

Fixed term contracts

Legal information for community organisations

This fact sheet covers:

- ▶ what is a fixed term contract?
- ▶ what is a maximum term contract?
- ▶ what about fixed term contracts in place before 6 December 2023
- ▶ exceptions to the fixed term contract provisions
- ▶ what if your organisation breaches the requirements?



This fact sheet covers 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 amendments to the *Fair Work Act 2009 (Cth)* (**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 the same, or substantially similar, work is limited.



The changes to fixed term contracts apply to contracts entered into from 6 December 2023. However, the limitations will still apply to consecutive contracts to a fixed term contract entered before 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.



What is a fixed term contract?

A fixed term contract terminates at the expiration of the agreed date (**Termination Date**) and does not provide an unqualified right to terminate prior to the Termination Date. It can be terminated if the employee engages in serious misconduct before the Termination Date.

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 renewed or 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 by providing notice in accordance with the terms of the contract.

These restrictions do not apply to casual employees.

Employers are required to provide a [Fixed Term Contract Information Statement](#) to all employees entering into a fixed term contract, before, or as soon as practicable after, the contract is entered into, 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, the contract is entered into.

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 6 December 2023, and
- your organisation enters into a further fixed term contract (current contract) for the employee to perform the same, or substantially similar, work, and
- 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, which were for the employee to perform the same, or substantially similar, work and there was substantial continuity of the employment relationship

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



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

There is limited guidance on what is meant by the term ‘the same, or substantially similar, work’ in the context of the 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.

Note – the 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 limitation provisions on fixed term contracts.

An employer may be subject to civil penalties if they are found in breach of the fixed term contract 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 consecutive contract limits.

For example, if an employer entered 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 December 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 consecutive fixed term contract to the teacher if any of the following applies:

- the sum of the period the previous contract was in effect and the new contract is greater than two 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 to perform the same, or substantially similar, work and there was substantial continuity of the employment relationship

- **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 sum of the identifiable period and any other period for which the contract may be extended or renewed is greater than two years, or the contract provides an option or right to extend or renew the contract more than once.



Exceptions to the fixed term contract provisions

The 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 (for example, a technology professional engaged to provide specialised technology support on a particular project)
- 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 (for example, seasonal work)
- the employee is engaged under the contract to work during emergency circumstances or a temporary absence of another employee (for example, replacing a permanent employee who is on 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 \$175,000 from 1 July 2024 and indexed each year)
- the contract relates to a position that is funded in whole or in part by government funding, provided that the funding is payable for more than two years and there are no reasonable prospects that the funding will be renewed
- the contract relates to a governance position that has a time limit under the governing rules of a corporation or association
- a modern award that covers the employee includes terms that permit the use of fixed term contracts, or
- the *Fair Work Regulations 2009* (**Regulations**) permit the contract to be made



Contracts permitted by Regulations

From 1 November 2024, a new category of contracts have been permitted by the Regulations. The following types of contracts are now exempt from the fixed term contract provision.

Contracts permitted by Regulations

Some fixed term contracts which are entered into between 6 December 2023 and 1 November 2025 and cover certain roles relating to organised sport, high performance sport and in the higher education sector are excluded from the fixed term restrictions.

There are also exceptions relevant to some medical or health research sector employees and public hospital employees.

From 1 November 2024, new categories of fixed term contracts have been permitted by the Regulations. Fixed term contracts for **Not-For-Profit** sector employees who perform work that is funded in whole or in part by government, a philanthropic entity or through a testamentary gift or contribution will be exempt from the fixed term contract limitations, provided that the applicable pre-conditions are met.

Pre-conditions

The pre-conditions for **Not-For-Profit** sector contracts being exempt from fixed term limitations are as follows:

- the employer must be a philanthropic entity (registered with ACNC)
- the contract must relate to the performance of work that is wholly or partly funded by:
 - government (funding that is provided directly to an individual (for example, NDIS) and Commonwealth Home Support Program funding is excluded)
 - a philanthropic entity (other than the employer), or



- a testamentary gift or contribution made for a charitable purpose
- the funded program or project runs for no more than five years
- the term of the contract does not substantially extend beyond the program or project end date
- if the employee is already employed or has previously been employed by the employer, the fixed term contract cannot result in an employment period of more than seven years
- the employee cannot be covered by the Higher Education Industry-Academic Staff-Award 2020 or the Higher Education Industry-General Staff-Award 2020
- the fixed term contract must relate to government funding granted on or after 1 November 2024, and
- the fixed term contract must be entered into after 1 November 2024 and before 1 November 2025



Note

The person who wishes to rely on an exception bears the evidential burden.



For more information about these exceptions, see the [Fair Work Ombudsman webpage 'Additional fixed term contract exceptions'](#)



Which government-funding exemption will apply?

There are now two exceptions that apply to government-funded positions – one that applies for up to two years (Fair Work Act) and one that applies for up to five years (Fair Work Regulations).

A not-for-profit organisation will be able to rely on either exception if the specific conditions are satisfied.

Key differences between the exceptions include:

- the two year exception applies to all employers, while the five year exception applies only to employers who are philanthropic entities registered as a charity under the *Australian Charities and Not-for-profits Commission Act 2012 (Cth)*
- the two year exception requires that there is no reasonable prospect of the funding being renewed. Under the five year exception, the funding (and the contract) may be for a period of no more than five years. If the funding is renewed beyond this period, the employee will not be able to extend their fixed term contract.
- the five year exception only applies to projects or programs that are funded on or after 1 November 2024. Therefore, if the contract relates to work on a project or program that has already begun, only the two year exception is available.
- the five year exception relates to funding received from government, philanthropic entities and testamentary gifts or contributions for a charitable purpose, while the two year exception only relates to funding received from government.

Charitable purpose is defined broadly and can include: for the purpose of advancing health, education, social or public welfare, religion, culture, the natural environment, or the security or safety of Australia or the Australian public. It also includes promoting reconciliation, mutual respect and tolerance between groups of individuals that are in Australia, promoting or protecting human rights, preventing or relieving the suffering of animals, or any other purpose beneficial to the general public that is analogous to any of the above.



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 government funding, and part of their position is funded by a government grant or philanthropic funding (of the kind outlined above) that meets the requirements provided above (see 'Will philanthropic or membership funded positions be exempt?'), 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, including 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.



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.



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 make redundancy payments.

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 that the employment was not of a permanent or an indefinite 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.

What if your organisation breaches the requirements?

If a fixed term contract is made in breach of the 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 requirements or do not provide a Fixed Term Contract Information Statement may also be subject to civil penalties.

Under the provisions, the Fair Work Commission is empowered to resolve disputes in relation to an employee's status, the length, and exception to fixed term contracts 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 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 pay transparency requirements apply to fixed term contracts?

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

This means that any new employment 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. An employee may also ask any other employee their remuneration and any terms and conditions of their employment that are reasonably necessary to determine remuneration outcomes.

Steps your organisation can take to comply with these changes include:

- Reviewing how your organisation is using fixed-term labour and consider if this can continue under the 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 breaching the fixed term contract provisions
- Reviewing your fixed term contract templates to ensure your organisation is compliant with the fixed term contract provisions
- Ensuring you provide fixed-term employees with a Fixed Term Contract Information Statement and Fair Work 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 [Fixed Term Contract Information Statement](#)