

Explanatory Statement

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

Fair Work Act 2009

Fair Work Amendment (Fixed Term Contracts – Exceptions Measures) Regulations 2024

Authority

The *Fair Work Act 2009* (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* (Principal Regulations) 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 established by the Act.

As regulations made under the Act, the *Fair Work Amendment (Fixed Term Contracts – Exceptions Measures) Regulations 2024* (Instrument) are specifically exempted from sunseting pursuant to section 12 of the *Legislation (Exemptions and Other Matters) Regulations 2015*.

Purpose and Operation

Sections 333E to 333L of the Act provide for the limitation on the use of fixed term contracts, including provisions dealing with disputes and anti-avoidance. The Act prohibits the use of fixed term contracts for the same role beyond two years or two consecutive contracts (whichever is shorter), including renewals. Section 333F of the Act provides principles-based exceptions for certain fixed term contracts to which the limitation will not apply. Section 333F also contains regulation making powers that allow for regulations to be made prescribing exceptions to the limitations on certain fixed term contracts.

The provisions provide protections for employees engaged under successive fixed term contracts, while allowing employers to continue to use fixed term contracts for legitimate purposes. The provisions commenced operation on 6 December 2023.

The purpose of the Instrument is to amend the Principal Regulations to:

- repeal the current exception from the fixed term provisions of the Act that applies to the live performance sector
- prescribe an extension to the period of operation of the existing higher education sector exception to contracts entered into on or after 6 December 2023 and before 1 November 2025
- repeal the current exception for non-government funded philanthropic entities

- prescribe further exceptions, for the purposes of paragraph 333F(1)(i) of the Act, in relation to the philanthropic and not-for-profit, medical and health research, and public hospital sectors. These exceptions will apply to contracts entered into on or after commencement and before 1 November 2025.

These changes respond to circumstances in the relevant sectors and were developed in consultation with stakeholders.

Regulatory Impact

The Office of Impact Analysis has advised that an impact analysis is not required as it is likely to have very minor impact.

Commencement

The Instrument commences seven days after it is registered.

Consultation

The Department of Employment and Workplace Relations undertook consultation with key stakeholders in sectors who will be affected by the Instrument, relevant Commonwealth agencies, the members of the Committee on Industrial Legislation (a subcommittee of the National Workplace Relations Consultative Council, established under the *National Workplace Relations Consultative Act 2002*), and states and territories under the *Intergovernmental Agreement for a National Workplace Relations System for the Private Sector*.

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 – Exceptions Measures) Regulations 2024

The *Fair Work Amendment (Fixed Term Contracts – Exceptions Measures) 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* (Principal Regulations) to:

- repeal the current exception from the fixed term provisions of the Act that applies to the live performance sector
- prescribe an extension to the period of operation of the existing higher education sector exception to contracts entered into on or after 6 December 2023 and before 1 November 2025
- repeal the current exception for non-government funded philanthropic entities
- prescribe further exceptions, for the purposes of paragraph 333F(1)(i) of the *Fair Work Act 2009* (Act), in relation to the philanthropic and not-for-profit, medical and health research, and public hospital sectors. These exceptions will apply to contracts entered into on or after commencement and before 1 November 2025.

Human rights implications

The Instrument engages the following right:

- 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 Principal Regulations currently provide certain exceptions to the limitation on the use of fixed term contracts under the Act.

The Instrument extends the current exception for the higher education sector for a short period. This promotes the right to just and favourable conditions of work by allowing employer and employee representatives additional time to reach agreement on appropriate and necessary amendments to relevant modern awards in relation to fixed term contracts. The modern awards exception in paragraph 333F(1)(h) of the Act would apply to such arrangements.

The Instrument repeals the current exception for the live performance industry as this exception is no longer necessary following the Fair Work Commission's variation of the *Live Performance Award 2020*. Employees in the live performance industry can now be engaged on fixed term contracts consistent with the Act, or Live Performance Award relying on the modern award exception in paragraph 333F(1)(h) of the Act. Repealing the exception promotes workers' right to just and favourable working conditions by giving effect to the award variations. These variations reflect the agreement reached between employer and employee representatives on the appropriate and necessary use of fixed term contracts in the live performance industry.

