



LIMITATIONS ON USING FIXED TERM CONTRACTS FROM 6 DECEMBER 2023

BY SIMON OBEE | 21 JUNE 2023 |

The law is changing from 6 December 2023 to severely limit the ability of employers to engage employees on fixed-term contracts.

In this article we take a deep dive into the practical effects of the changes to help employers get ready for the new rules.

What is changing?

From 6 December 2023 it will not be possible to enter into a fixed term contract which lasts for more than two years or that can be renewed more than once (subject to limited exceptions explained more fully below).

From 6 December 2023 employers will also not be able to renew an existing contract where it has already previously been renewed, or where the total length of the contracts will exceed two years (again, subject to limited exceptions explained more fully below).

The rules will apply to both “true” fixed-term contracts (ie those which have a specific end date, or terminate when a specific event occurs, but cannot be terminated earlier) and so-called “maximum-term” or “outer-limit” contracts (ie those which have a specific end date, or terminate when a specific event occurs, but can also be terminated earlier ie by the employer or employee giving notice).

The policy idea behind the new rules is to give employees greater job security by making it harder for employees to be engaged for a short or limited time.

Employers will also be required to provide employees entering into fixed term contracts with a Fixed Term Employment Information Statement, which the Fair Work Ombudsman will publish prior to 6 December 2023. We will update you when the statement is made available.

What about existing fixed-term contracts? What will happen to them on 6 December 2023?

For any employees currently on fixed-term contracts the new rules do not mean that their contracts will automatically become invalid on 6 December 2023.

For example, if you have an employee on a fixed-term contract which is due to end on 1 January 2024 and the contract has already been renewed once or more and/or has been ongoing for more than two years, nothing will happen on 6 December 2023.

However, when it comes to 1 January 2024 you would not be able to renew it at that point, if it has already been renewed previously. You would also not be able to renew the contract if the employee has already been employed for at least 2 years at that point. This is obviously subject to an exemption applying.

In other words, length of service and/or previous contract renewals that occurred prior to 6 December 2023 will be taken into account when assessing whether the employee has been employed for at least two years or if their contract has previously been renewed.

If it is not possible to renew or extend a fixed term contract, then the employer will face the option of treating the employee's employment as ending at that point or continuing to employ the employee on a permanent basis.

What are the exemptions which can be relied upon to continue to use fixed term contracts beyond two years or to renew a contract more than once?

The Fair Work Act 2009 lists the follow exemptions to the “two-year rule” and the “only one renewal” rule:

- (a) the employee is engaged under the contract to perform only a distinct and identifiable task involving specialised skills; or
- (b) the employee is engaged under the contract in relation to a training arrangement; or
- (c) the employee is engaged under the contract to undertake essential work during a peak demand period; or
- (d) the employee is engaged under the contract to undertake work during emergency circumstances or during a temporary absence of another employee; or
- (e) 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; or
- (f) the contract relates to a position for the performance of work that:
 - (i) is funded in whole or in part by government funding or funding of a kind prescribed by the regulations for the purposes of this subparagraph; and
 - (ii) the funding is payable for a period of more than 2 years; and
 - (iii) there are no reasonable prospects that the funding will be renewed after the end of that period; or
- (g) the contract relates to a governance position that has a time limit under the governing rules of a corporation or association of persons; or
- (h) a modern award that covers the employee includes terms that permit any of the circumstances mentioned in subsections 333E (2) to (4) to occur; or
- (i) the contract is of a kind prescribed by the regulations for the purposes of this paragraph.

There has not been a great amount of commentary about the operation of the exemptions. We provide some further commentary on each of these below.



(A) “The employee is engaged under the contract to perform only a distinct and identifiable task involving specialised skills”

In the Explanatory Memorandum to the new legislation, it says that this exemption is for where *“the employee has specialised skills that the employer does not have, but needs, to complete a specific task.”*

We therefore consider it will be possible to continue to use fixed-term contracts where the business is bringing in a specialist employee, with skills the business does not have, to work on a specific task or project.

(B) “The employee is engaged under the contract in relation to a training arrangement”

This exemption will mean it is still possible to engage apprentices under fixed-term contracts.

