

## **Identifying a "true employer" and why it matters**

Labour

by SARAH GREENHALGH *Jul 29, 2015*

In Ontario's construction industry, a bargaining unit will generally be certified by the Ontario Labour Relations Board (the Board), where the union files an Application for Certification ("Application") and can demonstrate it holds 'cards' for at least 55 per cent of the group of "employees" at issue on the day that the application is filed.

### Identifying a "true employer" and why it matters

Consider a scenario in which your company receives an application from a union. Upon review, you note that several of the workers listed as members of the proposed bargaining unit were hired from a labour supply company or were engaged as sub-contractors. You think your company will be able to defeat the application because these workers are not your employees.

Unfortunately, you could be wrong. In a situation such as this, the question the Board asks is: "who is the true employer?"

### The test for determining the "true employer"

The test derives from the case of York Condominium Corp. No. 46 (York Condominium) in which the Board applied a series of criteria when attempting to establish which party has "fundamental control" over an employee. No single factor is more important than the others, and all of the factors must be assessed together, including:

- 1) Who exercises direction and control over the employee?
- 2) Which party bears the burden of remuneration?
- 3) Which party imposes discipline?
- 4) Who does the hiring?
- 5) Who does the firing?
- 6) Who does the worker perceive as his or her employer?
- 7) Is there an intention to create the relationship of employer and employee?

If, after assessing these factors your company is found to be the "true employer" the workers at the centre of the dispute can be counted among the "employees" for the purposes of an application at your work site.

### **Tips for employers**

Whilst there is no "silver bullet" listed below are some examples of ways in which you can support an argument a labour supply worker or sub-contractor is not your employee:

- 1) Require your labour supply company or sub-contractor to provide its own foreman on your work site to direct and control the day-to-day operations of the workers.
- 2) Ensure timesheets are completed by the worker or foreman and submitted to the labour supply company or sub-contractor before invoices are sent to you for payment of work.
- 3) Ensure discipline of workers is carried out by the foreman or labour supply company/sub-contractor directly.
- 4) Hire through the labour supply company or sub-contractor.
- 5) Fire (including the decision to fire) through the labour supply company or sub-contractor.
- 6) Take positive steps to ensure the worker does not perceive your company to be their employer. For example, ensure workers appreciate complaints must be directed to the foreman or labour supply company/sub-contractor.
- 7) Do not expressly or impliedly create an employment relationship. For example, do not enter in to a contract of employment with the worker.

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