



# MEMBERS UPDATE

————— SEPTEMBER 2024 —————

# Welcome to the September 2024 member's update

In this month's members update we look at:

- Right to Disconnect from 26th August 2024
- Casual conversion transitional rules from 26th August 2024
- New independent contractor rules effective 26th August 2024
- Updated Fair Work Information Statements



# Right to Disconnect.

From 26th August 2024, eligible employees now have the right to refuse contact outside of their working hours, unless that refusal is unreasonable.

Employees of non-small business employers have the right to refuse to monitor, read or respond to contact (or attempted contact) outside their working hours, unless doing so is unreasonable. This includes contact (or attempted contact) from an employer or a third party.

The provisions are effective from 26th August 2025 for small business employer and their employees.

Employers and employees are encouraged to discuss contact out of hours and set expectations that suit the workplace and the employee's role.

When working out whether an employee's refusal is unreasonable, the following factors must be considered:

- the reason for the contact
- how the contact is made and how disruptive it is to the employee
- how much the employee is compensated or paid extra for:
  - being available to perform work during the period they're contacted, or
  - working additional hours outside their ordinary hours of work
- working additional hours outside their ordinary hours of work
- the employee's role in the business and level of responsibility
- the employee's personal circumstances, including family or caring responsibilities.

Other matters may also be considered.

It will be unreasonable for an employee to refuse to read, monitor or respond if the contact or attempted contact is required by law.

Awards, enterprise agreements and other registered agreements can also include additional right to disconnect provisions.

## Right to Disconnect in Awards

All awards include a right to disconnect term. The Fair Work Commission added right to disconnect terms to all awards on 26th August 2024.

In some situations, an employee may be required to monitor, read or respond to contact (or attempted contact) from the employer outside their working hours in accordance with an award term.

Some award terms will specify when an employer is still permitted to contact an employee outside of their working hours. An example of such a clause, from the Clerks Award, clause 13A.4

*13A.4 Clause 13A.3 does not prevent an employer from contacting, or attempting to contact, an employee outside of working hours in circumstances including to notify them of a recall to work under clause 21.5.*

## Right to Disconnect in Agreements

Employees who are covered by an enterprise or other registered agreement, should check the terms of their agreement for information about the right to disconnect.

The right to disconnect is a workplace right under general protection laws. These laws are protected rights employees have under the Fair Work Act.

<https://www.fwc.gov.au/hearings-decisions/major-cases/variation-modern-awards-include-right-disconnect>

<https://www.fairwork.gov.au/employment-conditions/hours-of-work-breaks-and-rosters/right-to-disconnect>

<https://www.fwc.gov.au/documents/resources/right-to-disconnect-fact-sheet.pdf>

## Action items

- Employers and employees should discuss out of hours contact and set expectations that suit the workplace and the employee's role
- Review current policies and practices in relation to out of hours contact and provide information to employees on the new laws
- Provide training to managers on the new laws
- Review Right to Disconnect clauses in awards covering employees, to ensure compliance with any additional terms or payment requirements

# Independent Contractor changes 26th August 2024

From 26th August 2024, there were changes to definitions and protections for independent contractors.

## Definition of employment

A new definition of employment has been added to the Fair Work Act to help determine the meaning of 'employee' and 'employer'. This is used by some businesses to work out whether a worker is an independent contractor (contractor) or an employee.

To work out if someone is a contractor or an employee, the following must be considered:

- the real substance, practical reality and true nature of the working relationship
- all parts of the working relationship between the parties. This includes the terms of the contract and how the contract is performed in practice.

Applying the new definition may:

- mean that some working relationships are characterised differently
- result in different rights and obligations for people affected.

The new definition doesn't apply to some businesses and workers. Generally, this definition isn't used by state referred national system businesses (state referred businesses) and workers for these businesses.

The new definition also doesn't affect the meaning of 'employee' and 'employer' in other existing laws defining employment. For example:

- tax
- superannuation
- workers compensation.