(C) “The employee is engaged under the contract to undertake essential work during a peak demand period”

This is likely to cover situations such as where employees are brought in on fixed-term contracts on a seasonal basis, eg to assist with harvesting, etc.

(D) “The employee is engaged under the contract to undertake work during emergency circumstances or during a temporary absence of another employee”

This could be used for fixed term contracts to cover employees absent on leave such as parental leave.

(E) “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”

The current high-income threshold is \$162,000 per annum, but is likely to increase on 1 July 2023. For employees earning above this (on a pro rata basis), the rules limiting the use of ongoing fixed-term contracts will not apply.

(F) “The contract relates to a position for the performance of work that:

- (i) is funded in whole or in part by government funding or funding of a kind prescribed by the regulations for the purposes of this subparagraph; and**
- (ii) the funding is payable for a period of more than 2 years; and**
- (iii) there are no reasonable prospects that the funding will be renewed after the end of that period;”**

This exemption has caused considerable confusion amongst organisations dependent on government funding, particularly in the not-for-profit and NDIS sectors.

It is clear from the wording of the exemption that to rely on it there can be *“no reasonable prospects of the funding being renewed”*. The exemption could not therefore be relied on (in our view) just because the funding is not guaranteed or because the amount the organisation is allocated each year is uncertain.



It is likely only to be of use for organisations where they have been told that they will not be eligible for future funding (which is why they would only be able to engage an employee for a fixed period of time).

(G) “The contract relates to a governance position that has a time limit under the governing rules of a corporation or association of persons”

Some corporations or associations have specific rules saying, for example, that the CEO must only be employed for a set period of time (eg three years), this could be relied upon to avoid the rules limiting the use of ongoing fixed-term employment.

(H) “A modern award that covers the employee includes terms that permit any of the circumstances mentioned in subsections 333E (2) to (4) to occur”

It will be important to check the terms of any modern award that applies to the business to see whether it provides that ongoing fixed-term engagement is possible. It will be rare that an award does provide for such a term.

(I) “The contract is of a kind prescribed by the regulations for the purposes of this paragraph”

The Government has reserved itself the ability to introduce regulations which will describe other situations where ongoing fixed-term contracts can be used, to date it has not exercised this power.

What about employees on visas?

We have received a larger number of queries about employees on visas and whether it would be possible to continue to engage them on fixed-term contracts which end at the expiry of their visa.

As will be noted from the above, there is no specific exemption which applies to visa workers, although in some circumstances it might be possible to rely on another exemption (e.g., the one about specialised skills for a distinct task, etc.).

If no exemption applies then for employees who will be employed for two years or more, they will need to be employed on a permanent basis. If/when their visa expires their employment will need to be terminated in the usual way (i.e., by the employer providing notice). We consider that termination of employment due to the expiry of a visa will be considered a valid reason for termination and therefore a successful unfair dismissal claim will be unlikely.

What are the consequences of not being able to extend / renew a fixed term contract?

If a business cannot rely on an exemption to extend or renew a fixed-term contract then they will be faced with the option of letting the employment terminate at the end of the contract or continuing to engage the employee on a permanent basis.

The rules around whether employees can claim unfair dismissal where their employment terminates at the end of the contract, and whether they will be entitled to redundancy pay or to be provided with notice are complex, please contact us if you require further advice in this area.



How should businesses be preparing for the changes?

We would suggest that businesses review all employees employed on a fixed term contract and work out if the new rules will mean that when the contract expires, they will not be able to extend or renew the contract, and/or whether extending/renewing the contract will mean relying on an exemption.

If an exemption will need to be relied upon, businesses should consider which exemptions are possible and seek advice if appropriate.

If no exemption is likely to be applicable, the business will need to consider what the future plans are for the relevant employees and to start preparing for the possible outcomes (eg allowing their employment to terminate at the end of the contract or keeping them on as a permanent employee, etc).

It would be best practice to consult with any employees that are likely to be affected by the changes, especially those employees who are used to being given periodic new fixed-term contracts each year.

The business should also consider whether it is viable to engage new employees on fixed-term contracts going forward. This should not be a problem if the business is only likely to need to employ such persons for up to two years, but could be problematic thereafter (unless an exemption applies).

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