VII. EMPLOYEE STATUS

A. Seasonal Employees

Regular seasonal employees are those who have a reasonable expectation of re-employment in the foreseeable future. If they have a reasonable expectation of recall and perform unit work, they are included in the bargaining unit. Factors to be considered include: whether the employer draws from the same labor force each season; whether former employees are given preference in rehiring; whether there are similar duties, working conditions and supervision for seasonal and permanent employees; and whether seasonal employees can become permanent employees. See *Maine Apple Growers, Inc*., 254 NLRB 501 (1981).

Note: There is a difference between a seasonal employer and a cyclical one. If the employer, despite hiring some employees seasonally, is engaged in virtually year round production operations and the number of employees in the year round complement is relatively substantial, the employer's operation may be deemed cyclical and not seasonal. *Baugh Chemical Co.,* 150 NLRB 1034 (1965).

See *An Outline of Law and Procedure in Representation Cases,* Section 20–300.

Relevant Questions:

1. What classifications constitute the employer's permanent work force? Number of employees in each classification?

2. What classifications constitute the employer's seasonal peak work force? Number of employees in each classification?

3. When does the seasonal period begin, peak and end?

4. How many employees are added during the seasonal period? At various stages during the peak season?

5. Does the employer keep records of seasonal employees? Describe the kind of records used and how they are used.

6. Does the employer draw seasonal employees from the same labor force year after year? For instance, does the employer maintain a list of employees who worked in prior seasons and call employees from this list? Or, does the employer advertise to the general public each season?

7. Does the employer draw its seasonal employees from the same geographical area each year?

8. From what other sources does the employer obtain seasonal employees?

9. Is the labor force composed primarily of former employees? If so, how many employees are re-employed every season? Seek payroll records, over a number of seasons, to confirm the numbers and reduce lengthy testimony.

10. What percentage of seasonal employees return year after year?

11. What is the employer's policy regarding recall or hiring of seasonal employees? Are they given preference?

12. What notice is given to seasonal employees upon their hire? Are they told that they are hired only for the particular season or for a limited duration?

13. When the season is over, what have the employees been told about their prospects for future employment? Are any documents given to employees in this regard?

14. Have seasonal employees become permanent employees? If so, under what circumstances, how many and how often?

15. Ask questions on community of interest located in Section V, A, Community of Interest; compare terms and conditions of employment of permanent and seasonal employees.

B. Part Time, On-Call/Per Diem and Casual Employees

In determining unit placement and eligibility issues, the status of employees and their tenure are major considerations. Unit placement involves whether an employee or the classification shares a community of interest with others in the proposed unit. See Section V, A, Community of Interest. Eligibility involves, among other factors, the specific nature of employment, such as the frequency and regularity of work.

Regular part-time employees are included in a unit with full-time employees whenever part-time employees perform work within the unit on a regular basis for a sufficient period of time during each week or other appropriate calendar period to demonstrate that they have a substantial and continuing community of interest with the remainder of the unit. *Fleming Foods*, 313 NLRB 948 (1994). The test for determining whether an employee is a regular part-time employee involves an analysis of such factors as the regularity and continuity of employment, length of employment, degree of similarity of work duties performed by such employee in relation to those performed by bargaining unit employees, similarity of wages and benefits and other factors establishing whether such employee enjoys a community of interest with bargaining unit employees. *Pat's Blue Ribbons*, 286 NLRB 918 (1987). Regularity of work does not necessarily mean a fixed schedule; rather, this requirement can be satisfied by evidence that an employee has worked a substantial number of hours within the period of employment prior to the eligibility date and there is no showing that work is on a sporadic basis. Generally, infrequent employment can lead to a casual status finding. Where an

employee is found to be an irregular part-time employee, the Board has excluded those employees as casual employees. *Royal Hearth Restaurant,* 153 NLRB 1331, 1333 (1965). However, an employee's option to turn down work and the fact that an employee does not necessarily call in every day does not preclude a finding of regular part-time status. *Mercury Distribution Carriers,* 312 NLRB 840 (1993).

