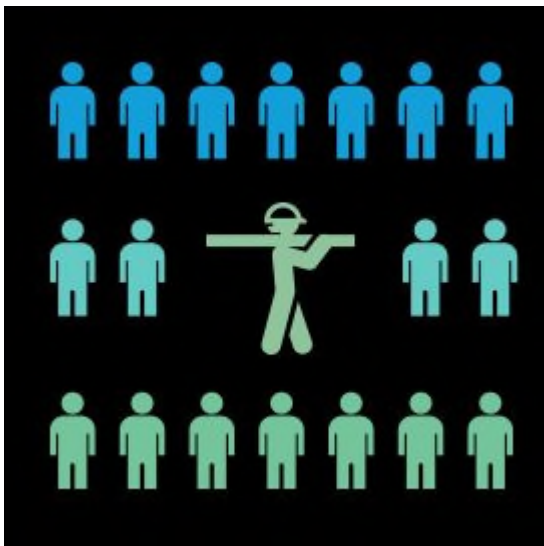


## Article

# INDUSTRY PERSPECTIVES: Are you aware of the employment standards for construction employees?

by label: BRIAN WASYLIW *May 20, 2015*

Most employees and employers in Ontario are covered by the Employment Standards Act 2000 ("ESA").



However, there are certain individuals to whom the ESA does not apply or for whom there are special provisions.

In this article, we'll examine those ESA provisions applicable to a 'construction employee' as defined in the ESA. In the next edition of Daily Commercial News, we will look at how adjudicators determine who is a 'construction employee' and who is not.

Who is a construction employee?

The ESA defines 'construction employee' as follows:

"construction employee" means,

(a) an employee employed at the site in any of the activities described in the definition of "construction industry", or

(b) an employee who is engaged in off-site work, in whole or in part, but is commonly associated in work or collective bargaining with an employee described in clause (a).

"construction industry" means the businesses that are engaged in constructing, altering, decorating, repairing or demolishing buildings, structures, roads, sewers, water or gas mains, pipe lines, tunnels, bridges, canals or other works at the site.

### Hours of Work

#### Maximum Hours and Rest Periods

The ESA limits the amount of time that an employee can spend at work. Generally speaking the limits are eight hours in a day and 48 hours in a week (arrangements can be different with shift work). A construction employee is not covered by the daily and weekly maximum time limits on the hours of work that apply to other employees. Similarly, the ESA requires

that employees be provided with certain minimum time off between shifts, as well as time off for rest measured on a weekly and bi-weekly period. The ESA generally requires that employees are provided 11 hours free from work each day, eight hours between shifts and 24 consecutive hours free in a week or 48 consecutive hours in two weeks. However, a 'construction employee' is exempt from these provisions regarding rest periods.

### Eating Period

Under the ESA, an employer is required to provide eating periods but not other types of breaks. A 'construction employee', like other employees, is prohibited from working for more than five consecutive hours without a 30 minute eating period free from work. If the employer and employee agree, the eating period can be split into two periods within the same five consecutive hours (in other words, two 15-minute breaks). An eating period is unpaid unless the contract of employment (e.g., individual employment contract or collective agreement) indicates it will be paid. An eating period, whether paid or unpaid, is neither considered hours of work nor counted toward overtime.

### Overtime

Overtime applies to construction employees after 44 hours have been worked in a week. Overtime pay is one and a half times the employee's regular rate of pay. Employers and employees can agree to an averaging agreement for the purpose of calculating overtime, in which case the employee's hours are averaged over a specified period of two or more weeks. These agreements must be in writing and the employer must obtain approval from the Director of Employment Standards.

### Holiday and Vacation

A construction employee is exempt from the public holiday provisions of the ESA so long as the employee is receiving 7.7 per cent, or more, of his or her hourly wages in lieu of holiday pay or vacation pay.

A construction employee is entitled to vacation with pay pursuant to the ESA. As such, the employer can pay its 'construction employees' at least 7.7 per cent on all of their hourly wages and then not have to worry about tracking vacation and holidays when scheduling 'construction employees'.

### Termination and Severance Pay

A construction employee is not entitled to notice of termination, or pay in lieu thereof, nor severance pay under the ESA. This is a significant exception from the ESA driven by the seasonal and transient nature of the construction industry.

However, a construction employee may be entitled to common law notice of termination which can be significantly higher than the ESA minimums.

The limitation on the right to common law notice is if the construction employee is covered by a collective agreement which provides entitlements on termination, or has a written employment agreement limiting entitlements.

In the next edition of DCN (May 21), we will look at how adjudicators determine who is a 'construction employee' and who is not. To learn more, contact a member of the Sherrard Kuzz LLP team.

Brian Wasyliw is a lawyer with Sherrard Kuzz LLP, one of Canada's leading employment and labour law firms, representing management. Call 416-603-0700 or visit [www.sherrardkuzz.com](http://www.sherrardkuzz.com) for more information.