

# Changes to fixed term contracts under the Fair Work Act



Legal information for community organisations

This fact sheet covers the key changes to the *Fair Work Act 2009 (Cth)* (Fair Work Act) about limiting the use of fixed term contracts.



## Disclaimer

This fact sheet provides general information about fixed term contracts and the Fair Work Act. This information is a guide only and is not legal advice. If you or your organisation has a specific legal issue, you should seek legal advice before deciding what to do.

Please refer to [the full disclaimer](#) that applies to this fact sheet.

Under changes to the Fair Work Act (passed under the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022*), the length and number of fixed term contracts that an employer may offer to an employee to perform essentially the same work will be limited.



**The changes to fixed term contracts apply to contracts entered into from 6 December 2023.** Importantly, these restrictions also apply to maximum term contracts.

References to fixed term contracts in this fact sheet include a reference to maximum term contracts.

## Key changes to fixed term contracts

From 6 December 2023, unless an exception applies, an employer must not enter into a contract of employment with an employee, or prospective employee, for an identifiable period longer than two years (including any extensions), or a contract which may be extended more than once. There are also restrictions on some consecutive contracts. Among other things, consecutive contracts cannot be used to extend the identifiable period beyond two years.

These restrictions also apply to maximum term contracts.



### What is a maximum term contract?

A maximum term contract provides that the contract will terminate at the end of an identifiable period but can be terminated before the end of that period.

These restrictions do not apply to casual employees.

Employers will also be required to provide a **Fixed Term Contract Information Statement** to all employees entering into a fixed term contract, together with a **Fair Work Information Statement**.



### What is a Fixed Term Contract Information Statement?

The Fixed Term Contract Information Statement sets out details on the fixed term contract limitations, exceptions and the dispute resolution procedure.

The statement is available on the [Fair Work Ombudsman website](#).



### What is a Fair Work Information Statement?

The Fair Work Information Statement is a document that provides new employees with information about their working rights in Australia and the conditions of their employment.

Employers must give every new employee a copy of the Fair Work Information Statement before, or as soon as possible after, they start their new job. The statement is available on the [Fair Work Ombudsman website](#).

## What about fixed term contracts in place before 6 December 2023?

A fixed term contract that started before 6 December 2023:

- will continue in force until the end of the term, which can exceed two years, but
- (unless an exception applies) may not be extended or renewed after 6 December 2023 so that the total term would be more than two years



## Caution – when a fixed term employee may become an ongoing employee due to consecutive contracts

In circumstances where:

- your organisation has an employee whose existing employment contract (which is for an identifiable period) expires on or after 5 December 2023
- your organisation enters into a further fixed term contract (current contract) for the employee to perform the same, or substantially similar, work
- there is substantial continuity of the employment during the period between the previous contract terminating and the current contract coming into effect, and
- any of the following also applies:
  - the sum of the period the previous contract was in effect and the current contract is for two or more years
  - the current contract contains an option for renewal or extension
  - the previous contract contained an option for extension that has been exercised, or
  - the employee has been engaged under two previous consecutive fixed term contracts,

the employee will become an ongoing employee (if no exception otherwise applies).



## What constitutes ‘the same, or substantially similar, work’?

There is currently no guidance on what is meant by the term ‘the same, or substantially similar, work’ in the context of these new fixed term provisions.

However, in determining whether, overall, an employee is performing work which is the same or substantially similar to that which the employee was previously performing for the employer, it’s likely that the contract and employment relationship will be considered holistically.

In making this assessment, the following non-exhaustive factors may be considered:

- the responsibilities, duties and seniority of the employee (as set out in a position description but also in reality), noting that it will not matter if the precise duties have changed
- the skills, qualifications and expertise required
- the purpose of the role, and
- the location of the work

**Note** – the new provisions of the Fair Work Act relating to fixed term contracts expressly state that an employer must not change the nature of the work or tasks the employee is required to perform or otherwise alter an employment relationship, for the purposes of avoiding the operation of the new limitation provisions on fixed term contracts.

An employer may be subject to civil penalties if they are found in breach of these new provisions.



### Caution – consideration of previous fixed term contracts

A fixed term contract that was in place with an employee before 6 December 2023 will be considered in applying the new limits.

For example, if an employer enters into a new contract with an employee on or after 6 December 2023, a fixed term contract that existed between the parties before 6 December 2023 will count towards assessing if there have been more than two contracts, and in assessing how long the employee has been employed on a fixed term contract.



### A preschool example – fixed term contracts from 6 December 2023

The manager of a not-for-profit preschool is considering staffing arrangements for Term 1 2024. They have the following questions:

- **Can the organisation employ a new teacher from 1 January 2024 on a 12 month contract?**

Yes, fixed term contracts with an identifiable period of two years or less are permitted.