On-call employees may or may not be considered regular part-time employees, depending on the specific nature of their employment. When they are employed sporadically, with no established pattern of continued employment, they are excluded from the unit, as are irregular part-time employees. But, where on-call employees have a substantial working history, with a substantial probability of employment and regular hiring, and meet any other criteria established by the parties, they are considered regular part-time employees.

See *An Outline of Law and Procedure in Representation Cases* Section, 20–100.

The suggested questions below cover part-time status, on-call/per-diem employees or those asserted to be casual employees:

Similarity of Duties/Community of Interest Questions:

First, establish that the disputed employees perform unit work similar to the work performed by the employees who are undisputedly included in the unit. If possible, the hearing officer should explore a stipulation that the disputed employees perform the same or similar work as other employees and receive similar wages and benefits. This way, the only remaining issue concerns the regularity of their employment. If it becomes necessary to call witnesses regarding community of interest issues, see Section V, A, Community of Interest, for suggested questions.

Regularity of Work:

Explore how often the employee(s) work for the employer over a specific period of time. Whenever appropriate, and certainly in lieu of lengthy testimony, the hearing officer should seek payroll records that may shortcut testimony from witnesses. If payroll records are available, they should be identified clearly on the record and submitted as evidence. The hearing officer should make sure that the records cover a sufficient period to establish the pattern of employment. If witnesses need to be called, here are some suggested questions regarding the regularity of work:

Relevant Questions:

1. How does the employee receive work opportunities?

2. How many hours does the employee in question work for the employer on a daily, weekly, monthly or other basis?

3. How many hours did he/she average per week during each of the two calendar quarters immediately prior to the hearing?

4. How long has the employee worked for the employer under this type of schedule or arrangement?

5. Is the employee employed elsewhere on a full-time basis?

6. Is the employee regularly scheduled to work a specific amount of time?

7. Is the employee free to reject work when it is offered?

Eligibility Formulas Covering
Part-time, Per Diem and On-Call Employees:

Even though regular part-time employees or per diem/on-call employees may be included in a unit, where these employees have varying hours of work, eligibility formulas have been devised to determine employees' eligibility to vote based on the hours worked during a particular period. Various standards, such as hours worked per day or week or days worked per calendar period, have been applied in different industries to determine whether part-time, per diem or on call employees are eligible to vote. Where there is a wide disparity in the number of hours worked by these employees, the Board has fashioned appropriate standards to assure an equitable formula. Parties may agree that part-time, per-diem or on-call employees should be included in the unit, but dispute which formula should be utilized in determining voting eligibility. Where the parties litigate the inclusion of part-time, per diem or on-call employees, the hearing officer should also ask the parties their positions regarding eligibility formulas. The hearing officer should encourage the parties to use a Board-approved formula appropriate for the circumstances of the case. If the parties stipulate to a different formula from one normally used by the Board, the record must contain an adequate basis upon which the Regional Director can determine the appropriateness of the proposed formula.

Davison-Paxon: The Frequently Used Standard

The most common eligibility formula for determining the eligibility of irregular part-time employees is the formula found in *Davison-Paxon*, 185 NLRB 21, 24 (1970), under which employees who average 4 hours per week for the calendar quarter preceding the election eligibility date are eligible to vote.

Health Care Industry Formula:

In the health care industry, the most commonly used standard is also the *Davison-Paxon* formula. *Sisters of Mercy*, 298 NLRB 483 (1990); *Beverly Manor Nursing Home*, 310 NLRB 538 (1993). The *Davison-Paxon* formula also has been applied to the home-health care industry. *People Care*, 311 NLRB 1075 (1993); *Five Hospital Elderly Program*, 323 NLRB 441 (1997). However, in a case where the facts showed a wide

disparity in the number of hours worked, the Board fashioned a different formula. *Marquette*, 218 NLRB 713 (1975) (on-call nurses who worked a minimum of 120 hours in either of the two quarters preceding the election eligible to vote).

