



The following Response to Public Inquiry under Title 33, M.P.T.L., as amended, (“Preference Law”) provides employers with the benefit of the MERO’s interpretive guidance relating to a specific public inquiry. This response is based solely on the facts presented below. The reader is expected to be familiar with the terminology utilized in the law and procedures manual.

**Public Inquiry:** The employer is subject to the Preference Law. The employer has periodic temporary positions on the Reservation and not exempt from the Preference Law that it fills through a temporary services agency. The employer does not require the temporary services agency to comply with the Preference Law. Is the employer required to post or otherwise advertise its temporary positions?

**MERO Response:** Whether the employer acts directly or through a third party such as a temporary services agency, its obligations under the Preference Law are the same. If a third party is utilized by the employer, it is the employer’s obligation to make certain the third party’s actions comply with the Preference Law, if applicable, and the employer may be held liable for any noncompliance by the third party.

Any open employment position that must be filled in compliance with the Preference Law (hereinafter “Preference Position”) is required to be properly publicized. A temporary position generally is not considered a Preference Position if the position is filled for a duration of four (4) weeks or less, not to exceed 160 work hours. Changed circumstances unknown to the employer in good faith may extend or reinitiate the period during which a temporary position is not considered a Preference Position. Examples follow:

- (1) The employer elects to fill a temporary six (6) week opening that will be created by a part-time employee who is expected to take maternity leave. The temporary position is a Preference Position.
- (2) During a six (6) week employee leave, the employer needs only two (2) weeks of coverage. The temporary two (2) week position would not be considered a Preference Position.
- (3) Under the circumstances described in (2), after filling the temporary position for two (2) weeks, the employer decides it requires the position to be filled for another two (2) weeks. The additional two (2) weeks is not considered a Preference Position to the extent the entire four (4) week period does not exceed 160 work hours.

- (4) Under the circumstances described in (2), after filling the temporary position for two (2) weeks, the employer decides it requires the position to be filled for the entire six (6) weeks of the employee's leave, although there are no changed circumstances. The entire six (6) week period is now a Preference Position and if the employer did not comply with the Preference Law in filling the position during any part of the six (6) week period, the employer would be in non-compliance with the Preference Law.
- (5) An employee suffers a sudden medical condition that causes him not to be at work for an indeterminate period of time. The position may be filled for up to four (4) weeks (not to exceed 160 work hours) of his absence without being considered a Preference Position.
- (6) Under the circumstances described in (5), the employer fills the temporary position and is informed during the employee's second week of absence that the employee will remain out of work on medical leave for an additional six (6) weeks. Regardless of the number of days the position has been filled on a temporary basis up to that point in time, the employer has an additional four (4) weeks from receipt of this new information (not to exceed 160 work hours) during which the position is not a Preference Position.
- (7) Under the circumstances described in (5), the employer is initially informed that although the total leave time is indeterminate, the medical leave will last at least eight (8) weeks. The position may be filled for up to four (4) weeks (not to exceed 160 work hours) of the employee's absence without being considered a Preference Position. The total of four (4) weeks is not extended, even if the employer receives information during the eight week period that extends the absence in excess of eight (8) weeks.
- (8) An employee is granted and takes an emergency leave of absence for three (3) weeks. The leave of absence period is not considered a Preference Position. The employee returns for one (1) week, then requests and receives a two (2) week leave of absence for reasons related to the initial leave. The additional two (2) week leave of absence is not considered a Preference Position.

Notwithstanding the foregoing, a temporary open position that is filled for four (4) or less weeks or 160 or less hours by a non-preference eligible individual may be a violation of the Preference Law under certain circumstances, such as when the employer knows or should know of the availability of a well qualified preference eligible individual. For example, if the employer has a temporary three (3) week vacancy in an unskilled position that corresponds with the layoff of a skilled preference eligible employee, the employer's failure to offer the preference eligible employee the temporary position may be considered a violation of the Preference Law.