

Commissioner's Guideline: Fixed Period Contracts

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Acronyms	Full form
CEO	Chief Executive Officer
CPE	Commissioner for Public Employment
DCDD	Department of Corporate and Digital Development
FWA	<i>Fair Work Act 2009</i>
FWC	Fair Work Commission
NT	Northern Territory
NTPS	Northern Territory Public Sector
NTPSEA 2016	Northern Territory Public Sector Enterprise Award 2016 [MA000151]
OCPE	Office of the Commissioner for Public Employment
PSEMA	<i>Public Sector Employment and Management Act 1993</i>

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1. Introduction

From 6 December 2023, amendments to the FWA come into force that impact the use of 'fixed term' contracts by employers (including the Northern Territory Public Sector (NTPS)).

The Commonwealth advises these changes will mean that employers retain the flexibility to manage their workplace needs, while providing protections to employees who may be exploited by these contracts when inappropriately used.

In the NTPS, 'fixed term' contracts translate to 'fixed period' contracts under s29 (3) (b) of the Public Sector Employment and Management Act (PSEMA).

These guidelines provide advice to Chief Executive Officers, Managers and Human Resource Officers and ensure Agencies covered by the PSEMA use fixed period contract arrangements consistently with the FWA provisions.

2. Summary

The FWA amendments provide that a contract of employment entered into on or after 6 December 2023, unless an exception applies, must not include a term (end date) that:

- (i) specifies a period that greater than 2 years (i.e. the contract is for more than 2 years); or
- (ii) creates consecutive contracts (including any contract on 6 December 2023 and any prior consecutive contract) for the same or substantially similar work which totals more than 2 years, or more than 2 contracts.

If a fixed period contract is in breach of one of the above, the term (the end date) will be taken to have no effect from the date it is entered into. This will result in the employee's employment being considered to continue indefinitely (and them becoming eligible for certain FWA national employment standard provisions, principally notice of termination and access to unfair dismissal). It may also result in Fair Work Ombudsman action and civil penalties.

However, their employment status under the PSEMA does not change from 'fixed period' to 'ongoing' and all entitlements as a fixed period employee continue. For example, this would not result in them being subject to probation or, if terminated, becoming eligible for the redeployment and redundancy provisions in NTPS enterprise agreements.

There are a number of exceptions including when employees are over the high income threshold, where agencies use fixed period contracts to fill a temporary absence of another employee, for trainees or for jobs relying on time limited government funding.

Employers must give employees employed on a fixed period contract a copy of the Fair Work Ombudsman's *Fixed Term Contract Information Statement*, before or, as soon as practicable after, the contract is entered into.

3. When can I use a fixed period contract?

Subject to existing governance and merit selection requirements, fixed period contracts under the PSEMA can continue to be used in the NTPS in the following circumstances (that are not otherwise an exception):

- (i) If the contract is for up to 2 years or less, and isn't a continuation of a prior and identical arrangement as at 6 December 2023;
- (ii) If a consecutive contract is being considered for the same or a substantially similar job, and the total period of the contracts does not exceed 2 years;
- (iii) If a consecutive contract is being considered for the same or a substantially similar job, the maximum number of contracts does not exceed 2 (note in relation to consideration of consecutive contracts which involve a contract in existence on 6 December 2023, any prior consecutive contract is also to be counted); and

Where a consecutive contract is for a different job.

4. What exceptions apply under the FWA?

The FWA provides a number of exceptions and fixed period contracts can continue to be used for the following employment circumstances:

- (i) a temporary absence of another employee (e.g. on backfilling an employee on leave or on temporary transfer, workers compensation);
- (ii) trainees or apprentices;
- (iii) casual employment;
- (iv) essential work during a peak demand period;
- (v) work during emergency circumstances;
- (vi) performance of a distinct and identifiable task involving specialised skills (this exception is expected to become clearer following commencement of the FWA amendments);
- (vii) jobs in which the earnings under the contract are above the high income threshold in the year the contract is entered into. Income is to be calculated with reference to base salary, superannuation contributions above the applicable minimum statutory contribution, salary sacrifice amounts, agreed value of non-monetary benefits, and guaranteed allowances, determined in advance;
- (viii) jobs that rely in whole or in part by government funding:
 - a. that is payable for a period of more than 2 years; and
 - b. there are no reasonable prospects that the funding will be renewed after the end of that period.