The Construction Industry Formula:

Unlike all other industries, a special eligibility formula applies to all cases in the construction industry, unless the parties specifically stipulate to use the standard Board formula. In *Steiny & Co.*, 308 NLRB 1323 (1992), the Board returned to the voting eligibility formula established in *Daniel Construction Co.*, 133 NLRB 264 (1961), as modified in *Daniel II*, 167 NLRB 1078 (1967), as being applicable to all elections conducted among employees of construction industry employers. Thus, the *Daniel* formula provides that, in addition to those employees who would be eligible to vote under standard Board criteria for eligibility, other employees will be eligible if:

> (1) they have been employed for 30 working days or more within the 12 months preceding the eligibility date for the election: or,
>
> (2) if they have had some employment in the 12 months preceding the eligibility date for the election and have been employed for 45 working days or more within the 24-month period immediately preceding the eligibility date.

Excluded from the *Daniel* formula are employees who have been terminated for cause or who have quit voluntarily prior to the completion of the last job on which they were employed. The *Daniel* formula does not apply to employers who clearly operate on a seasonal basis. *Steiny,* 308 NLRB 1323 (1992), at fn.16.

If the hearing officer is faced with the issue of whether the employer is an employer engaged in the building and construction industry, he/she should elicit specific testimony as to the employer's operations. An employer that is primarily engaged in construction of new work, additions, alterations, reconstruction, installations and repairs is considered to be an employer engaged in the construction industry. *South Jersey Regional Council of Carpenters, Local 623 (Atlantic Exposition Services, Inc.),* 335 NLRB 586 (2001).

C. Probationary Employees and Trainees

Probationary employees who share the same duties and basic terms and conditions of employment with permanent employees and have an expectation of permanent employment upon the completion of their probationary period are eligible to vote. Employees attending training programs are eligible to vote, if they are performing unit work. *CWM, Inc.*, 306 NLRB 495 (1992); *Dynacorp/Dynair Services, Inc*., 320 NLRB 120 (1995).

See *An Outline of Law and Procedure in Representation Cases,* Section 23–111.

Relevant Questions:

1. Describe the details of the training program or probationary period and its duration, purpose and content. Is the program or period subject to extension? How often does that occur? For how long may they be extended?

2. In what job or classification are individuals working?

3. What will be the assignment of the individuals on completion of the training or probationary period?

4. With which other employees do the individuals work?

5. Do individuals perform the same or similar duties as other unit employees?

6. How are individuals hired? Same or different from other employees?

7. What happens if an individual fails to complete training?

8. Percentage of these individuals who become permanent employees?

9. Do they attend meetings with other employees? What type of meetings? How often?

10. If disciplinary problems arise, how are these individuals treated? How does this compare with unit employees?

11. Ask community of interest questions located in Section V, A, Community of Interest and compare probationary employees or trainees with other unit employees.

D. Laid Off Employees

Temporarily laid-off employees are eligible to vote. Evidence is required to determine whether the laid-off employees have a "reasonable expectation" of being recalled to work in the foreseeable future. Objective factors that existed on or before the eligibility date must be considered, including the circumstances of the layoff, the employer's prior experiences with layoffs, the employer's future plans and what employees were told about the layoffs. There must be a reasonable expectation of recall on both the eligibility date and the date of the election. *Osram Sylvania, Inc*., 325 NLRB 758 (1998); *Apex Paper Box Co*., 302 NLRB 67 (1991).

See *An Outline of Law and Procedure in Representation Cases,* Section 23–115.

Relevant Questions:

1. Hiring date, classification, department, shift, supervisor, rate of pay, seniority.

2. Duties of the employee.

3. Layoff date; by whom; reason given (details); temporary; written or oral?

4. Others laid off at the same time? Number, classification, department, shift, reason?

5. At the time of the layoff, what was said about recall? Subsequent conversations about recall?

6. Any memoranda issued by the employer regarding future employment needs, business lost or new business expected?

7. Has the employee been laid off before? When, why, how long?

8. Has the employer had layoffs before? When, how often? What is the employer's policy and past practice regarding recall of laid-off employees? What criteria did the employer use to determine who would be laid off and who would be recalled? How would these criteria be applied to the employees in issue herein?

