

TRUE EMPLOYER AND SUBCONTRACTORS

INTRODUCTION

It is sometimes necessary for the Board to determine who is the true employer of a group of workers. For example, a company may choose to employ a subcontractor to complete some of its work. The subcontractor may in turn employ other workers to get a job done. If, for example, there was a certification application filed by these workers, the Board would need to determine who was the true employer: the company or the subcontractor?

This policy provides guidance to an officer regarding who is the true employer of employees. This policy neither deals with common employer declarations affecting subcontractors nor with determining if a person is an employee or an independent contractor. See: [[Spin-offs, Chapter 26\(f\)](#); [Independent Contractor vs. Employee, Chapter 24\(f\)\(i\)](#)]. This policy covers:

- statutory definitions;
- the contract chain;
- what is a subcontractor;
- the test to determine if a subcontractor is a true employer; and
- management contractors and labour brokers.

STATUTORY DEFINITIONS

The [Labour Relations Code](#) does not define subcontractors. The [Code](#) does define employer.

1 In this Act,

(m) "employer" means a person who customarily or actually employs an employee;

The Board has only this definition to rely upon to determine if a subcontractor is an employer.

THE CONTRACT CHAIN

A contract chain is formed when several parties are bound together by contracts to perform a job or achieve an overall result. A contract chain might look like:

- | | |
|--------------------------|---|
| 1. Company or Owner | Shell Canada |
| 2. General Contractor | PCL |
| 3. Subcontractor | Lockerbie and Hole (mechanical contractor) |
| 4. Sub-subcontractor | Johnson Controls (building control systems) |
| 5. Sub-sub-subcontractor | Trotter and Morton (electrical installation of buildings) |

A contractor is a person, company or entity that contracts to perform work for other persons or companies. Contractors can include an owner, employer, public authority, general contractor or a sub-contractor in its own right. A company can act as its own general contractor. The contractor retains control of how the contract is completed. A contractor may in turn contract out parts of its own work to others. In this policy a “contractor” will describe the party above the subcontractor in the “contract chain.”

WHAT IS A SUBCONTRACTOR?

A subcontractor performs someone else’s contract in whole or in part. A subcontractor may be an individual or an incorporated company. A subcontractor falls under step three in the contract chain noted above. Commonly, we refer to anyone performing part of someone else’s **work** as a subcontractor. When an officer is trying to decide which party is the true employer, it does not matter if the subcontractor’s work is:

- a part of an existing contract;
- a contract between a general contractor and an owner; or
- a portion of work the owner is carrying on the owner’s own account.

TEST OF WHO IS THE TRUE EMPLOYER

Section 12(3) gives the Board the power to determine who is an employer. In cases where there is a contract chain, this can be tricky. Begin by reviewing the contract(s) signed between the company, contractor and subcontractor(s). Also examine how the relationship operates in practice.

The Board and the Courts have developed a series of tests to determine which (if any) entity in the contract chain is the employer. The main test used by the Board is described in the Ontario Labour Relations Board decision *K-Mart Canada Ltd. v. Teamsters Local 419* [1983] 3 C.L.R.B.R. (NS) 224 as reprised in *UA 488, OE 955 v. Midwest*. [1989] Alta.L.R.B.R. 166. This seven-fold test examines:

1. Who has direction and control over how the work is done?
2. Who has the burden of remuneration?
3. Who imposes discipline?
4. Who hires?
5. Who fires?
6. Who do the employees think is the employer?
7. The existence of an intention to create an employer/employee relationship?

The Board looks who has “overriding control” of these factors when determining if an entity is a true employer.

MANAGEMENT CONTRACTORS AND LABOUR BROKERS

A common form of contract used in the construction industry involves a management contract. A company will contract with a management contractor (an owner or perhaps a former general contractor) to provide management services for the construction company. The company and the management contractor will sign a contract that says the company will not be an employer. The supply of labour will come from a labour broker.

Labour brokers are usually hired as subcontractors. They provide manpower to contractors. Labour brokers may or may not be a true employer. The Board will have to decide whether the management contractor is, despite their contract services, acting as a true employer for employees apparently hired by a labour broker. Independence and control over their workers are key factors for determining if a labour broker is a true employer.