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# Temporary Help Agencies & Legislative Changes

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## Overview

1. Joint and Several Liability under the *Employment Standards Act, 2000*
2. Additional Changes to the *Employment Standards Act, 2000*
3. OLRB Certification Process



# Joint and Several Liability

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## Liability: Agency v Client

- Under the ESA the agency is liable for unpaid wages
- Legislative amendments will allow an employee to claim unpaid wages from a client
- If the client is found to be liable, it can then sue the agency to recover the amount paid



## Statutory Change to Liability

Section 74.18 was added to the ESA which makes the temporary agency and the client jointly and severally liable

- One Client
  - If agency fails to pay wages, the agency AND the client are jointly and severally liable
- Multiple Clients
  - If agency fails to pay wages, the agency AND each client are jointly and severally liable. The client is jointly and severally liable ONLY for the share of wages proportional to the hours worked during the pay period



## Enforcement

- The temporary help agency **remains** primarily responsible
- An employee can proceed against a client **before exhausting** proceedings against the agency
- The client will be deemed the employer
- Employment Standards Officers can issue orders against clients of the agency



## What Wages are Included?

- Regular wages
- Overtime pay
- Public holiday pay
- Premium pay



# ***Employment Standards Act, 2000*** **(ESA) Changes**

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# General ESA Changes: Wages

## Increased liability for wages

- Previously wage recovery was limited to \$10,000
- Section 103(4) which imposes this limit will be repealed on February 20, 2017
  - Wages due prior to February 20, 2015 are limited to \$10,000 in recovery
- Section 103(4.1) establishes that there is no limit on wage recovery for wages due after February 20, 2015



# General ESA Changes: Timing

Increased time period for recovery

- Previously unpaid wage recovery was limited to six months
- Section 8 of the *Stronger Workplaces for a Stronger Economy Act, 2014* increased this time period to two years



## General ESA Changes: Information

- Prior to May 20, 2015 employers were required to post MOL information posters
- Now, employers are required to provide MOL information posters to employees and post the most current version
- **AND** Temporary Help Agencies must provide the information sheet “*Your employment standards rights: temporary help agency assignment employees*” as of November, 2009



# Temporary Agency ESA Changes: Records

Section 74.4.1 creates record keeping obligations on the temporary agency

- record the number of hours worked by each assignment employee for each client of the agency
- Retain or arrange for a third party to retain the records for three years after the day or week of the information
- Ensure that these records are readily available
- In force November 20, 2015



## Client ESA Changes: Records

Section 74.4.2 creates record keeping obligations on the temporary client

- record the number of hours worked by each assignment employee
- Retain or arrange for a third party to retain the records for three years after the day or week of the information
- Ensure that these records are readily available
- In force November 20, 2015



# Changing Workplaces Review

- The Review that is being conducted is considering a number of additional changes, including:
  - Changes to Personal Emergency Leave
  - Re-Examination of Scheduling Requirements and Exemptions
  - Identification and Protection of “Vulnerable Workers”



# OLRB Treatment of Temporary Help Agencies in Certification Applications

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# Labour Relations Act, 1995

## Definition of Employee

### Section 1

“employee” includes a dependent contractor;  
 (“employé”)



# Employees in the Proposed Bargaining Unit

In an Application for Certification, the Union must identify, among other things:

- i) Who is the alleged employer?
- ii) Where the work is alleged to have been done?
- iii) What is the nature of the work performed by the employees they seek to represent?



# Requirement of Employment Relationship

- Matter of substance rather than form
- Not just whose name is on a contract, or pay cheque



## Who is the Employer?

OLRB has considered numerous factors when deciding who is the employer of specific employees in dispute in an Application for Certification.



## Who is the Employer?

### ***York Condominium*, [1977] OLRB Rep. Oct. 645**

- The party exercising direction and control over the employees performing the work
- The party bearing the burden of remuneration
- The party imposing the discipline
- The party hiring the employees
- The party with the authority to dismiss the employees
- The party who is perceived to be the employer by the employees
- The existence of an intention to create the relationship of employer and employee



## ***National Waste Services Inc., [2009] OLRB Rep. May/June 415***

CAW Canada applied for certification of drivers and pitchers (trash collectors) of National Waste Services Inc. (“National”) National contracted with a temporary help agency, Erie Personnel Corporation (“Erie”) to provide pitchers and drivers. National and Erie both argued that Erie was the true employer of the drivers and pitchers.

