

Explanatory Statement

Issued by the authority of the Minister for Employment and Workplace Relations

Fair Work Act 2009

Fair Work Amendment (Fixed Term Contracts) Regulations 2024

Authority

The *Fair Work Act 2009* (the Act) provides a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians. The *Fair Work Regulations 2009* support matters of detail within the legislative framework contained in the Act.

Subsection 796(1) of the Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Section 333F of the Act provides, in part, that the Governor-General may make regulations prescribing exceptions that may apply to the limitations on fixed term contracts (paragraph 333F(1)(i) of the Act), and that specify types of funding for the purposes of the exception in subparagraph 333F(1)(f)(i) of the Act.

Row 27 of the table at section 12 of the *Legislation (Exemptions and Other Matters) Regulation 2015* provides that sunseting of legislative instruments does not apply to regulations made under the Act. Pursuant to section 12, these regulations would not be subject to ordinary sunseting processes.

The Act specifies no conditions that need to be satisfied before the power to make the proposed Regulations may be exercised.

Purpose and Operation

The purpose of the Instrument is to support amendments in the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2023* (Secure Jobs, Better Pay Act).

On 6 December 2023, the provisions of the Secure Jobs, Better Pay Act that limited the use of fixed term contracts came into effect. These provisions were introduced to provide protections for employees engaged under successive fixed term contracts, while allowing employers to continue to use fixed term contracts for legitimate and necessary purposes.

Section 333E of the Act limits employers from using fixed term contracts that exceed two years or two contracts, whichever comes first. Section 333F provides exceptions for certain fixed term contracts so that the limitations will not apply. Relevantly:

- Subparagraph 333F(1)(f)(i) allows an exception where the contract relates to work funded in whole or in part by government funding or other funding prescribed by the regulations, where there are no reasonable prospects that the funding would be renewed.
- Subparagraph 333F(1)(i) allows an exception for contracts of a kind prescribed by the regulations.

In November 2023, the Fair Work Regulations 2009 (Principal Regulations) were amended by the *Fair Work Amendment (Fixed Term Contracts) Regulations 2023* (the 2023 Regulations). The 2023 Regulations:

- Expanded the exception in subparagraph 333F(1)(f)(i) of the Act to include positions funded by philanthropic entities, or by testamentary gifts or contributions given to philanthropic entities for charitable purposes, for contracts entered into on or after 6 December 2023 and before 1 July 2024 (subregulations 2.15(1), (3), (5), and (7) of the Principal Regulations); and
- Prescribed, for the purposes of paragraph 333F(1)(i) of the Act, exceptions for positions in organised sports, high performance international event sporting bodies, the live performance industry and higher education, for contracts entered into on or after 6 December 2023 and before 1 July 2024 (subregulation 2.15(6) of the Principal Regulations) (collectively, the Regulations Exceptions).

The Instrument amends the Regulations Exceptions as follows:

- For organised sports and high performance international event sporting bodies, funding by non-government philanthropic entities, and the live performance industry, extend the Principal Regulations to include contracts entered into on or after 6 December 2023 and before 1 November 2025. This would allow industry and employee representative bodies to reach agreement and propose future amendments to the Principal Regulations.
- For higher education, extend the Principal Regulations to include contracts entered into on or after 6 December 2023 and before 1 January 2025. This would allow industry and employee representative bodies to reach agreement on appropriate and necessary amendments to the relevant awards so the modern awards exception in paragraph 333F(1)(h) would apply.

Regulatory Impact

The Office of Impact Analysis has advised that an Impact Analysis is not required for this Instrument as the reforms are unlikely to have more than a minor regulatory impact (OBPR22-02411).

Commencement

The Instrument commences on the day after it is registered.

Consultation

The Department of Employment and Workplace Relations consulted with referring states and territories under the *Intergovernmental Agreement for a National Workplace Relations System for the Private Sector*, and the Committee on Industrial Legislation.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Fair Work Amendment (Fixed Term Contracts) Regulations 2024

The *Fair Work Amendment (Fixed Term Contracts) Regulations 2024* (Instrument) is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Instrument

The Instrument amends the *Fair Work Regulations 2009* (the Regulations) to extend the current exceptions to the limitations on the use of fixed term contracts for contracts entered into before 1 January 2025 for employees in the higher education industry, and for contracts entered into before 1 November 2025 otherwise.

