

# Counting to 67. Sound Easy? It Isn't.

*Who are Seasonal, Temporary and Part-time Employees under PELRA*

MCHRMA Conference

April 3, 2014

Pamela R. Galanter

Attorney at Law

MADDEN GALANTER HANSEN, LLP

505 North Highway 169, Suite 295

Plymouth, MN 55441

(763) 545-2525

[PGalanter@mgh-lawfirm.com](mailto:PGalanter@mgh-lawfirm.com)

These materials are intended to be educational only  
and do not constitute legal advice.

## What Will Be Covered

- Definition of a public employee.
- Which employees meet definition of part-time employees.
- Determining when temporary and seasonal employees are in bargaining unit.
- CBA language and issues relating to part-time, seasonal and temporary employees.

## PELRA Definition of Public Employee

“Public employee” or “employee” defined in § 179A.03, subd. 14:

Every person appointed or employed by a public employer is a “public employee” or “employee” **unless** they fall within one of the exceptions.

# Exceptions – Who are not public employees

- Elected public officials
- Election officers
- Commissioned/enlisted personnel of MN National Guard
- Emergency employees
- Part-time employees
- Temporary/seasonal employees
- Charitable hospital employees
- Full-time undergraduate students employed by school
- Individual employed less than 300 hrs/fiscal year as instructor in adult vocational ed program
- Certain court employees
- Managerial, supervisory and confidential employees of HCMC

# Part-time Employee Defined



Employees whose service does not exceed the lesser of 14 hours per week or 35 percent of the normal work week in the employee's appropriate unit.

Minn. Stat. § 179A.03, subd. 14(a)(5).

# Part-time Employee Defined

## *“Normal work week”*

The term “normal work week” refers to the normal, predominant work week of full-time employees in the bargaining unit.

Indep. Sch. Dist. No. 721 v. Sch. Services Employees, Local 284, 379 N.W.2d 673 (Minn. Ct. App. 1986).

# Part-time Employee Defined

## *BMS Test for Determining Part-time Employee Status*

BMS established six-part test for determining whether an employee is NOT a “public employee” because they fail “part-time” test:

1. Determine number of hours in normal work week of bargaining unit in which employee would be included.
2. Calculate “part-time” hourly exclusion – either more than 14 hours per week or 35 percent of normal work week, whichever is less.

# Part-time Employee Defined

## *BMS Test for Determining Part-time Employee Status*

3. Identify “previous calendar year” period.
4. Establish number of weeks during which employee in question worked during “previous calendar year.”
5. Determine number of “weeks worked” during previous calendar year in which employee’s hours worked exceeded number determined in #2 above.



# Part-time Employee Defined

## BMS Test for Determining Part-time Employee Status

6. If a majority of “weeks worked” during “previous calendar year” exceed number determined in #2 above, employee is considered a “public employee” and is included in appropriate unit.

However, if employee’s “weeks worked” is less than a majority during “previous calendar year,” employee is not a “public employee” and is excluded from bargaining unit.

AFSCME Council No. 65 and City of Granite Falls, BMS Case No. 96-PCL-1460 (June 1996).

# Temporary and Seasonal Employee Defined

Employees whose positions are basically temporary or seasonal in character and:

- (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 employer, and have indicated, either in an application for employment or by being enrolled at an educational institution for next academic year or term, an intention to continue as students during or after temporary employment.

Minn. Stat. § 179A.03, subd. 14(a)(6).

# Temporary and Seasonal Employee Defined

The following individuals are public employees regardless of the exclusions in paragraph (a), clauses (5) and (6):

(2) an employee hired for a position under paragraph (a), clause (6), item (i), if that same position has already been filled under paragraph (a), clause (6), item (i), in the same calendar year and the cumulative number of days worked in that same position by all employees exceeds 67 calendar days in that year. For the purpose of this paragraph, “same position” includes a substantially equivalent position if it is not the same position solely due to a change in the classification or title of the position; . . .

Minn. Stat. § 179A.03, subd. 14(b)(2).

# Temporary and Seasonal Employee Defined

## *Student Exception*

Criteria for determining “student” status:

- Under age 22;
- Full-time students;
- Enrolled in school prior to being hired; and
- Indicated intention to continue as student after temporary employment ends.

