For How Long Can We Hire a Summer Seasonal or Temporary Employee?

It’s such a simple and legitimate question, the answer to which keeps getting more complex. Several layers of laws affect how long a County may hire a summer seasonal or other temporary worker without other requirements or costs being imposed.

If there is a collective bargaining agreement (CBA), the clearest answer is year-round as long as the employee does not work more than 14 hours per week (or fewer hours if the normal work week is less than 40 hours per week – there is a cap of 35% of the normal work week). If the employee will work more than 14 hours per week, then the seasonal/temporary employee can show up for work for a maximum of 67 (or 100) working days in a calendar year. (Number each day worked... These are *days actually scheduled* *and worked*. Not calendar days. Not days employed.) But, if the County is willing to accept and apply other state and federal obligations, the employee can stay longer.

Collective Bargaining Agreements (CBAs)

Each of the CBAs your County has with its various unions probably has a definition or wording on what constitutes a “seasonal” or “temporary” worker, and unions often are not interested in trying to represent this group of employees. Seasonal workers are by definition of short duration, and they are usually entry level workers. Often, by the time a union representative is alerted that there is about to be a new worker, it is almost time for the seasonal worker to leave. Review the applicable CBA to determine how seasonal/temporary employees are defined, and any terms and conditions of employment that may become applicable to this class of employee.

Personnel Policies

Even if there is no CBA covering the type of work the seasonal/temporary will be performing, your County may already have language it has imposed on itself limiting the length of time or the conditions which apply to a “seasonal” or “temporary” employee. Your County has control over what it establishes as its personnel policies; and there is a procedure to make a rule or to change it.

There is some comfort in knowing your County can shape the boundaries to match what is important to your County, within certain parameters. But the County still has to abide by state and federal laws and requirements.

Minnesota Public Employment Labor Relations Act (MPELRA)

[Minnesota Statutes § 179A.03, Subd. 14(a)(5&6)](https://www.revisor.mn.gov/statutes/?id=179A.03) defines who is not recognized as a “public employee” to be covered by the rights and responsibilities of the state’s labor relations laws. It excludes from the definition of public employee, anyone who does not work more than 14 hours per week, no matter how many days worked. It also excludes a worker whose position is “basically temporary or seasonal in character” and is not for more than 67 working days in a calendar year. However, if the worker is under age 22, and is and intends to continue to be a full-time student, the employee can work up to 100 working days.

Q: How much of an FTE (full time equivalent) is that?

A: About a 0.26 FTE.

67 work days \* 8 hours worked each day = 536 hours, which is about a 0.26 FTE

(Note: there are ways to get more hours worked in the same number days worked, such as a shorter work week with 4, 10-hour days.)

Q: How many weeks is 67 working days?

A: Using a regular Monday through Friday schedule, without any holidays or other non-work days interrupting it, 67 working days is 13.4 weeks.

As an example, it would look like this:

* A new hire starting on Friday, June 1, 2018,
* Who does not work on Wednesday, July 4, 2018 (Independence Day) and
* Who does not work on Monday, September 3, 2018 (Labor Day),
* Will reach the 67th work day on Wednesday, September 5, 2018.

A 4-day, Monday - Thursday work schedule will lengthen this season to Monday, October 1, 2018.

If you do not have a scheduling or an HRIS/payroll system that counts this for you, counting actual calendar pages becomes very helpful.

PRO TIP: Once a seasonal/temporary worker exceeds 14 hours per week, you start counting each day because the worker is then subject to the 67/100 working day rule. If you want to maximize the number of hours worked each day, to maximize the possible productivity the County could hope to achieve, be aware of how many hours the individual is working each day. A worker who only comes in for one hour has “used up” one of the 67/100 possible work days, and the County may not have received much productivity for the time.

But, be careful! On the 68th/101st day worked, the employee becomes covered by the state labor relations laws applicable to a public employee, and the County might not be prepared for that. In addition, when the worker becomes a public employee by definition, this likely means the worker is covered by the relevant CBA. You may be faced with a large, internal problem! There are competing interests. Seasonal/temporaries typically cannot morph into regular positions just because they worked too many days, yet the CBA will require you treat them as a covered position.

One way to meet both the requirement of being covered by a CBA, and being able to terminate at the end of a season longer than 67/100 days, is to negotiate language with the applicable union which acknowledges the seasonal/temporary employee has become a “public employee” who basically receive nothing extra from the CBA. Some wording could be along the lines of, “ the provisions of this Article contain the only terms and conditions of employment which apply to seasonal employees who become members of the bargaining unit,” and, “the seasonal hourly rates are established by the County Board.” Otherwise, you will probably need to terminate the employee immediately once they reach day 67/100 to avoid applying the regular terms and conditions for public employees covered by the CBA.

Factors to consider if you think you want to work the seasonal/temporary longer than 67/100 work days:

* + Did you use a 100 point, open, competitive process when hiring the seasonal/temporary?
  + Do you have permission or authority to fill a vacant or new regular position or FTE?
  + Are you paying the seasonal/temporary on the CBA’s pay scale?
  + Have you offered the accrued leave, insurance, and other benefits required by the CBA?
  + Have you budgeted sufficiently for this regular position?

You will probably find yourself answering “no” to at least one of these factors and will need to terminate the seasonal/temporary worker.

