

History of OPM's Reaction to Temporary Employment Reform

National Federation of Federal Employees

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Executive Summary

The purpose of Land Management Workforce Flexibility Act (LMWFA) is to “provide a pathway *for temporary seasonal employees* in Federal land management agencies to compete for vacant permanent positions under internal merit promotion procedures, and for other purposes (emphasis added).”¹ The Office of Personnel Management (OPM) issued guidance on its implementation on Dec. 29, 2015.² The guidance is fatally flawed:

- Legislative intent, clearly defined in the Congressional Record, is to provide eligible temporary employees with the same opportunity to compete for career advancement opportunities available to other Federal employees by allowing them to use the same procedures available to other Federal employees. OPM's guidance would ban them from applying to vacancies open to all Federal employees.
- OPM's guidance deviates from legislative intent by defining “internal merit promotion procedures” as referring to a situation in which the hiring agency “is accepting applications only from individuals inside its own workforce for that purpose.” Legislators defined the term as applicable to situations in which vacancies are open to all current or former Federal employees.

Recent history of OPM's involvement with temporary employment, particularly seasonal temporary employment, reveals a pattern of denial regarding even the existence of long-serving temporary employees. This has led to a situation in which agency deliverables have consistently undermined reform efforts:

- In response to a 2002 GAO review, OPM told GAO there was apparently abuse of temporary employment (long-term employment in temporary positions). In 2010 Congressional testimony and in a 2013 report to Congress, OPM denied there was abuse.
- OPM told GAO they would track work histories of temporary employees to assess the problem of long-term employment in temporary positions. In responding to the Congressional inquiries referenced above on this question, OPM did not provide any data on the work histories of temporary employees and did not reference any program to track work histories.
- OPM told GAO they had modified regulations to address the problem of long-term employment in temporary positions. This statement was not true. They had not and still have not to this day.

¹ Public Law 114-47. Available at <https://www.gpo.gov/fdsys/pkg/PLAW-114publ47/pdf/PLAW-114publ47.pdf>.

² 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>.

2002: GAO Review of Temporary Employment and OPM's Oversight Thereof

In March, 2002, the Government Accountability Office released a report to, among other items, “identify steps OPM has taken to ensure the appropriate use of temporary limited employees and to determine whether long-term use of temporary limited employees still exists.”³ The following statements are taken verbatim from the report:

1. [I]n 1994 OPM revised its regulations governing the use of temporary appointments to help ensure that temporary employees were “used to meet truly short-term needs.” OPM stated that it developed “those regulations in response to Congressional and employee concerns and evidence that some employees were, indeed, serving for years under a succession of temporary appointments with no benefits and no job security.”⁴ For example, a 1992 OPM study reported that many nonpermanent seasonal employees *in the land management agencies* were “making a career” out of temporary work (emphasis added).⁵
2. [T]he regulations do not preclude agencies from hiring temporary limited employees to work in a series of extensions, reappointments, and appointments. Thus, there seems to be an inconsistency between OPM’s stated intent and what is permissible under the provisions of its regulations. The regulations allow agencies to continue a pattern of repetitive temporary appointments...⁶
3. OPM’s Office of Merit Systems Oversight and Effectiveness (OMSOE)... generally does not look at the work history of temporary limited employees serving in those appointments... Because of the typically limited nature of its reviews of temporary limited appointments, OMSOE’s reviews of agencies are unlikely to uncover instances of long-term temporary limited employment... OPM’s data do not identify the number of temporary limited employees who worked for continuous extended periods...⁷ [N]either OPM nor agencies monitor the total years of temporary employment by temporary limited employees...⁸
4. [GAO’s review found that] a substantial number of temporary limited employees hired in fiscal year 2000 have worked for the federal government for at least 5 years, and there is no way to determine from OPM’s data whether some of these employees have worked for

³ GAO-02-296, “OPM Data Do Not Identify if Temporary Employees Work for Extended Periods,” (March, 2002) at 2. Available at <http://www.gao.gov/products/GAO-02-296>.

