

# Navigating the Compliance Landscape: What to Look out for Next Week ... and Next Year

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# The Fair Work loopholes are closing ...

Key changes from the Fair Work Legislation Amendment (Closing Loopholes No 2) Act 2024 take effect on **26 August 2024**

On top of previous changes from

- Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022
- Fair Work Legislation Amendment (Protecting Worker Entitlements) Act 2023
- Fair Work Legislation Amendment (Closing Loopholes) Act 2023

*But what will be next on the Albanese Government's agenda?*

# Coming next week ...

Major changes to rules on

- determining employment status
- casual employment
- the right to disconnect

*plus new regulation of road transport contractors  
and 'employee-like' platform workers*

*and new unfair contract remedies for independent  
contractors*



August 2024

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
28	29	30	31	1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	31

The calendar shows the month of August 2024. The date 26th is circled in red, indicating the start of the week mentioned in the text.

# Who is an employee?

No statutory definition

Courts use an impressionistic 'multi-factor' test

Gradual shift this century towards a reality-based test

But halted by February 2022 High Court decisions in *Personnel Contracting* and *Jamsek*



# New test for identifying employment

Courts must consider *real substance, practical reality and true nature of the relationship*, not just contractual terms

But not applicable to all employers

And only applies under Fair Work Act, not other laws under tax, super, workers comp, etc

Note also narrower defence to prohibition on misclassifying an employee as a contractor

High earning contractors at risk of becoming employees can opt out



# When a casual job becomes a permanent headache ...

The problem of defining casual employment

The *WorkPac* cases

The 2021 legislation

Labor's promise of an 'objective' definition



# New definition of 'casual'

- Still looks for an absence of *any firm advance commitment to continuing and indefinite work*
- But to be determined by *real substance, practical reality and true nature of the relationship*, including expectations and practice
- Emphasis that status can only change in limited ways
- So only likely to affect arrangements that were never truly casual from the outset, not those which start casual and settle into regularity
- Still protection against getting it wrong

# Casual or fixed-term?

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Amendments to original Closing Loopholes Bill removed clear distinction between casual and fixed/contingent term employment

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Academics or teaching staff in higher education cannot be engaged for an identifiable period and be casual

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Otherwise, remains possible for short term engagements to be casual (though unclear how long is too long)

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BUT casuals cannot now be given more than two consecutive contracts, if more than shift-length



# The 'employee choice' pathway to permanency

Existing conversion provisions to be scrapped

Casual employee who believes they are no longer casual can notify employer they want permanent employment

- but only after 6 months' employment, or 12 months for small business
- employer can refuse on basis that employee is still casual, or plead statutory recruitment requirements or 'reasonable operational grounds' as an excuse
- FWC can arbitrate any dispute
- but query how many casuals will use this mechanism

*Casual Employment Information Statement to be reissued every 12 months, plus after 6 months by larger employers*

# The new right to disconnect

Employee may refuse, unless unreasonable, to monitor, read or respond to any contact, or attempted contact, outside working hours

- from employer
- or from any third party (eg a client) if work-related

*Not applicable to small business employers until August 2025*



# When is a refusal unreasonable?

Factors to be considered include

- reason for contact
- how contact is made or attempted, and disruption it causes
- extent to which employee is compensated to remain available then, or for working additional hours
- nature of employee's role and level of responsibility
- employee's personal circumstances (including family or caring responsibilities)

**Refusal is automatically unreasonable if required by law**

# Fair Work Commission's role

Each award must contain a term about exercising right to disconnect

FWC may grant order to stop

- unreasonable refusals to accept contact by employee
- unreasonable requirement by employer to accept contact, or
- disciplinary action for what employer considers unreasonable refusals

Otherwise, FWC may conciliate any dispute, but only arbitrate with parties' consent



# Coming next year???



## Definitely

- New criminal liability for underpayments
- Wage increases in (some) feminised industries

## Probably

- Limits on employment restraints
- National labour hire registration system

## Maybe

- New rules on employee privacy
- New procedure for recovering underpayments

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Questions?