9. Did the employer maintain a recall list? If so, obtain and put in evidence.

10. Have other employees been recalled? Who? When? Department, classification, shift, reason?

11. During the layoff period, was the employee continued on the payroll? Were insurance, seniority or other benefits continued?

12. Is the reason for the layoff of a temporary nature? Obtain details regarding the reason for layoff.

13. Will additional employees be needed? If so, when, number, classification, department, shift?

E. Discharged Employees, Alleged Discriminatees and Strikers

Discharged Employees or Alleged Discriminatees:

An employee is assumed to have been discharged for cause unless there is a pending grievance (*Pacific Tile & Porcelain Co*., 137 NLRB 1358, 1365 (1962)) or unfair labor practice charge (*Dura Steel Co.,* 111 NLRB 590, 592 (1955)) alleging the contrary. During the course of a hearing, the hearing officer will not permit evidence to be presented in support of a pending charge or grievance. The **only** question is whether there is such a charge or grievance pending. If there is a pending charge or grievance, the alleged discriminatee may vote subject to challenge. *Curtis Industries, Inc*., 310 NLRB 1212, 1213 (1993).

See *An Outline of Law and Procedure in Representation Cases,* Section 23–113.

Strikers:

Strikers are presumed to be economic strikers. *Bright Foods Inc.*, 126 NLRB 553, 554 (1960). If a charge has been filed alleging that the strike is an unfair labor practice strike, the hearing officer will not permit evidence to be presented in support of that charge. Economic strikers are eligible to vote if they have not been permanently replaced unless the opposing party establishes, by objective evidence, that the economic strikers have abandoned their interest in their struck positions. *Pacific Tile & Porcelain Co*., 137 NLRB1358 (1962). This is an issue that may be fully litigated during the representation hearing.

Where the employer asserts that strikers have been permanently replaced and the petitioner contests such assertion, the hearing officer must inquire as to whether there is litigation pending regarding that issue. Permanently replaced strikers involved in pending litigation regarding their status shall vote subject to challenge. *Curtis Industries*, 310 NLRB 1212 (1993). If there is no pending litigation, strikers may be challenged during the election and their eligibility may be resolved postelection if those challenges are determinative. Replaced economic strikers are eligible to vote if the strike commenced less than 12 months prior to the election. *Tractor Supply Co.*, 235 NLRB 269 (1978). If the strike has been ongoing more than 12 months and the strikers have been replaced, they are generally not eligible to vote. Employees who are engaged in an economic strike and have not been permanently replaced are eligible to vote even if the strike has been ongoing more than 12 months. Permanent replacements are eligible to vote.

See *An Outline of Law and Procedure in Representation Cases,* Section 23–120.

Relevant Questions Pertaining to Strikers:

1. In general, what is the basis for the assertion that the employee(s) have abandoned their interest in their jobs?

2. Does the striker have a new job? Compare wages and benefits at new job vis-a-vis the struck work.

3. Is it a permanent or temporary position?

4. Did the striker move? When and under what circumstances? Was the move related to seeking other employment? Temporary or permanent?

5. Were any statements made by the striker regarding returning to the struck work, the move or whether the new job was temporary or permanent?

Permanent Replacements:

1. Describe the struck work and the positions held by the strikers and the replacements.

2. When did the strike begin?

3. When were replacements hired?

4. How did the employer solicit applicants? Obtain copies of any written advertisements.

5. What were the replacements told about their anticipated duration of employment, either at the time of hire or at any other time? Obtain specifics.

6. What were the replacements told about the strike?

7. What do the replacements understand regarding the permanent or temporary nature of their employment?

8. Did the employer have any conversations with strikers about their employment and whether they would be recalled after the strike? Obtain specific details.

9. Do the employer's personnel records indicate the duration or nature of employment of replacements or strikers?

10. Have there been other strikes at the employer's facility? When? What was the employer's past practice regarding replacements and strikers during prior strikes?