OLRB noted its approach in this kind of case at para. 52:

In determining which entity is the employer for labour relations purposes, the Board's task is therefore generally to determine whether the client or the personnel agency has the greatest control over all aspects of the employees' work so that the employees can bargain with that entity.



# Changing Workplaces Review

- At this point, the Review Advisors have made clear that they have issues with the identity of the “true employer” and are contemplating whether there should be a joint obligation



## ***National Waste Services Inc., [2009] OLRB Rep. May/June 415***

The Board assessed fundamental control by analyzing the following factors:

- Direction and Control of Employees Performing the Work
- Burden of Remuneration
- Hiring of Employees
- Imposition of Discipline and Authority to Dismiss
- Perception of the Employees
- Intention to Create an Employment Relationship



## ***National Waste Services Inc., [2009] OLRB Rep. May/June 415***

### **Direction and Control**

The Board held that National exercised actual direction and control over the employees, by being responsible for day to day supervision and assignment of duties. This factor overwhelmingly indicated that National was the employer.



## ***National Waste Services Inc., [2009] OLRB Rep. May/June 415***

### **Burden of Remuneration**

National had considerable say in the pay rates of the employees, including their incentive bonuses. Erie was in fact more of a paymaster who required National to pay invoices in order to meet their own payroll obligations. All of the expenses related to the drivers and pitchers were charged back to National. The Board found that this factor pointed to National as the employer.



## ***National Waste Services Inc., [2009] OLRB Rep. May/June 415***

### **Hiring of the Employees**

While Erie was responsible for initial recruitment and screening of employees, they would not be retained unless they could pass National's road test. National had final say over who performed the work, and so the Board found that this factor indicated National was the employer.



## ***National Waste Services Inc., [2009] OLRB Rep. May/June 415***

### **Imposition of Discipline and the Authority to Dismiss**

While the parties argued that Erie was the only party with actual authority to discipline or dismiss the employees, the Board found that in fact National would either directly discipline pitchers and drivers, or recommend discipline to Erie that Erie would then be compelled to implement. The Board looked not at who had authority to discipline and dismiss on paper, but who had actually done so in reality. This factor pointed to National as the employer.



## ***National Waste Services Inc., [2009] OLRB Rep. May/June 415***

### **Perception of the Employees**

National provided all of the work, assignments, equipment, and supervision to the drivers and pitchers. Furthermore, all relevant paperwork bore National's name. Accordingly, the employees who gave evidence at the hearing indicated that they perceived National to be the employer. The Board noted that this factor was given little weight.



## ***National Waste Services Inc., [2009] OLRB Rep. May/June 415***

### **Intention to Create an Employment Relationship**

Given that Erie was a personnel agency, and that its documentation clearly expressed an intention that Erie be the employer, the Board found that this factor favoured Erie. However, the Board also noted that this factor was given little weight.



## ***National Waste Services Inc., [2009] OLRB Rep. May/June 415***

### **Assessment of Fundamental Control**

The Board assessed each factor and determined that only the intention to create an employment relationship favoured a finding that Erie was employer. Otherwise, an overall and holistic analysis indicated that National exercised fundamental control over the employment of the employees in dispute.



## ***National Waste Services Inc., [2009] OLRB Rep. May/June 415***

Accordingly, the Board ruled that the individuals in dispute were employees of National, and not of Erie.

The Board also held, as in **180 University** (supra) that the amendments to the ESA regarding temporary help agencies would not impact the analysis of true employer for purposes of an application for certification under the *Labour Relations Act*. (Para. 86-88)



# Additional Case Law

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## ***Sutton Place Hotel, [1980] OLRB Rep. Oct. 1538***

Analysis should be contextual, who determine who exercises fundamental control over the employees.

