



**EEOC SETS FORTH ITS STRATEGIC ENFORCEMENT PLAN**



**Fred Bissinger**

“...the EEOC plans to continue its vigorous and aggressive approach to dealing with the issues outlined herein.”

The EEOC in late December set forth its strategic enforcement plan for 2013-2016. The Commission has identified priorities for national enforcement including issues that would have broad impact, issues involving developing areas of the law, issues affecting workers who may lack an awareness of their legal protections, and issues that may be best addressed by government enforcement. These criteria resulted in the following national priorities.

**1. Eliminating Barriers in Recruitment and Hiring.** The EEOC will target class-based recruitment, hiring discrimination, facially neutral recruitment, and hiring practices that adversely impact particular racial, ethnic, and religious groups, older workers, women, and people with disabilities. These include exclusionary policies and practices, the channeling/steering of individuals into specific jobs due to their status in a particular group, restrictive application processes, and the use of screening tools (e.g., pre-employment tests, background checks, date-of-birth inquiries).

**2. Protecting Immigrant, Migrant and Other Vulnerable Workers.** The EEOC will target disparate pay, job segregation, harassment, trafficking and other discriminatory practices and policies affecting immigrant, migrant, and other vulnerable workers.

**3. Addressing Emerging and Developing Issues.** For example, the Commission recognizes that elements of the following issues are emerging or developing:

- (1) Certain ADAAA issues, including coverage, reasonable accommodation, qualification standards, undue hardship, and direct threat;
- (2) Accommodating pregnancy-related limitations; and limitations under the ADAAA and the Pregnancy Discrimination Act.
- (3) Coverage of lesbian, gay, bi-sexual and transgender individuals under Title VII’s sex discrimination provisions;

**4. Enforcing Equal Pay Laws.**

**5. Preserving Access to the Legal System.** The EEOC will also target policies and practices that discourage or prohibit individuals from exercising their rights under employment discrimination statutes, or which impede the EEOC’s investigative or enforcement efforts. These policies or practices include retaliatory actions, overly broad waivers, settlement provisions that prohibit filing charges with the EEOC or providing information to assist in the investigation or prosecution of claims of unlawful discrimination, and failure to retain records required by EEOC regulations.

**6. Preventing Harassment Through Systemic Enforcement and Targeted Outreach.** The EEOC believes a more targeted approach that focuses on systemic enforcement and an outreach campaign aimed at educating employers and employees will greatly deter harassment.

As outlined in its Strategic Enforcement Plan, the EEOC plans to continue its vigorous and aggressive approach to dealing with the issues outlined herein. Accordingly, employers should invest appropriate time and effort to prevent these issues, and immediately and effectively deal with them when they arise.



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**Cathy Shuck**.....

*“The IRS’s proposed regulations on the employer mandate offer some guidance and relief to employers in dealing with temporary and seasonal employees.”*

## **APPLYING THE PLAY OR PAY MANDATE TO SEASONAL AND TEMPORARY EMPLOYEES**

As every employer who has not been living under a rock knows, as of January 1, 2014, the Patient Protection and Affordable Care Act (“PPACA”) requires employers with 50 or more full-time equivalent employees to offer qualifying health insurance to their full-time employees, and those employees’ dependants, or pay a penalty. What many employers may not know, however, is how PPACA’s employer mandate applies to seasonal and temporary employees. Although this is still a grey area, the IRS’s proposed regulations, published on January 2, 2013, offer some guidance.

The regulations include two sets of rules: (1) how to count hours to determine if an employer meets the 50-FTE threshold and (2) how to count hours to determine if a particular employee is full time and thus entitled to health insurance. Both rules address seasonal and part-time employees.

Recall that PPACA defines “full-time” as 30 or more hours per week.

### **Inclusion of seasonal and temporary employees when determining whether an employer has 50 full-time equivalent employees.**

An employer is covered by the mandate if it employed “an average of at least 50 full-time employees on business days during the preceding calendar year.” To calculate FTEs, the employer determines the number of FTEs for each month (including fractions), then adds up the number for each month, divides by 12, and rounds down to the nearest whole number.

To calculate FTEs by month, the employer first counts the number of employees who worked 30 or more hours every week during that month. The employer next adds up all the hours worked by all other employees and divides that number by 120. The two numbers added together are the FTEs for that month.

When counting full-time hours, or aggregating the hours of employees who are less than full time, the employer does not distinguish between temporary and regular employees. All workers must be counted unless the employee qualifies as a “leased employee” or a “seasonal worker.”

### **Temporary / Leased Employees**

The proposed regulations adopt the common-law definition of “employee.” That is, if the employer has the right to direct and control the worker, and the worker is subject to the will and control of the employer not only as to what shall be done but how it shall be done, then the worker is an employee. Again, there is no exception for temporary employees.

