Australian Government
Australian Public Service Commission

# Casual employment and the Fair Work Act 2009

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# Purpose

This document has been developed to support APS agencies understand their obligations in relation to casual employees and the operation of the new employee choice notification provisions in the *Fair Work Act 2009* (FW Act) and should be read in conjunction with the *Australian Public Service Commissioner's Amendment (2024 Measures No.1) Directions 2024* and its Explanatory Statement. This information provides general guidance and is not legal advice. Agencies seeking further advice on specific employment circumstances should consider obtaining legal advice.

# Overview

The *Fair Work Act Amendment (Closing Loopholes No.2) Act 2024* amends the FW Act to change employment laws relevant to national system employers, including the APS. From 26 August 2024, the FW Act will include a new definition of 'casual employee' and a new pathway for casual employees to convert to permanent employment. In the APS context, these changes apply to irregular or intermittent employees. Irregular or intermittent employees who have worked for at least six months in an APS agency may notify their agency they believe they no longer meet the definition of casual employee (referred to as an 'employee choice notification').

For APS agencies, transitional arrangements in the FW Act will mean that the existing casual conversion rights and obligations continue to apply for 6 months from commencement for employment relationships entered into before 26 August 2024. Following the transitional period, the previous obligations for employers to proactively offer casual conversion will no longer apply. Under the new employee choice pathway a casual employee (if eligible) who was employed before 26 August 2024 can make an employee choice notification from 26 February 2025.

To ensure all irregular and intermittent employees in the APS have the opportunity to access the employee choice provisions in the FW Act, amendments have been made to the *Australian Public Service Commissioner's Directions 2022* (the Directions). This includes the addition of provisions that require an agency to complete a merit-based selection process in certain circumstances where an employee submits an employee choice notification and otherwise meets the criteria to convert to permanent employment.

Agencies are expected to ensure that their employment practices position the APS as a model employer, and that a proactive approach is taken to regularly reviewing casual arrangements.

## Terminology

The *Public Service Act 1999* (PS Act) and the FW Act both define certain terms relating to the employment relationship. The PS Act provides for 'irregular and intermittent' employment, which is generally equivalent to casual employment in the FW Act. In accordance with the APS Bargaining Statement of Common Conditions, conditions under both the PS Act and FW Act must be met in order for an APS employee to be casual.

Similarly, the PS Act provides for 'ongoing' employment, which is generally equivalent to permanent full-time or permanent part-time employment in the FW Act.

Different terminology may be used throughout this document depending on whether the context is specific to the PS Act, the FW Act, or a casual employee in accordance with an agency's Enterprise Agreement.

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# Basis for ongoing employment in the APS

The PS Act recognises that ongoing employment is the usual basis for engagement in the APS. In accordance with section 22 of the PS Act, an Agency Head may engage a person:

- as an ongoing Australian Public Service (APS) employee (paragraph 22(2)(a)), or
- for a specified term or for the duration of a specified task (paragraph 22(2)(b)) of the PS Act or
- for duties that are irregular or intermittent (paragraph 22(2)(c) of the PS Act). This is commonly referred to as casual employment and employees engaged on this basis are considered casual employees, provided that the FW Act definition of casual employee (see below) is also met.

APS agencies are required to apply the APS Employment Principles set out in section 10A of the PS Act, including merit-based decision making, when filling ongoing vacancies. However, Subdivision C of Division 1 Part 4 of the Directions provides that an Agency Head may engage a person as an APS employee on a short-term, irregular or intermittent basis to perform the duties of a non-ongoing APS employee without all the elements of a merit-based selection process taking place.

In this context, it would be possible for a casual employee to be engaged on a non-ongoing irregular or intermittent basis without having been subject to a merit-based selection process. Therefore, to ensure casual employees have the opportunity to convert from casual to permanent employment where they no longer meet the definition of casual, provisions have been included in the Directions that provide these employees with the opportunity to be assessed in a merit-based process, if they have not had the opportunity to do so.

# New Fair Work Act definition of casual employee and employee choice provisions

## Definition of casual employee

From 26 August 2024, a new definition of casual employee will commence in the FW Act. Section 15A(1) of the FW Act prescribes:

An employee is a *casual employee* of an employer only if:

a. the employment relationship is characterised by an absence of a firm advance commitment to continuing and indefinite work; and
b. the employee would be entitled to a casual loading or a specific rate of pay for casual employees under the terms of a Fair Work instrument if the employee were a casual employee, or the employee is entitled to such a loading or rate of pay under the contract of employment.