- **Can the teacher's contract include a right to extend their employment for a further term?**

Yes, that would be fine provided that the contract contains the right to extend the contract for only one additional term, and, if that right is exercised, the contract will be for a total term of two years or less.

- **The preschool has an existing teacher on a fixed term contract which expires on 30 June 2024. Will the school be able to offer them another fixed term contract after this?**

Fixed term contracts entered into before 6 December 2023 will continue to have effect, including that their fixed end date will apply. However, unless an exception applies, you cannot offer a new fixed term contract to the teacher next year if any of the following applies:

- the sum of the period the previous contract was in effect and the new contract is for two or more years
- the new contract contains an option for renewal or extension
- the previous contract contained an option for extension that has been exercised, or
- the employee has been engaged under two previous consecutive fixed term contracts

- **Can the organisation continue to use its template fixed term contract from 6 December 2023? It says the employer and employee can agree to renew the contract for up to two additional terms.**

No, unless an exception applies, the legislation prohibits the use of 'renewable contracts' where the contract provides an option or right to extend or renew the contract more than once.



# Exceptions to the new provisions

The new limitations on fixed term contracts won't apply to certain fixed term contracts, including where:

- the employee is engaged under the contract to perform only a distinct and identifiable task involving specialised skills
- the employee is engaged under the contract under a training arrangement (for example, as an apprentice or trainee)
- the employee is engaged under the contract to do essential work during a peak demand period
- the employee is engaged under the contract to work during emergency circumstances or a temporary absence of another employee (for example, parental leave)
- in the year the contract is entered into, the amount of the employee's earnings under the contract is above the high income threshold for that year (this is \$167,500 from 1 July 2023 and indexed each year)
- the contract relates to a position that is funded in whole or in part by government funding, or certain philanthropic funding (see below for more detail under 'Will philanthropic or membership funded positions be exempt?'), that is payable for a period of more than two years and the funding has no reasonable prospects of being renewed after the end of that period
- the contract relates to a governance position that has a time limit under the governing rules of a corporation or association, or
- a modern award that covers the employee includes terms that permit the use of fixed term contracts

The Minister can also make regulations to exempt certain types of contracts, for example to address sector specific arrangements.

As of November 2023, regulations have been made that exempt the following industries until 1 July 2024 – 'organised sport', 'high performance sport', 'live performance' and 'higher education'.



## Note

The employer bears the evidentiary burden to prove that an exception applies.



## When will the exceptions around government-funded positions apply?

The exceptions around government-funded positions will apply in limited circumstances.

An organisation will only be able to rely on this exception when the following conditions are satisfied:

- an employee's position is funded in whole or in part by government funding
- the funding is payable for a period of more than two years, and
- there are no reasonable prospects of the funding being renewed after the end of the period

Based on this wording, it's likely that the exception will only apply where the government is providing once-off funding for a particular type of work or the government makes it clear that funding is being provided for the last time.

The employer bears the burden of pointing to evidence that the exception applies. Unless there is documentation to support the argument that there are no reasonable prospects of the funding being renewed, it will be difficult to rely on this exception.

If the employer shows evidence that the exception applies, it's then up to the employee to prove that the exception does not apply.



### Will philanthropic or membership funded positions be exempt?

If a position is part-funded by philanthropic or membership funding and part government-funded, the position may fall within the exception around government-funded positions.

If a position is entirely funded by philanthropic or membership funding, there will only be an exception in the following circumstances:

- the fixed term contract is entered into on or after 6 December 2023 and before 1 July 2024
- the funding is provided:
  - by a philanthropic entity registered as a charity with the Australian Charities and Not for profits Commission, or
  - as a testamentary gift or testamentary contribution to a philanthropic entity for a charitable purpose
- the person who entered into the contract with the employee is not an associated entity of the philanthropic entity
- the funding is payable for a period of more than two years, and
- there are no reasonable prospects of the funding been renewed after the end of the period

‘Charitable purpose’ is defined broadly and can include for the purpose of advancing health, education, social or public welfare, religion, culture, etc.

Organisations are responsible for verifying the charitable status of the philanthropic entity to ensure the exception applies.



### Will the fixed term contract exception apply if an employee’s position is related to ongoing (core) funding which often has a reasonable chance of being renewed?

When considering whether the exception applies, a primary consideration is whether there is a reasonable prospect of the government funding or philanthropic funding (of the kind outlined above) being renewed.

If an employee’s position is related to ongoing funding, with a reasonable chance of the funding being renewed, the exception will **not** apply.

However, in circumstances where part of the employee’s position is funded by ongoing (core) government funding, and part of their position is funded by a government grant or philanthropic funding (of the kind outlined above) that has no reasonable prospects of being renewed (and is for longer than two years), whether the exception applies will be considered on a case by case basis.