The Instrument repeals the current exception for non-government funded philanthropic entities as it is no longer appropriately adapted to the needs of employers and employees. The Instrument also provides certain new exceptions to the limitation on the use of fixed term contracts for charities, medical and health research, and public hospitals.

The Instrument balances the aim of providing secure and, where applicable, permanent work for employees with the uncertain nature of funding in these sectors. As with the exceptions contained in the primary legislation, the employer bears the evidentiary burden to prove that an exception applies. The new exceptions include certain eligibility requirements that need to be met to ensure fixed term contracts are not inappropriately used where permanent employment could be provided. Further, the new exceptions, as with all exceptions in the Instrument, are time limited.

Where a fixed term contract contravenes the exceptions provided for in the Act and/or the Instrument, 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. This positively engages the right to work.

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.

Senator the Hon Murray Watt, Minister for Employment and Workplace Relations

Fair Work Amendment (Fixed Term Contracts – Exceptions Measures) Regulations 2024

EXPLANATION OF PROVISIONS

Section 1: Name

1. This section states that the title of the Regulations is the *Fair Work Amendment (Fixed Term Contracts – Exceptions Measures) Regulations 2024* (Instrument).

Section 2: Commencement

2. This section provides for the provisions of the Instrument to commence seven days after it is registered.

Section 3: Authority

3. This section provides that the Instrument is made under the *Fair Work Act 2009* (Act).

Section 4: Schedules

4. This section provides 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] – Regulation 1.03

5. This item inserts a definition of ‘philanthropic entity’ into regulation 1.03 of the *Fair Work Regulations 2009* (Principal Regulations), which contains a list of defined terms for the purposes of the Principal Regulations.
6. ‘Philanthropic entity’ is defined as an entity registered under the *Australian Charities and Not-for-profits Commission Act 2012* (ACNC Act) as the type of entity mentioned in column 1 of item 1 of the table in subsection 25-5(5) of the ACNC Act. This reflects the change at item 4 of the Instrument to repeal the existing subregulation 2.15(7), which currently contains the same definition of ‘philanthropic entity’.

Item [2] – Subregulation 2.15(5)

7. This item repeals the exception for contracts in the live performance industry. This exception is no longer necessary following the Fair Work Commission’s variation of the *Live Performance Award 2020*. Employees in the live performance industry can now be engaged on fixed term contracts consistent with the Act, or Live Performance Award relying on the award exception in paragraph 333F(1)(h) of the Act.

Item [3] – Subparagraph 2.15(6)(b)(ii)

8. This item repeals and substitutes subparagraph 2.15(6)(b)(ii) to extend the operation of the exception for the higher education sector in subregulation 2.15(6) of the Principal Regulations to include contracts that are entered into on or after 6 December 2023 and before 1 November 2025.
9. This will align the exception with the other temporary exceptions in regulation 2.15 and is intended to allow the Fair Work Commission time to complete its review of the fixed term provisions in the *Higher Education Industry – Academic Staff— Award 2020* and the *Higher Education Industry – General Staff— Award 2020* (AM2024/39). The review will consider whether any changes to the awards are required to give effect to the changes to the Act made by *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* relating to the regulation of fixed term employment.

Item [4] – Subregulation 2.15(7)

10. This item repeals the existing exception to the limits on fixed term contracts made under paragraph 333F(1)(f) of the Act for the performance of work funded in whole or in part by philanthropic entities and introduce new exceptions for certain types of contracts in the charities and not-for-profit sector, medical and health research sector and public hospitals
11. This item is intended to address issues arising from the nature of funding arrangements in the relevant sectors by making time-limited exceptions to the use of fixed term contracts.
12. Paragraph 333F(1)(f) of the Act requires that, for the exception to apply, the funding must be for more than two years and there must be no reasonable prospects that the funding will be renewed at the end of that period. The practical effect of repealing the existing exception is that these requirements will be removed for positions funded by funding arrangements entered into on or after the date of commencement. The repeal will not affect the operation of any contract that was made under the existing subregulation 2.15(7) before the date of commencement.
13. The new exceptions are made under paragraph 333F(1)(i) of the Act, which provides that the regulations may prescribe types of contracts in respect of which an exception to subsection 333E(1) would apply. This item prescribes certain eligibility requirements that need to be met for each of the new exceptions for the charities and not-for-profit sector, medical and health research sector, and public hospitals.
14. The requirements in the new exceptions are intended to meet the specific needs of the relevant sectors while ensuring that fixed term contracts are not inappropriately used where permanent employment could be provided. To the extent appropriate, there is consistency in approach across the new exceptions and any differences are intended to be tailored to the specific sector. The new exceptions are time-limited and apply to certain contracts entered into after the date of commencement and before 1 November 2025.

