

INFORMATION BULLETIN

Inclusion or Exclusion from Bargaining Units

Management and Confidential Employees

This Information Bulletin answers questions regarding the inclusion or exclusion of employees from the bargaining unit – i.e. what is commonly referred to as the “ins and outs.”

Introduction

Subsection 2(2) (a) of the *Trade Union Act* sets out two reasons why an employee may be excluded from a bargaining unit:

“For the purposes of this Act, no person shall be deemed to be an employee [...] who is a manager or superintendent, or any other person who, in the opinion of the Board, is employed in a confidential capacity in matters relating to labour relations or who exercises management functions;”

Any individual in a workplace who exercises management functions and/or who is employed in a confidential capacity in matters relating to labour relations is therefore not considered an “employee” for the purposes of the *Trade Union Act*.

What happens if the parties do not agree on the “ins and outs”?

There are many times when parties agree as to which employees are managerial or confidential as it relates to labour relations. However, if there are disagreements, the parties must identify to the Board as soon as possible, in writing, which individuals are in dispute. A Board Officer will contact the parties to assist them in trying to reach agreement which may include referring them to relevant decisions of the Board. If the parties do not reach an agreement, the Board may conduct a hearing – in person or by paper review – in order to decide the issue. The party who seeks to have an employee excluded based on ss. 2(2) bears the onus of demonstrating to the Board why the employee should be excluded.

What are “Interview Examinations”?

If the dispute involves the nature of the work the employee in question is involved in, the Board will frequently ask the Board Officer to conduct an Interview Examination. The Officer will question the employee about the nature of his or her role in the workplace. This is part of the

fact-gathering process and is used to help the parties and/or the Board decide the issue based on an accurate picture of the employee's duties. More information on this process can be found at:

<https://novascotia.ca/lae/labourboard/procedures/documents/InterviewExaminationProcessFebruary2014.pdf>.

What does it mean to exercise “management functions”?

The purpose of the “management” exclusion is to avoid conflicts of interest and prevent bargaining unit members from acting in a managerial capacity over their colleagues in the unit.

“Management functions” include decision-making powers or effective influence on decision-making in matters that directly impact employees (such as their wages, promotions, discipline, etc.) and those that establish the policies and strategic operations of the organization.

How does the Board decide whether an employee is exercising management functions?

The following principles are extracted from the Board's case law and are relied on to determine if an employee exercises management functions:

- The Board is not concerned with the employee's title, or “paper powers”, but is concerned with an employee's actual responsibilities and authorities (see, for example: [UFCW v Fisherman's Market International](#))
- There is a difference between actually exercising decision-making authority and simply carrying out pre-determined decisions (see, for example: [UFCW v Fisherman's Market International](#))
- The core of an employee's functions must be managerial in nature (see, for example: [CUPE v Grand View Manor](#))
- A manager is someone with control over substantive economic factors such as hiring, firing, discipline, hours of work, wages, or vacation approvals (see, for example: [UFCW v Fisherman's Market International](#); [CUPE v Grand View Manor](#); [NSGEU v Riverview](#))
- The evidence in favour of excluding the individual must be clear and persuasive enough to justify taking away an employee's statutory right to belong to a union (see, for example: [NSGEU v Black Loyalist Heritage Society](#))

What does it mean to be “employed in a confidential capacity in matters relating to labour relations”?

The purpose of this exclusion is to ensure that confidential labour relations information, such as grievance and arbitration strategy or collective bargaining strategy, is protected and not available to a bargaining unit member to the disadvantage of the employer. An employee will be excluded under this section if he or she handles confidential information relating to labour relations such as participation in collective bargaining for the employer as part of the core functions of his or her position.

How does the Board decide whether an employee’s position is confidential in relation to labour relations?

The following principles are extracted from the Board’s case law, and are relied on to determine if a person is employed in a confidential capacity relating to labour relations:

- The confidential matters must be concerning labour relations and not general industrial secrets (see, for example: [NSGEU v Black Loyalist Heritage Society](#))
- Individuals with access to financial and banking information of employees (such as payroll clerks) may be dealing with confidential information, but as this does not relate to labour relations matters, they are often included in bargaining units (see, for example: [CUPE v Grand View Manor](#))
- Information that a union or its members have knowledge of (such as salaries, performance appraisals, etc.) or information that may be obtained from other sources (such as personal history, family information, etc.) is not “confidential information” for the purposes of this section (see, for example: [NSGEU v Black Loyalist Heritage Society](#))
- The confidential information must be such that disclosure would adversely affect the employer (see, for example: [CUPE v Grand View Manor](#))
- The person must be involved with the confidential information as a regular and not an occasional part of their duties. Access to such information caused by employer laxity does not suffice. (see, for example: [Faculty Union of NSCAD v Board of Governors of NSCAD](#))
- While the employer cannot be expected to restructure its operations to allow one person with access to confidential labour relations matters to join the bargaining unit (see, for example: [NSGEU v MSVU](#)), where possible the employer must take steps to prevent possible access to confidential labour relations matters where it does not relate to the employee’s core functions (see, for example: [CUPE v Grand View Manor](#))

What happens if the Board finds that an employee is excluded from the bargaining unit pursuant to ss. 2(2)?

In a certification process, the individual excluded pursuant to ss. 2(2) will be determined not to be an “employee.” If the individual has signed a membership card, it will not be counted towards the 40% membership support. It also means that the individual’s vote will not be counted in determining if the majority of employees in the bargaining unit want that union to represent them. If the union is certified, the union will not bargain on that individual’s behalf.

For More Information

You can contact the Board at 902-424-6730 (in Halifax) or at 1-877-424-6730 (toll free) or via email at labourboard@novascotia.ca.

Additional information and the relevant statutes, rules, and regulations can be found at the Board’s website: www.novascotia.ca/lae/labourboard/.

This Information Bulletin is not intended to be legal advice. The Labour Board encourages parties to become informed of their rights and obligation which may mean getting independent legal advice from qualified legal counsel.