

Status – Employers

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OBJECTIVE

1. This practice directive describes how the Board determines employer status and aids in the interpretation of *Assessment Manual Items: API-1-1 to API-1-4*.

INTERPRETATIVE GUIDELINES

2. The *Workers Compensation Act* grants benefits and imposes responsibilities on an employer under the *Act* regardless of whether or not the employer has discharged its statutory and policy duties to register with the Board. Thus, the status of employer – and the benefits and responsibilities that flow therefrom – are not dependent upon or coincident with registration with the Board. Conversely, registration with the Board does not in and of itself bestow employer status. Accordingly, the following general rules respecting employer status must be kept in the forefront of any consideration of status:
 - a) A firm which meets the statutory definition of employer and which is not exempted from registration by order of the Board is an employer under the *Act*, notwithstanding the fact that it may not be registered with the Board.
 - b) A firm registered with the Board as an employer may not be an employer under the *Act*, notwithstanding the fact that it is registered with the Board; for neither the statutory definition of employer nor Board policy has expanded the definition or description of employer to include a firm as an employer solely on the basis that it is registered with the Board.
 - c) An individual can be both an employer and a worker under the *Act* at the same time by entering into at least two distinct contracts of service: one as an employer

and another as a worker. Therefore, the mere fact that the individual is registered with the Board cannot ensure that the individual will be determined to be an employer under all contracts of service. What must be determined in each case is the effective contract of service and the individual's capacity under that contract of service.

ADJUDICATIVE GUIDELINES

I STATUTORY DEFINITION OF EMPLOYER

3. The statutory definition of employer in section 1 of the *Act*, although inclusive, in effect creates the following primary three-part test for “employer”:
 - An individual or firm having in its service,
 - under a contract of hiring or apprenticeship,
 - another person engaged in work in or about an industry in British Columbia.
4. As the statutory definition of employer is inclusive, an individual or firm which does not meet the primary three-part test for employer may nevertheless be an employer for workers' compensation purposes (for example, by way of the *Fishing Industry Regulations*).

A An individual or firm having in its service ...

5. The first branch of the three-part test for employer requires that the individual or firm have another “in its service.” That is, the individual or firm must be the recipient of service from another (which, for the first branch of this test, can be by way of either a contract of or for service).
6. The word “having” is a present perfect tense verb and requires that an employer currently have another in its service. That is, the verb “having” indicates the temporal relationship of the service as the present. Thus, an individual or firm which “had” or which “will have” another in its service may not meet the first branch of the test. A corollary of this principle is that an individual or firm may only meet the first branch of the three-part test for employer during those times that the individual or firm has another in its service.
7. However, the Board recognizes that it is impractical to require an employer to delay registration with the Board until the exact moment at which the employer employs a worker; and has, therefore, as a business convenience, implemented a practice allowing an employer to register no more than four weeks prior to employing a worker.

B ... under a contract of hiring or apprenticeship ...

8. Although the statutory definition of employer refers to a “contract of hiring” while the statutory definition of worker refers to a “contract of service”, there is no significance to this distinction; and for all purposes of Part 1 of the *Act*, a contract of hire is a contract of service.¹

C ... another person engaged in work in or about an industry.

9. The third branch of the three-part test requires the following:
 - a) The individual or firm hire another (that is, the individual or firm cannot hire itself).
 - b) The “another person” must perform “work”, whether actual or deemed (for example, by way of issuance of a *T4A-FLAT - Statement of Pension, Retirement, Annuity and Other Income*).
 - c) The work must be performed in an industry, as that term is defined in the *Act*, which is within the jurisdiction of the Board.

II REGISTRATION AS AN EMPLOYER

10. An individual or firm, who is not a labour contractor, and who employs a worker is an employer and is required to be registered with the Board, unless exempted under the law, the *Act*, or policy.

A Rule of evidence

11. The Assessment Department assumes that most applications for registration are *bona fide* in respect of a properly registrable business and not part of some scheme to avoid provisions of the *Act*. Accordingly, the department operates under a rule of evidence that absent grounds for suspecting that an attempt is being made to subvert provisions of the *Act*, a Board officer may assume as correct the information provided by an applicant on registration.

