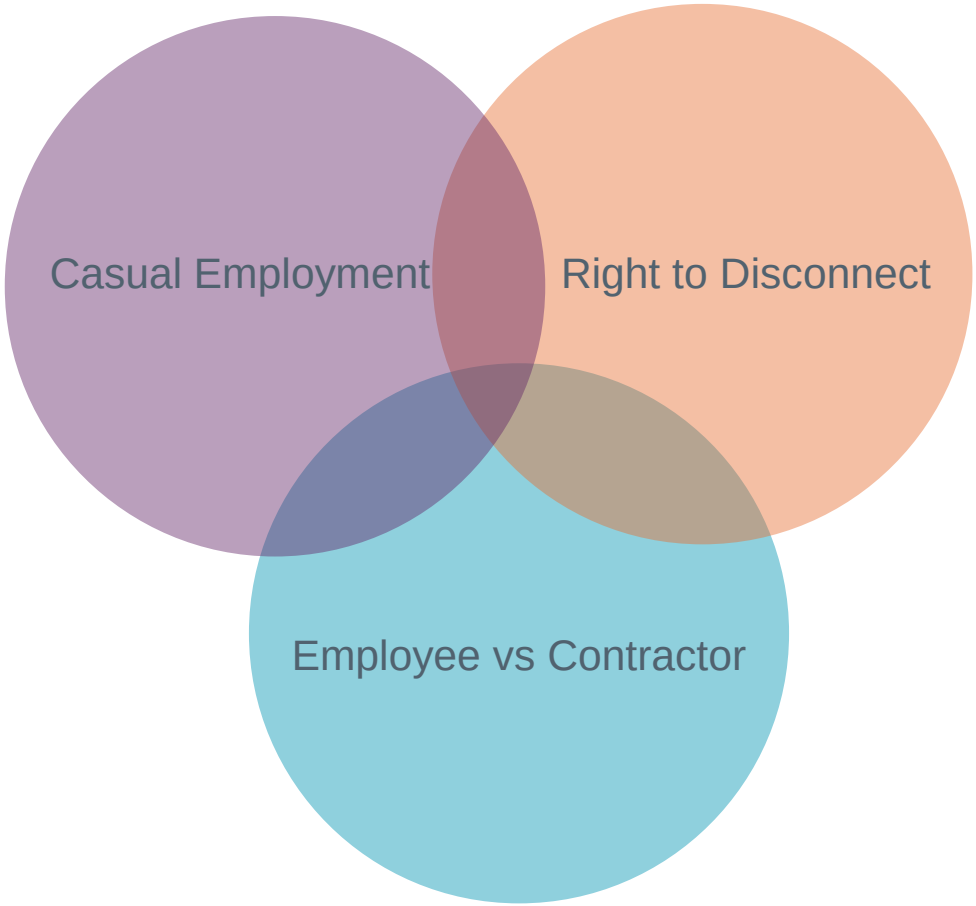
WHAT'S CHANGING ON 26 AUGUST?



RIGHT TO DISCONNECT

RIGHT TO DISCONNECT

New workplace right for *all* employees: Employees may refuse to monitor, read or respond to contact, or attempted contact, from an employer or a third party about work outside of their working hours unless the refusal is unreasonable.

Employer likely to bear the onus of establishing that refusal is unreasonable.

Will be added into all modern Awards from 26 August 2024, with 12-month delayed commencement for small business.

Practical application likely to turn on whether employee refusal is unreasonable.

1. Dispute mechanism.
2. New workplace right.
3. Right to Disconnect term in Modern Awards.

THE TEST

It does give employees the right to refuse to monitor, read or respond to contact, or attempted contact, from an employer or third party (such as a client or supplier) relating to their work, outside of their working hours unless their refusal is *unreasonable*.

It does not prevent employers from attempting to make contact with employees outside of normal working hours or prevent employees from contacting one another, including across time zones.

New provisions will be added into Part 2-9 of the Fair Work Act and will be effective on *26 August 2024* (*26 August 2025* for small business employees).

WHEN WILL AN EMPLOYEE'S REFUSAL BE UNREASONABLE?