New subregulation 2.15(7) – Charity and not-for-profit sector employees

15. The new subregulation 2.15(7) provides an exception to the limits on fixed term contracts in the charities and not-for-profit sector, where all of the requirements in paragraphs 2.15(7)(a)-(i) are met. This exception is intended to address issues arising from the uncertainty and duration of funding in the charities sector while providing appropriate safeguards for employees.
16. The new paragraph 2.15(7)(a) requires the employment contract to be entered into by or on behalf of a philanthropic entity, as defined in regulation 1.03 of the Principal Regulations. An employment contract may be entered on behalf of a philanthropic entity if, for example, the philanthropic entity is an unincorporated association and cannot enter into employment contracts in its own name.
17. The new paragraph 2.15(7)(e) requires the employment contract to be for substantially the same period as the program or project operates, or the remainder of the period. This is intended to allow an employer to hire an employee mid-way through a program or project due to staff turnover, or to backfill a period of leave provided that the other requirements of the exception are met. However, an employer will not be able to engage an employee on a series of short-term contracts within the period of the program or project, as the period of the employment contract must be aligned with the program or project period.
18. The new paragraph 2.15(7)(f) requires that the engagement of the employee under the contract does not result in the employee having been engaged by the employer for more than seven years, on a continuous or substantially continuous basis, regardless of the type of work performed. ‘Substantial continuity’ has the same meaning as in paragraph 333E(5)(c) of the Act. This means an employer will be able to engage an employee on a subsequent contract to perform a different kind of work on the program or project as long as the total duration of the employee’s employment is no more than seven years and any periods between contracts were not intended to end the employment relationship. A break between contracts taken by an employee for personal reasons or to pursue alternative employment may break the connection between the contracts.
19. The new paragraph 2.15(7)(g) requires that, for the exception to apply, the employee must not be covered by the *Higher Education Industry – Academic Staff – Award 2020*, or the *Higher Education Industry – General Staff – Award 2020*. This is intended to make clear that the exception does not apply to employees in the higher education sector. Employers in the higher education sector are still able to rely on the existing exception in the Act and in subregulation 2.15(6) of the Principal Regulations to engage employees on fixed term contracts.
20. The new paragraph 2.15(7)(h) requires that the funding arrangement, to which the contract relates, must have come into effect after the commencement of the Instrument.
21. The new paragraph 2.15(7)(i) requires that the contract must have been entered into on or after the date of commencement of the Instrument and before 1 November 2025.

22. The new subregulation 2.15(8) prescribes, for the purpose of the new subparagraph 2.17(7)(b)(i), certain types of government funding provided to a philanthropic entity, to which the exception does not apply.
23. The intention is the exception will apply where a philanthropic entity is funded for a specific program and project for a set duration. However, it does not apply where payments are made to, or for the benefit of an individual where the entitlement to that payment is provided for by legislation. This is intended to include, for example, the Child Care Subsidy received by child care providers and funding provided in respect of participant's plans under the National Disability Insurance Scheme. The exception also does not apply to payments made under the Commonwealth Home Support Programme. This is intended to be consistent with the Government's commitments to reform, and ensure job security for the aged care sector.

