

## EMPLOYMENT LAW CHANGES COMMENCING TODAY: 26 AUGUST 2024

As part of the Closing Loopholes reforms, several employment law changes have come into effect today, 26 August 2024. These changes introduce new rights and responsibilities for both employers and employees. It is crucial to familiarise yourself with these updates to ensure compliance and to understand how they may impact your workplace.

### RIGHT TO DISCONNECT

Employees of non-small businesses (15 or more employees) now have the right to refuse to monitor, read, or respond to contact (or attempted contact) outside their working hours, unless the refusal is deemed unreasonable.

For employees of small businesses (fewer than 15 employees) this right will apply from 26 August 2025.

The reasonableness of an employee's refusal to engage in out-of-hours contact will be evaluated based on several factors, including:

- the reason for the contact or attempted contact;
- how the contact or attempted contact is made and the level of disruption the contact or attempted contact causes the employee;
- the extent to which the employee is compensated:
  - to remain available to perform work during the period in which the contact or attempted contact is made; or
  - for working additional hours outside of the employee's ordinary hours of work;
- the nature of the employee's role and level of responsibility; and
- the employee's personal circumstances (including family or caring responsibilities).

This right is protected under Part 3-1 of the Fair Work Act 2009 (Cth) (**FW Act**), safeguarding employees from adverse actions for exercising or intending to exercise this right.

If there is a dispute, the employer and employee must first attempt to resolve it at a workplace level. If unresolved, the Fair Work Commission (**FWC**) has authority to deal with the dispute.

Modern awards are being updated with a new right to disconnect term which will be reviewed in 12 months. A copy of the FWC decision and model term can be found [here](#).

The FWC has indicated that it will prepare guidelines about how the right to disconnect works after they have dealt with some disputes about the new right.

### CASUAL EMPLOYMENT CHANGES

#### CASUAL DEFINITION

There is now a new definition of 'casual employee'. The new definition considers the totality of the employment relationship, rather than solely the terms of the initial offer and acceptance of employment. This is a significant shift from the current definition and precedent set by the High Court in the *WorkPac v Rossato* [2021] HCA 23.

Under the new definition, an employee will be casual employee if:

- the employment relationship is characterised by an absence of a firm advance commitment to continuing and indefinite work; and
- the employee would be entitled to a casual loading or a specific rate of pay for casual employees, either under an industrial instrument or an employment contract.

Assessing whether there is a firm advance commitment to continuing an indefinite work includes consideration of:

- the real substance, practical reality, and true nature of the employment relationship;
- whether there is an inability of the employer to offer work or not, or an inability of the employee to accept or reject work (and whether this occurs in practice);
- whether, having regard to the nature of the employer's enterprise, there will likely be future availability of continuing work usually performed by the employee;
- whether permanent employees perform the same kind of work; and
- whether there is a regular pattern of work for the employee.

A firm advance commitment can be in the form of a contract or a mutual understanding or expectation.

Employers are prohibited from dismissing and re-engaging employees to perform the same (or substantially the same) work as casuals and from making false statements to persuade non-casual or former employees to work as casuals. These provisions carry civil penalties.

Employees engaged as casual employees remain so until a specified event occurs (e.g. they transition to permanent employment under the casual conversion provisions or otherwise accept a permanent employment offer).

### CASUAL CONVERSION

An employee can notify their employer in writing if they believe they are no longer a casual employee after six months of employment (or 12 months for small businesses). The employer must consult with the employee and respond within 21 days. The FWC can resolve disputes in this area.

### CASUAL EMPLOYMENT INFORMATION STATEMENT

Casual employees must receive a Casual Employment Information Statement (**CEIS**) before, or as soon as possible after, they have started employment.

From 26 August 2024, casual employees must also receive a CEIS:

- for small business employers – after every 12 months; and
- for other employers – after six and 12 months of employment, and then every 12 months.

A copy of the CEIS (and other information statements) can be found on the Fair Work Ombudsman website [here](#).

## INDEPENDENT CONTRACTOR CHANGES

### EMPLOYEE AND EMPLOYER DEFINITION

A new definition of employment has been added to the FW Act. Whether a person is an 'employee' or 'employer' for the purpose of the FW Act will be determined by ascertaining the

‘real substance, practical reality and true nature of the relationship’ between the parties. This assessment will consider the totality of the relationship including the contract terms governing the relationship and other factors relating to the employment relationship, including how the contract is performed in practice (i.e. whole of relationship test).

The intention of this change is to return to the ‘multi factorial’ assessment applied by courts and tribunals before the High Court of Australia’s decisions in February 2022 in *CFMMEU v Personnel Contracting Pty Ltd* [2022] HCA 1 and *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2.

### OPT OUT

A worker for a constitutionally covered business who earns more than the contractor high income threshold can give notice to ‘opt out’ of using the whole of relationship test. Instead, they can use the start of relationship test which determines if a worker is a contractor, or an employee based on what the parties have agreed.

From 1 July 2024, the contractor high income threshold is \$175,000.

### UNFAIR CONTRACT TERMS

Eligible contractors earning less than the high-income threshold are now able to apply to the FWC to deal with disputes about unfair contract terms in service contracts. The FWC can determine whether the term is unfair considering a range of factors and make an order to set aside, amend or vary unfair terms that would relate to workplace relations matters if the contractor were an employee.

### REGULATED WORKERS

New minimum standards and protections will apply to certain kinds of independent contractors in the gig economy and road transport industry, known as regulated workers. The FWC has the power to make minimum standards orders and guidelines for regulated workers, make road transport contractual chain orders and guidelines and register collective agreements that apply to regulated workers and businesses.

### MEMBER SERVICE

We provide advice on all aspects of employment law. If you require any assistance with the above changes in your workplace, please contact us on **1300 101 391** or [oa@industrylegalgroup.com.au](mailto:oa@industrylegalgroup.com.au)

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Dated: 26 August 2024