[New Ontario ESA Rules for Business and IT Consultants Take Effect](#)

Is your consultant still an "employee" entitled to ESA benefits?

Ontario companies that have consultants on their payroll need to be aware of the new *Employment Standards Act* (ESA) exemptions that took effect on January 1, 2023. **Bottom Line:** Certain business and information technology (IT) consultants may no longer count as "employees" under the ESA. Here are 4 FAQs that explain the new law and its potential impact on your own company.

FAQ 1. What's At Stake?

Answer: Being considered an "employee" under the ESA is a big deal because it means the individual is entitled to the wage, hour, termination notice and other protections that the law provides. The new exemptions, which are part of [Bill 88, the Working for Workers Act](#) adopted in 2022, are designed to bump highly paid consultants to the realm beyond which the ESA applies and contracts may be freely negotiated without floors. It's a realm currently occupied by [independent contractors](#) and persons deemed as [exercising management functions](#).

While consultants probably don't need to worry about minimum wages and other compensation matters, being an "employee" could be crucial with regard to disputes over working hours, overtime and where the consultant is terminated without cause or termination notice.

FAQ 2. To Whom Do the New ESA Exemptions Apply?

Answer: The new exemptions cover 2 kinds of consultants [defined in Section 1(1) of the ESA.](#) The first is a "business consultant," defined as one who provides advice or services to a business or organization on its performance, including any of the following:

- Operations;
- Profitability;
- Management;
- Structure;
- Processes;
- Finances;

- Accounting;
- Procurements;
- Human resources;
- Environmental impacts;
- Marketing;
- Risk management;
- Compliance; or
- Strategy

"Information technology consultant" is defined as one who provides advice or services to a business or organization on its IT systems, including with regard to any of the following:

- Planning;
- Designing;
- Analyzing;
- Documenting;
- Configuring;
- Developing;
- Testing; or
- Installing.

It doesn't matter whether the business or organization on the receiving end of the consultant's advice or services is the consultant's employer, or a client of the consultant's employer.

FAQ 3. When Does the ESA Exemption Apply?

Answer: The ESA exemption for a business or IT consultant applies only if all 4 of the following conditions are met:

- The individual meets one of the above definitions of business consultant or IT consultant;
- The consultant provides services via a corporation or sole proprietorship. Individual must be providing their services through either:
  - A corporation of which they're a director or a shareholder party to a unanimous shareholder agreement; or
  - A sole proprietorship if the services are provided under a business name of the sole proprietorship that's registered under an Ontario law called the *Business Names Act*;
- The employer and consultant have a written agreement in that sets out when, and how much, the consultant will be paid, with the consultant's pay expressed as an hourly rate of at least $60 per hour not including:
  - Bonuses;
  - Commissions;
  - Expenses;
  - Travelling allowances; or
  - Benefits;
- The consultant must be paid at the time, and for the amount, specified in the agreement.

FAQ 4. What Must We Do to Comply?

Answer: The first step is to determine whether any of your current consultants meet the definition of either business consultant or IT consultant and, if so, whether all 4 of the above conditions apply to your contractual arrangement. If an exemption does

apply, the consultant isn't entitled to any of the ESA's benefits or protections.

However, you also need to continuously monitor the arrangement to verify that the 4 conditions are continuing to be met. When and if any of the conditions is no longer being met, the exemption no longer applies and you must recognize the consultant's rights under the ESA.