It is certainly frustrating, but don’t make the mistake of thinking you can engage in the practice of “serial hiring.” That’s when a public employer tries to string several temporary or seasonal workers in succession to cover the work year-round, or beyond the permitted 67/100 days. This practice is not permitted to skirt around meeting the definition of a “public employee.” Minnesota Statutes §179A.03, Subd. 14(b)(2) explicitly states workers in these instances are public employees, regardless of the number of hours or the number of days they work:

“if that same position has already been filled … in the same calendar year and the cumulative number of days worked in that same position by all employees exceed 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 of title of the position; …”

Fair Labor Standards Act (FLSA) and Overtime Payment

Subpart b – The Overtime Pay requirements, §778.101 lists 40 hours as the maximum number of hours a non-exempt employee can work without receiving additional compensation for the overtime hours. If you want to maximize productivity by working a seasonal/temporary more than 8 hours per day, remember that 40 hours per work week is the maximum number of hours a non-exempt employee can work before receiving time-and-one-half overtime compensation.

Double check your collective bargaining agreement and personnel policies to make sure they do not reference overtime incurring when working over 8 hours per day.

Affordable Care Act (ACA)

Another reason for promptly ending a seasonal/temporary’s employment at 67/100 days is to keep from having to apply the ACA’s health insurance requirements.

The ACA is interested in having people covered by health insurance. The ACA requires most employers to offer affordable health insurance to full-time (meaning on average, 30 or more hours per week) employees and their dependents or pay a penalty tax if the full-time employee receives a premium tax credit to buy coverage through MNsure, for example. It’s their “Pay or Play” rule.

Your seasonal/temporary worker could easily be working 30 or more hours each week. Does this mean you have to start offering them health insurance? Not necessarily, for at least two reasons:

1. Seasonal employees’ customary annual employment under the ACA is 6 months or less, beginning in each calendar year, at about the same time of year (*e.g.*, summer or winter). [IRS ACA FAQ](https://www.irs.gov/affordable-care-act/employers/questions-and-answers-on-employer-shared-responsibility-provisions-under-the-affordable-care-act#Identification) #26. Your seasonal/temporary employee will probably be on payroll less than 6 months. If it will be longer than 6 months, you will need to look at the number of hours worked each week or month.
2. Using the ACA’s “look back” method to count whether there has been 30 hours of service per week or whether the employee has had 130 hours of service in the month, will probably reveal that your seasonal/temporary employee has met this requirement, but not on a prolonged basis. [IRS ACA FAQ](https://www.irs.gov/affordable-care-act/employers/questions-and-answers-on-employer-shared-responsibility-provisions-under-the-affordable-care-act#Identification) #19.

Dollars Earned, Not Days Worked: Public Employees Retirement Association of Minnesota (PERA)

A few years ago, PERA switched to an *annual dollars earned* standard for determining when an employee is “covered” by PERA. An employee can now earn up to $5,100 in a calendar year before the employer and employee have to contribute toward PERA. If it is anticipated that the seasonal/temporary employee will earn $5,100, then the deductions/contributions are made right away, but “held” until the $5,100 threshold is earned, and then all of the contributions are counted toward the employee’s PERA account.

After employment, the employee can choose to withdraw their contributions, but the County’s contributions remain with PERA.

If you are unsure of how much the seasonal/temporary will be working, and therefore not certain how much will be earned, it is OK to monitor the earnings, but then alert the employee and payroll when it looks like the $5,100 earnings threshold may be met. It’s an unpleasant surprise for a seasonal/temporary to suddenly have a significant deduction from a paycheck, even though the employee can withdraw it later.

However, if it is known that the seasonal/temporary employee will consistently be working full time (40 hours per week), both the employee and the employer will likely end up making PERA contributions from the date of hire, even if the seasonal/temporary worker is only earning minimum wage ($9.65 per hour in 2018). The deductions/contributions will be held until approximately the 66th day, which might possibly be the very last work day, which is when PERA’s $5,100 earnings threshold is met.

* + 8 hours per day x $9.65 minimum wage = $77.20 earned per day
  + $5,100 PERA’s earnings threshold ÷ $77.20 daily earnings = 66.06 days before PERA contributions become mandatory

That cuts it very close! It is very important that payroll and human resources stay in close communication to track seasonal/temporary employees’ earnings towards this pension contribution requirement. Your County might easily be paying more than minimum wage, which means the $5,100 PERA earnings threshold will be met that much sooner.

If your County will work the employee on a full-time schedule for 67 working days, the employer and the employee should both plan on paying into PERA from the date of hire.

Note: There is a way to avoid the employer’s share of PERA by implementing a FICA Alternative plan with a deferred compensation vendor. The employer can require the employee to pay both the employer and the employee share of the FICA contributions which are put into the special deferred compensation account, and neither party makes a contribution toward PERA. The employee can still have access to all of the employee’s contributions after employment ends with the County. Ask your deferred compensation provider about it.

Staffing to meet public sector local government workforce requirements regularly incorporates temporary and seasonal positions as an effective approach to providing valued public service while conscientiously managing taxpayer dollars. When Human Resources leaders consider the myriad rules and regulations applicable to these seasonal and temporary arrangements, they will be positioned to guide their organization in the best decision-making process to identify a staffing plan that best serves the interests of their County.