<https://www.fairwork.gov.au/find-help-for/independent-contractors>

## Changes to contractor tests

There is a different method of checking if a worker is a contractor or an employee, using the new definition of employment that applies from 26th August 2024. This new method is known as the whole of relationship test. This test can generally only be used by constitutionally covered businesses.

The whole of relationship test doesn't apply to state referred businesses and workers. These businesses and workers use the start of relationship test.

Both tests still consider various factors of employment or contracting relationships, including:

- the amount of control over how work is performed
- financial responsibility and risk
- who supplies the tools and equipment
- ability to delegate or subcontract work
- hours of work
- expectation of work continuing.

<https://www.fairwork.gov.au/find-help-for/independent-contractors/whole-of-relationship-test>

<https://www.fairwork.gov.au/find-help-for/independent-contractors/start-of-relationship-test>

## Opting out of the whole of relationship test

Workers who earn more than the contractor high income threshold can 'opt out' of using the whole of relationship test by notifying the business they work for. Instead, they can use the start of relationship test.

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

<https://www.fairwork.gov.au/find-help-for/independent-contractors/whole-of-relationship-test/opting-out-of-the-whole-of-relationship-test>

## Unfair terms in contracts

Contractors can apply to the Fair Work Commission (the Commission) if they think their services contract contains an unfair contract term.

The Commission will be able to:

- determine whether a term of a services contract is an unfair contract term, taking into account a range of factors
- make an order to set aside, amend or vary all or part of the contract if a services contract contains one or more unfair contract terms.
- The new laws only apply where there is a 'constitutional connection'. For example, if the contractor performs work under a services contract with a constitutional corporation.
- Contractors earning over the contractor high income threshold can't apply for an unfair contract remedy with the Commission.

<https://www.fairwork.gov.au/find-help-for/independent-contractors/contractor-entitlements-and-support>

## Regulated workers

A new category of contractor has been created, known as regulated workers. Regulated workers have additional rules and protections compared to most contractors.

Regulated workers are contractors doing certain types of work, including:

- employee-like workers doing digital labour platform work
- contractors in the road transport industry
- contractors performing work in a road transport contractual chain.

<https://www.fairwork.gov.au/find-help-for/independent-contractors/regulated-workers>

<https://www.fairwork.gov.au/about-us/workplace-laws/legislation-changes/closing-loopholes/independent-contractor-changes/minimum-standards-for-contractors>

<https://www.fairwork.gov.au/about-us/workplace-laws/legislation-changes/closing-loopholes/independent-contractor-changes>

## Action items

- Review contractor contracts and working arrangements to see if they may meet the new definition of employee
- Notify contractors earning over the high income threshold that they have the right to opt out of the whole of relationship test, including the impacts of opting out

# Casual Conversion - 26th August 2024 transitional rules

Casuals now have a new pathway to full-time or part-time (permanent) employment under the National Employment Standards. The 'employee choice pathway' will allow eligible casuals to notify their employer in writing of their intention to change to permanent employment. An employer can only refuse the notice for certain reasons.

These rules replace the current rules for changing to permanent employment.

## Casuals employed before 26th August 2024

There are transitional arrangements for casual employees who started with their employer prior to 26th August 2024. The current casual conversion pathways (that apply before 26th August 2024) continue to apply for employers and their casuals employed before 26th August 2024 for a transitional period.

Employers must continue to offer eligible employees the opportunity to convert to casual employment. Eligible casual

employees may also request to convert to permanent employment under the existing rules.

These transitional rules are in place for 6 months for non small business employers, and 12 months for small business employers.

	Offers and requests for casual conversion	New employee choice pathway
Casuals employed before 26 August 2024	Continues to apply for 6 months (12 months if employed by a small business) from 26 August 2024. Additional rules apply.	Applies from 6 months (12 months if employed by a small business) after 26 August 2024. Additional rules apply.
Casuals employed on or after 26 August 2024	Does not apply.	Applies after being employed for 6 months (12 months if employed by a small business). Additional rules apply.

