

## Article

# INDUSTRY PERSPECTIVES: Who is a 'construction employee' and why does it matter?

by MATTHEW BADROV *May 21, 2015*



The article examined provisions of the Ontario Employment Standards Act 2000 ("ESA") applicable to a 'construction employee' as defined in the ESA.

This follow-up article examines how adjudicators determine whether an individual is a 'construction employee' and the distinction between 'repair' and 'maintenance' work.

Why does it matter?

The characterization of an employee as a 'construction employee' is important because certain exemptions apply to a construction employee under the ESA.

For example, a construction employee is not entitled to notice of termination, or pay in lieu thereof, nor severance pay under the ESA, and is not restricted by the daily or weekly maximum hours of work.

If an employer incorrectly classifies a non-construction employee as a 'construction employee', the employer will be in breach of the ESA and have exposed itself to liability including the potential for costly litigation (e.g., grievance arbitration, an ESA complaint, or class action) and an ESA compliance audit by the Ministry of Labour.

If non-compliance exists over several years, the quantum of liability can be considerable.

How do adjudicators determine who

is a 'construction employee'?

Whether an individual is a construction employee under the ESA may seem like an easy question to answer, but this isn't always the case.

For example, an individual installing HVAC components in a school under construction would seem to be a construction employee.

But what if that same individual is installing those same components in a school that has already been built, or doing repair work on an existing HVAC unit?

Is that employee still a construction employee?

The answer depends on whether the work being done is defined as 'maintenance' or 'repair'. Adjudicators have consistently stated that 'repair' work falls within construction while 'maintenance' work does not.

What is 'maintenance' and 'repair' work?

Generally speaking, work done to preserve or maintain the functionality of a machine or equipment is considered 'maintenance' while work done to restore or bring a machine or equipment to working order is considered 'repair' (or construction).

This distinction was first articulated in the leading case of Catalytic Enterprises Ltd. in which the Ontario Labour Relations Board said the following:

"In our view, it is a question of the context of any given work and the degree of addition or subtraction of such work to an existing system or part of a system.

Where the work assists in preserving the functioning of a system or part of a system, such work is maintenance work.

Where the work is necessary to restore a system or part of a system which has ceased to function economically, such work is repair work. 'Maintenance' and 'repair' work are not mutually exclusive concepts and lack of adequate maintenance will surely produce a situation where repair becomes inevitable."

Tips for employers

Whether an employee is a construction employee will depend on an assessment of the individualized facts. When faced with this question, begin by applying the test set out in Catalytic Enterprises Ltd.

If you are unsure, or want an objective second opinion, contact a member of the Sherrard Kuzz LLP team. We are one of Canada's leading construction labour and employment law firms, and would be pleased to assist you.

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