Whether an employee's refusal to respond to contact is unreasonable will depend on the circumstances and will be considered with reference to the following factors:

- The reason for the attempted contact.
- How the contact or attempted contact is made and the level of disruption it causes the employee.
- The extent that the employee is compensated for remaining available during the period that contact is made or attempted.
- The extent that the employee is compensated for working additional hours outside of the employee's ordinary working hours.
- The nature of the employee's role.
- The employee's level of responsibility.
- The employee's personal circumstances (including caring and family responsibilities).
- Other factors such as patterns of behaviour.

DISPUTE RESOLUTION

1 *Attempt to resolve at workplace level*

2 *Apply to Fair Work Commission to make an order or to otherwise deal with the dispute*

The Commission may resolve the dispute through mediation, conciliation, making a recommendation or expressing an opinion. If both parties agree, the Commission may arbitrate.

The Commission may make an order to:

- Prevent employees from continuing to unreasonably refuse
- Prevent employers from taking disciplinary actions against an employee for exercising right to disconnect
- Prevent employers from continuing to require the employee to monitor, read or respond to contact

WORKPLACE RIGHT AND ADVERSE ACTION

New workplace right

Employee's right to disconnect is a workplace right for the purposes of the Fair Work Act

Implications

This means that employers are prohibited from taking adverse action against an employee (e.g., dismissal or demotion) because they exercise or propose to exercise this right

DRAFT MODERN AWARD RIGHT TO DISCONNECT CLAUSE

- Unless it is unreasonable to do so, an employee may refuse to *monitor, read or respond* to contact or attempted contact from:
  - Their employer *outside of the employee's working hours*; or
  - A *third party* if the contact or attempted contact *relates to, their work* and is *outside of the employee's working hours.*
- An employer *must not prevent* an employee from exercising their right to disconnect under the Act

Exceptions:

Employee is paid a stand-down allowance.

The contact is to notify an employee they are to attend work.

Contact aligns with usual arrangements for notifications.

Contact is for an emergency roster change.

Contact is for recall to work.

PRACTICAL CONSIDERATIONS

Communicate with employees about what is expected in terms of out of hours work.

Include any out of hours expectations in position descriptions and employment contracts.

The Commission will issue guidelines once modern award term finalised.

Employers should set expectations clearly including via training / policies.

Does not limit employers from contacting employees (but watch this space for award employees).

CASUALS

NEW DEFINITION OF 'CASUAL'

New definition for casual employees: the definition of casual employment focusses on the totality of the employment relationship.

Casual employment will now consider the totality of the employment relationship.

This is a departure from the previous assessment of casual employment, which focused on the terms of the employment contract.

These provisions commence on 26 August 2024.

1. New framework requires (one) an absence of a 'firm advance commitment to continuing and indefinite work' & (two) the employee is paid a casual loading or a specific rate of pay for casual employees.

2. '*Firm advance commitment*' is assessed based on a number of factors, including: the real substance & practical reality of the relationship, the contract of employment, an ability to offer and refuse work, patterns of work and future availability of work.

3. Practitioners will be familiar with this approach. This is a return to the broader test for casual employment, which was narrowed following the High Court decision in *WorkPac v Rossato* [2021] HCA 23.

CHANGES TO CASUAL CONVERSION

New workplace right for all employees: Casual employees may now give an employer written notification if they would like to change their employment status to full-time or part-time employment after six months' employment (12 months for small businesses).

The existing casual conversion provisions are being replaced with a similar, but separate, "employee choice" framework.

This will replace the existing regime where the predominant onus is on the employer to offer conversion to qualifying employees.

These provisions commence on 26 August 2024.

1. Employers will be required to respond to written notifications from casual employees within 21 days after the notification is given to the employer.
2. The employer may not accept the employee notification if the employee does not qualify for conversion; there are fair and reasonable operational grounds for not accepting the request; or, it may result in non-compliance with a Government recruitment or selection process or an award / EBA.
3. Disputes regarding conversion are intended to be resolved at the workplace level. However, the FWC has powers to resolve the dispute if necessary.

NEW DEFINITION OF ‘CASUAL’

An employee is only a casual if:

- The employment relationship is characterised by an *absence of a firm advanced commitment* to continuing and indefinite work
- The employee *is entitled to a casual loading*

Must be assessed on:

- Real substance, practical reality and true nature
- Not limited to looking at contract can include mutual understanding or expectation

ABSENCE OF A FIRM ADVANCE COMMITMENT?

