

# Fixed Term Contracts

## Frequently Asked Questions



### Technical Questions

Question	Answer
<i>Does an ACT Government initiative meet the requirements for a government contract exception?</i>	<p>There is limited advice from the Fair Work Commission available at this stage to address this question in full. Where the funding is linked to Federal Government funding and initiatives, we would agree that these would meet the exception rules. The employer bears the burden of proving the exception – therefore, if the employer is able draw a strong case that the funding is for a specific project for a specific period and there is no possibility of the role being ongoing in nature then there may be an argument that it could be considered an exception under the legislation.</p> <p>However, we should be extremely careful in applying this exception where funding is provided by our own government. An ACT government funded initiative that has been renewed previously would not likely be supported as an exception.</p>
<i>Can you provide more information about what would meet the requirement for a government contract exception?</i>	<p>Project funding from the Federal Government would meet this exception.</p> <p>As noted above, the ACTPS should be extremely careful in applying the exception where the project is funded by the ACT Government. Strict oversight of the application of this exception will be required and all the following would need to be demonstrated:</p> <ul style="list-style-type: none"><li>• that it was a project of a once off nature,</li><li>• it was a contained and discrete project,</li><li>• It is unlikely to require more than one extension of contract, and</li></ul> <p>It is unlikely to ever become ongoing if ongoing funding becomes available. So for example, if your funding is provided through a budget bid each year and has been provided more than once, this would indicate that this is work of an ongoing nature and the ACTPS should not be seeking to apply an exception because of its financial governance requirements.</p>
<i>Are individuals on Boards and Committee contracts subject to the FWA rules?</i>	<p>Contracts for a governance position that is for a limited time and based upon the rules of the corporation or associations are exceptions under the legislation, this would include contracts for individuals on Boards and Committees.</p>

<p><i>Is there an exception available for visa holders who are waiting for permanent residency as they often require multiple extensions of their contract?</i></p>	<p>At this time, there is no exception available for visa holders. When a contract breaches the terms of the FW Act (either through going over 2 years duration or through renewal more than twice) the contract remains in place, but the fixed term end date of the contract is not enforceable. The employee then becomes entitled to unfair dismissal protections, notice period requirements and redundancy payments.</p> <p>However, if the visa holder has been engaged in a contract to work on a specific task that requires specialised skills, for example, a research specialist engaged to conduct a distinct and confined research project, they may have an exception for 'specialised skills' under the new rules.</p>
<p><i>Can employees opt-in to the new contract arrangements if they prefer to remain a temporary employee?</i></p>	<p>The legislation does not provide for an employee to opt in or out of the new obligations towards permanent appointment.</p>
<p><i>Does the legislation apply retrospectively? Are there implications for employees currently engaged on fixed term contracts that end after 6 December 2023?</i></p>	<p>Fixed term contracts entered into before 6 December must be considered when applying the consecutive contracts limitation for a new fixed term contract that is entered into on or after 6 December 2023.</p>
<p><i>Can you engage a temporary employee in a role and then engage a different temporary employee in the same or similar role afterwards?</i></p>	<p>The anti-avoidance protections provide that re-engaging an employee and employing someone else to do the same or substantially similar work is a breach of the legislation. This action may lead to civil penalties and the employee may also bring about a case of adverse action against the Territory.</p> <p>Instead, managers should consider whether the role should be made ongoing if subsequent contracts are entered into for the same role.</p> <p>It is very important that managers do not seek to avoid renewal of a contract under the anti-avoidance rules, they should not end a period of temporary employment where additional work for the employee is available.</p> <p>Managers should also not change the type of work or tasks that the employee does or change the employment relationship to avoid the new rules under the anti-avoidance protections.</p>
<p><i>How do the new rules apply when an employee is undertaking a HDA or secondment role and a temporary employee is engaged to backfill the role?</i></p>	<p>The new rules do not apply to permanent officers in the ACTPS who are acting in other roles in a transfer or a HDA arrangement, it only applies to temporary fixed term contract employees.</p> <p>An employee who holds permanent employment and also temporary employment with the ACTPS may still be required to consider whether their temporary employment contract should also be made permanent.</p>

