

CONFIDENTIAL EXCLUSIONS

INTRODUCTION

The [Labour Relations Code](#) states that workers employed to do confidential labour relations work are not considered employees for the purposes of the statute. Section (1)(l)(i) states:

1(l) "employee" means a person employed to do work who is in receipt of or entitled to wages, but does not include

(i) a person who in the opinion of the Board performs managerial functions or is employed in a confidential capacity in matters relating to labour relations, or

This issue usually arises during certification proceedings when the Board is determining who is included in a bargaining unit. The issue also arises because of organizational changes made by the employer. For example, an employee may receive new job responsibilities or a new title. Under Section 12(3)(b), the Board can directly hear and decide an application for determination of the person's status. The parties must show the Board they have attempted to resolve the difference before they bring a determination application.

This policy summarizes the purposes of the confidential exclusion and the general criteria for determining when it applies.

PURPOSE

People employed in a confidential capacity relating to labour relations are not considered employees. This exclusion is to avoid a conflict of interest. An employer requires some staff to handle confidential information. This exclusion ensures that employer can rely upon this staff to keep the information confidential. Similarly, a person's interest as a member of the bargaining unit might interfere with the performance of their job functions on behalf of the employer.

CRITERIA

The Board narrowly interprets this exclusion. A three-fold test is normally applied:

1. the person's duties must involve labour relations considerations;
2. their involvement with this information must be on a regular basis; and
3. disclosure of this information would adversely affect the employer.

Under the first criterion, it is not enough that the person's duties involve confidential matters. They must also relate to **labour relations**. Examples include having continual access to information relating to collective agreement negotiations or to the employer's strategy for disposing of grievances and conducting litigation involving a union before the Labour Relations Board,

arbitrators or the Courts. The person is not excluded where the duties involve non-labour relations matters such as trade secrets. Similarly, access to general personnel information is distinct from matters relating to industrial relations, and does not warrant excluding a person.

The second criterion means that access to the information must not be incidental to the person's main duties. The person's involvement must be on a **regular** basis. The fact that a person occasionally comes into contact with such information is not sufficient grounds for an exclusion. Neither is the fact that the person may have access due to employer laxity.

The third criterion involves determining whether there would be real prejudice to the employer from a labour relations perspective if the information was disclosed. Is the information really confidential such that its disclosure will undermine the employer's interests? If the information is of common knowledge, then the exclusion should not operate. For example, mere access to salaries and performance appraisals signed by employees does not justify denying that person bargaining rights.