44. A particularly important question answerable through an evaluation of all of the factors set out in York Condominium is who exercises fundamental control over the employees. In some cases control over hiring may reflect fundamental control. In other situations, reminiscent of a hiring hall, it may not. In some cases day-to-day supervision may suggest fundamental control, in others it may not. Similarly with the payment of wages: in the factual mix of some cases the payment of wages may, along with other factors, suggest who holds the fundamental control while in other cases it may be of minor significance. No single factor listed in York Condominium inevitably points to the possession of fundamental control. The Board's ultimate evaluation of who holds fundamental control in any particular fact situation, however, is generally the single most determinative question in identifying the employer. In a word, to find the seat of fundamental control is generally to find the employer for the purposes of The Labour Relations Act.



## ***Point-Claire (City) v Quebec (Labour Court)*** **[1997] SCR 1015**

The OLRB has also accepted the Supreme Court of Canada's position, that a contextual approach should be applied to each unique case.

48. According to this more comprehensive approach the legal subordination and integration into the business criteria should not be used as exclusive criteria for identifying the real employer. In my view, in a context of collective relations governed by the Labour Code, it is essential that temporary employees be able to bargain with the party that exercises the greatest control over all aspects of their work – and not only over the supervision of their day-to-day work. Moreover, when there is a certain splitting of the employer's identity in the context of a tripartite relationship, the more comprehensive and more flexible approach has the advantage of allowing for a consideration of which party has the most control over all aspects of the work on the specific facts of each case. Without drawing up an exhaustive list of factors pertaining to the employer-employee relationship, I shall mention the following examples: the selection process, hiring, training, discipline, evaluation, supervision, assignment of duties, remuneration and integration into the business.



## ***180 University Management Inc., [2011] OLRB Rep. November/December 671***

A temporary help agency in the construction industry, Hunt Personnel, argued that it was the employer of a terminated employee. Hunt Personnel referred to the amended sections of the Employment Standards Act, 2000, but the Board held that those provisions were not applicable in the circumstances.

66 Hunt Personnel argues that it is the employer of Lloyd, both as a result of the application of the York Condominium test and as a result of section 74.3 of the Employment Standards Act, 2000, which provides as follows:

Where a temporary help agency and a person agree, whether or not in writing, that the agency will assign or attempt to assign the person to perform work on a temporary basis for clients or potential clients of the agency,

- (a) the temporary help agency is the person's employer;
- (b) the person is an employee of the temporary help agency.



## ***180 University Management Inc., [2011] OLRB Rep. November/December 671***

67 Hunt Personnel argues that since the Board is responsible for the interpretation and application of both the Employment Standards Act, 2000 and the Labour Relations Act, 1995, the Board should apply section 74.3 of the Employment Standards Act, 2000 to the issue of who is the employer for the purposes of the Labour Relations Act, 1995. I am not persuaded by this argument. The Board has a role in interpreting and applying a number of statutes. The Labour Relations Act, 1995 contains no definition of the term employer. However, the definition of employer contained in other statutes under which the Board has jurisdiction is not the same. For example, the definition of employer contained in the Employment Standards Act, 2000 differs from the definition contained in the Occupational Health and Safety Act which differs again from the various definitions in the Public Service Labour Relations Transition Act, 1997. In my view, the meaning of the term employer under the Labour Relations Act, 1995 requires consideration of the purposes of the Labour Relations Act, 1995, not the definition of employer contained in one or more other statutes. I agree that they were. They are, however, persuasive and I adopt them here



## ***180 University Management Inc., [2011] OLRB Rep. November/December 671***

68 In *National Waste Services Inc.* 2009 CanLII 29865 (ON LRB) the Board (differently constituted) considered whether section 74.3 of the Employment Standards Act, 2000 would alter the Board's determination of who was the employer for the purposes of Labour Relations Act, 1995. The Board held that it did not. It noted that the amendments of the Employment Standards Act, 2000 had the effect of deeming temporary help agencies to be the employer for the purposes of certain employment standards minimums: they do not alter the Board's assessment of who has fundamental control for the purposes of an application for certification. It also noted that had the Legislature wanted to ensure that collective bargaining is done by the same entity which will have the employment standards obligations for temporary help workers it could have amended the Labour Relations Act, 1995 at the same time. Hunt Personnel argues that the comments by the Board in *National Waste Services Inc.*



# Questions?

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