

Fixed Term Contracts

Commencement: 6 December 2023

Highlights

- From the 6th of December 2023 certain fixed term contracts will be unlawful as a result of the Government's Secure Jobs Better Pay legislation.
 - If you have employees on fixed term contracts, check whether they may be covered by an exemption to the new limitation on fixed term contracts.
 - Make sure all new employees on fixed term contracts are provided with the Fixed Term Contract Information Statement.
 - If you are not covered by any exemptions, begin to make workforce changes to ensure you are not penalised. Do not try to avoid the prohibition through other means.
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What is a Fixed Term Contract?

You're offering fixed term contract if you enter a contract with an employee that has a set end date. For example, the contract ends after a set period of time or after a season. Employees engaged on fixed term contracts who are engaged on a full-time or part-time basis have similar conditions and entitlements as permanent (ongoing) employees. This includes leave entitlements.

What are the Changes Coming into Effect?

The new laws, passed with the Secure Jobs Better Pay Act, will mean that contracts of certain specified lengths will be unlawful, subject to a series of prescribed exceptions. In summary, the changes, which will come into effect on the 6th of December, to the use of fixed term contracts are:

- a. contracts for fixed periods of more than two years will be unlawful
- b. renewable contracts — those that have a fixed duration that can be renewed for a further period, the sum of which is greater than two years, and those that can be renewed more than once — will be unlawful
- c. consecutive contracts — broadly, fixed term contracts that replace prior fixed term contracts for the performance of the same or substantially similar work — will be unlawful
- d. there are exemptions for specialised jobs, training arrangements, temporary absences, high income employees, once-off government funded work, governance positions, and others
- e. employers will be required to give new employees on fixed term contracts the Fixed Term Contracts Information Statement

Employers who contravene the laws will face financial penalties of up to \$165,000 (600 penalty units) for a serious contravention, or otherwise up to \$16,500 (60 penalty units). Claims against employers can be pursued in the courts by employees, prospective employees, employee organisations and the Fair Work Ombudsman. Employers who contravene the anti-avoidance provisions similarly face penalties of up to \$165,000 (600 penalty units).

The changes will apply to contracts with a “fixed term” and those that are described as “maximum-term contracts”, being contracts where there is an identifiable end date, but which allows the parties to terminate before that date.

Are there Exemptions?

There are a range of exemptions to the new laws regarding fixed term contracts, they are listed below. Advice should always be sought before relying on an exemption.

1. Contracts entered into with employees who are engaged to “perform only a distinct and identifiable task involving specialised skills” are exempt – caution should be taken when relying on it; the explanatory memoranda lack examples, and the interpretation of this provision is likely to be contested in the courts.
2. Contracts entered into with employees who are engaged under a training relationship are exempt. For example, a carpentry apprentice on a fixed term contract for 3 years may be exempt
3. Contracts entered into with employees who are engaged to undertake “essential work” during a peak demand period are exempt. For example, a fruit picker engaged on multiple consecutive contracts during a period of high demand may be exempt.
4. Contracts entered into with employees who are engaged to undertake work during emergency circumstances or while another employee is temporarily absent are exempt. For example, if an employee on an 18-month fixed term contract is offered a further 12-month contract to temporarily fill a position usually occupied by an employee who is taking long service leave, that second contract may be exempt.
5. Contracts entered into with employees who exceed the high income threshold are exempt. The high income threshold for a full-time employee is currently \$162,000.

Further Exemptions by Regulation

On 23 November 2023, the Minister for Employment and Workplace Relations published the Fair Work Amendment (Fixed Term Contracts) Regulations 2023 which included four additional exemptions. They included:

1. **Organised sport employees** in organised sport including athletes, coaches, another kind of performance support professionals for athletes participating, match officials or performance support professionals for match officials.
2. **Employees in high performance sport related to international event organising** – take for example, the Olympics. This will include those involved in the administration or organisation of an international event for high performance sport.
3. **Live performance employees** – where the fixed term employee is covered by the *Live Performance Award 2020* (the fixed term of the contract must not be greater than 12 months).
4. **Higher education employees** where the fixed term employee is covered by the *Higher Education Industry – Academic Staff – Award 2020*, or the *Higher Education Industry – General Staff – Award 2020*.

5. Positions for the performance of work that is funded by a **philanthropic entity** registered under the *Australian Charities and Not-for-Profits Commission Act 2012*, including when the position is funded by a testamentary gift or contribution to a philanthropic entity for a charitable purpose of that entity. This exception does not apply to positions for the performance of work where philanthropic funding is received by charities from noncharitable entities.

General Advice for Employers



Step 1 — Identify All Fixed Term Employees



Step 2 — Examine Whether Any Exemptions Apply



Step 3 — Transition Employees Onto New Contracts



Step 4 — Update Internal Processes

Step 1 — Identify all fixed term employees

Employers should review the working arrangements of their employees to identify all the positions that are filled by employees on fixed term contracts. This will include any worker who is an employee (rather than an independent contractor) engaged under a contract that stipulates a specified end period, expiry date or termination date. This will also include employees engaged under contracts that stipulate expiry dates and contain other terms which provide for circumstances in which the contract may be terminated before the end of the specified period. It does not include casual employees.

Step 2 — Examine whether any exemptions apply

Once it is known which employees are engaged fixed term contracts, each contract should be examined against the available exemptions. It is important to bear in mind that each exemption is specific to the individual contract; simply because an employer is entitled to utilise the exemption for one contract, does not mean the business can freely use fixed term contracts at large.

Step 3 — Transition unexempted employees onto other work arrangements

Employers should act now and start transitioning employees onto permanent contracts or making alternative workforce arrangements where no exemptions apply to them.

Do not take measures to avoid the prohibition while continuing to engage employees under fixed term contracts if the exemptions do not apply. The anti-avoidance provisions are broad and include any alteration of the employment relationship, as well as intermittent disengagement and re-engagements of employees. As mentioned, the employer will need to prove that *none* of the reasons for action taken in respect of employees under a fixed term contract were to avoid the prohibition, if a dispute were to arise.

Step 4 — Incorporate the Fixed Term Contract Information Statement into internal processes

Employers must now incorporate the provision of the Fixed Term Contract Information Statement into their hiring procedure and onboarding process. Although it only needs to be given to those on fixed term contracts, employers' minds should be turned to it with the hiring of every new employee to ensure that liability is avoided, which can lead to a \$13,320 penalty for a non-serious contravention.

Further Guidance

The DEWR provides guidance on the new limitations on the use of fixed term contracts which can be accessed [here](#).

The Fair Work Ombudsman helps everyone in Australia follow the laws that make all workplaces equal and fair. They provide information and advice about pay, conditions and entitlements for all employees, including fixed term employees. Visit [fairwork.gov.au](https://www.fairwork.gov.au) or call **13 13 94**

The Fair Work Commission deals with claims about a range of issues, including unfair dismissal and disputes about the limitations and exceptions on fixed term contracts. Visit [fwc.gov.au](https://www.fwc.gov.au) or call **1300 799 67**

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