

Two recent decisions have created uncertainty for employers with respect to leave entitlements under the [National Employment Standards](#) ("NES"). The NES are [minimum standards](#) that override any other conditions of employment, notably [awards / enterprise agreements](#) or contracts of employment, where those conditions are inferior to the NES. Employers who [breach](#) the NES face significant [financial penalties](#).

### Casual employees entitled to leave

In a recent Full Federal Court [decision](#), it was held that a casual labour-hire employee was, as a matter of law, not a casual employee and therefore entitled to [annual leave](#) under the NES. This was particularly concerning because the employee had been paid a loaded-up flat rate which included a casual loading, meaning there is effectively 'double-dipping' of entitlements.

This case is not a definitive statement that all casual employees are or may be permanent employees. There were particular facts in that matter, including ambiguity in the terms of engagement and the worker worked an extended period of time on a regular and systematic "fly in, fly out" roster with a regimented shift regime. This led the Court to conclude that the parties did not enter into an arrangement that was "casual" as a matter of law. Once a finding of this nature is made, it follows under the NES that there is an entitlement to annual leave. This same logic would also extend to [paid personal leave](#) and, at least arguably, [public holidays](#), [notice of termination](#) and [redundancy](#).

As a result of this decision, employers need to be mindful of the importance of having documents and workplace practices that clearly evidence a casual employee's engagement and the risks associated with long-term casual engagements. "Casual" employment is characterised by:

- The absence of a firm advance commitment as to the duration, pattern or continuing nature of employment; and
- Irregular and/or uncertain work patterns.

This is an emerging area of law that employers should keep a careful eye on. The [decision](#) relied on by the Federal Court in deciding what was meant by 'casual' employment required a legislative response to correct the uncertainty created by it. This decision is likely to require a legislative response and, in turn, this leaves employers exposed to claims pending these issues settling down.

### Shift workers entitled to extra leave

Leave entitlements have generally been accrued on the basis of hours of work (for example, ten days of sick leave has been accrued as 76 hours for people working a 38 hour week). This is so common that accounting software packages accrue leave that way.

However, a recent Fair Work Commission [decision](#) held that the entitlement to "[10 days](#)" personal leave means, in essence, ten normal working days'. While for most workers whether it is expressed as days or hours does not matter. However, for some workers, such as shift workers who work a "four on, four off" roster, or any other arrangement where more than 7.6 ordinary hours are worked, this has potentially serious implications.

In the decision, it was held that workers who worked 12 ordinary hours in a shift were entitled to payment for all of those hours when calculating a "day" of sick leave. This could mean an employee would be entitled to up 120 hours of sick leave each year, even though the conventional accrual would only have been 76 hours for the year.

This decision obviously raises questions as to how personal/carer's leave is accrued and calculated where

more than 7.6 ordinary hours are worked on any day, including RDO accruals where these would not otherwise accrue. Similar terminology is used for annual leave (although it refers to “[weeks](#)” instead of “days”), bringing into doubt the ability for employers to provide periods of leave that are less than a week, especially part-days.

It is noted that this same issue is the subject of a pending Federal Court application, in which the Commonwealth has intervened. If this decision upholds the Fair Work Commission’s decision there will be considerable issues for employers utilising these arrangements, including potential backpay.

### What do I need to do?

Given the uncertainty created by these decisions there is no definitive answer as to what to do. Employers should consider what steps they can take to minimise any risks of adverse findings. This includes:

- Assessing their terms of engagement for casual workers to ensure that documentation clearly reflects the nature of the engagement, including, but not limited to, checking letters of offer, contracts of employment, enterprise agreements and even so far as ensuring that pay slips properly identify the casual loading.
- Reviewing actual work patterns of casual workers. Where casual workers have worked long periods on set rosters, further advice should be taken.
- For employers who operate on the basis of more than 7.6 ordinary hours per shift, consideration will need to be given to how sick leave is given and taken, and consideration should also be given to only permitting annual leave to be taken in whole week blocks.

### Need more information

If you would like further information about the above matters including terms and conditions of employment and the application of awards, enterprise agreements or the NES, please contact the team at Fair Work Lawyers.



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