



MEMBER ALERT — UPCOMING CHANGES TO FIXED-TERM EMPLOYMENT CONTRACTS (August 2023)

What's changing?

From 6 December 2023, it will be unlawful for members to engage employees on employment contracts that:

1. Are for a fixed period, or for total consecutive periods, longer than two-years; or
2. Provide an option to extend the contract more than once.

The limitations will only apply to new contracts entered into on or after 7 December 2023, but any contract that was in place prior to this date will count towards the relevant timeframes if a further consecutive contract is entered into.

Members will also be required to provide a *Fixed Term Contract Information Sheet*, which will be prepared by the Fair Work Ombudsman in due course, to any new employee that is engaged by the member on a fixed-term contract.

Are there any exceptions?

Yes. The limitations on fixed-term contracts won't apply where:

- An employee is engaged under the contract to perform only a distinct and identifiable task involving specialised skills (i.e. skills the member needs, but does not have, to complete the task).
- An employee is engaged under the contract in relation to a training arrangement (for example apprenticeship training contracts).
- An employee is engaged under the contract to undertake essential work during a peak demand period (e.g. seasonal work).
- An employee is engaged under the contract to undertake work during emergency circumstances or during a temporary absence of another employee (e.g. parental leave, sabbatical, long service 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 (currently \$167,500, prorated for part-time employees).
- The contract relates to a position for the performance of work that:
 - Is funded in whole or in part by government funding or funding of a kind prescribed by the regulations; and
 - The funding is payable for a period of more than two-years; and
 - There are no reasonable prospects that the funding will be renewed after the end of that period (**this is a relatively high bar, and members might be assisted by seeking confirmation from the government that the funding will not be extended beyond the two-year period**).
- The contract relates to a governance position that has a time limit under the member's governing rules (i.e. the rules specify the length of time the appointment can be in place).
- A modern award that covers the employee includes terms that permit any of the limitations to occur.
- The contract is of a kind prescribed by the Fair Work Regulations.

Where a member relies on an exception, the onus will be on that member to prove that the exception actually applies.

What happens if a member doesn't comply with the new rules?

The relevant contract will remain valid, but the fixed-term will have no effect, meaning that there will be an ongoing employment relationship. In addition, it might mean that the member is required to give the employee notice of termination, and in some instances, redundancy pay.

Additionally, the member may be subject to penalties for breaching the Fair Work Act 2009 (Cth), which can include big fines (up to \$939,000 per contravention).

Can't we just avoid the new rules?

No. A member can face big fines (up to \$939,000 per contravention) if it attempts to avoid the new rules by doing any of the following things:

- Terminating an employee's employment for a period;
- Delaying re-engaging an employee for a period;
- Not re-engaging an employee and instead engaging another person to perform the same, or substantially similar, work for the member as the employee performed;
- Changing the nature of the work or tasks the employee is required to perform for the member; or
- Otherwise altering an employment relationship.

How will the new rules apply in practice?

Scenario	Likely Outcome
A member engages an IT specialist to perform a specialist IT project, which will take three-years	Because it is a distinct and identifiable task involving specialised skills (that the member does not have), and because the IT specialist will work on the project only, the contract will likely be exempt from the limitation
A member engages an employee to perform administrative duties for 24-months, but extends the engagement with a new one-month contract for the employee to perform urgent tasks because other employees are temporarily absent	Because the employee is engaged under the one-month contract to undertake work during a temporary absence of another employee, the contract will likely be exempt from the limitation
A member engages an employee to undertake essential work during Christmas each year	Provided that Christmas is a peak demand period for the member, the contract will likely be exempt from the limitation
An employee is paid \$200,000 per year	Because the employee's earnings under the contract was above the high-income threshold (currently \$167,500), the contract will likely be exempt from the limitation

A member engages an executive director for a fixed period of three-years in accordance with the timeframes required by its rules	Because the contract relates to a governance position that has a time limit under the governing rules, the contract will likely be exempt from the limitation
A position is funded through fundraising, sponsorships and/or membership fees	Unless one of the relevant exemptions apply, this contract will be subject to the limitation
A position is funded by multiple sources, including in part by the Commonwealth Government	Provided that the funding is payable for a period of more than two-years and there are no reasonable prospects that the funding will be renewed after the end of that period, the contract will likely be exempt from the limitation
A worker's hours are reduced because of changes to funding	This should not affect the contract
The member engages an employee for a three-year fixed-term as a trainee for a Certificate III in Health Support Services	Because the relevant employee is engaged under the contract in relation to a training arrangement, the contract will likely be exempt from the limitation

What should members do now?

Members should review their template contracts to remove unlawful terms, and make relevant employees (such as managers and HR) aware of the new rules.

What will happen next?

The Commonwealth Government will likely release regulations on the new rules, which will hopefully provide greater clarity and further exceptions. We expect that might happen sometime in September 2023, after which we will release a further alert.

** This alert is intended to provide general information in summary form on legal topics, current at the time of the publication. The contents do not constitute legal advice and should not be relied upon as such. Formal legal advice should be sought in particular matters relevant to members.*