Subsection 15A(2) provides the basis for assessing whether there is an absence of a firm advance commitment to continuing and indefinite work. A firm advance commitment could be identified on the basis of ongoing work performed on a regular, systematic, stable or predictable basis performed over a sufficient length of time (which includes fluctuations or variations over time, for example absences related to illness, injury or recreation).

Agencies need to ensure that employees engaged to perform duties on an irregular or intermittent basis meet the new definition of casual employment under the FW Act. Whether an employee is a casual employee will depend on an assessment of the totality of the employment relationship to determine its ‘real substance, practical reality, or true nature’, having regard to the non-exhaustive list

of considerations in section 15A of the FW Act. Under the new definition, the practical reality of the relationship is relevant in addition to the terms of the contract and no single factor is determinative of the employment relationship. Further information on the FW Act definition of casual is available on the Department of Employment and Workplace Relations website.

## Employee choice notification provisions

Subdivision B of Division 4A, Part 2-2 of the FW Act provides a new 'employee choice' pathway to permanent employment that replaces the previous casual conversion offer and request process. In accordance with the new section 66AAB.

Under the new provisions in the FW Act, employees who have worked for at least six months in an agency will be able to choose to submit a written employee choice notification to their employer where they believe they no longer meet the definition of a casual employee. An employee cannot submit a written employee choice notification if there is a current dispute about their casual employment or the agency has refused a notification in the previous 6 months.

The new section 66AAC sets out how an employer must respond to an employee choice notification made under section 66AAB, and includes grounds for not accepting the notification. Of particular relevance to the APS is section 66AAC(4)(c), which provides that an employer may not accept the notification if acceptance would result in the employer not complying with a recruitment or selection process required by or under a law of the Commonwealth or a State or a Territory.

Agencies have 21 days to respond to an employee notification and either convert the employee to full-time or part-time employment or give reasons why the notification is not accepted.

The PS Act requires that decisions relating to engagement into ongoing APS roles are based on merit, which is a long-standing and fundamental principle of APS employment. This requirement is set out in section 10A of the PS Act and Subdivision B of the Directions and is 'a recruitment or selection process required by or under a law of the Commonwealth or a State or a Territory' for the purpose of section 66AAC(4)(c) of the FW Act. Making an ongoing offer of employment to an employee who has not been found suitable in a merit-based selection process for the same or a similar vacancy (as defined in section 9 of the Directions) within the preceding 18 months, would be inconsistent with the requirements of the PS Act.

However, to ensure that all irregular and intermittent employees in the APS have the opportunity to access the employee choice provisions in the FW Act, amendments have been made to the Directions. The amendments include provisions that require an agency to complete a merit-based selection process in certain circumstances where an employee submits an employee choice notification and otherwise meets the criteria to convert to permanent employment.

## Resolving disputes

Agencies should follow processes outlined in their enterprise agreement and policies and procedures for resolving disputes. In addition, the Fair Work Commission will be able to help resolve disputes, including by arbitration as a last resort.

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# Key expectations for the APS

Agencies should be mindful of the Government's intention to facilitate more secure work and position the APS as a model employer. Fostering integrity in decision making continues to be of the highest priority. The operational impact of the new provisions will depend on the individual agency context, workforce profile and type of work being conducted. However, agencies are strongly encouraged to consider the aims and purpose of the FW Act when considering how to implement these changes. This includes taking into consideration the totality of the employment relationship at the time an employee choice notification is being made and ensuring they are engaging employees in the most appropriate category of employment.

As noted above, merit is a fundamental principle of the APS. Therefore, any recruitment process undertaken as a result of an employee choice notification, could result in a different candidate being found most suitable. Agencies should ensure casual employees are made aware of the potential outcomes when running a recruitment process following an employee choice notification. This risk can be mitigated by undertaking regular recruitment processes to provide casual employees with the opportunity to be assessed through a merit-based selection process. In addition, for agencies with large numbers of casual employees, undertaking regular recruitment processes may be more efficient than undertaking a separate process each time an employee choice notification is received.

