Employers beware: The more dependent the worker the greater the labour exposure

DENTONS

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It has become common practice for employers in Ontario to supplement their workforce with the use of independent contractors and temporary help agency staff. These arrangements provide flexibility but often employers also hope that the use of these types of workers will create some protection from unionization and other related labour risks. More and more, the legal underpinnings for this strategy are being eroded. As a consequence many Ontario employers may be unaware of the actual risks created by the use of independent contractors and temporary help agencies.

Independent contractors

On July 27, 2023, the Supreme Court of Canada denied leave to appeal of the Ontario Court of Appeal's decision in *Enercare Home & Commercial Services Limited v. Unifor Local 975 and Ontario Labour Relations Board*[1] (***Enercare***). In doing so, the Supreme Court of Canada reaffirmed the Ontario Court of Appeal's expansion of the concept of joint and related employers and, consequently, the potential labour exposure that an employer may face.

How was the concept of related employer expanded?

Enercare involved an application to the Ontario Labour Relations Board (the **Board**) for a related-employer declaration. Enercare had a longstanding practice of using independent contractors, this use was expressly permitted by the collective agreement applicable to Enercare's employees. In its application, however, Unifor asserted that independent contractors engaged by Enercare were related employers. After a lengthy hearing, the Board concluded that two of the three contractors did share common control and direction with Enercare, but the third did not. The Board emphasized that the two contractors – both of which had an over 10-year-long relationship with Enercare – were "functionally economically dependent" on Enercare, and that as a result Enercare had "effective indirect control" over the business of the contractors. Enercare also had a significant role in managing the work sent to the contractors, including by determining when, how and by whom the work was completed. The contractors' operations were integrated with Enercare's, for example work was dispatched to them directly through Enercare's dispatch system and Enercare provided the equipment required to complete the work. The contractors had no public identity apart from Enercare.

The Board's decision was appealed to the Divisional Court, which concluded that the Board's analysis was unreasonable because it had failed to take into consideration the bargaining history between Enercare and Unifor, the collective agreement, and the relevant provisions of the collective agreement related to Enercare's longstanding practice of contracting out work to independent contractors.

The case was then further appealed to the Ontario Court of Appeal, where the Divisional Court's decision was set aside and the original Board decision was restored. In making this order, the Ontario Court of Appeal confirmed that the reasoning of the Board was internally coherent, rational and logical, and there was no fatal flaw in the Board's overarching logic.

In restoring the original decision of the Board, the Ontario Court of Appeal reinforced the important role that economic dependence can play in a related employer determination. In fact, in *Enercare* only difference between the two contractors that were declared related to Enercare and the one that was not was the degree of economic dependence on Enercare, which in turn contributed to the Board's assessment of whether the contractor had an identity independent of Enercare.

Temporary help agencies: Who is the "true" employer?

While the *Enercare* case is a recent example of the risks employers should be aware of when engaging independent contractors and temporary help agencies, the relationship between economic dependence and the related-employer analysis, and its implications on an employer's labour exposure, is not novel. Many employers are not aware that it is long settled law in Ontario that the use of temporary help agencies does not automatically shield an employer from labour woes. The analysis on whether they should be considered employees centres around the question of which entity is the "true" employer of the temporary workers.

The leading decision in Ontario on whether the employees of a temporary help agency will be considered employees of the agency's client for the purpose of union certification is *Teamsters Local Union No. 419 v. Lantic Sugar Ltd.*[2] In that case, the Board considered whether truck drivers provided to Lantic by a temporary help agency should be considered employees of Lantic. In finding that the temporary help agency workers were actually employees for the purpose of the certification application the Board considered the following factors:

1. The party exercising direction and control over the employees performing the work.
2. The party bearing the burden of remuneration.
3. The party imposing the discipline.
4. The party hiring the employees.
5. The party with the authority to dismiss the employees.
6. The party who is perceived to be the employer by the employees.
7. The existence of an intention to create the relationship of employer and employees.

The Board held that each case must be determined based on its specific facts and as such no one single factor is determinative. In finding against Lantic in this case, the Board relied on the fact that the company controlled the day-to-day scheduling of agency drivers and that those drivers believed that the manager at Lantic was "their boss," in part, because he had effective control over decisions to discipline. The drivers also wore a Lantic supplied and branded uniforms and many had worked at Lantic continuously for years. The Board also found that the wages paid to the drivers by the temporary help agency were effectively linked to the rates negotiated by Lantic for the services provided by the drivers.

The Board also considered a number of factors that weighted in the direction of Lantic not being the employer of the agency drivers; including that the temporary help agency was responsible for hiring and assigning workers to Lantic, managing vacation scheduling, managing payroll, monitoring driver performance, and providing training.

The Board ultimately held that Lantic was the employer of the drivers because it was the "seat of fundamental"

control. As a result the Union was successful in obtaining bargaining rights with Lantic for the agency drivers. In making this finding the Board acknowledged that it resulted in a bizarre situation where one party would be bound to a collective agreement with respect to workers that it did not directly pay.

What can companies do?

A related employer declaration, or a finding that agency workers are actually employees, can significantly impact an employer's labour relations exposure whether in the context of a certification application or an existing bargaining relationship. In particular, the above case law confirms that contracting out work, even if permissible, may not reduce an employer's labour exposure.

That said, there are a number of things employers can do when organizing their operations to mitigate against the risk of a related-employer declaration. Each of these things centres around minimizing the extent or appearance of control, and include:

1. Monitoring the amount of work being provided to contractors;
2. Ensuring contractors use their own tools and equipment to complete contracted work;
3. Excluding contractors from any company systems or operating procedures, particularly any systems or procedures integrally connected to the company's day-to-day operations; and
4. Ensure that contractors are not dependent on the employer and are obtaining work from other clients.

When using agency workers employers should:

1. Avoid controlling or directing the performance of the work to the maximum extent possible;
2. Do not discipline agency staff or otherwise subject them to policies that apply to employees;
3. Avoid becoming involve in the hiring and training processes or with payroll; and
4. Require the agency to cycle staff and/or not place any specific individual with the employer for more than 12 months.

Ultimately, the steps that should be taken to reduce the risk of a related-employer or true-employer finding will depend on the specific structure of an employer's workplace, and the particulars of the working environment. If you are concerned about your labour relations exposure, we would be happy to advise you on the risks specific to your workplace.

For more information on this topic, please contact **Russell Groves** and **Larysa Workewych.**

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[1] 2022 ONCA 779.
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