⁴ GAO-02-296 at 4. See also p. 19: “OPM stated that its intention in revising the regulations was to ensure that temporary limited employees were used to meet truly short-term needs and were not serving for years under a series of temporary appointments without many of the benefits afforded other long-term employees.”

⁵ GAO-02-296 at 20. Interestingly, perhaps tellingly, the OPM report cited by GAO is apparently no longer available.

⁶ GAO-02-296 at 27

⁷ GAO-02-296 at 4-5

⁸ GAO-02-296 at 27

continuous extended periods...⁹ Most of the 16,232 temporary limited employees hired in fiscal year 2000 who had 5 or more years in federal service were hired under *seasonal appointments* (emphasis added).¹⁰

5. [GAO recommended and OPM agreed] to conduct a study to identify the number of temporary limited employees who have been working for continuous extended periods in temporary limited appointments and the reasons and conditions that permitted such cases to occur. [OPM reported back that there] appear[ed] to be questionable practices occurring in the retention of employees in an ongoing series of temporary appointments. For example, in one case, an OPM analyst identified an employee at the National Park Service who had 31 temporary appointments from January 6, 1996, through November 11, 2001. In analyzing these data, the preparation notes state that an assumption can be made that *many "seasonal" employees may not be performing legitimate "seasonal" work* (emphasis added). [GAO's records indicate this recommendation was implemented.]¹¹
6. [GAO recommended and OPM agreed] to include a sample of temporary limited employees and their work histories as part of its periodic oversight reviews of agencies. [OPM reported back that] in April 2002, the acting Assistant Director for Merit Systems Oversight directed all OMSOE oversight divisions to review temporary limited appointments to ensure that such appointments were not used to appoint individuals continuously for extended periods of time. OMSOE has incorporated a sample of temporary limited employees into their regularly scheduled oversight reviews of agencies. [GAO's records indicate this recommendation was implemented.]¹²
7. [GAO recommended] that the director should use the results of the recommended study to modify the regulations governing temporary limited employees to address any problem areas found. OPM did not specify precisely what it would do in response to this recommendation but said that any problems identified would be addressed through recommended or required corrective actions.¹³ [OPM reported back that they had] amended regulations governing procedures for making temporary appointments. Specifically, OPM revised 5 U.S.C. sec. 316.402(a).¹⁴ [GAO's records indicate this recommendation was implemented.]

In fact, OPM's response to the recommendation in #7 was disingenuous. Regulations governing procedures relevant to the problem areas found in GAO's review and the subsequent OPM study were not changed. Regulations relevant to time limits of temporary employment are the same today as they were in 1994.

⁹ GAO-02-296 at 5

¹⁰ GAO-02-296 at 26 (parenthetical at p. 25)

¹¹ GAO-02-296, "Recommendations for Executive Action." Available at <http://www.gao.gov/products/GAO-02-296>, select the RECOMMENDATIONS tab.

¹² GAO-02-296, "Recommendations for Executive Action."

¹³ GAO-02-296 at 28

¹⁴ GAO-02-296, "Recommendations for Executive Action."

In claiming they had modified regulations governing temporary employment to address “questionable practices occurring in the retention of employees in an ongoing series of temporary appointments,” OPM cited modifications to 5 CFR 316.402(a).¹⁵ The cited modification had nothing to do with the retention of temporary employees. 316.402(a) was modified as part of the housekeeping associated with new regulations to implement human resources flexibilities contained in the Homeland Securities Act of 2002, which created a new direct hire authority.¹⁶

Regulations relevant to the issue at hand reside at 5 CFR 316.401. A provision at 5 CFR 316.402(b)(7) also plays a role. No changes were made to these provisions. Thus, while 5 CFR 316.402(a) is located adjacent to regulations relevant to the problems identified during the GAO review, the housekeeping changes made to it had nothing whatsoever to do with the issue at hand. It is difficult to conclude that this episode was anything other than a deliberate attempt to mislead.

Further, with regard to OPM’s commitment to “include a sample of temporary limited employees and their work histories as part of its periodic oversight reviews of agencies (#6),” in subsequent questioning by Congress OPM has not disclosed or referenced such data even in contexts in which it would have been necessary to answer the questions posed.