5. Anti-avoidance provisions

The FWA includes anti-avoidance provisions that specify a person must not do any of the following to avoid any right or prohibition under the fixed term contracts provisions:

- (a) terminate an employee's employment for a period or delay re-engagement to interrupt or reset the time limits prescribed

- (b) not re-engage an employee and instead engage another person to perform the same, or substantially similar, work for the person as the employee had performed for the person, to attempt to continue fixed period employment
- (c) change the nature of the work or tasks the employee is required to perform for the person or otherwise alter the employment arrangement in an attempt to interrupt what would be considered continuous duties.

6. What if the FW provisions are breached?

If no other action is undertaken to remedy the issue (which should be the highest priority) the end date of the last fixed period contract is considered to have no effect and the following summarises the key impacts to NTPS employment:

- (i) The person effectively becomes 'indefinitely' employed until another action occurs e.g. they resign/ retire; their employment is terminated for a reason that does not breach the anti-avoidance provisions, the employee is instead offered an ongoing position (subject to ongoing employment considerations etc.)
- (ii) the employee does not become an 'ongoing' employee under the PSEMA: they remain entitled to the terms and conditions for fixed period employees, except the defined end date has no effect;
- (iii) If their employment were terminated on conduct or performance grounds, this would be done under s33 of the PSEMA after being provided with natural justice in accordance with EI 3;
- (iv) If their employment were terminated for operational reasons under s33 of the PSEMA (e.g. work runs out, restructure) then they would be entitled to notice of termination (or payment in lieu of that notice) or redundancy pay under the FWA;

7. How do I fix a breach of the provisions?

When a breach is found, resulting in a fixed period contract being deemed 'indefinite', CEOs will need, as soon as practicable, to do one of the following:

- (i) cease the employment (noting the need for a valid reason and the Anti-avoidance provisions); or
- (ii) take recruitment action to fill the position on an ongoing basis.*

*The CPE has issued an instrument of delegation to authorise CEOs to select without advertising where a breach of the FWA provisions has occurred.

8. Where to get advice and support

Should you require any further information, please contact Employee Relations in DCDD at employee.relations@nt.gov.au or your alternative workforce support team.

Attachment 1

Examples

The following examples are provided to assist CEOs/ DCDD manage fixed period contract arrangements:

- (a) Teacher originally employed on 12 month contract from 29 January 2023 to 28 January 2024 in remote school. No exceptions apply. On 6 December 2023 current contract and terms unaffected. If renewal is required it will be limited to a maximum of 12 months or less. No subsequent fixed period contract will be able to be offered if it is for the same or substantially similar role as the subsequent contract.
- (b) Nurse employed in remote clinic for 6 months from 1 October 2023 to 31 March 2024. No exceptions applied. Nurse is offered/employed for another 6 months. No subsequent fixed period contract will be able to be offered as the total number of contracts would be greater than 2, even though it is less than a two year duration.
- (c) Temporary vacancy created by an employee, Employee A, proceeding on parental leave for 12 months from 1 March 2023 to 28 February 2024. Employee B employed on a fixed period contract for this period. Close to the end of leave Employee A extends for a further 12 months (and then again at the end of the second period). Employee B can be employed on a second and third fixed period contract as the reason for the contract is an exception under the FWA (replacing someone on leave). The exception being relied upon to support the continued fixed term engagement should be made clear to Employee B.
- (d) Employee A wins a higher duties position in another agency for 2 months to replace the nominal occupant (Employee B) on personal leave. Employee C is given a fixed period contract to fill employee A's job. Employee B extends their personal leave for 1 month; and then for another 1 month. In this case, Employee C is able to be offered further contracts of 1 month 1 month because the contracts meet the exception of filling a temporary absence of another employee.