

The Land Management Workforce Flexibility Act: OPM Guidance is Inconsistent with the Act

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On December 29, 2015, the Office of Personnel Management (OPM) released guidance pertaining to the implementation of the Land Management Workforce Flexibility Act.¹ The guidance limits positions to which eligible temporary employees may apply to those which are otherwise open only to the employing agency's internal workforce. In other words, time-limited employees would be banned from competing for merit vacancies that are open to candidates from outside of the hiring agency, such as vacancies whose area of consideration² is government-wide. This guidance is deeply flawed in that it restricts eligibility in a manner contrary to the plain language of the Act and contrary to clearly expressed legislative intent to make merit promotion available to eligible time-limited land management employees "so they can compete for career jobs like any other Federal employee."

OPM Guidance Does Not Comport with Legislative Intent

OPM's guidance prohibits eligible temporary employees from applying to vacancies that are open to all federal employees. Other federal employees may apply to such vacancies. The guidance therefore does not provide eligible temporary employees with the same opportunities as other federal employees.

Legislative history indicates intent to provide eligible temporary employees with the same career advancement opportunities available to permanent federal employees (emphasis has been added to the following quotes from the record):

- [The Act] "authorizes qualifying employees... to compete for vacant permanent positions under internal merit promotion procedures, *just as any permanent federal employee is eligible to do.*"³
- "It is appropriate that these individuals be provided *the same opportunity to compete for career advancement opportunities available to other federal employees.*"⁴
- "The purpose of [the Act] is to remove unnecessary regulations that prevent long-term temporary seasonal employees from competing for vacant permanent positions *under the procedures that other federal employees enjoy.*"⁵
- "[Eligible temporary employees] should be provided *the same opportunity to compete for career advancement opportunities available to other federal employees.* Accordingly, H.R. 1531..."⁶
- "[The Act] provides long-serving, temporary seasonal wildland firefighters and other seasonal employees with *the same career advancement opportunities available to all other Federal employees.* Specifically, [it] authorizes qualifying land management agency employees serving under time-limited

¹ OPM, "The Land Management Workforce Flexibility Act: Implementing Policy Guidance" (Dec. 29, 2015). Available at <https://www.chcoc.gov/content/implementing-policy-guidance-land-management-workforce-flexibility-act>.

² The area of consideration defines to whom a job vacancy will be "open." The area of consideration can be as broad as allowing all U.S. citizens to apply or as narrow as permitting only members of a specific organizational unit within an agency to apply. See MSPB, "The Impact of Recruitment Strategy on Fair and Open Competition for Federal Jobs" (Jan. 2015) at 11. Available at <http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=1118751&version=1123213>.

³ House Report 114-182 at 2. Available at <https://www.gpo.gov/fdsys/pkg/CRPT-114hrpt182/pdf/CRPT-114hrpt182.pdf>.

⁴ House Report 114-182 at 4

⁵ Senate Report 114-123 at 1. Available at <https://www.gpo.gov/fdsys/pkg/CRPT-114srpt123/pdf/CRPT-114srpt123.pdf>.

⁶ Senate Report 114-123 at 2

appointments to compete for vacant permanent positions under internal merit promotion procedures, *just as any permanent Federal employee is eligible to do.*⁷

Under OPM’s guidance at Q7, an individual who is eligible under the Act can compete for a merit promotion vacancy within their employing agency if the area of consideration for that vacancy limits applications to agency employees only. If the area of consideration includes employees from other Federal agencies in addition to agency employees, however, Act-eligible individuals are barred from competing. In contrast, a permanent Federal employee in the same agency could compete in either case. These are scenarios #1 and #2 in the table, below. The guidance’s interpretation is contrary to the legislative intent provide eligible temporary employees with “the same opportunity to compete for career advancement opportunities available to other federal employees.”

Under OPM’s guidance at Q31, an individual who is eligible under the Act can compete for a merit promotion vacancy within a different agency than their employing agency if the area of consideration for that vacancy limits applications to that agency’s employees only. However, if the area of consideration includes employees from Federal agencies other than the hiring agency, then Act-eligible individuals are barred from competing. These are scenarios #3 and #4 in the table, below. This is the exact opposite as the case for permanent employees. Thus, the guidance’s interpretation is contrary to the legislative intent of the Act to provide eligible temporary employees with “the same opportunity to compete for career advancement opportunities available to other federal employees.”

Scenario #	Employing Agency	Hiring Agency	Area of Consideration	Can Permanent Employees Apply?	Can Eligible Temps Apply?
1	A	A	Agency A	Yes	Yes
2	A	A	All federal employees	Yes	No
3	A	B	Agency B	No	Yes
4	A	B	All federal employees	Yes	No

OPM Guidance Is Contrary to the Plain Language of the Act

Clearly, the guidance deviates from legislative intent. Is this deviation an unintended consequence of a proper interpretation of bad legislative language? Or, is it a bad interpretation of good legislative language? Analysis shows that it is the latter. The core provision of the Act states, in relevant part:

[A]n employee of a land management agency serving under a time-limited appointment in the competitive service is eligible to compete for a permanent appointment in the competitive service at any

⁷ Statement of Representative Gerry Connolly, sponsor of Public Law 114-47, Congressional Record (July 7, 2015) at H4783. Available at <https://www.gpo.gov/fdsys/pkg/CREC-2015-07-07/pdf/CREC-2015-07-07-pt1-PgH4782.pdf>.

