

The construction industry and unions: what you need to know

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In Ontario, union certification can happen extremely quickly, have an extraordinary impact on a business and, if not addressed lawfully, create significant financial liability for an organization.

What does it mean to be unionized?

If an organization is unionized it means a union has obtained the legal right to represent the workers (or a specific group of workers) with respect to the terms and conditions of employment. Usually, unionization also means the organization must meet with the union and negotiate toward a collective agreement. However, when the organization performs work in certain sectors of the construction industry, such as in the industrial, commercial and institutional (“ICI”) sector, unionization means the organization is automatically bound to an

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Being unionized may also have an impact on an organization’s ability to hire new employees as well as its ability to subcontract work to a company of its choosing. For example, the organization may be required to hire employees who are existing members of the union; and subcontract work only to an organization bound to the same union.

How does an organization become unionized in Ontario?

A union will file an Application for Certification with the Ontario Labour Relations Board (the “board”) to be certified to represent an identified group of workers of a particular employer. If the union can show it has support (signed union cards) of at least 55 per cent of the identified group of employees on the day the union files the application, the board will generally certify the union. This means that, provided the union has support from 55 per cent of the identified group of employees, there is not a vote. There will be a vote if the union has support from at least 40 per cent, but not more than 55 per cent, of employees.

An application can be filed on any day of the week, including Saturday and Sunday. The day the application is filed is critical. Only employees at work that day who are performing work covered by the union’s application are counted for the purpose of determining if the union has met the 40 per cent or 55 per cent threshold. By way of example: if an organization regularly employs 10 to 15 workers from Monday

to Friday, and the union chooses to file an application on a Saturday when only three employees are working, the application could succeed if two of those three employees have signed a union card. The result is that the union becomes the bargaining agent for all employees for which the union sought representation – not only those employees at work that day. Thereafter, each employee in the bargaining unit would have to become a member of the union to continue working for the employer.

How does an employer respond to an application?

Once an organization receives notice of the Application for Certification, it has two business days to file a response, including a list of employees in the relevant employee group and whatever legal positions the organization intends to take on issues raised in the application. It is only in the most exceptional circumstances that an organization will be permitted to file a late response, and the board has repeatedly stated that ignorance of the legal requirements and timelines will not be an acceptable excuse (e.g., not having seen the application, being on vacation, fax machine not working, or waiting to meet with a lawyer, etc.).

If there is any disagreement about who was at work and/or performing work

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Lawyers’ fees can range from \$250 to \$500 per hour or more for legal



advice and representation. Participation in OEL’s Legal Support Program (LSP) provides OEL members legal support for labour related issues. Through this program all OEL member contractors are entitled to one 15-minute call per month with a labour and employment lawyer of Sherrard Kuzz LLP.

What you need to know

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covered by the application on the application date, additional evidence may be required, and the employer may be asked to file written submissions or attend a hearing before the board. If the organization decides not to participate in the process, the board can and will make decisions that bind the organization in its absence.

How can an employer stay out of trouble?

Whether to join a union is a decision to be made by employees, not their employer. The Labour Relations Act prohibits an employer from penalizing an employee because he or she supports a union. Where an employer has disciplined, terminated or laid off an employee (or taken other negative action) in response to union organizing or an employee's support for a union, the board can reverse the employer's decision. For example, the board can reinstate a terminated employee and order payment of full back-wages. Further, if the board finds

the employer's actions amounted to threats or intimidation, the board can penalize an employer by automatically unionizing the employer even where no employee has signed a union card.

Bottom line: the stakes are high.

Thankfully, becoming unionized is not inevitable. An employer can reduce the potential for unionization by:

- Establishing and maintaining positive employee relations.
- Establishing and maintaining a competitive compensation package.
- Maintaining up-to-date and accurate records (i.e. employee schedules, lists of job sites, payroll records, etc.) in the event of an application for unionization.
- Becoming educated on the process of unionization in Ontario and an organization's rights and obligations.
- Working with labour counsel knowledgeable of and experienced with construction labour relations.

For more information, please contact a member of the construction team at Sherrard Kuzz LLP. ☎

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