

# Engaging casual employees

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When engaging a new employee, a decision needs to be made regarding the new employee's employment status.

Where you require an employee to work on an on-going basis and you intend to provide a firm advance commitment of that ongoing employment including predicting in advance the general hours that the employee will be required to work, you should engage the employee on a permanent basis (whether that be full-time, part-time or fixed-term) unless there are further factors which militate against this.

However, where you require an employee to fill a short-term labour gap or cannot predict their hours due to fluctuating operational or seasonal requirements, engaging the employee on a casual basis may be more suitable. This will provide greater flexibility throughout the employment, as well as reducing your obligations when the time comes for terminating the employment.

## Risks associated with engaging employees on a casual basis

While the increased flexibility of casual employment can be appealing, before engaging an employee on a casual basis it is important to also consider some of the potential downsides of casual employment.

Casual employees are not entitled to paid leave entitlements. However, they are entitled to casual loading (usually 25%), which can result in higher than necessary staffing costs.

In addition, casual employees may be entitled to casual conversion where they meet the criteria set out in an applicable industrial instrument.

Finally, even if the employee is not entitled to casual conversion, care must still be taken to ensure the employee has properly been classified as a casual and is not in fact a permanent employee. If an employee has been classified as a casual but having regard to the nature of their engagement they are not, a court can ultimately find that the employee was in fact permanent and order you to backpay unpaid leave entitlements, public holidays, notice of termination and redundancy pay, if applicable. In addition, a court can also order that you pay penalties of up to \$63,000 per contravention if you are a corporation and \$12,600 per contravention for individuals for wrongly classifying the employee as a casual when in fact they should have been classified as permanent.

## Protecting your business against these risks

Protect your business by understanding (and complying with) your obligations under any applicable industrial instrument regarding casual conversion. You should also regularly review your relationship with casual employees against the factors set out in the below table as the relationship could intend to be casual but overtime it becomes a more permanent one.

The factors out below are factors which the courts have determined are relevant in distinguishing between permanent and casual employment, and accordingly should be kept in mind when engaging and managing casuals.

As a general guide, casual employment is characterised as unpredictable, irregular, intermittent and not pre-allocated, whilst permanent employment is characterised as an indefinite duration which is stable, regular and predictable.

Note that the below factors should not be considered in isolation – the courts will look at the entirety of the relationship when assessing your legal obligations.

	Permanent	Casual
<b>Description given to the relationship</b>	The terms of any contract or agreement between the parties will be taken into consideration.	
<b>Commitment</b>	A permanent employee typically commits to the employer for a continuous and indefinite time period, subject to the provision of notice of termination.	A casual employee typically does not make any commitment to the employer as to their ongoing availability, instead committing on a shift by shift basis. There is no firm advance commitment to ongoing work on an indefinite basis and an employer can terminate the employment by giving 1 hours' notice.
<b>Regularity</b>	A permanent employee typically works regular and predictable hours.  The hours of work are typically predetermined on a timesheet/roster provided by the employer.	A casual employee typically works on an intermittent, irregular basis and has unpredictable hours of work. They typically work on demand and for short periods.*
<b>Ability to refuse work</b>	A permanent employee is required to accept the hours of work agreed as part of their employment.	A casual employee can choose to accept or refuse any work offered by the employer on a particular day and the employer can choose to offer work on a particular day.
<b>Notification method</b>	A permanent employee typically has set hours of work that are known in advance.	A casual employee is usually notified of their hours as needed, often on short notice and is employed on an hourly basis.
<b>Loading</b>	A permanent employee typically receives a base hourly rate of pay or annual salary.	A casual employee typically receives a casual loading on top of the base hourly rate of pay**.
<b>Leave entitlements</b>	In addition to the base rate of pay, a permanent employee will accrue an entitlement to paid annual leave and personal leave, and will typically be entitled to a paid day off when a public holiday falls on their usual work day.	A casual employee does not accrue an entitlement to paid annual leave and/or personal leave, nor are they entitled to a paid day off on public holidays.

**\*\*Note- casual loading should be separately identified in the employment contract and pay slip or pay records.**

\*Below are some examples of where the court has confirmed that these employees are casual, not permanent, despite the regular nature of employment.

- *A relief teacher is employed by a secondary school to relieve a teacher ill with the flu. She is employed for 10 consecutive school days. On the ninth day she is asked to relieve a teacher taking two months long service leave. That takes her employment through to the end of the school term. A few days into the new term, the relief teacher relieves for another teacher who has unexpectedly been dismissed and works for a month until a replacement for the dismissed teacher is found. And so the pattern continues for 12 months. Whilst irregularity was not a feature of the employment, at no time during the 12-month period was the teacher other than in casual employment because at no time was there a firm advance mutual commitment to on-going employment on an agreed pattern of ordinary hours of work. It just happened that the teacher's work turned out to be regular.*
  
- *A researcher is employed by a university as and when funding grants for particular scientific research become available. Funding grants are short-term and whether or not the university will succeed in obtaining funds is unpredictable. In a particular year the university is successful in winning several grants across a number of research projects. That results in the researcher moving from one project to the next but being regularly employed for over 12 months. Unpredictability as to the availability of further work for the researcher meant that at no point in the 12-month period was an advance mutual commitment to ongoing employment on an agreed pattern of work a characteristic of the employment. Despite the regularity of the employment, the researcher remained a casual employee over that period.*

If you identify that a casual employee exhibits characteristics more akin to a permanent employee, or require any assistance understanding the nature of casual employment or your casual conversion obligations, contact EmploySure's Advice Team on 1300 651 415 for assistance.