*land management agency or any other agency (as defined in section 101 of title 31) under the internal merit promotion procedures of the applicable agency if...*⁸

The Act goes on to list conditions which must be met for eligibility. Eligibility depends exclusively upon the listed criteria. An employee is eligible “if the employee meets three criteria.”⁹ The area of consideration of the agency seeking to fill a vacancy by merit promotion is not among these criteria. It is therefore not a determinative condition for eligibility. An employee is eligible regardless of area of consideration. Further, at no point does the Act define conditions under which an eligible employee is rendered ineligible.

The restrictions in the guidance stem from its redefinition of the term “internal merit promotion procedures.” It states, at Q13, “we understand the term ‘internal merit promotion procedures’ to refer to a situation where the hiring agency plans to prepare a list of candidates under merit promotion procedures and is accepting applications only from individuals inside its own workforce for that purpose.” This conflicts with the definition in the legislative record:

- House Report 114-182 states, “Internal merit promotion procedures vary by agency, but... are generally open to current or former Federal employees who have or had permanent appointments.”¹⁰
- In discussing the term, the House Report cites a Merit System Protection Board (MSPB) document which states, “Internal merit promotion announcements may limit who is considered. For example, an announcement may be open to displaced or about-to-be-displaced employees only, to agency employees only, or to employees from other Federal agencies within the commuting area.”¹¹
- Indeed, prior to issuance of the guidance, even OPM used the term “internal merit promotion procedures” to encompass situations wherein all federal employees may apply for the job.¹²

The legislative record shows that the term “internal merit promotion procedures” is used synonymously with the term “merit promotion procedures.” Use of “internal” does not denote a limitation of the area of consideration (e.g., whether only internal candidates or all federal employees are being considered). The adjective “internal” is merely descriptive of the fact, as noted in 5 CFR Part 335, that these procedures are developed by each agency and are unique to each agency. The usage by MSPB would seem to show this usage is not limited to the legislative record, but rather is well-understood general usage.

OPM Guidance Is Contrary to Requirements of Good Government

It is also worth pointing out that the outcomes created by the guidance are inconsistent with requirements of good government. Determination of the area of consideration for a given position is a strategic decision properly reserved for agency discretion. As noted by MSPB, “When announcing a job opening via [Merit Promotion] procedures, managers, with advice from their HR staff, can decide how large the area of consideration will be. It may be as narrow as a work unit, or as broad as the entire civil service. Merit Promotion procedures allow the inclusion of applicants from other merit systems with an interchange agreement and/or employees who left the civil service but are eligible for reinstatement. The area of consideration also may be limited geographically to a small area (such as a single city), world-wide, or somewhere in between.”¹³

⁸ Public Law 114-47. Available at <https://www.gpo.gov/fdsys/pkg/PLAW-114publ47/pdf/PLAW-114publ47.pdf>.

⁹ House Report 114-182 at p. 5.

¹⁰ House Report 114-182 at 2-3

¹¹ U.S. Merit Systems Protection Board, Office of Policy and Evaluation, Report to the President and Congress, ‘Help Wanted: A Review of Federal Vacancy Announcements’ (April 2003) at 5. Available at: <http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=253634&version=253921&>.

¹² See OPM, Delegated Examining Operations Handbook (May 2007) at 69, where the term is used in reference to a hiring authority that is only applicable for jobs open to all federal employees. Available at https://www.opm.gov/policy-data-oversight/hiring-authorities/competitive-hiring/deo_handbook.pdf.

¹³ MSPB, “The Impact of Recruitment Strategy on Fair and Open Competition for Federal Jobs” (Jan. 2015) at 13. Available at <http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=1118751&version=1123213>.

For example, an agency may for good reasons decide to limit the applicant pool for a given job by limiting the area of consideration for that job to its own workforce. Under this circumstance and contrary to the agency's hiring strategy, OPM's guidance forces that agency to expand the applicant pool by considering eligible temporary employees outside of its workforce (scenario #3, above).

Or, an agency may decide to expand the applicant pool by opening up the area of consideration to include all Federal employees. Under this circumstance and again contrary to the agency's hiring strategy, OPM's guidance minimizes the applicant pool by blocking the agency from considering eligible temporary employees – even those from its own workforce who are likely to be among the best qualified for the position (scenarios #2 and #4, above).

This is not just a hypothetical problem. The federal wildfire organization is inter-agency in nature, consisting of Interior agencies and the USDA Forest Service. Accordingly, jobs are almost always open across agency lines. OPM's guidance would effectively negate the reforms enacted by Congress insofar as wildland firefighters are concerned; leaving them in the same situation they were in before Congress acted.

Thus, OPM's guidance forces the opposite of a good government outcome under most circumstances. One need have no crystal ball to predict what kind of "consideration" a hiring official who intends to consider only internal agency applicants will give to an eligible temporary employee from outside their agency (scenario #3, above). However, this aspect is secondary; the primary consideration is that the guidance very clearly contravenes legislative intent and the plain language of the Act.

Conclusions

"Internal merit promotion procedures" is defined in legislative history to be synonymous with "merit promotion procedures." Use of the adjective "internal" does not denote a limitation on the positions for which eligible temporary employees may apply. OPM's guidance errs in redefining the term, thereby prohibiting qualifying temporary employees from competing for merit promotion vacancies whose area of consideration includes employees from outside the agency that is filling the position. In so doing, OPM's guidance does not comport with the legislative intent to provide eligible temporary employees with the same career advancement opportunities that are available to all other Federal employees.

We note that the Act does not affect the ability of agencies to exercise their appropriate authority under their merit promotion procedures. Specifically, the Act does nothing to undermine agencies' authorities to determine areas of consideration. Consequently, and consistent with legislative intent, temporary employees eligible under the Act should be subject to the same properly determined areas of consideration as are their permanent coworkers.