¹ *Joey's Delivery Service v. New Brunswick (Workplace Health, Safety and Compensation Commission)*, [2001] N.B.J. 222, 2001 NBCA 17 at para. 31: “Despite the fact that the definition of employer refers to those who retain persons under a contract of ‘hire’, while the definition of worker refers to those who work under a contract of ‘service’, the distinction is without significance. A contract of hire is a contract of employment.”

B Locum

12. A locum is an individual temporarily taking the place of another and includes a locum practitioner, a replacement driver, or other form of substitute. An individual engaging a locum as a replacement for the individual may become the employer of the locum. If the engagement of the locum creates an employment relationship, the individual must register with the Board; and, in so doing, must advise the Board of the anticipated duration of the employment relationship.
13. Independently of the above, the employer of a locum must contact the Board at the conclusion of the locum's employment to inform the Board that it may no longer be an employer under the *Act*.

III CONTINUANCE AS A REGISTERED EMPLOYER

A The 90 day presumption

14. An employment relationship may be permanent, temporary, *ad hoc*, intermittent, or episodic. In any of these situations, an employer may employ a worker under a contract of service who is, for a defined or undefined period of time, not actually "engaged in work in or about an industry." That is, the contract of service may continue to exist even though the worker is not able to work in or about an industry for any number of reasons, including lack of available work.
15. Accordingly, the department has established and generally acts under a rebuttable presumption that, for and limited to the determination of continuance of registration as an employer with the Board, and subject to typical interruptions in employment – vacations, illness, etc. – an individual or firm may continue to be an employer under Division 4 of Part 1 of the *Act*, notwithstanding the fact that the individual or firm has not had a worker "engaged in work in or about an industry" under a contract of service for not more than 90 days.
16. However, the above rebuttable presumption does not apply to employers in industries in which sub-contracting of work is commonplace or widespread (e.g., Class 3 [Construction] and Class 4 [Transportation and warehousing] of section 37(1) of the *Act*); for it is recognized that the general moderation of the control factor in these industries and the intermittent or episodic nature of engagement can make it difficult to distinguish between a contract of service and a contract for service. In these industries, a reported assessable payroll of less than \$1,000 per quarter year is generally not indicative of a subsisting contract of service. Thus, if an employer in any such industry reports an assessable payroll of less than \$1,000 per quarter, that employer will be an employer for the purposes of Division 4 of Part 1 of the *Act* only during those times that the employer engaged a worker in work in or about an industry under a contract of service.

17. Notwithstanding the above, the Board may recognize the seasonal nature of employment in certain industries and may permit an employer's account to remain active provided that the employer demonstrates the seasonality of the industry and its intent to employ workers at the commencement of the next employment season.

B Pattern of employment

18. For and limited to the determination of continuance of registration as an employer with the Board, the department recognizes that some individuals engage workers very briefly in a year or quarter thereof but are registered with the Board as an employer throughout the year. There is a question of whether such an individual is, in fact, an employer under the *Act* throughout the year or is only an employer for brief periods during the year. As the Board cannot discern this pattern of employment until the annual reporting period is at an end, such an individual – and any firm that engages such an individual – runs the risk of the Board retroactively determining that the individual was not an employer under the *Act* for a period or periods during the preceding year or years. However, in order to allow for a degree of certainty, in the absence of evidence that the registration was a sham, the Board may not so retroactively determine if the individual has and maintains personal optional protection in good standing throughout the year.

IV CESSATION OF EMPLOYER STATUS

19. An individual or firm which ceases to be an employer under the *Act* must inform the department of such as soon as practicable.

V INDIVIDUAL WITH EMPLOYER AND WORKER STATUS

20. An individual can be both an employer and a worker under the *Act* in or about the same time period but not under the same contract. That is, an individual who is both an employer and a worker in or about the same time period must have entered into at least two distinct contracts of service: one as an employer and one as a worker.
21. In determining the status of such an individual, the critical requirement is to identify the effective contract of service and thereafter the individual's capacity under that contract of service.