



SEASONAL AND TEMPORARY EMPLOYEES: COMMON QUESTIONS

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Minnesota law treats seasonal and temporary employees differently than permanent or long-term employees. Towns using seasonal or temporary employees must be aware of how employment laws apply to these particular employees. This resource answers common questions and provides recommendations about seasonal and temporary employment arrangements.¹

I. ADVERTISING THE POSITION

Question: Is the town required to advertise that it is hiring?

Answer: No, the town is not required to advertise job openings, but the best practice is to advertise positions to avoid discrimination claims. This recommendation remains even if the town intends to re-hire the same employees each year. Suppose a person interested in the job is a member of a protected class, but the town does not offer the opportunity to apply. In that case, it may appear that the town is discriminating against a particular group of people. For example, if a woman wants

¹ This resource is adapted and updated from material provided to MAT by attorneys Scott J. Riggs and Robert A. Alsop, of the Kennedy & Graven law firm.

to apply for a seasonal position, but the town has only hired men for the job and does not allow others to apply, the woman may claim the town discriminated against her based on her gender. People from other protected classes may make similar allegations based on race, color, religion, national origin, age, marital status, citizenship, disability, veteran status, sexual orientation, and medical status. The town can mitigate such claims by advertising the position and accept employment applications.

Appearances matter in employment law issues. Even if the supervisors did not intend to discriminate against a particular person or protected class, the town may be liable for a discriminatory effect that was not intended.

Ultimately, the board may hire the same people as it has in the past, but advertising creates the opportunity for other candidates to apply. The board would make its hiring decision and explain why the person hired is qualified and is believed to be the best choice.

II. ENDING THE EMPLOYMENT RELATIONSHIP

Question: How does the town end or limit the employment relationship with the seasonal or temporary employee?

Answer: The town should: (1) set a specific period of employment by setting a date, period, or specific event upon which the employment will end; and (2) inform the employee of the specific period when the town makes the employment offer.

Providing a definite term of employment helps the town avoid liability under some statutes. For example, the Veterans' Preference Act ("VPA") provides extra employment-related protections to veterans, including hearings and legal process before termination. Still, those protections do not apply if the veteran-employee knows the employment is temporary. Likewise, an employee's right to participate in collective bargaining depends on whether the employment period is less than a specific number of days.² Suppose a town does not limit the employment period at the time of hire. The employee may be entitled to collective bargaining rights if the employment period exceeds the number of days after which collective bargaining rights apply.

If the town wants to terminate the temporary employee for cause, misconduct, or some other reason unrelated to the end of the expected employment period, the town should take several additional steps described in **APPENDIX A** to this resource.

When the employment term ends, the town *must* remove the temporary employee from the town's payroll, even if it expects to re-hire the employee later. Removing the former employee from the payroll is one action that demonstrates the temporary nature of the employment. If the town does

² Collective bargaining rights under the Public Employment Labor Relations Act (PELRA) are discussed later in this resource.

not show that the employment was temporary, the VPA and other statutes may regulate the employment relationship.

III. RE-HIRING TEMPORARY EMPLOYEES

Question: Should re-hired temporary employees complete new employment-related paperwork, even if a prior year's document is still accurate and acceptable to the employee?

Answer: Yes, the town should treat individuals who are re-hired for temporary employment as if the town is hiring them for the first time for purposes of completing employment-related paperwork. By following the re-hiring process is another action that demonstrates the temporary nature of the employment.

IV. COLLECTIVE BARGAINING RIGHTS (PELRA)

Question: Are temporary employees entitled to collective bargaining rights under the Public Employees Labor Relations Act (PELRA)?

Answer: PELRA entitles public employees to participate in any applicable collective bargaining arrangement. However, the term "public employee" excludes temporary or seasonal employees whose positions that:

“(i) are not for more than 67 working days in any calendar year; or (ii) are not for more than 100 working days in any calendar year and the employees are under the age of 22, are full-time students enrolled in a nonprofit or public educational institution prior to being hired by the employer, and have indicated, either in an application for employment or by being enrolled at an educational institution for the next academic year or term, an intention to continue as students during or after their temporary employment;”

If the board wants to prevent seasonal employees from qualifying for collective bargaining rights, the board must ensure the temporary employment does not last more than 67 days, or in the case of a qualifying full-time student, no more than 100 days.

V. PUBLIC EMPLOYEES RETIREMENT ASSOCIATION (PERA)

Question: Are temporary or seasonal employees allowed to participate in Minnesota's Public Employees Retirement Association program?

Answer: No, neither temporary nor seasonal employees may participate in PERA, but the employment position must qualify as “temporary” or “seasonal” under the statute.³ The PERA statute treats temporary and seasonal employment arrangements slightly different from one another to describe each in turn.