# Changes to the APS legislative framework

To ensure that casual employees in the APS have the opportunity to access the employee choice pathway to permanent employment in the FW Act, amendments have been made to the Directions.

The amendments to the Directions ensure eligible APS employees engaged to perform duties that are irregular or intermittent have the opportunity to request to convert to ongoing employment where they believe they no longer meet the definition of casual employee. These amendments recognise that merit is a fundamental principle of the APS.

The Directions include provisions which require an agency to complete a merit-based selection process where an irregular or intermittent employee:

- wants to be a permanent employee and chooses to submit an employee choice notification and
- no longer meets the requirements of a casual employee under subsection 15A(1) to (4) and
- has not been assessed as suitable through a merit-based selection process for the same or similar vacancy in the preceding 18 months.

This means that when assessing an employee choice notification, an agency will need to consider if the casual employee meets the requirements to convert to permanent employment except for being found suitable through a merit-based selection process.

If the casual employee meets the requirements, but has not been found suitable through a merit-based selection process, the agency must notify the employee that they cannot accept the employee choice notification because accepting the notification would result in the employer not complying with a recruitment or selection process required by or under a law of the Commonwealth. The agency will however, undertake a merit-based selection process for the duties the employee is performing in accordance with section 25A(3)(b) of the Directions.

The vacancy must be notified in the Public Service Gazette within three months of the agency receiving the employee choice notification as set out in section 25A(4) of the Directions.

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An agency can undertake a separate process for each employee choice notification received, or they can elect to run regular bulk recruitment processes. Whether an agency undertakes separate processes, or regular processes, they should either:

- notify the employee in writing when the vacancy will be published on APSjobs, or
- notify the employee in writing when the vacancy is published on APSjobs.

Where an agency runs regular recruitment processes, they must ensure that they are able to comply with the requirement to notify the vacancy within three months of receiving the employee choice notification. This could be achieved by:

- running recruitment processes every three months, or
- running processes less frequently but then undertaking ad hoc processes where required.

An agency is not required to undertake a merit-based selection process where the employee has been found unsuitable for the same or a similar vacancy in the preceding 6 months.

Agencies should be mindful that if the employee:

- has already been assessed as suitable for an ongoing vacancy through a merit-based selection process in the preceding 18 months for the same or a similar vacancy, and
- meets the criteria to convert from casual to permanent employment

then the agency is not required to undertake a new merit-based selection exercise and should convert the employee as an ongoing employee.

Agencies are still required to undertake a recruitment process if:

- an irregular or intermittent employee submits an employee choice notification and
- the agency has previously advertised the vacancy, but
- the irregular or intermittent employee did not apply.

This is because there may have been a number of reasons why the employee did not apply for the previously advertised role. For example, the irregular or intermittent employee:

- may not have been aware of the recruitment process, or
- may not have been interested in permanent employment at that time, or
- may not yet have had sufficient experience to feel confident in applying for the role.

Therefore, excluding an employee because they didn’t apply would not be consistent with the intent of the provisions in the FW Act.

To avoid this situation from occurring, agencies should be mindful of the importance of communicating with their irregular or intermittent employees in advance, to make them aware of opportunities to be considered for ongoing employment through a merit-based selection process. This will assist agencies to manage the changes to the new provisions.

# Casual Employment Information Statement

The Fair Work Ombudsman publishes a Casual Employment Information Statement (CEIS), which must be provided to all casual employees as soon as practicable after they start work. To ensure employees are reminded of their rights and ability to change to permanent work, a CEIS must be provided to casual employees as soon as possible after:

- 6 months of employment and
- 12 months of employment, and
- every subsequent period of 12 months of employment.

Agencies must also provide their new casual employees with a copy of the Fair Work Information Statement (FWIS) before, or as soon as possible after, they start their new job. The Fair Work Ombudsman publishes the statement in a variety of accessible languages and formats that agencies can access via Contact us - Fair Work Ombudsman.

Further information on the CEIS and the FWIS is available on the Fair Work Ombudsman's website.

