

Is Your Employee Exempt From Employment Standards Legislation?



On January 1, 2023, an amendment to the Ontario *Employment Standards Act, 2000* (“ESA”) came into force that creates a new exemption for business and information technology (IT) consultants.¹ This means that if an individual meets the criteria for a “business consultant” or “information technology consultant” under the ESA, then the consultant is excluded from the application of the ESA. If that is the case, then the employer does not have to comply with the minimum employment standards set out in the ESA with respect to the consultant.

Employers should consider whether this new exemption applies to any individuals in their Ontario workforce. In addition, it is also a good reminder for employers to consider whether they are up to date on key exemptions from employment standards legislation in all of the provinces and territories in which their business operates, as the exemptions do vary by province and territory.

What is the “Business Consultant” or “Information Technology Consultant” Exemption?

These two terms are now defined in the ESA as follows:

- **“Business consultant”** means “an individual who provides advice or services to a business or organization in respect of its performance, including advice or services in respect of the operations, profitability, management, structure, processes, finances, accounting, procurements, human resources, environmental impacts, marketing, risk management, compliance or strategy of the business or organization.”
- **“Information technology consultant”** means “an individual who provides advice or services to a business or organization in respect of its information technology systems, including advice about or services in respect of planning, designing, analyzing, documenting, configuring, developing, testing and installing the business’s or organization’s information technology systems.”

In order for a business or IT consultant to be exempt from the ESA, all of the following criteria must be met:

1. the consultant must be providing their services through a business. Specifically, through either of the following:
 1. a corporation of which the individual is either a director or a shareholder who is party to a unanimous shareholder agreement; or\
 2. a sole proprietorship of which the individual is the sole proprietor, if the services are provided under a business name of the sole proprietorship that is registered under the *Business Names Act*;
2. the parties must have entered into a written agreement that addresses when, and how much, the consultant will be paid. The pay must be set out as an hourly rate and be at least \$60 per hour (excluding bonuses, commissions, expenses, travelling allowances, and benefits); and
3. the consultant must be paid at the time, and for the amount, specified in the written agreement.

In light of this definition, this exemption is going to be most relevant for businesses who hire these types of workers as consultants or independent contractors.²

The employment standards exemptions that Ontario employers are familiar with are much narrower exemptions that exempt certain professions or categories of employees from limited parts of the ESA only (e.g. hours of work and overtime).³ In comparison, this new exemption is much broader. If it applies, the consultant is entirely exempt from the ESA, including minimum standards relating to hours of work and overtime, vacation and public holiday pay, statutory leaves of absence, and statutory termination pay and statutory severance pay. Note that while the statutory termination provisions in the ESA will not apply, the individual may still be entitled to common law reasonable notice of termination. Consequently, it is important to ensure that agreements with business and IT consultants are carefully drafted and address key terms like termination of employment.

What About Other Provinces and Territories?

So far, Ontario is the only province in Canada with this business or IT consultant exemption.

IT professionals are already exempt from parts of employment standards legislation in Ontario and other Canadian provinces. For example, “information technology professionals” in Ontario are exempt from the hours of work, eating period and overtime pay provisions in the ESA.⁴ In British Columbia, a “high technology professional” is exempt from almost all of the minimum standards relating to hours of work and overtime, as well as from those concerning statutory holidays.⁵ In Alberta, an “information systems professional” is exempt from minimum standards relating to hours of work and overtime.⁶ In Nova Scotia, “information technology professionals” are exempt from overtime pay requirements.⁷ While the definitions of IT professionals are similar in the employment standards legislation in these provinces, they are not identical.

Key Takeaways

Beyond the category of IT professionals, the occupations and categories of employees that are exempt from employment standards legislation (either entirely or in part) also vary by province and territory. Just because an employee is exempt from employment standards legislation in one province or territory does

not mean that will be the case in another Canadian province or territory. In some provinces and territories, certain professions are excluded from the legislation entirely whereas in other provinces and territories they are only excluded from certain provisions in the legislation.⁸ For businesses with employees in multiple jurisdictions, this reinforces the importance of considering these statutory exemptions in each applicable province or territory.

Footnotes

1. *Employment Standards Act, 2000*, s. 3(5), (7)-(8).
2. A reminder that the ESA has an express prohibition on misclassifying employees as independent contractors: ON *Employment Standards Act, 2000*, s. 5.1.
3. For example, managers are exempt from the overtime pay provisions in the ESA, and certain professionals are exempt from the hours of work, minimum wage, public holiday and vacation provisions in the ESA (*When Work Deemed to be Performed, Exemptions and Special Rules*, ss. 2, 8(b))
4. *When Work Deemed to be Performed, Exemptions and Special Rules*, ss. 4(3)(b), 8(1)
5. BC *Employment Standards Regulation*, s. 37.8(2).
6. AB *Employment Standards Regulation*, s. 2(2)(o)
7. NS *General Labour Standards Code Regulations*, s. 2(2C)
8. For example, in BC certain professions and occupations, such as architects, accountants, lawyers, and professional engineers are entirely excluded from the BC *Employment Standards Act* (*Employment Standards Regulation*, s. 31). In comparison, in Ontario, these same professionals are only excluded from the parts of the ESA concerning hours of work, eating periods, the three hour rule, minimum wage, public holidays and vacations (*When Work Deemed to be Performed, Exemptions and Special Rules*, s. 2).

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