Consider:

- Whether there is an inability of the employer to elect to offer or not offer work or an inability of the employment to elect to accept of reject work
- Whether there will be future availability of continuing work
- Whether full time or part time employees are performing the same work
- Whether there is a regular pattern of work for the employee (can be regular even if not absolutely uniform and includes fluctuation and variation over time)

CASUAL CONVERSION FROM 26 AUGUST 2024

Employee Choice

Casual employees will be able to give the employer written notification of their intention to change their employment status to full-time or part-time employment if:

a) They have been employed for at least six months (12 months for small business employers); and

b) They believe they no longer meet the requirements of the new casual employee definition.

Note: A casual employee cannot notify their employer if:
(a) they are currently engaged in a dispute about casual conversion; or
(b) in the last six months the employer has refused a previous notification or has resolved a dispute with the employee about casual conversion.

CHANGES FROM 26 AUGUST 2024

Employer Response

The employer *must formally consult* with the employee and give a written response *within 21 days* as to whether it accepts the notification.

The written response must include:

- Whether the employment will be full-time or part-time
- What the hours of work will be
- The day the change to permanent employment will take effect

IF THE EMPLOYER DOES NOT ACCEPT

If the employer *does not* accept the notification, it must be on one of the following grounds

i. The *employee still meets the definition of a casual*;

ii. Accepting the notification would result in the employer *not complying with a recruitment or selection process required by law*; or

iii. There are *fair and reasonable grounds* for not granting conversion, including that:

a) Substantial changes would be required to the way the employer's work is organised;

b) There would be significant impacts on the employer's operations;

c) Substantial changes to the employee's employment conditions would be necessary so that the employer does not contravene an award or enterprise agreement.

WHAT THIS MEANS FOR EMPLOYERS

An employer's current obligations to offer casual conversion will continue to apply to employment relationships entered into before 26 August 2024, for a period of six months from that date.

An employer must ensure that its written contracts of employment for casual employees *conform with these new changes* and specify that:

- Casual employment is being offered
- There is no firm advanced commitment to continuing and indefinite work
- There is a specific casual loading such as 25%

CONTRACTORS

EMPLOYMENT V CONTRACTING

New distinction between 'employee' and 'contractor':

Involves an assessment of the real substance, practical reality and true nature of the relationship between the parties.

This amendment unwinds previous decisions which held that primacy was to be given to contractual terms, as opposed to the behaviour of the parties.

Commence on 26 August 2024.

1. To make an assessment concerning the real substance, practical reality and true nature of the relationship, consider: *degree of control, remuneration (loading, invoices, tax etc) and hours of work*.

2. A return to the common law multi-factorial test as exemplified in *Hollis v Vabu* [2001] HCA 44 *and Stevens v Bodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16.

EMPLOYMENT V CONTRACTING CONT.

Opt-out provisions:

- Contractor high income threshold
- Not yet available

Other impacts:

- Not intended to interfere with definition of ‘contractor’ in tax, superannuation and workers’ compensation context

Minimum Standards:

- Performing work on digital labour platforms
- Road Transport Industry

SHAM ARRANGEMENTS & UNFAIR CONTRACTS

New employer/contractor protections: a new defence for employers against sham contracting claims and provides contractors a means to fight unfair contract terms as well.

The sham contracting defence applies if it's *reasonably believed* the contract of employment was a contract for services.

A new framework for independent contractors to set aside perceived unfair contract terms in service contracts has been introduced.

These provisions commence on 27 Feb and 26 August respectively.

1. In determining whether an employer's belief was reasonable, regard will be had to the size and nature of the enterprise and any other related matters.
2. Unfair contracts, or their terms will be determined through a broad multi-factor test (e.g. bargaining power, interests, harsh unjust and unreasonable).
3. When dealing with these disputes, the FWC may choose to either conduct a private conference to deal with the matter or proceed to hearing.

SHAM CONTRACTING

Sham contracting is misrepresenting an employment arrangement as an independent contractor arrangement:

Employers need to show they reasonably believed the contract was for services.

Reckless civil breaches of prescribed provisions may be treated as serious contraventions, with increased maximum penalties.

QUESTIONS?

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