# Frequently asked questions

**Under what circumstances can a casual employee submit an employee choice notification to convert to ongoing employment under section 66AAB of the FW Act?**

A casual employee may make a request to change from casual to permanent employment by providing their agency with a written employee choice notification, if the employee:

- has been employed for at least 6 months and
- believes they no longer meet the requirements of the new casual employee definition under subsection 15A(1) of the FW Act.

A casual employee can't notify their agency of their request to change to permanent employment if they:

- are currently engaged in an ongoing dispute with their employer about changing from casual to permanent employment, or
- in the last 6 months before the day of the notification is given has:
  - had their employing agency refuse a previous notification, or
  - had a dispute with their employing agency about changing from casual to permanent employment resolved

**Employee A no longer believes that they are a casual employee as defined under subsection 15(A) of the FW Act. Employee A then submits an employee choice notification in accordance with section 66AAB of the FW Act. What is the time period in which a merit-based selection process needs to have been undertaken for the agency to consider accepting the notification?**

The employee needs to have been assessed as suitable for the same or a similar vacancy through a merit-based selection process in the preceding 18 months.

If the irregular or intermittent (casual) employee has not yet been considered through a merit-based selection process and the employee meets all of the criteria to move to permanent ongoing employment under subsection 66AAB of the FW Act, the agency must undertake a merit-based selection process for the role the employee is performing in accordance with section 25A(3)(b) of the Directions.

The vacancy must be notified in the Public Service Gazette within three months of the agency receiving the employee choice notification as set out in section 25A(4) of the Directions.

However, an agency is not required to undertake a merit-based selection process where the employee has been found unsuitable for the same or a similar vacancy in the preceding 6 months to the employee submitting an employee choice notification.

**What happens if an irregular or intermittent (casual) employee submits an employee choice notification under section 66AAB of the FW Act, but has not been subject to a merit-based selection process?**

The agency must first assess whether the employee meets all of the eligibility requirements to convert to permanent employment under the FW Act.

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If the employer considers the employee is a casual employee under the FW Act definition, the agency may decline the employee choice notification. However, before providing the employee with a written response, the agency head must first consult with the employee about why they are not accepting the notification. An employee may be able to have someone support or represent them during this consultation (which could include a union entitled to represent them). The agency has 21 days from the date of receiving a written employee choice notification to consult with the employee and provide the employee with a written response.

If the employee no longer meets the definition of casual but has not yet been considered through a merit-based process, the agency must first consult with the employee to advise them that they are declining the employee's notification as the employee must be found suitable through a merit–based selection process. The agency is then required to undertake a recruitment process. The agency should advise the employee that they will conduct a merit-based selection process for an ongoing vacancy which will be advertised in the Gazette within 3 months of the notification, which the employee can apply for should they still wish to convert to permanent employment.

During this process, agencies are encouraged to manage the employee's expectations on the possible outcomes, as they may differ depending on the circumstances of the process.

The recruitment process could result in:

- the employee being found suitable and offered permanent ongoing employment, or
- another candidate being found suitable and offered the ongoing role (in this case the employee may still be found suitable, but may not have been the most meritorious during the recruitment process).

**How long does an agency have to respond to an employee's ongoing request in accordance with section 66AAB of the FW Act?**

In accordance with the requirements outlined in the FW Act, an agency has 21 days to respond to an employee choice notification requesting to convert from irregular or intermittent (casual) employment to permanent employment. This means the agency has 21 days in total to consult with the employee on the details including what will change and when and respond in writing to the employee advising if they accept or refuse the employee choice notification.

**In what circumstances can an agency refuse an employee choice notification?**

Section 66AAC of the FW Act provides grounds for not accepting a notification. These include:

- the employee still meets the definition of a casual
- fair and reasonable operational grounds (in accordance with section 66AAC(5)
- accepting the change means the agency is not complying with a recruitment or selection process required by law.

The *Public Service Act 1999* requires that decisions relating to engagement into ongoing APS roles are based on merit, and is 'a recruitment or selection process required by or under a law of the Commonwealth or a State or a Territory' for the purpose of section 66AAC(4)(c) of the FW Act.

However, the Directions provide that employees who would be eligible for ongoing employment, but for this criteria, must be given the opportunity to be assessed in a merit-based selection process.

If an agency refuses the change, they must provide reasons for the refusal in their response.