<p><i>Are the PSM Act provisions of fixed term contracts up to 5 years also redundant due to FW provisions?</i></p>	<p>The Fair Work Act provisions will prevail over any of our ACT employment legislation as we do not have exclusions from Commonwealth legislative power like the States do. However, there may be occasions where fixed term contracts up to 5 years will still remain appropriate; that is, where the terms of the contract fall under one of the exceptions. For example, an employee takes leave to accompany a partner on a posting for 3 years and the workplace backfills the role for a period of 3 years under the exception of 'temporary absences'.</p>
<p><i>Do the new legislative rules override merit and equity set out in the PSM Act?</i></p>	<p>The new legislation provides that a cessation date on a fixed term contract no longer has any legal effect if the temporary contract rules are breached. Consideration of how breaches of the legislation will be managed by the ACTPS and whether conversion to permanent employment will be an appropriate recourse are currently under consideration by government. Where there is ongoing work available past the cessation date, we should follow our usual recruitment practices (i.e. advertise the role as permanent and then apply the merit and equity principles). Areas should be more aware of milestone dates when they have employees engaged on fixed term contracts and ensure that recruitment processes are run wherever necessary.</p>
<p><i>If a temporary employee holds an exception to conversion under the FW Act conversion rules, does this mean they will have an exception under the new fixed term contracts rules?</i></p>	<p>Exceptions to the FW Act conversion rules are <u>separate and different</u> to the new fixed term contract rules under the FW Act. However, there may be some similarities to matters that are considered an exception under the fixed term contract provisions and casual conversion. As previously noted, we have identified that there is no legislative exception for a visa holder/non-permanent resident. We are looking into this issue further and will provide updates after this matter is considered further.</p>
<p><i>How do we manage Labor Hire employees engaged on temporary contracts?</i></p>	<p>The ACTPS is not an employer of labour hire employees, they have their own employer who will need to apply the new legislative rules themselves.</p>
<p><i>A new contract is required to be entered into when a temporary employee is offered higher duties arrangements. How will this interact with the new legislation?</i></p>	<p>The FW Act captures employees working in the same role undertaking consecutive contracts. Where a temporary employee enters a new contract for a different position with different work level standards, this would not necessarily enliven the legislative obligations to consider whether the position should be made permanent.</p> <p>However, the new anti-avoidance protections provide that the employer should not change the type of work or tasks that an employee does or change the relationship to avoid the new rules. Evidence that the HDA arrangement is not an attempt to circumvent the rules should be retained (e.g. undertake a selection process that demonstrates that the employee won the HDA on merit).</p>

<i>Can we end a temporary employee to avoid having to convert them?</i>	No, the new FW Act rules do not contemplate that you will resolve this matter by ceasing the contract when there is further work available to them, as this is not a valid reason to cease. Instead, the FW Act contemplates that you will do the opposite – make the employee permanent.
<p><i>(a) If I submit an extension to a contract before 6 December 2023, and the extension is from a date after the 6 December 2023, am I doing the wrong thing if it is the second extension?</i></p> <p><i>(b) If I enter a new contract before the 6 December 2023 to commence from a date after the 6 December 2023, am I doing the wrong thing if it is the second contract?</i></p>	<p>a) It is important to distinguish between a contract extension and a new contract. A contract extension is an agreement between the parties to an existing contract to extend the terms of that agreement for an additional period of time. A contract extension entered into after 6 December 2023 must not exceed two years in total.</p> <p>b) If it is a new contract that is entered into after 6 December 2023, the length of the previous contract will count towards the two-year limit.</p>
<p><i>(a) If I submit a contract extension after the 6 December, will the previous extensions that occurred before the 6 December count?</i></p> <p><i>(b) If I enter a new contract after the 6 December, will the previous contract that occurred before the 6 December count?</i></p>	<p>a) Again, as above we need to distinguish between an extension and a new contract. An extension entered into after 6 December will just extend the period of time of the contract that was in place.</p> <p>b) Any previous contract that was in force prior to 6 December 2023 will count towards the limits.</p>
<i>I advertised a position with union consultation for a period of 12 months with the possibility of extension. They have been working with me for 20 months – do I need to warn them that the contract will end in four months and readvertise?</i>	If the role is likely to extend past 2 years, then you must consider making the role permanent, unless it meets one of exceptions under the legislation.
<i>What happens if I have finalised a selection report and my temporary employee has been successful in winning the position permanently. They have already been extended previously or have been in the position for two years. How can I bridge the gap between the end of the current contract and the date of effect of the appointment?</i>	<p>This is not a recommended practice and managers should be mindful of important milestones and be proactive about engaging in recruitment practices prior to a contract extension being necessary.</p> <p>In this scenario, you would have to offer a new contract which will breach the new legislation and technically civil penalties could apply. The risk of the employee seeking assistance of the Fair Work Commission to enforce legal rights is very low due to the ACTPS processes being undertaken to make the employee permanent. The terms of the contract remain in place, but the fixed term end date would not have legal effect.</p>
<i>We have someone on birth leave and they extended their leave again. The temporary employee backfilling the position has already been extended once. Does this mean I have to find someone new for the temporary role?</i>	No. An exception will apply in this circumstance as it involves a temporary absence and replacement of an employee. Even if an exception was not available, the anti-avoidance prohibitions would not support ending