2010: OPM’s Testimony before House Oversight and Government Reform

On June 30, 2010, the House Oversight and Government Reform Committee held a hearing on the topic, “Temporary Employment Practices: How Long Does Temporary Last?” In oral testimony and under oath, OPM Deputy Associate Director for Recruitment and Hiring Angela Bailey testified as follows as regards abuse of temporary employment authorities:¹⁷

Mr. Connolly. Let me ask Ms. Bailey, is it your testimony today that abuses have, in fact, occurred using temporary hires?

Ms. Bailey. No, it is not my testimony today that---

Mr. Connolly. So, then, no abuses have occurred?

Ms. Bailey. No, we do not believe that abuses have occurred using this temporary appointment authority. Given our oversight and accountability role in this and working with the agencies, we do not believe that there have been abuses.

Mr. Connolly. No abuses?

Ms. Bailey. Correct....

¹⁵ GAO’s closeout document actually cites 5 USC 316.402(a); however, because OPM lacks the authority to modify the U.S. Code we assume they meant to cite 5 USC 316.402(a), which is located in the CFR Part addressing temporary employment.

¹⁶ Specifically, modifications under the Act replaced Part 333 with Part 337, which in turn necessitated changing the reference by 5 CFR 316.402(a) from Part 333 to the new Part 337. See Federal Register Vol. 68, No. 114, p. 35265, available at <https://www.gpo.gov/fdsys/pkg/FR-2003-06-13/pdf/03-14971.pdf>.

¹⁷ Oral testimony is available at <https://www.gpo.gov/fdsys/pkg/CHRG-111hrg62948/html/CHRG-111hrg62948.htm>.

Mr. Connolly. I just want to say, I am stunned by Ms. Bailey's testimony that they have never found, are not aware of any abuse of the use of temporary hires. That is an extraordinary statement for a work force as large as the Federal Government. Even a work force as normally perfect as ours, there has to be abuse now and then. And I think that is a challenge, frankly, for this committee. Thank you.

Ms. Norton [presiding]. Thank you very much. Ms. Bailey, would you like to revise your statement in any way? I mean, you have just--my colleague says that you have just come up with a perfect system.

Ms. Bailey. Well, yes. Thank you, ma'am. I think it is safe to say that we do have--through our oversight role, if we do find a situation where there is an abuse that is occurring, we will absolutely go in and work with that agency in an informal manner. We can do all kinds of things, from training the hiring managers to training the HR specialists...

Mr. Connolly. I thought Ms. Bailey's testimony, in answer directly to my question was, we have found no such examples, none. And now I am hearing Ms. Bailey say, well, actually, when we find them, we do take corrective action. And if you wanted to correct your statement, please feel free to do so. But I am leaving here with your answer under oath to my question that you have found no examples of the abuse of the use of temporary positions in the Federal work force.

Ms. Bailey. And that, sir, I do not want to change. That is correct. We have not found one instance of an abuse under this authority.

Ms. Norton. Apparently, GAO data showed that 11 percent of the temporary employees had worked more than 5 years. Would you consider that an abuse?

Ms. Bailey. Well, it really depends on exactly under what conditions these folks are working.

Ms. Bailey's testimony appears to contradict OPM's finding that there "appear to be questionable practices occurring in the retention of employees in an ongoing series of temporary appointments," as reported to GAO in item #5, above. Further, in response to GAO's review, OPM committed to "include a sample of temporary limited employees and their work histories as part of its periodic oversight reviews of agencies (GAO item #6, above)." These data would have been of utmost relevance in addressing the question posed by the hearing, "How long does temporary last?" Neither Ms. Bailey nor OPM's written testimony mentioned such data. Either they failed to collect such data or they declined to provide it to Congress during the hearing.