Human rights implications

The Regulations engage the following rights:

- the right to the enjoyment of just and favourable conditions of work under Articles 6 and 7 of the International Covenant on Economic Social and Cultural Rights (ICESCR).

Right to work and rights in work

Article 6 of the ICESCR requires the State Parties to the Covenant to recognise the right to work and to take appropriate steps to safeguard this right. The United Nations Committee on Economic, Social and Cultural Rights has stated that the right to work in Article 6(1) encompasses the need to provide the worker with just and favourable conditions of work.

Article 7 of the ICESCR requires the State Parties to the Covenant to recognise the right of everyone to the enjoyment of just and favourable working conditions.

The Regulations currently provide certain exceptions to the limitation on the use of fixed term contracts. As with the exceptions contained in the primary legislation, the employer bears the evidentiary burden to prove that an exception applies. The Instrument would extend those exceptions for a short period, in order to allow employer and employee representatives the further opportunity to reach agreement on the appropriate scope of the exception in their industries, including by applying for amendments to relevant modern awards.

Where a fixed term contract contravenes the exceptions provided for in the *Fair Work Act 2009* (the Act) and/or the Regulations, the employee is not deprived of their employment. Rather, the employment contract would continue as if the fixed termination date had no effect, and the employee would be entitled to notice of termination and redundancy pay under the Act.

The Regulations facilitate just terms and conditions of employment for fixed term employees under Article 7 of the ICESCR, including protecting employees' rights not to be unfairly deprived of work, by ensuring that fixed term contracts are used only where subject to an appropriate exception, and that employees are otherwise entitled to the same rights and entitlements under the Act.

Conclusion

The Instrument is compatible with human rights because to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.

The Hon. Tony Burke, Minister for Employment and Workplace Relations

FAIR WORK AMENDMENT (UNPAID PARENTAL LEAVE) REGULATIONS 2024

EXPLANATION OF PROVISIONS

Section 1 - Name

This section would provide that the title of the Regulations is the *Fair Work Amendment (Fixed Term Contracts) Regulations 2024*.

Section 2 - Commencement

This section would provide for the Regulations to commence on the day after this instrument is registered.

Section 3 - Authority

This section would provide that the instrument is made under the *Fair Work Act 2009*.

Section 4 - Schedule(s)

This section would provide that each item that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1 – Amendments

Fair Work Regulations 2009

Item 1 – Subparagraph 2.15(1)(c)(ii)

This item would extend the operation of subparagraph 2.15(1)(c)(ii) of the *Fair Work Regulations 2009* (Fair Work Regulations) to contracts related to positions in organised sports, entered into on or after 6 December 2023 and before 1 November 2025.

Item 2 – Subparagraph 2.15(3)(e)(ii)

This item would extend the operation of subparagraph 2.15(3)(e)(ii) of the Fair Work Regulations to contracts related to positions in high performance sport – international event organising bodies, entered into on or after 6 December 2023 and before 1 November 2025.

Item 3 – Subparagraph 2.15(5)(b)(ii)

This item would extend the operation of subparagraph 2.15(5)(b)(ii) of the Fair Work Regulations to contracts related to positions in the live performance industry, entered into on or after 6 December 2023 and before 1 November 2025.

Item 4 – Subparagraph 2.15(6)(b)(ii)

This item would extend the operation of subparagraph 2.15(3)(e)(ii) of the Fair Work Regulations to contracts related to positions in the higher education industry, to include contracts entered into on or after 6 December 2023 and before 1 January 2025.

Item 5 – Subparagraph 2.15(7)(c)(ii)

This item would extend the operation of subparagraph 2.15(7) of the Fair Work Regulations to contracts where the position is funded by a philanthropic entity, or by a testamentary gift or contribution given to a philanthropic entity for charitable purposes, entered into on or after 6 December 2023 and before 1 November 2025.