	the temporary employee's engagement because you were seeking to avoid breaching the new rules.
<i>I have a successful applicant that is currently on a temporary contract doing a similar job to the one that I have advertised. Does this mean I have to count their period of employment and extension when employing them?</i>	The legislation will capture a previous contract where "the previous contract was for the employee to perform the same, or substantially similar, work for the person as the employee is required to perform under the contract". Therefore, if the previous job is substantially similar it will count for the purposes of the new rules.
<i>I have a temporary contract to process for a former employee who finished a month ago. The position for the new contract is similar to the previous one. What is a "substantial break" in employment. Can I reemploy them?</i>	Further details of what is considered a substantial break in employment have not been provided yet by the Fair Work Ombudsman. It is considered a question at law yet to be defined or tested. It will likely depend upon the circumstances of the case. In the absence of firmer advice, we would consider that one month may not necessarily meet the requirements of a substantial break, but it would depend upon the individual circumstances.
<i>People who are high income earners are exempt from the limitations. What is the starting salary for high income earners and does it include allowances and ARINS?</i>	<p>The high-income threshold is based on the calculation method in the Fair Work Amendment (Fixed Term Contracts) Regulations 2023 – it is currently \$167,500 a year. ARIns count as salary and should be included in the salary calculations for the purposes of the legislation. As for allowances, this will depend on the particular allowance type and whether it is annualised salary (which will count as salary) or per occasion (which will generally not count as salary).</p> <p>Directorates should be mindful of the new rules when removing an ARIn (e.g. through a review or underperformance/misconduct process) in case the substantial salary of the employee without the ARIn in place is subsequently captured by the new rules.</p>
<i>If I have someone who is on higher duties and has asked if they can be extended for 6 months do I have the option to extend my temporary employee for the second time?</i>	If the employee is a permanent employee on higher duties they will not fall under the new rules. If it is a temporary employee, the new rules apply. However, if the contract relates to backfilling a temporary absence of an employee there is an exception available for this purpose.
<i>Do the fixed term contract rules apply when an employee holds both a permanent role and a temporary contract with the ACTPS?</i>	The legislation requires consideration of a fixed term contract arrangement between an employer and employee. It does not provide that because an employee holds permanency in a role with the same employer, it has an exception relating to their fixed term contract. Therefore, until we are advised further, the temporary contract should be considered in isolation.
<i>Do JMOs meet the requirements under the specialised skill or training exception?</i>	We would agree that JMOs would fall under a training program exception, noting that the performance of JMO duties form part of their training requirements.

## Process Questions

Question	Answer
<i>At what stage do compliance checks need to be undertaken?</i>	At advertising stage, you do not know if you will get a successful candidate that is external/on a contract or already holds a permanent role – so we must await outcome of decision before compliance checks are done on the recruitment activity. We are implementing a HR compliance check before a new or an extension of contract is offered.
<i>What are the possible implications if I submit an extension to a current contract before 6 December 2023 which does not comply with the limitations? Will this be process by Payroll?</i>	Payroll will process the contract if an appropriate delegate has actioned it. The OIRWS team will undertake an audit of any new or extensions of contract approved by delegates before 6 December (but commence after 6 December) and will contact relevant HR areas to review the data for compliance.
<i>If a contract is issued before 6 December 2023, but will not commence until after 6 December 2023, do we need to reissue the contract to include the Fixed Term Contract Information Statement (FTCIS)?</i>	No. The contract does not need to be reissued, however the FTCIS should be provided as soon as possible. An initial audit will be completed by OIRWS for all directorates and we will advise where there may be gaps and seek the directorates assistance in issuing the FWC FTCIS.
<i>When temporary employees alter their work hours using the OneGov Change Working Hours form, they are engaged on a new temporary contract as the standard change of hours process is only for Permanent Officers. Would this then count as a renewal or consecutive contract?</i>	<p>No, however only where no other changes to the contract occur. The work hours must be the only change for it not to be counted as a renewal or consecutive contract.</p> <p>OIRWS are currently exploring making changes to this process so a new contract is not required.</p>