

# CCV SIAG Workplace Relations Update

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# Casual Employment

- *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021*
  - Took effect on and from 27 March 2021
- Changes include:
  - A new statutory definition of 'casual employee';
  - A casual conversion process;
  - A statutory 'set off' arrangement;
  - The provision of a Casual Employment Information Statement.

# Definition of Casual Employee

- (1) A person is a casual employee of an employer if:*
- (a) an offer of employment made by the employer to the person is made on the basis that the employer makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person; and*
  - (b) the person accepts the offer on that basis; and*
  - (c) the person is an employee as a result of that acceptance*

*(Section 15A, Fair Work Act 2009 (Cth))*

# Definition of Casual Employee

- Relevant considerations at the time the offer is made are:
  - Whether employer can elect to offer work and employee can elect to reject or accept work;
  - Whether person will work as required according to the needs of the employer;
  - Whether employment is described as casual;
  - Whether the employee will be entitled to a casual loading
- ‘Regular pattern of hours’ is not of itself indicative;
- To be assessed on the basis of the offer of employment, not any subsequent conduct.

# Casual Conversion

- New casual conversion provisions set out in the National Employment Standards in the Fair Work Act 2009 (Cth)
- Award will be updated
- Does not apply to small business employers (i.e employs less than 15 employees)
- Applies from 27 September 2021

# Casual Conversion

- Offer of permanent employment by employer if:
  - Employee has been employed for 12 months; and
  - During the last 6 months, the employee has worked a regular pattern of hours on an ongoing basis which, without significant adjustment, the employee could continue on a permanent basis
- Offer must be in writing and to convert to equivalent type of employment;
- Offer must be provided within period of 21 days after end of 12 month period.

# Casual Conversion

- Employer not required to make offer to convert if there are reasonable grounds not to do so and those grounds are based on facts known, or reasonably foreseeable
- Reasonable grounds include (non-exhaustive):
  - Position will cease within 12 months;
  - Hours of work will be significantly reduced;
  - Significant change in days and/or times on which work will be required to be performed which cannot be accommodated within the employee's availability;
  - Offer will not comply with recruitment or selection process required by law

# Casual Conversion

- If employer believes that there are reasonable grounds not to make an offer, it must provide written notice within 21 days, including reasons for not making offer
- Response to Offer
  - Employee must give response within 21 days of receipt, otherwise it is taken to be declined;
- If employee accepts, employer must discuss and give written notice within 21 days of:
  - Whether full-time or part-time conversion;
  - Hours of work;
  - Commencement date.





# Casual Conversion

- Employee maintains residual right to request to convert
  - Request must be in writing;
  - Request must be to reflect pattern of hours worked;
  - Employer must respond within 21 days;
  - Employer must not refuse the request unless:
    - The employer has consulted with the employee;
    - There are reasonable grounds to refuse the request; and
    - The reasonable grounds are based on facts known, or reasonably foreseeable at the time of refusal.

# Casual Conversion

- If employer grants request, employer must consult with employee and then give notice about:
  - Conversion to full time or part-time;
  - Hours of work;
  - Date conversion will take effect.
- Process for disputes regarding casual conversion



# Casual Employment

- Casual Employment Information Statement
  - To be provided to casual employees employed on or after 27 March 2021;
  - To be provided with a Fair Work Information Statement;
  - Found at Fair Work Ombudsman website;
  - Existing casual employees:
    - Small business employers must provide as soon as possible after 27 March 2021;
    - Other employers must provide as soon as possible after 27 September 2021.

# Casual Employment

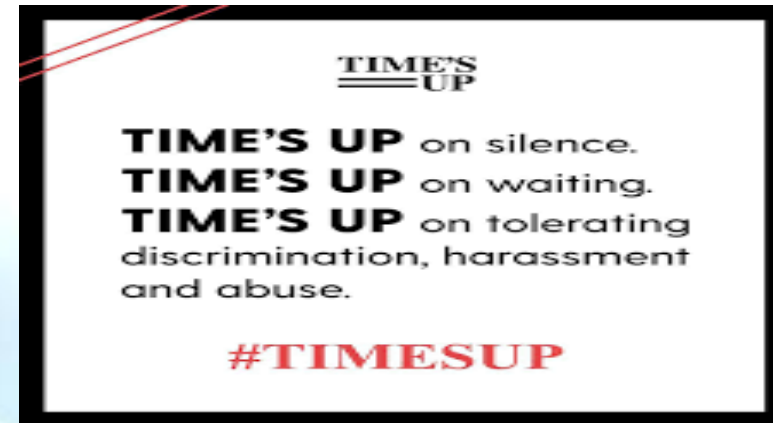
- Off-set provisions:
  - Court is required to reduce a claim amount by an amount equal to the loading amount or an appropriate proportion of the loading amount based on the relevant entitlement



# What can I do?

- Ensure Casual Employment Information Statement is provided;
- Review casual engagement within your business and provide yourself with triggers/reminders regarding casual conversion (noting it will not apply until 27 September);
- Updated contracts will be available on CCV/SIAG website.