There is an exception, however, for workers who meet the definition of a “leased employee” set forth in 26 U.S.C. § 414(n) (2). That statute defines a leased employee as someone who (a) provides services to the recipient employer pursuant to an agreement between the recipient and any other person (e.g. a leasing agency); (b) has performed services for the recipient on a *substantially full-time basis for a period of at least 1 year*; and (c) is subject to the primary direction and control of the recipient.

Thus, a long-term temporary employee may satisfy the definition of a “leased employee” and be subject to exclusion from the employer’s calculation of its number of FTEs. The leased employee, however, would likely be an employee of the leasing agency.

The proposed regulations recognize the logistical challenges in determining whether employees of temporary agencies are full-time employees or are reasonably expected to work full time. The regulations declined to create a broad exemption for employees employed by temporary agencies, although the IRS invited comments on rules and methods for determining full-time status that would also guard against abuse.

### **Seasonal Workers**

PPACA specifically provides that where an employer’s workforce exceeds 50 FTEs for 120 or fewer days, and where the FTEs in excess of 50 were “seasonal workers,” the employer is not subject to the mandate. In other words, if an employer normally has fewer than 50 FTEs but goes over 50 due to a seasonal increase (or increases) in staffing, the employer is not subject to the mandate as long as the seasonal increase lasted fewer than 120 days. The proposed regulations take a slightly more expansive view than the statute, permitting an employer to consider four calendar months—whether consecutive or not—as equivalent to 120 days. The proposed regulations also note that the 120 days may be consecutive or not.

Continued on page 4 ►►

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**Howard Jackson...**

**"In a decision issued on January 25, the United States Court of Appeals for the District of Columbia Circuit has taken the issue one step further"**

## **LABOR BOARD MEMBERS AND BOARD LACK AUTHORITY TO RULE WHAT HAPPENS NEXT?**

The U.S. Supreme Court ruled during 2010 that the National Labor Relations Board (NLRB or Board) cannot act without a quorum of three members. *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010). In a decision issued on January 25, the United States Court of Appeals for the District of Columbia Circuit has taken the issue one step further, and ruled that the purported appointments of the last three members of the Board were invalid under the Recess Appointments Clause of the U.S. Constitution. *Noel Canning v. NLRB*.

Members of the Board are "Officers of the United States" within the meaning of the Appointments Clause of the Constitution, which provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint... particular officers of the United States..." that the purported appointments of the three members were clearly not made by and with the advice and consent of the Senate. But the "Recess Appointments Clause" of the Constitution provides that "[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate by granting Commissions which shall expire at the End of their next Session." The case turned on whether the Senate was in recess at the time of the appointments, and on whether the vacancies happened during the Recess of the Senate.

The court found that the NLRB's interpretation of "the Recess" would defeat the purpose of the Framers of the Constitution and the careful separation of power structure reflected in the Appointments Clause, and that such appointment structure used the term "Recess" to refer only to the Recess between Sessions, when the Senate simply cannot provide advice and consent. The court found that the appointment structure would have been turned upside down if the President could make appointments any time the Senate so much as broke for lunch.

The court further found the Appointments invalid as the vacancies did not "happen" during "the Recess." That is, it is insufficient that the qualifying vacancy "exists" during the recess; it must actually "arise" during the recess. Thus, the President may only make recess appointments to fill vacancies that arise during the recess. Because none of the three appointments were valid, the NLRB lacked quorum and the NLRB decision was vacated.

**Editor's Notes:** *The issue in the Noel Canning case will likely end up in the U.S. Supreme Court. The President will argue that he is unable to fulfill his chief constitutional obligation to "take care that the laws be faithfully executed," or that the interpretation could even pose national security risks. The court answered this issue by stating that if Congress wished to alleviate such problems, it could certainly create Board members whose service extended until the qualification of the successor, or provide for action by less than the current quorum, or deal with the problems in some other fashion, noting that the executive branch has provided for the temporary filling of a vacancy by statute allowing an "acting officer" to perform all the duties and exercise all the powers of the office.*

*The case involves a classic dispute concerning the "separation of powers" between the executive, legislative, and judicial branches of our government. In the Noel Canning case, the District of Columbia Circuit ruled that the executive branch exceeded its constitutional authority.*

*The NLRB is allowed to issue decisions only with a quorum of at least three members and the Noel Canning decision leaves the Board with only one validly appointed member. The court's ruling not only invalidate the NLRB's ruling in Noel Canning, but hundreds of other NLRB decisions issued by the Board for more than a year.*

Continued on page 4 ▶▶

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## **KNOW YOUR ATTORNEY MARGARET L. NOLAND**

MARGARET L. NOLAND is a Senior Associate in the Cookeville, Tennessee office of Wimberly Lawson Wright Daves & Jones, PLLC, joining in September 2008. She is a practicing attorney since 1988, with experience in the areas of workers' compensation, personal injury and general practice.