**Do the employee choice provisions (section 66AAB of the FW Act) apply to non-ongoing (specified term or specified task) employees?**

Section 66AAB of the FW Act only applies to employees engaged for duties that are irregular or intermittent, in accordance with section 22(2)(c) of the PS Act. It does not apply to employees engaged for a specified task or specified term. Agency employment contracts should clearly outline the intended employment type.

Further information on provisions in the FW Act relevant to non-ongoing APS employees is available on the Commission's non-ongoing employment webpage: Non-ongoing and irregular or intermittent employment | Australian Public Service Commission (apsc.gov.au).

# What agencies should do now

Agencies should review their casual arrangements and practices to establish processes that ensure compliance with the FW Act and the Directions, as amended. This will include:

- Reviewing letters of offer and terms contained in contracts of employment including the definition of casual employment, as amended.
- Regularly reviewing and considering the work conducted in their agencies more holistically. This includes reviewing the makeup of their workforce to ensure it meets their business requirements and using workforce planning to strategically consider the future needs across the entire agency.
- Reviewing instruments of delegation.

Agencies should also consider conducting regular recruitment processes which could include affirmative measures recruitment processes to provide casual employees with an opportunity to be assessed through a merit-based recruitment process.

# Further information

HR practitioners seeking more information on casual employment and changes to the FW Act can contact the Employment Policy team via employmentpolicy@apsc.gov.au or call the advice line on (02) 6202 3857.

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# Attachment A - Employee choice notification

**From 26 August a casual employee is defined in subsection 15A(1) of the Fair Work Act 2009 (FW Act):**

An employee is a casual employee of an employer only 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 under the terms of a fair work instrument if the employee were a casual employee, or the employee is entitled to such a loading or rate of pay under the contract of employment.

**Under subsection 15A(2)(c), there are a broad and non-exclusive range of considerations to determine whether there is an absence of firm advance commitment to continuing and indefinite work including whether:**

- There is an inability of the employer to elect to offer or not offer work, or an inability of the employee to accept or reject work.
- Taking into account the nature of the employer's enterprise it is reasonably likely there will be future availability of continuing work in the enterprise of the kind usually performed by the employee.
- There are full-time or part-time employees performing the same kind of work.
- There is a regular pattern of work for the employee (which includes fluctuations or variations over time, including for absences related to illness, injury or recreation).

**Employee lodges employee choice notification**

**Does employee meet the eligibility criteria?**

- the employee has been employed for at least 6 months as at 26 February 2025 onwards and
- the employee no longer meets the requirements of a casual employee and
- the employee does not have a current dispute in place with their employer in regard to the casual employee converting to permanent employment and
- in the previous 6 months, the employee has not:
  - received a response from their employer refusing a previous notification or
  - resolved a dispute with their employer about converting to permanent employment.

**Yes**

**Has the employee been assessed as suitable through a merit-based selection process in the previous 18 months for the same or similar role?**

**Yes**

1. Consult with the employee to discuss what will change if the employer accepts the notification and the employee is no longer a casual employee.
2. Respond in writing accepting the request within 21 days of receiving the notification. The acceptance should include the employee's new employment status, hours of work and the date it will take effect.

**No**

1. Consult with the employee about why their notification isn't being accepted.
2. Respond to the request in writing within 21 days of receiving the notification, notifying the employee that the notification has not been accepted, including the reason(s).
3. Undertake a merit-based selection process for the duties performed by the employee.* The vacancy must be notified in the Public Service Gazette within 3 months of the Agency Head receiving the employee choice notification.

*Except where the employee has been found unsuitable for the same or a similar role in the preceding 6 months

**No**

1. Consult with the employee about why their notification isn't being accepted. An employee may be able to have someone support or represent them during this consultation (which could include a union entitled to represent them).
2. Respond to the request in writing within 21 days of receiving the notification, notifying the employee that the notification has not been accepted, including the reason(s).

**An agency may not accept the notification on any of the following grounds:**

- the employee still meets the definition of a casual
- there are fair and reasonable operational grounds for not accepting the notification such as:
  - substantial changes would be required to the way in which work in the agency is organised
  - there would be significant impacts on the operation of the agency's business or
  - substantial changes to the employee's employment conditions would be necessary to ensure the agency does not break any rules that would apply to the employee
- accepting the change means the agency is not complying with a recruitment or selection process required by law.

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