A. *Temporary Position.* PERA deems a position as a “temporary position,” and not eligible to participate in PERA when the employer determines at the time of hire that the period of employment will be 6-months or less in duration.⁴ Although not directly stated in the statute, it appears the 6-month period can span over two separate calendar years. For example, employment from November 1, 2015, to January 31, 2016, would amount to 3 months of employment, not two months in 2015, and one month in 2016. As long as the temporary position lasts 6-months or less, the employee is not eligible to participate in PERA.

B. *Seasonal Position.* PERA deems a position as a “seasonal position” when the nature of the work or its length is related to a specific season or seasons, regardless of whether the employer expects the same employee to return for the same position the following year.⁵ The duration of a “seasonal position” cannot exceed 185 consecutive days (which amounts to about 6 months) in a calendar year.⁶ However, the 185-day period of employment resets if the individual goes 30 days without seasonal employment,⁷ which means a seasonal employee may end up working more than 185 total days in seasonal employment for the same employer within one calendar year.

Remember that whether a position is “temporary” or “seasonal” for purposes of PERA, depends on how the PERA statute defines those terms. The town board’s own interpretation of temporary or seasonal is not controlling for purposes of PERA.

VI. MINNESOTA UNEMPLOYMENT INSURANCE LAW

Temporary and seasonal employees may receive unemployment benefits under Minnesota’s Unemployment Insurance statute if they do not find employment after the temporary or seasonal position ends. Temporary or seasonal employees are eligible for unemployment benefits even if the employee knew at the time of hire that the position was temporary or seasonal. The employer cannot require the employee to waive the employee’s rights to unemployment benefits in any way.⁸ Before hiring a temporary employee, the town board should be aware that the town may be required to pay unemployment benefits to the employee when the employment ends.

³ Minn. Stat. § 353.01, subd 2b(a)(5) (prohibiting temporary employees from participating in PERA); Minn. Stat. § 353.01, subd. 2b(a)(19) (prohibiting seasonal employees from participating in PERA).

⁴ *Id.*, at subd 12a(a).

⁵ *Id.*, at subd. 12b.

⁶ *Id.*, at subd. 2b(a)(19).

⁷ *Id.*, at subd 12b.

⁸ Minn. Stat. § 268.192, subd. 1.

VII. FAIR LABOR STANDARDS ACT (FLSA)

Temporary and seasonal employees are entitled to minimum wage, overtime pay, and compensatory time, as required by the State and Federal Fair Labor Standards Acts (FLSA).⁹ Fortunately, for the sake of administration, the FLSA protections do not change based on whether an employee is temporary or permanent. Employees may not waive any of the protections provided by the FLSA.

Certain “white collar” employees performing executive, administrative, or professional roles may be exempt from the FLSA if the town pays them on a salary basis.¹⁰ Since most seasonal or temporary town employees are not serving in these roles, this resource will not further discuss the exemptions. If your town employs an executive, administrator, or professional on a temporary basis, consult your town attorney for information related to that employee’s status under the FLSA.

⁹ See Minn. Stat. ch. 177.

¹⁰ 29 U.S.C.A. 213(a)(1) (describing the many exemptions from the Federal FLSA).

Termination Checklist

It is **strongly** recommended that the board consult the town attorney before terminating employment for reasons unrelated to the end of the seasonal or temporary employment period. The checklist provided is **not** a substitute for the advice of an experienced town attorney. The town attorney can help identify any potential lawsuits the employee may bring in retaliation for the termination, and can possibly negotiate waivers of those potential claims.

The following checklist is a limited list of factors that the town should consider before choosing to terminate an employee for reasons other than the end of the season or temporary work period. The town **must** consider these factors when terminating employment based on misconduct, dissatisfaction with their performance, a change in the employer's need for the employee.

During the employment, the town should: (1) document any incidents of misconduct or non-compliance with the town's employment expectations; (2) document perform performance reviews if conducted; and (3) record any discipline imposed upon the employee such as oral or written reprimands, suspension without pay, and termination.

Also, the town should consider whether:

1. the employee is a member of a protected class, which includes factors related to race, color, religion, national origin, age, marital status, citizenship, disability, veteran status, sexual orientation, medical status, pregnancy, or use of public assistance;
2. the employee ever made a complaint about working conditions, "blown the whistle" on misconduct, or participated in any investigation related to claims of discrimination, employee compensation & working conditions, or harassment;
3. there is an employment contract or employee policy manual, and if so, does it have provisions related to termination. For example, it may define the reasons the board may terminate employment, require notices to the employee, require an escalating series of discipline responses from the town, require severance pay, or other restrictions on the board's ability to terminate employment;
4. the employee filed a worker's compensation claim;
5. the employee complained of physical disabilities to perform work;
6. the employee requested reasonable accommodations from the town to perform job duties;
7. the employee requested a leave of absence;
8. the employee disclosed any medical condition to the employer;
9. the employee received performance reviews and the result of those reviews;
10. the employee has received any discipline, formal or informal, written or oral;
11. there is precedent, similar conduct or occurrence encountered in the past, and the town's resolutions to those issues;
12. the employer documented any of the above factors;
13. there is a compelling reason to terminate the employment.