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Certain business, IT consultants now exempt from Ontario's employment standards legislation

February 6, 2023

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Effective Jan. 1, 2023, certain business consultants and information technology consultants are exempt from Ontario's Employment Standards Act, 2000 (ESA). This means they are not eligible for minimum wage, overtime pay, leaves of absence, termination pay and all other ESA related benefits and entitlements.

This briefing note outlines who falls within the exemption and how it impacts employers.

Who qualifies as a “consultant”?

A “business consultant” is an individual who provides advice or services to a business or organization in respect of its performance. This can include advice or services regarding operations, profitability, management, structure, processes, finances, accounting, procurements, human resources, environmental impacts, marketing, risk management, compliance or strategy of the business or organization.

An "information technology consultant" is an individual who provides advice or services to a business or organization in respect of its information technology systems. This can include advice about or services regarding planning, design, analysis, documenting, configuring, developing, testing and installing the information technology system of the business or organization.

Criteria for exemption

A business consultant or information technology consultant is exempt from the ESA if two criteria are met:

1. The business consultant or information technology consultant provides services through,
 1. a corporation of which the consultant is either a director or shareholder by a unanimous shareholder agreement, or
 2. a sole proprietorship of which the consultant is the sole proprietor, if services are provided under a business name of the sole proprietorship registered under the *Business Names Act*.
2. There is an agreement for the consultant's services that sets out when and the amount the consultant will be paid, which amount must be equal to or greater than \$60 per hour, excluding bonuses, commissions, expenses, travelling allowances and benefits, or such other amount as may be prescribed, and must be expressed as an hourly rate.

Impact on employers

As noted above, the amendment means that a business or information technology consultant who provides services as described above is exempt from the application of the ESA.

However, even if the consultant is not exempt from the ESA, this does not mean the ESA necessarily applies. The ESA only applies to an employee. A decision-maker under the ESA will still look at the circumstances of the arrangement to determine if the consultant is, in fact, an employee. The traditional factors evaluated in making this assessment

include (a) the control the organization has over the consultant and how they perform work, (b) the extent to which the consultant is in business for themselves such that they have a chance of profit and a risk of loss, and (c) whether the organization provides the tools necessary for the consultant to perform their work.

Further, the fact that a business or information technology consultant may be exempt from the ESA does not impact the common law analysis. In some circumstances, the individual could still be found to be an employee or dependent contractor for common law purposes and therefore entitled to common law reasonable notice.

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