Minn. Stat. § 179A.03, subd. 14(a)(6)(ii).

# Temporary and Seasonal Employee Defined

## *67 Day Rule*

BMS has established that a “position” is “one person” and the incumbent in that position becomes a “public employee” after the person works more than 67 days in a calendar year.

AFSCME Council No. 65 and City of Hibbing, BMS Case No. 92-PCL-423 (Nov. 12, 1991).

# Temporary and Seasonal Employee Defined

## *67 Day Rule*

BMS' interpretation was upheld in 2013 by MN Court of Appeals:

BMS reasoned below that “[n]othing limits the Bureau orders to classification titles and not employee names, especially, such as here, where employees in the same classification may be included or excluded from a bargaining unit based on the number of days worked.” . . . . Although the statute addresses seasonal positions, it does not require the measuring of time spent in a particular job classification of union employees. And the naming of individuals by BMS coincides with the statutory language addressing personal characteristics, such as student status.

Minn. Teamsters Pub. and Law Enforcement Employees, Local No. 320 v. City of Coon Rapids, 2013 WL 1500975 at \*2 (Minn. Ct. App. Apr. 15, 2013).

# Temporary and Seasonal Employee Defined

## *Application of the 67 Day Rule*

- Is there a limit to the number of temporary and seasonal employees a public employer can hire at one time?

# Temporary and Seasonal Employee Defined

## *Application of the 67 Day Rule*

- If a public employer hires 20 seasonal employees, 10 to work at the golf course, and 10 to work in the parks, are they included or excluded from the bargaining unit?



# Temporary and Seasonal Employee Defined

## *Application of the 67 Day Rule*

- Can a public employer hire 10 seasonal employees at the same time for highway maintenance work?

# Temporary and Seasonal Employee Defined

## *Application of the 67 Day Rule*

- Should a public employer hire 5 seasonal employees in May for highway maintenance work, and replace them with 5 new seasonal employees in late July?

# Contract Language

## *Recognition Article*

Common Recognition Article language refers to definition of a “public employee”:

The Employer recognizes the Union as the exclusive representative for all employees in the job classifications listed in the wage appendix who are public employees within the meaning of Minn. Stat. 179A.03, subd. 14, excluding supervisory, confidential and all other employees.

# Contract Language

*Excluding Temporary/Seasonal Employees from CBA*

*Wage Rates and Benefits*

## Example:

For an employee hired that does not meet the definition of a public employee under Minn. Stat. 179A.03, subd. 14, the Employer shall retain the sole right and authority to determine wages, benefits, working conditions, and all other terms and conditions of employment.

# Contract Language

*Excluding Temporary/Seasonal Employees from CBA*

*Wage Rates and Benefits*

## Example:

For an employee hired by the Employer on a seasonal or temporary basis, the employee shall be employed by the Employer for a period of not more than 180 working days in a calendar year. The Employer shall determine the wages, benefits, working conditions, and all other terms and conditions of employment for temporary and seasonal employees except for the 91<sup>st</sup> working day through the 180<sup>th</sup> working day, the hourly wage of the temporary or seasonal employee shall be the same hourly wage as Step 1 of the appropriate job classification.

# Contract Language

*Excluding Temporary/Seasonal Employees from CBA*

*Wage Rates and Benefits*

## Example:

Employees employed by the Employer on a seasonal or temporary basis for no more than 180 calendar days per calendar year either in a full-time or part-time capacity (more than 14 hours per week) will be paid at a rate to be determined by the Employer for the term of their employment. Such employees will not be eligible for any benefits under this agreement except those which may be required by law.

# Miscellaneous Issues

## *Probationary Period*

If a temporary/seasonal employee becomes a “public employee” based on the length of employment, when does the probationary period start and end?

# Miscellaneous Issues

## *Fair Share Fees of Dues Deductions*

Is the employer required to deduct fair share fee or dues from wages when the temporary/seasonal employee becomes a “public employee”?



# Miscellaneous Issues



What happens on day 68?

# Miscellaneous Issues



Training supervisors and establishing systems to monitor