New subregulation 2.15(9) – Medical or health research sector employees

24. The new subregulation 2.15(9) prescribes an exception to the limits on fixed term contracts for employment contracts in the medical and health research sector, where all of the requirements in paragraphs 2.15(9)(a)-(j) are met. This exception is intended to address issues with uncertainty of funding in the medical and health research sector while providing appropriate safeguards for employees.
25. For the purposes of new paragraph 2.15(9)(a), an employer may enter into an employment contract on behalf of an entity if, for example, the philanthropic entity is an unincorporated association.
26. For the purposes of the new paragraph 2.15(9)(c), the form of research must relate to 'medical or health research'.
27. The new paragraph 2.15(9)(f) requires the employment contract to be for substantially the same period as the program or project operates, or the remainder of the period. This is intended to allow an employer to hire an employee mid-way through the program or project due to staff turnover, or to backfill a period of leave provided that the other requirements of the exception are met. However, it does not allow an employer to engage an employee on a series of short-term contracts within the period of the program or project, as the period of the employment contract must be aligned with the program or project period.
28. The new paragraph 2.15(9)(g) requires that the engagement of the employee under the contract does not result in the employee having been engaged by the employer for more than seven years, on a continuous or substantially continuous basis, regardless of the type of work performed. 'Substantial continuity' has the same meaning as in paragraph 333E(5)(c) of the Act. This means an employer will be able to engage an employee on a subsequent contract to perform a different kind of work on the program or project as long as the total duration of the employee's employment is no more than seven years and any periods between contracts were not intended to end the employment relationship. A break between contracts taken by an employee for personal reasons or to pursue alternative employment may break the connection between the contracts.

29. The new paragraph 2.15(9)(h) requires that, for the exception to apply, the employee must not be covered by the *Higher Education Industry — Academic Staff— Award 2020*, or the *Higher Education Industry — General Staff— Award 2020*. This is intended to make clear that the exception does not apply to employees in the higher education sector. Employers in the higher education sector are still able to rely on the existing exceptions in the Act and in subregulation 2.15(6) of the Principal Regulations to engage employees on fixed term contracts.
30. The new paragraph 2.15(9)(i) requires that the funding arrangement, to which the contract relates, must have come into effect after the commencement of the Instrument.
31. The new paragraph 2.15(9)(j) requires that the contract must have been entered into on or after the date of commencement of the Instrument and before 1 November 2025.

New subregulation 2.15(10) – Public hospital employees

32. The new subregulation 2.15(10) prescribes an exception to the limits on fixed term contracts in public hospitals, where all of the requirements in paragraphs 2.15(10)(a)-(h) are met. This exception is intended to address issues arising from the uncertainty of philanthropic and charitable funding in the public hospital sector while providing appropriate safeguards for employees.
33. For the purposes of the new paragraph 2.15(10)(b), a public hospital will be able to use funding from by a philanthropic entity or for a charitable purpose, or a combination of both, to make up the majority (that is, more than 50 per cent) of funding. It is intended that a public hospital will not be able to rely on this exception by dividing philanthropic or charitable funding into small amounts to partially fund multiple positions. The exception also does not apply to positions that are majority funded by government.
34. The new paragraph 2.15(10)(e) requires the employment contract to be for substantially the same period as the program or project operates, or the remainder of that period. Including the remainder of the period would allow an employer to hire an employee mid-way through the program or project due to staff turnover, or to backfill a period of leave provided that the other requirements of the exception are met. However, it would not allow an employer to engage an employee on a series of short-term contracts within the period of the program or project, as the period of the employment contract must be aligned with the program or project period.
35. The new paragraph 2.15(10)(f) requires that the engagement of the employee under the contract does not result in the employee having been engaged by the employer for seven years or more, on a continuous or substantially continuous basis, regardless of the type of work performed. ‘Substantial continuity’ has the same meaning as in paragraph 333E(5)(c) of the Act. This means an employer will be able to engage an employee on a subsequent contract to perform a different kind of work on the program or project as long as the total duration of the employee’s employment is no more than seven years and any periods between contracts were not intended to end the employment relationship. A break between contracts taken by an employee for

personal reasons or to pursue alternative employment may break the connection between the contracts.

36. New paragraph 2.15(10)(g) requires that the funding arrangement, to which the contract relates, must have come into effect after the commencement of the Instrument.
37. New paragraph 2.15(10)(h) requires that the contract must have been entered into on or after the date of commencement of the Instrument and before 1 November 2025.

Legislative note

38. This item adds a note a note to regulation 2.15 of the Principal Regulations to refer to reader to subsection 123(2) of the Act. This subsection makes clear that entitlements to redundancy pay and payment in lieu of notice will still arise if an employee is engaged on a fixed term contract with the intention of avoiding those obligations.