Casual employees may request to convert to permanent employment under the new rules from 26th February 2025 (or 26th August 2025 if employed by a small business)

Current casual conversion rules can be found on the Fair Work website

<https://www.fairwork.gov.au/starting-employment/types-of-employees/casual-employees/becoming-a-permanent-employee>

<https://www.fairwork.gov.au/about-us/workplace-laws/legislation-changes/closing-loopholes/casual-employment-changes/casual-conversion>

#### Action items

- Continue to review casual employees under the old rules until February 26th 2025 (26th August 2025 for small business employers)
- Offer conversion to permanent employment as applicable
- Review new rules to ensure process in place for handling requests received from 26th February 2025 (26th August 2025 for small business employers)

## Updated Fair Work Information Statements Services

Fair Work have updated their information statements in line with the changes from 26th August. Make sure you are providing your employees with the current version of the statements.

<https://www.fairwork.gov.au/employment-conditions/information-statements/fair-work-information-statement>

<https://www.fairwork.gov.au/employment-conditions/information-statements/casual-employment-information-statement>

<https://www.fairwork.gov.au/employment-conditions/information-statements/fixed-term-contract-information-statement>

## FAQ

### Q. How do I process a refund of a salary sacrifice?

A. The way to treat this depends on whether the refund of salary sacrifice occurs in the same, or in a different, financial year from when the amount was initially sacrificed.

#### Refund of salary sacrifice if it occurs within the same financial year as the initial sacrifice.

1. Reduce the YTD amounts you have reported as:

- a) Salary sacrifice type S by the amount of the refund relating to sacrifice to super, and
- b) Salary sacrifice type O by the amount of the refund relating to sacrifice to other benefits. For example, novated leases

2. Withhold from the salary sacrifice refund and include the additional PAYG withholding in your STP report

3. Check whether you have paid super on the refunded amount in a previous quarter. If you haven't, pay the additional super and include the amount in your STP reporting.

4. Check the RESC and RFBA you have reported to ensure you have not overstated them due to the refund of salary sacrifice.

**Refund of salary sacrifice if it occurs in a different financial year as the initial sacrifice.**

1. For the current financial year, increase the YTD amounts you have reported as Gross by the total amount of the refund.

2. Withhold from the salary sacrifice refund and include the additional PAYG withholding in your STP report for the current financial year.

3. Check whether you have paid super on the refunded amount in a previous quarter and, if you haven't, pay the additional super and include the additional super amount in your STP reporting for the current financial year.

4. For the previous financial year, reduce the YTD amount you have reported as:

a) Gross by the total amount of the refund

b) Salary sacrifice type S by the amount of the refund relating to sacrifice to super, and

c) Salary sacrifice type O by the amount of the refund relating to sacrifice to other benefits.

5. For the previous financial year, check the RESC and RFBA you have reported to ensure you have not overstated them due to the refund of salary sacrifice.

<https://www.ato.gov.au/businesses-and-organisations/hiring-and-paying-your-workers/single-touch-payroll/in-detail/single-touch-payroll-phase-2-employer-reporting-guidelines/reporting-the-amounts-you-have-paid/salary-sacrifice>

## Creating confidence webinar: Wage Compliance with ADP and KPMG

This month Ross Heron will be joined by ADP and KPMG to discuss Wage Compliance – Are you covered? Understanding Payroll and legislation is key. This exclusive webinar will equip you with essential strategies to mitigate wage compliance risks, navigate upcoming legislative changes, including the impending Wage Theft laws, and ensure your organization remains compliant in the increasingly scrutinized Australian employment landscape.

19 September at 1pm AEST click below to register

[https://us06web.zoom.us/webinar/register/WN\\_pZD87DoeQp-jToQJb5ik4A](https://us06web.zoom.us/webinar/register/WN_pZD87DoeQp-jToQJb5ik4A)

### MEMBERS WEBINAR



**Our September webinar will be held on 25th September at 1pm where we will be looking at an Overview of 26 August changes - Casual Employment, Right to Disconnect, Independent Contractors**