# Sexual Harassment



# Sexual harassment – what is it?

Prohibited under the *Equal Opportunity Act 2010* (Vic), *Sex Discrimination Act 1984* (Cth)

*Equal Opportunity Act 2010* (Vic): Sexual harassment occurs if a person:

- Makes an **unwelcome** sexual advance or an **unwelcome** request for sexual favours to the other person; or
- Engages in any other **unwelcome conduct of a sexual nature** in relation to the other person; and

in circumstances where a **reasonable person**, having regard to all the circumstances would have anticipated the that the other person would be:

- **Offended;**
- **Humiliated;** or
- **Intimidated.**



# Sexual harassment examples

Examples of sexual harassment include:

- Uninvited or unwelcome physical contact;
- Uninvited kisses or embraces;
- Smutty jokes or comments;
- Making promises or threats in return for sexual favours;
- Displays of sexually graphic material;
- Sexual gestures;
- Sending or displaying content of a sexual nature via electronic means (including email, social media, text message, messaging apps - evolving)
- Repeated invitations after prior refusal;
- Persistent questions or insinuations about a person's private life.





# Sexual Harassment (cont)

- Vicarious Liability

- Employer can be held liable for acts of sexual harassment engaged in by employee;
- Employer will not be held vicariously liable if the employer can prove, on the balance of probabilities, that the employer took reasonable precautions to prevent the employee from engaging in the conduct.



# Social Media & Computer Usage

Behaviour online is increasingly relevant and important.

Relevant conduct extends to:

- Electronic communication of a professional nature (i.e. to customers, suppliers etc.) and within the workplace (emails to colleagues)
- Social media platforms



# Computer Usage and Sexual Harassment

All obligations in relation to appropriate workplace behaviour (including sexual harassment) apply to behaviour online.

*Colwell v Sydney International Container Terminals* [2018] FWC 174

Employee who sent pornographic video to 19 co-workers via Facebook messenger while on a rostered week off and at night. Subsequently posted an apology.

FINDING: valid reason for dismissal

## REASONING

- Relevant connection – being Facebook friends stemmed only from employment.
- It was likely that the dissemination of this material would spill into the workplace.
- No one had complained about the conduct – irrelevant, part of employer obligation.



# Government Response to Respect@Work

- ‘A Roadmap for Respect: Preventing and Addressing Sexual Harassment in Australian Workplace’ was released on 8 April 2021.
- Government agreed to following changes:
  - Sexual harassment amounts to a valid reason for dismissal;
  - Serious misconduct definition amended to include reference to sexual harassment;
  - Clarification that a ‘Stop bullying order’ is available in the context of sexual harassment;
  - Ask FWC and FWO to update existing guidance and develop additional materials;
  - Work with State and Territory governments to amend anti-discrimination legislation;
  - Victims of unlawful discrimination will have 24 months, rather than 6 months, from the time of alleged unlawful discrimination to lodge a complaint with the Australian Human Rights Commission
- Did not agree to introduce positive duty on all employers to eliminate sex discrimination, sexual harassment and victimization.

# Case Study

*Ms Bou-Jamie Barber v Goodstart Early Learning [2021] FWC 2156 (20 April 2021)*

- June 2020: policy mandating flu vaccine unless the employee had a ‘medical condition which makes it unsafe for them to do so’
- Employee was unable to obtain satisfactory medical evidence, although doctors supported her claim of a ‘sensitive immune system’ and alleged history of adverse reaction to vaccine
- Dismissal due to the employee’s inability to perform the inherent requirements of the role.
- HELD: dismissal was valid
- REASONING:
- Valid reason due to failure to comply with lawful and reasonable direction (not inability to perform inherent requirements)
- Unable to provide evidence of genuine risk
- Caution against extrapolating to other industries and other contexts

# Questions?