Where possible, community organisations could use the core funding to fund permanent positions and the short-term funding to fund fixed-term contracts.



## What happens when an employee's hours are reduced because of funding changes?

If an employer would like to change an employee's ordinary hours of work due to funding changes, in circumstances where the employee has become an ongoing employee as a result of these changes to fixed term contracts under the Fair Work Act, then the employer must seek the employee's agreement in relation to this change.

If the employee agrees to reduce their hours, the organisation should formalise this change in writing, by having the employee sign a variation to the contract.

However, if an employee does not agree to reduce their hours, the organisation should seek legal advice. For example, the employer may need to consider making the role redundant.



## If an organisation wishes to terminate the employment of an employee, in circumstances where the employee has become an ongoing employee and government funding has not been renewed, will the organisation be responsible for redundancy pay to the employee?

Generally, an employee will be entitled to redundancy pay if they are terminated at the employer's initiative because the employer no longer requires the job to be done by anyone. However, there is no requirement to pay redundancy pay where the redundancy is due to the **ordinary and customary turnover of labour**.

Generally a small business employer (which has less than 15 employees) will also not need to pay redundancy pay.

### **Ordinary and customary turnover of labour exception**

If an organisation is unable to obtain ongoing funding for a particular position due to the loss of a government contract, it may be possible for the organisation to rely on the 'ordinary and customary turnover of labour' exception.

In determining whether the ordinary and customary turnover of labour exception applies, it is necessary to consider whether a reasonable person in the position of both parties to the employment contract would have understood or expected, from the beginning, that the job was not of a permanent or an ongoing nature, but would come to an end within a reasonably foreseeable timeframe.

Whether this exception will apply requires consideration of the whole of the employment relationship. If an organisation wishes to rely on this exception, it will need to properly explore potential redeployment options and comply with any consultation obligations.

Your organisation should seek legal advice before seeking to rely on the ordinary and customary turnover of labour exception.



## Can the community sector rely on the terms of a modern award that permit the use of fixed term contracts as an exception to the changes to fixed term contracts under the Fair Work Act?

The *Social, Community, Home Care and Disability Services Industry Award 2010* (**Social Award**) covers many community organisations.

Currently, the Social Award does not include any terms that permit the use of fixed term contracts.

## What if your organisation breaches the new requirements?

If a fixed term contract is made in breach of the new requirements, the contract will still be valid, except that the contract term that provides for its expiry on a set date will be of no effect. Essentially, the employee will become an ongoing employee.

This means the employee will generally gain:

- entitlements to notice of termination and redundancy payments, either through the National Employment Standards or their relevant industrial instrument (calculated from the start of the employment relationship), and
- access to unfair dismissal proceedings from the end of their employment

Employers who breach the new requirements or do not provide a Fixed Term Contract Information Statement may also be subject to civil penalties.

Under the new provisions, the Fair Work Commission is empowered to resolve disputes in relation to an employee's status as a fixed term employee if the parties can't agree to resolve the dispute at the workplace level. Both the employee and employer are allowed to take the dispute to the Fair Work Commission. Employees are still able to take civil action in the small claims court.

## Other protections

Anti-avoidance provisions in the Fair Work Act will apply from 6 December 2023. These provisions provide that a person must not do any of the following to avoid any right or prohibition under the new fixed term contract provisions:

- terminate an employee's employment for a period
- delay re-engaging an employee for a period
- not re-engage an employee and instead engage another person to perform the same, or substantially similar, work for the person as the employee had performed for the person
- change the nature of the work or tasks the employee is required to perform for the person, or
- otherwise alter an employment relationship





## Do the new pay transparency requirements apply to fixed term contracts?

Yes, the new pay transparency requirements apply to all employment contracts entered into from 7 June 2023.

This means that any new contracts can't include a pay secrecy clause or prohibit an employee from disclosing any terms and conditions of their employment that are reasonably necessary to determine their remuneration.

### Steps your organisation can take to prepare for these changes include:

- Reviewing how your organisation is using fixed-term labour and consider if this can continue under the new fixed term contract provisions
- Seeking legal advice about your specific situation to assess if an exception is likely to apply, and to minimise the possibility of falling foul of the new provisions
- Reviewing your fixed-term contract templates to ensure your organisation is compliant with the new fixed term contract provisions
- Ensuring you provide fixed-term employees with a Fixed Term Contract Information Statement for any contracts entered into from 6 December 2023



For more information, see:

- the [fact sheet on limiting the use of fixed-term contracts](#) published by the Department of Employment and Workplace Relations, and
- the [Fair Work Ombudsman webpage 'New rules for fixed term contracts'](#)
- the new [Fixed Term Contract Information Statement](#)