

AUSTRALIA: EMPLOYMENT LAW | JANUARY 2023

NEW TWO YEAR LIMIT IMPOSED ON THE USE OF TERM CONTRACTS

The *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) (**Act**) has introduced several changes in Australia, including by placing limits on the use of fixed and maximum term contracts (**fixed-term contracts**). The amendments will come into effect in December 2023.

What are the changes?

From that time, employers will be prohibited from entering into fixed-term contracts with employees, in circumstances where, among other things:

- the fixed-term contract has a term of more than two years;
- the fixed-term contract contains an option to renew for another term, such that the employee may be employed for an overall term that is more than 2 years; or
- the fixed-term contract provides for an option or right to renew or extend the contract more than once.

It will also be unlawful in some cases for parties to enter into a series of consecutive fixed-term contracts, including where the combined terms exceed 2 years, where an employee will be performing the same, or substantially similar work, under the contracts or there is a substantial continuity of the employment relationship between the contracts. Employers that contravene these provisions may be liable for civil penalties.

Are there any exceptions?

There are limited exceptions to the fixed-term contract prohibition including where an employee is engaged:

- to perform only a distinct and identifiable task involving specialised skills;
- under a contract in relation to a training arrangement;
- under a contract to undertake essential work during a peak demand period;
- to undertake work during emergency circumstances or during the temporary absence of another employee;
- and in the year the contract is entered into, the amount of the employee's earnings under their contract exceeds the high-income threshold for that year (which is currently \$162,000.00);
- under a contract that relates to a position that is funded in whole or in part by the government where the funding is payable for a period of more than 2 years and there are no reasonable prospects that the funding will be renewed after the end of that period;
- under a contract that relates to a governance position that has a time limit under the governing rules of a corporation or association of persons; or
- under a contract where the employer is permitted to enter into the fixed-term contract by a term specified in a modern award.

The burden of proving the existence of an exception rests with the employer.

Anti-avoidance provisions

The Act also introduces some anti-avoidance provisions, essentially aimed at preventing the circumvention of the prohibition relating to fixed-term contracts set out above.

Specifically, an employer must not take action to avoid the prohibition by:

- terminating then re-engaging an employee in order to break continuity of employment;
- delaying re-engaging an employee for the purpose of breaking continuity of employment;
- changing the work or tasks of the employee; or
- engaging another person to perform the same or substantially similar work for the employer as the employee had performed.

Fixed-term information statement

There is also a new information statement to be provided to fixed-term employees from December 2023. Specifically, employers will be required to provide employees with a fixed-term contract information statement before or as soon as practicable after the fixed-term contract is entered into.

A failure to provide the new statement may expose an employer to civil penalties.

What happens if a fixed-term contract is entered into in breach of the prohibition?

If an employer enters into an employment contract that is in breach of the prohibition, the term that provides for the contract to end at or on a specific date will have no effect. However, the remainder of the contract will operate unaffected.

This could result in an employee becoming entitled to notice of termination of their employment and redundancy pay, and may provide them with protection from unfair dismissal.

Resolving disputes

In the first instance, the parties are required to attempt to resolve any dispute relating to the new fixed-term contract provisions by discussions at the workplace level. However, if a resolution cannot be achieved, a party can refer the dispute to the Fair Work Commission. The Fair Work Commission will be able to deal with the dispute as it considers appropriate, and this may involve mediation, conciliation, making recommendations, expressing opinions or, if both parties agree, arbitration.

What next?

Given the potential adverse consequences arising from non-compliance with the prohibition, it is important that employers start planning for the commencement of these new provisions. To that end, we have put together the following checklist to assist clients.

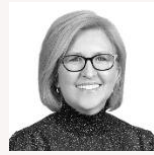
Employer checklist

Action items
Audit fixed-term contract use <ul style="list-style-type: none">• Check your current use of fixed-term contracts to assess whether they comply with the prohibition.• If your current use is inconsistent with the prohibition:<ul style="list-style-type: none">◦ Check whether any of the exceptions are likely to apply and, if they do, check whether there is sufficient evidence to justify the application of the exception (given burden of proof rests with employer);◦ Where no exceptions apply, consider what needs to be done to achieve compliance by December 2023 (noting the anti-avoidance provisions).
Update fixed-term contract templates <ul style="list-style-type: none">• For where no exception applies, review and edit your template fixed-term contracts to ensure that they:<ul style="list-style-type: none">◦ Are for a term of less than 2 years (or for a total term of less than 2 years with one option to renew included); and◦ Do not contain any clauses permitting multiple renewals.
Review recruitment practices <ul style="list-style-type: none">• Check whether recruitment practices are compliant with the prohibition.• Review the language of job advertisements to ensure consistency with the prohibition.
Fair Work Information Statement <ul style="list-style-type: none">• Access the Fixed-Term Contract Information Statement to be published by the Fair Work Ombudsman and introduce a procedure to ensure it will be provided to employees that are offered fixed-terms contracts.
Resource and personnel planning <ul style="list-style-type: none">• Consider and forecast any changes to staffing that may need to occur in light of the prohibition (noting the anti-avoidance provisions).
Training <ul style="list-style-type: none">• Train managers in the operation of the prohibition.

This article was prepared by Stephanie Nicol and Milly Khan. If you would like assistance, please get in touch with them, or one of our Employment team members.



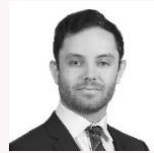
MARK SANT
Partner, Sydney
T +61 (0)2 9320 4601
E mark.sant@hfw.com



STEPHANIE NICOL
Legal Director, Sydney
T +61 (0)2 9320 4686
E stephanie.nicol@hfw.com



KRISTEN BARRATT
Special Counsel, Sydney
T +61 (0)2 9320 4669
E kristen.barratt@hfw.com



JAKE REDDIE
Senior Associate, Sydney
T +61 (0)2 9320 4606
E jake.reddie@hfw.com



STEVE BOWLER
Senior Associate, Perth
T +61 (0)8 9422 4724
E steve.bowler@hfw.com



ISABELLA PAGANIN
Senior Associate, Sydney
T +61 (0)2 9320 4661
E isabella.paganin@hfw.com



MILLY KHAN
Associate, Sydney
T +61 (0)2 9320 4607
E milly.khan@hfw.com



RUSH JAYAWEERA
Associate, Sydney
T +61 (0)2 9320 4641
E rush.jayaweera@hfw.com



LAURE-ELISE KENWORTHY
Associate, Sydney
T +61 (0)2 9320 4692
E laure-elise.kenworthy@hfw.com

[hfw.com](https://www.hfw.com)

© 2023 Holman Fenwick Willan LLP. All rights reserved. Ref:004728 HFWSYD\2935827-1

Whilst every care has been taken to ensure the accuracy of this information at the time of publication, the information is intended as guidance only. It should not be considered as legal advice. Holman Fenwick Willan LLP is the Data Controller for any data that it holds about you. To correct your personal details or change your mailing preferences please email hfwenquiries@hfw.com

Americas | Europe | Middle East | Asia Pacific