

# RECENT CHANGES TO CASUAL LOADING AND DOUBLE DIPPING

By Sean Melbourne

Last year's uncertainty regarding the status of casual employee payments caused angst for many employers. This uncertainty has been partially removed with new government regulations designed to provide greater clarity on casual pay entitlements.

Following last August's Full Federal Court decision in *Workpac v Skene*, businesses were left wondering if they could be required to pay their casual staff permanent entitlements such as annual leave on top of the casual loading they'd been paying. In *Workpac* the court held that an employee who it had deemed to be casual was entitled to be back-paid annual leave, even though he had received casual loading. This led to concerns that casual staff could 'double dip' – and employers could be required to back pay leave entitlements to their casual staff.

## What's changed?

The government has now issued regulations to the effect that, where casual employees have been paid a casual loading in lieu of permanent entitlements, employers can seek to have that loading offset against permanent entitlements claimed by casual employees.

## What does this mean?

This means that casual employees may have the right to make a claim for permanent entitlements, and employers have a way of seeking to have casual loadings they've already paid taken into account – subject to four criteria that need to be met for the new regulation to apply.

## What criteria need to be met?

The following criteria need to be met:

1. You employed the employee on a casual basis.
2. You paid the employee a casual loading that can be clearly identified as being paid in lieu of entitlements only available to permanent employees, such as annual or personal/carers leave.
3. Despite classifying your employee as casual, they were in fact a full-time or part-time employee for part or all of their employment.
4. Your employee has made a claim to be paid for at least one NES entitlement that they didn't receive for part or all of the time they were incorrectly classified as a casual. This may include annual or personal/carers leave.

If all four criteria are satisfied, you can make a claim to have the casual loading paid to your employee taken into account when working out what NES entitlements are owed to them.



**When did the regulations come into effect?**

These changes came into effect on 18 December 2018. They apply to periods of employment that occurred before and after this date.

**Should I do anything about this?**

Given that it's a requirement that casual loading paid to the employee is clearly identifiable as being paid in lieu of permanent entitlements, it's a good idea to check whether your casual contracts do this and, if not, update them.

**Need a hand?**

If you'd like help with how to deal with your casual employees, feel free to get in touch with our head of employment law, Sean Melbourne at [sean.melbourne@sourcelegal.com.au](mailto:sean.melbourne@sourcelegal.com.au).

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