2013: OPM's Report to Congress on Federal Temporary Employment

In September, 2013, OPM submitted a report to Congress in accordance with Senate Report 112-79,¹⁸ which incorporated by reference the following language in Senate Report 111-238:

Inappropriate Use of Temporary Hiring Authority - The Committee is aware that continuous and sustained inappropriate use of temporary hiring authority by Federal

¹⁸ OPM, "Temporary Employment in the Federal Government" (September, 2013). Available at <http://www.nffe.org/ht/a/GetDocumentAction/i/106840>.

agencies occurs and that this remains unresolved... The Committee directs OPM to report on options and recommendations to remedy the inequity no later than 90 days after enactment of this act. Included in the report should be identification of agencies and types of positions where continuous and sustained inappropriate use of temporary hiring authority is occurring...

We reproduce here in its entirety the section in OPM's report entitled "Oversight and Accountability," which is the portion of the report that is responsive to the Senate's core charge to identify "agencies and types of positions where continuous and sustained inappropriate use of temporary hiring authority is occurring:"

Agencies (through their self-led accountability audits) and OPM's Merit System Accountability and Compliance team, include temporary employment in their reviews of hiring practices. We have not found that agencies have carried out sustained inappropriate use of temporary employment.

That's it. There's no data responsive to the question. There's no description of what data were examined and how they were examined in order to reach this conclusion. As noted in the previous section, OPM committed to "include a sample of temporary limited employees and their work histories as part of its periodic oversight reviews of agencies (GAO item #6, above)." Yet, no such data are given. It would appear that OPM did not find sustained inappropriate use because they did not look for it in the way they committed to GAO that they would.

2015: OPM's Implementation Guidance for the LMWFA

As noted previously, we believe OPM's implementation guidance is fatally flawed. We have prepared a comprehensive analysis of our concerns¹⁹ and will not reproduce them in depth here. In brief:

- Legislative intent, as articulated in the House and Senate reports and in the Congressional Record during debate of H.R. 1531 in the House, is to provide eligible temporary employees with the same opportunity to compete for career advancement opportunities available to other Federal employees by allowing them to use the same procedures available to other Federal employees. OPM's guidance would prohibit them from applying to merit promotion vacancies unless the hiring agency limited applicants to its internal workforce only. In other words, unlike other Federal employees, they would be banned from applying to vacancies open to all Federal employees. The guidance is contrary to legislative intent.
- OPM's guidance defines "internal merit promotion procedures" as referring 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 usage of the term is contrary to its usage in House Report 114-

¹⁹ NFFE, The Land Management Workforce Flexibility Act: OPM Guidance is Inconsistent with the Act (January, 2016). Available <http://www.nffe.org/ht/a/GetDocumentAction/i/106657>.

182, which states, “Internal merit promotion procedures vary by agency, but... are generally open to current or former Federal employees who have or had permanent appointments.” It is also contrary to its usage in the Merit System Protection Board document cited by the House Report.

These misinterpretations go against the core purpose of the Act to provide eligible long-term temporary employees with the same opportunities as permanent federal employees by providing them access to the same procedures under which permanent employees compete.

Conclusions

To summarize the findings documented above:

- Regulations allow agencies to continue a pattern of repetitive temporary appointments (GAO item #2, above).
- OPM’s study in response to GAO’s 2002 review suggested that many "seasonal" employees may not be performing legitimate "seasonal" work (GAO item #5, above).
- The regulations to which GAO referred have not been changed. OPM’s statement to GAO that regulations had been changed to address the problems identified in their review (GAO item #7, above) was false.
- To check for inappropriate use of temporary employment authority, OPM committed to “include a sample of temporary limited employees and their work histories as part of its periodic oversight reviews of agencies (GAO item #6, above).” OPM did not release or make reference to such data in responding to Congressional questions to which such data would be highly relevant, even though under oath in one instance to give “the whole truth.”
- In drafting guidance for the Land Management Workforce Flexibility Act, OPM changed the meaning of a term clearly defined in the legislative record, thereby changing the effect of the Act in a way that does not comport with legislative intent. This seriously undermines the reform put in place by the Act.

Looking at the history, it is difficult to conclude that this pattern of behavior is anything other than a deliberate attempt to mislead GAO and Congress about the existence of significant numbers of long-term temporary seasonal employees because of unintended consequences of flawed regulations. Regardless of motive, this history of denial has had the effect of undermining much-needed reforms in federal employment regulations undertaken to deal with this significant population of employees. It is time for it to stop.