



What's New in HR Law

New Business and IT Consultant Exclusion under the *Employment Standards Act, 2000*

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Bottom Line

As of this past January, individuals who work as business consultants or information technology consultants (“IT consultants”) in Ontario, and who were previously covered under the *Employment Standards Act, 2000* (the “ESA” or the “Act”), may now be excluded from the Act’s application.

The Changes to the ESA

Effective January 1, 2023, the ESA was amended to introduce further exemptions affecting business and IT consultants. The amendments arise from Bill 88, the *Working for Workers Act, 2022*, which came into force on April 11, 2022.

Pursuant to section 3(7) of the ESA, individuals who meet all of the following criteria will be excluded from the application of the ESA:

1. The individual is a “business consultant” or “information technology consultant” as defined under the ESA. According to newly added definitions, a “**business consultant**” is an “individual who provides advice or services to a business or organization regarding its performance, including advice or services regarding its operations, profitability, management, structure,

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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 regarding its information technology systems, including advice about or services for planning, designing, analyzing, documenting, configuring, developing, testing, and installing the business’s or organization’s information technology systems.”

2. The business or IT consultant provides services through either:
 - a. a corporation of which the consultant is a director or shareholder who is a party to a unanimous shareholder agreement; or
 - b. a sole proprietorship where the consultant is the sole proprietor and provides services under a business name of the sole proprietorship that is registered under the *Business Names Act*.
3. There is a written agreement for the business or IT consultant’s services that sets out when and how much the consultant will be paid as an hourly rate. The consultant’s hourly rate must be at least \$60 per hour, excluding bonuses, commissions, expenses, travelling allowances, and benefits, or any other amount that may be prescribed.
4. The business or IT consultant must actually be paid the amount set out in paragraph 3 above.

Further criteria or requirements may also be prescribed by regulation but, at the time of writing, no such criteria or requirements have been enacted.

What Do These Changes Mean?

The Ministry of Labour has updated its online resource, *Your Guide to the Employment Standards Act* (the “Guide”), to provide insight into [how the Ministry interprets the new statutory changes](#).

According to the Guide, individuals who work as business or IT consultants will no longer be covered by the ESA if the four conditions outlined above are met. On the other hand, if any of the conditions is not met or ceases to be met, the exclusion will no longer apply and the individual may (again) have rights under the ESA.

The ESA exclusion for business and IT consultants applies whether the consultant provides advice or services to the consultant’s employer or a client of the consultant’s employer.

The Guide also clarifies that the business and IT consultant exclusion is not relevant to consultants who provide services as independent contractors. As such, it seems these changes are intended to capture only those business or IT consultants who perform services as employees, not those consultants who regularly function as independent contractors and who otherwise meet all of the common law characteristics of an independent contractor (e.g., control over their business, ownership of tools, exclusivity of services, and opportunity for profit and risk of loss).

Check the Box

In light of these changes and the updated Guide released by the Ministry, employers are encouraged to review the agreements that they have in place with the relevant consultants and determine whether these relationships may be impacted by the ESA amendments.

As a first step, employers should determine whether the consultant in question is a true independent contractor, such that the ESA would not apply, or whether the consultant is more accurately an employee. If it is determined that the consultant is an employee and not an independent contractor, then the next step for employers would be to assess whether the consultant is excluded from the Act as a result of the new ESA amendments (or application of the four criteria above).

Need More Information?

For more information or assistance with the new ESA amendments or worker classification issues, contact [Anja Djogo](mailto:adjogo@filion.on.ca) at adjogo@filion.on.ca or your regular lawyer at the firm.



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