F. Temporary Employees

Temporary employees are generally those without sufficient interests to be included in the unit. However, some employees who are classified as "temporary" may be eligible for inclusion in the unit. The test for determining the eligibility of individuals designated as temporary employees is whether they have uncertain tenure—the "date certain" test. If the tenure of the disputed individuals is indefinite and they are otherwise eligible, they are permitted to vote. *MGM Studios of New York Inc*., 336 NLRB No. 129 (2001). On the other hand, if employees are employed for one job only or for a set duration or have no substantial expectancy of continued employment and have been notified of this fact, then such employees are excluded as temporaries. *E.F. Drew*, 133 NLRB 155 (1961). This issue may also arise in the postelection challenge context; in those cases, hearing officers should be careful to inquire about the employees' status as of the eligibility date and not their status as of the election date or thereafter. *Apex Paper Box*, 302 NLRB 67 (1991).

See *An Outline of Law and Procedure in Representation Cases,* Section 20–200.

Relevant Questions:

1. Was the individual hired for a particular job or for a defined or limited duration? Was

he/she told by the employer the nature or duration of his/her employment?

2. Has the employee been retained in the past following the completion of a particular project for which he/she was hired? Have other temporary employees been retained past their projects' completion dates?

3. Do the employer's personnel records indicate the duration or nature of employment?

4. Does the employer have a history of recalling a substantial number of the same employees, even though they are described as temporary?

5. Even if employees were hired as temporary employees and with the understanding that their employment may be terminated at any time, did these employees remain in continuous service even after one year?

6. Has the employer continued to employ temporary employees beyond the original term? If so, for how long? What is the likelihood that their employment will end in the future?

7. Did the employee achieve permanent status prior to the eligibility date?

8. How is permanent status established?

9. Do these employees fill in for other employees? Who do they fill in for, on what basis, frequency?

10. Ask questions on community of interest located in Section V, A, Community of Interest, and compare temporary employees with other unit employees.

G. Dual Function Employees

Dual function employees are those who perform more than one function for the same employer. Dual function employees who spend part of their work time performing bargaining unit work may share a sufficient community of interest with the unit to be eligible to vote, even though they do not spend a majority of their time performing unit work. The same community of interest tests are applied to dual function employees as are applied to regular part-time employees. *Berea Publishing*, 140 NLRB 516, 519 (1963). Generally, dual function employees are included in the unit and are eligible to vote if they regularly perform duties similar to those performed by unit employees for sufficient periods of time to demonstrate that they have a substantial interest in the unit's terms and conditions of employment. *Ansted Center*, 326 NLRB 1208 (1998).

The dual function issue may arise in situations where employees have non-unit supervisory responsibilities. The Board has held that determinations of supervisory status are made based on a complete examination of all the factors present to determine the nature of the individual's alliance with management. *Rite Aid Corp.*, 325 NLRB 717

(1998). Thus, where a party raises an issue that a particular employee performs unit work but also performs work as a supervisor, the hearing officer must delve into the 2(11) issues and obtain testimony in this regard.

Note: In *Otasco, Inc.*, 278 NLRB 376 (1986), the Board held that contract bar principles preclude the inclusion of a dual function employees in a unit if they are already included in another unit covered by a contract. In *Benson Contracting Co. v. NLRB*, 941 F.2d 1262 (D.C. Cir. 1991), the court held that dual function employees were not entitled to vote in two separate units because it would require those employees to join two different unions to maintain their employment. Similarly, in *Nu-Life Spotless, Inc.*, 215 NLRB 357, 358 (1974), the Board held that in cases where elections are to be conducted in two units and some employees perform work in both units, those employees will be placed in the one unit in which their greater community of interest lies.

See *An Outline of Law and Procedure in Representation Cases,* Section 20–500.

Relevant Questions:

1. Does the employee perform non-unit work, as well as bargaining unit work?

2. Specify precisely the bargaining unit worked performed.

3. How much time does the employee spend performing bargaining unit as opposed to non-unit work? Are there payroll records or other documents that would show the number of hours worked in each area? If so, seek to have them introduced into evidence.

