

Article Information

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Fixed Term Contracts - What you need to know about the new restrictions, and further exceptions

The new restrictions on fixed term contracts are commencing on 6 December 2023, and will apply to all contracts entered on or after that date. A handful of exceptions were written into the amendments, and now the Federal Government has added several other exceptions via regulation, that will apply only for contracts entered into prior to 1 July 2024. Our team has examined these new regulations, and below we explore their application and impact.

In late 2022, the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022 (SJPB Act)* was passed, substantially changing the fixed term contracts regime in Australia. The SJPB Act made job security an object of the *Fair Work Act 2009 (FW Act)*, and will significantly limit the circumstances in which an employer can offer fixed term employment for a period of more than two years. With these new restrictions coming into place on 6 December 2023, the Government has now introduced the *Fair Work Amendment (Fixed Term Contracts) Regulations 2023 (the Regulations)*, providing some additional exceptions to those outlined in the SJPB Act.

The current exceptions under the SJPB Act

The SJPB Act will allow fixed term contracts (which include *maximum* term contracts, being contracts with a fixed end date, but the ability to terminate earlier) beyond two years where:

- the employee is contracted to “perform only a distinct and identifiable task involving specialised skills”;
- there is a training arrangement;
- the contract is to accommodate essential work during an emergency or a period of peak demand, or to cover a temporary absence of another employee;
- the contract provides payment in excess of the high income threshold (currently \$167,500, increased each 1 July), or a pro rata amount for part-time or partial year employees;
- the work is funded by a government funding scheme of a kind prescribed by regulations and the funding is payable for more than two years, but there is no reasonable prospect that the funding will be renewed beyond that period;
- the work relates to a governance position that is time-limited by the governing rules of a corporation;
- a modern award provides that fixed term contracts of the relevant type are permissible (such as the awards covering schools and higher education); or
- the contract falls within a class prescribed by regulation.

For more details of around the fixed term contract limitations, see our earlier Insight [here](#), and our earlier Podcast episodes, available [here](#) and [here](#).

New exceptions under the Regulations

Following up on the final exception above, the Federal Government has now exercised the power to create additional exceptions by passing the Regulations which will create five additional exceptions for:

1. Organised sport;
2. High performance sport—international event organising bodies;
3. Live performance industry employees;
4. Higher education employees; or

5. Non-government funded – philanthropic entities.

These exceptions will commence along with the other SJPB Act provisions on 6 December 2023. However, unlike the other exceptions, those within the Regulations will only apply to contracts entered on or after 6 December and before 1 July 2024.

Organised sport

This exception will apply to contracts between an employee and employer, where the employee is employed to primarily perform in an organised sport as either an athlete, coach for an athlete, match official, or a performance support professional. Specifically, the exception will only apply if the employer is:

- a National Sporting Organisation or a National Sporting Organisation for People with Disability recognised by the Australian Sports Commission; or
- the governing body for an organised sport in a State or a Territory (or if split between metropolitan and non-metropolitan areas, the governing body for the non-metropolitan areas); or
- a body conducting a State or Territory level competition for an organised sport; or
- a member of, or a person otherwise affiliated with, an organisation or body referred to above.

In these circumstances, a “performance support professional” is someone whose work primarily involves the direct support or assessment of either an athlete’s participation in an organised sport, or the performance of a match official for an organised sport.

Examples of where this exception may apply would be to members of a sporting team competing in National or state equivalent competitions, or a physiotherapist contracted to provide services to a team of athletes, directly supporting the athletes as they are allowing them to meet the physical standards required to participate in the sport.

In addition, “performance support professionals” will include employees who analyse an athlete or team, or make decisions impacting the team as a result of analysis. For example, list managers, selectors, and performance analysts will be considered to “assess athletes” for the purposes of the exception, and therefore be considered “performance support professionals”, whereas a person who sells memberships to support the team will not be considered as a “performance support professional”, because the exception generally will not apply to administrative, management or non-player facing roles.

High performance sport—international event organising bodies

The Regulations define a “high performance sport” as a part of a sport that is performed at the elite level by athletes, including athletes with a disability.

Contracts entered into by an employer and an employee will be captured, where the employee is employed to directly support the administration or organisation of an international event for a high-performance sport. The employer entering the contract must be the international organising body or the Australian organising body for the international event.

The international event must not be regularly held in Australia, and either an international organising body or the international event has granted the employer the right to host the particular international event, or the employer is seeking to be granted the right to host the particular international event.

International events may include the Olympic Games, Commonwealth Games, the FIFA Football World Cup or ICC Cricket World Cup. However, the exception will not apply to events regularly held in Australia (even if Australia is required to seek the right to host the event). This means that events such as the Australian Open tennis tournament or the Formula One Australian Grand Prix will not be captured.

Live performance industry employees

This exception will apply to employees who, at the time the contract is entered into, are covered by the *Live Performance Award 2020*. Further, for the purposes of the new s333E(1)(b) of the FW Act, the fixed term contract cannot be for a term greater than 12 months.

Higher education employees

Contracts entered into by an employer and an employee who, at the time it is entered into (if between 6 December 2023 and 1 July 2024), is covered by the *Higher Education Industry—Academic Staff—Award 2020* or the *Higher Education Industry—General Staff—Award 2020* will be exempt from the restrictions.

Non-government funded—philanthropic entities

This exception expands upon the funding exception which will be the new s 333F(1)(f)(i) of the FW Act. The Regulations provide that contracts for the performance of work will be exempt where:

- the funding is received from a philanthropic entity registered as a charity under the *Australian Charities and Not-for-Profits Commission Act 2012* with the charitable purpose of advancing health; or
- the contract is funded by a gift in a will to a philanthropic entity for a charitable purpose within the meaning of the *Charities Act 2013*.

The employer who entered into the contract with the employee must not be an associated entity of the philanthropic entity.

Conclusion

These new exceptions are likely to have a limited and specific impact, given the industries/employees they apply to, and the temporary nature of their application.

Regardless, they serve as a reminder that businesses only have until **6 December 2023** before the restrictions on the use of fixed term contracts commence, which will likely have a significant impact on hiring practices for many employers.

If you or your business uses fixed term contracts, or seeks to do so, and you are unsure whether your proposed use of fixed term contracts are compliant, please contact Piper Alderman for specific advice.