She currently focuses her practice on workers' compensation, general practice and litigation, estate planning and probate, as well as commercial law. She obtained a Bachelor of Arts degree in chemistry with honors from the

University of Tennessee at Knoxville in March 1983. In 1988, she received a Doctor of Jurisprudence degree from the University of Tennessee College of Law in Knoxville. She is a member of Tolletts Chapel United Methodist Church in Crossville, Tennessee, where she is treasurer and worship leader. She is also Chairman of the Trustees of the Cookeville District of the United Methodist Church. She is active in community affairs, including the Bread of Life Rescue Mission in Crossville, Tennessee, where she has volunteered since its inception in 2001.

PPACA defines a “seasonal worker” with reference to the Department of Labor’s agriculture regulations and with reference to “retail workers employed exclusively during holiday seasons.” The proposed regulations again take a more expansive view, stating that employers may use a reasonable, good faith interpretation of a seasonal worker by analogizing to agricultural and retail workers. It appears that as long as the worker’s position is calendar-driven, the worker will likely qualify as a seasonal worker who may be excluded from the 50-FTE calculation.

Inclusion of seasonal and temporary employees when determining who is a full-time employee entitled to be offered health insurance

If an employer employed an average of 50 or more FTEs during the previous calendar year and is thus covered by the mandate, the employer must only offer health insurance to its “full-time employees” and their dependents. (Note that the proposed regulations define “dependents” as children under 26 years of age but not spouses.) Here again, temporary and seasonal employees may be excluded in some cases.

The proposed regulations adopt a look-back measurement system for determining whether variable-hour employees are “full-time” employees who must be offered health insurance. That system permits employers to implement a “measurement period” of up to 12 months to determine whether a variable-hour employee has averaged 30 or more hours per week. The look-back system can apply to temporary employees (as long as they are hired on a variable-hour basis) and to seasonal employees. In fact, the proposed regulations specifically permit an employer to treat seasonal employees as variable-hour employees *even if* the seasonal employees work full time. The proposed regulations include the example of a ski instructor hired to work from November 15 to March 15 and expected to work 50 hours per week. The example notes that even though the worker would be expected to work in excess of full-time during his four-month period of employment, he would not be expected to average over 30 hours per week over a 12-month measurement period and thus would not have to be offered health insurance.

Moreover, the proposed regulations do not limit the time an employee may work as a “seasonal employee,” distinguishing a seasonal employee for this purpose from a “seasonal worker” who may be excluded from an employer’s FTE total for up to 120 days (or four months). The preamble to the proposed regulations does note that the final regulations are expected to impose some time limit, although it may be as much as six months. Note, however, that the proposed regulations also provide that where an employee is re-hired, prior service must generally be credited, unless the period of unemployment exceeds 26 weeks or was at least four weeks and exceeds the prior period of service.

### **Conclusion**

The IRS’s proposed regulations on the employer mandate offer some guidance and relief to employers in dealing with temporary and seasonal employees. [BLURB] Yet they leave many questions unanswered, and the devilish details may apply differently to different employers. Employers with questions about how PPACA’s mandate applies to their particular situation are encouraged to contact their Wimberly Lawson attorney for guidance.

*The current issues could be resolved via a decision by the U.S. Supreme Court, or by the executive and legislative branches reaching agreement on new and valid appointments to the NLRB.*

*As an agency, the NLRB can still perform many functions. The General Counsel of the NLRB has been delegated authority to take many actions, including the seeking of temporary court injunctions, and the many NLRB regional offices across the country will continue to operate, including holding elections, issuing complaints, and litigating cases before administrative law judges. But any appeal of such matters to the Board in Washington, and enforcement of such decisions by the courts may be postponed until a quorum at the Board is established.*

*Notably, White House Press Secretary Jay Carney has announced that the ruling would not affect the Board’s operations, referring other questions to the Justice Department. NLRB Chairman Mark Pearce has announced the Board would keep conducting its business, noting that the rule applies only to a single case in a single circuit, and that similar questions have been raised in more than a dozen cases pending in other courts of appeals. Thus, one interpretation of the current situation is that the Board will continue to carry out its normal functions, and simply ignore the ruling. The issue is more complex than that, however, as virtually all NLRB final rulings can be appealed to the District of Columbia Circuit, the court that issued the Noel Canning ruling. Therefore, if the ruling stands, every NLRB final ruling could be set aside by an appeal to the District of Columbia Circuit, at least until the NLRB quorum is legally established.*