4. Who supervises the employee when he or she performs bargaining unit work? Same supervisor as other unit employees?

5. Where is employee physically located when performing bargaining unit work? Situated with other unit employees?

6. Wage rates when performing unit work? Similar to others in the unit?

7. Benefits provided when performing unit work? Similar to others in the unit?

8. Is the dual function employee included in a different bargaining unit of the same employer? If so, is there a current collective-bargaining agreement that already covers the dual function employee in that unit?

9. Is the dual function employee being sought in more than one unit simultaneously? If so, ask community of interest questions in Section V, A, Community of Interest, and compare their community of interest with that of employees in each of the other units in which the dual function employee works.

H. Contingent Employees

In *M.B. Sturgis, Inc*., 331 NLRB 1298 (2000), a divided Board overruled *Lee Hospital*, 300 NLRB 947 (1990) and held that a unit combining the user's solely-employed employees and the supplier's employees jointly-employed by the user and the supplier does not constitute a multiemployer unit and thus does not require the consent of the user and the supplier. The proper analysis to be applied in determining the appropriateness of a unit of user and supplier employees is a community of interest analysis. If an examination of all the factors establishes that the jointly-employed employees share a mutuality of interests in wages, hours and working conditions with the user's employees, then a single unit combining both sets of employees may be appropriate. *Interstate Warehousing of Ohio*, 333 NLRB 682 (2001). There is no inquiry into community of interest issues unless there is a joint-employer relationship between the user and supplier of the employees in issue.

A unit of the user's employees, excluding the jointly-supplied supplier's employees, may also be appropriate. *Holiday Inn City Center*, 332 NLRB 1246 (2000). However, where the jointly-employed supplier's employees share such a strong community of interest with the user's solely-employed employees, their inclusion is required, despite the union's desire to exclude them. *Outokumpu Copper Franklin*, 334 NLRB 263 (2001); *Engineered Storage Products Co*., 334 NLRB 1063 (2001).

A union is not required to seek to bargain with both the user and the supplier; if the union names only the user in the petition, litigation of the possible joint employer relationship between the user and the supplier is not required. *Professional Facilities Management*, 332 NLRB 345 (2000).

See *An Outline of Law and Procedure in Representation Cases*, Section 14–600.

Relevant Questions:

1. If the parties do not stipulate to joint-employer status, the hearing officer must establish that the user and the supplier are joint employers. Refer to the questions on joint employer in Section IV, B, Single or Joint Employer. In particular, explore whether the two entities share responsibility for decisions concerning employees' wages, hours and other essential terms and conditions of employment, including decisions related to:

(a) Hiring
(b) Firing
(c) Discipline
(d) Work Schedules
(e) Job duties and requirements
(f) Work rules

2. What are the job duties and functions performed by the user employees and the supplier employees?

3. Compare their similarities. Are their duties functionally interrelated?

4. Compare the two types of employees in terms of:

(a) Wage rates
(b) Fringe benefits—both in types and amounts
(c) Working conditions
(d) Location of their work
(e) Supervision
(f) Schedule of hours
(g) Frequency and degree of contact
(h) Criteria for hiring

Note: Ask questions on community of interest and compare the terms and conditions of employment of the user and supplier employees. See Section V, A, Community of Interest, for community of interest questions.

5. How are the above terms and conditions of employment determined or controlled? By which employer?

I. Undocumented Workers

The Supreme Court has determined that undocumented workers are employees under the Act, notwithstanding their immigration status. *Sure Tan, Inc. v. NLRB,* 467 U.S. 883, 892 (1984). As employees, they are entitled to vote in NLRB elections. *County Window Cleaning Co.*, 328 NLRB 190, fn.2 (1999); GC Memorandum 02–06. Accordingly, if a party raises the issue of an employee's immigration status at a representation case hearing, the hearing officer should not permit evidence to be adduced, but rather should allow the party to present a brief offer of proof. The offer of proof will provide the Board with the context to consider the relevance of the employee's immigration status, if it chooses to do so.