

Construction Law / Labour & Employment Law January 2013

Bill 119 - WSIB Mandatory Coverage in Construction Comes into Effect on January 1, 2013 – Are You Affected?

Recent amendments to the Ontario Workplace Safety and Insurance Act, 1997, now in effect, have significantly expanded the scope of mandatory WSIB coverage in the construction industry. Generally, unless one of the exemptions outlined below applies, independent operators, sole proprietors, some partners and some executive officers are now required to have coverage. As well, companies that hire independent operators will need to request clearance certificates before work begins.

Mandatory Coverage for Deemed Workers – Who is Affected?

Before January 1, 2013, it was optional for certain categories of persons in the construction industry to have WSIB coverage. However, effective January 1, 2013, Bill 119 - the *Workplace Safety and Insurance Amendment Act, 2008* (“WSIA”) - now requires formerly optional insurance coverage to be mandatory for the following categories of persons operating in the construction industry:

1. **Independent Operators**, which means an individual who
 - (a) does not employ any workers;
 - (b) reports himself or herself as self-employed for the purposes of an Act or regulation in Ontario or Canada (i.e., to the Canada Revenue Agency); **and**
 - (c) is hired as a contractor or subcontractor by more than one person during an 18 month period OR an individual who is an executive officer of a corporation that does not employ any workers other than him or herself and is retained as a contractor or subcontractor by more than one person during an 18 month period.
2. **Sole Proprietors**
3. **Partners in partnerships**; and
4. **Executive officers of a corporation.**
(collectively, “Deemed Workers”).

Deemed Workers under the WSIA will be required as of January 1, 2013 to make mandatory payments of WSIB premiums, unless you fall within one of the exemptions

detailed below. If you fall within one of the categories of Deemed Workers, you are affected and you must be sure to register with the WSIB and start paying WSIB premiums as of January 1, 2013. The new law does not change the existing obligations of construction companies for their employees.

Are you Exempt from the Mandatory Coverage Requirements of the WSIA?

There are only two exemptions for the Deemed Workers’ mandatory coverage requirements:

1. Home Renovation Exemption:

Home renovators who work exclusively in home renovation are exempt, as long as the following conditions apply:

- (a) You do not employ any workers;
- (b) You work directly for the homeowner; and
- (c) You are paid directly by the homeowner.

The home renovator exemption only applies to individuals. However, if the individual hires workers, the individual is considered an employer under the WSIA and therefore must register with the WSIB to ensure the workers are covered.

Home renovation for the purpose of this exemption means construction work performed by Deemed Workers that is performed on an existing private residence (including a house, condominium, apartment, cottage and any structure located on the private residence that is not used for commercial purpose, such as a garage) that is or will be occupied by the person who

directly hires the Deemed Worker or by a member of the person's family (the WSIB policies set out who would constitute a member of a person's family). To be considered directly retained, the contractor must be (a) hired by the occupant of the private residence or a family member; (b) provide estimates or contracts or invoices to that person in the contractor's name; and (c) receive payment for the work directly from the occupant or the family member.

Some examples of when the home renovation exemption does not apply where construction work is being done on a private residence, thereby triggering registration requirements, are as follows:

- (a) If you are a subcontractor hired by the contractor to perform work on a private residence; and
- (b) If construction work is performed on structures located on the private residence where that structure is used for commercial purposes (e.g., a garage that is being used as a body shop).

The home renovation exemption does not apply if you perform both home renovation work and renovation work that is not exempt. In that case, you must maintain coverage for all of your activities since you do not exclusively perform home renovation work.

2. Exemption of a Partner or Executive Officer:

For Deemed Workers who are a corporation or partnership with workers, without workers but with multiple executive officers and partnerships with workers, the corporation/partnership is entitled to *select one* executive officer/partner to apply for an exemption. In order to qualify for this exemption, the individual selected to be exempt must not perform any actual construction work. The individual may make periodic visits to sites, but they cannot perform any construction work at the project site. Construction work is defined to include any manual work of a skilled or unskilled nature, the operation of equipment or machinery or the direct on-site supervision of workers.

In order to request this exemption, the corporation or partnership must file a Declaration of Exemption,

which is a specific WSIB form. The exemption will take effect on the day the declaration is received by the WSIB. A corporation must provide proof to the WSIB of the executive officer's status by providing current documentation, including but not limited to the corporation's Minute Books or public records filed with the Ministry of Government Services. The WSIB ultimately makes the decision as to whether an executive officer or partner qualifies for this exemption.

If you fall under one of these two exemptions, you are exempt from the Deemed Workers' mandatory coverage requirements.

Deemed Workers' Obligation to Register and Report Material Change

If you are a Deemed Worker and neither of the two exemptions applies to you, what are your obligations? You must register with the WSIB on or before January 1, 2013.

Deemed Workers who are individuals who operate their business on their own, as sole proprietors without workers, or as a single officer corporation, are required at the time of registration to submit a status declaration to confirm their status as an independent operator.

As noted above, for a corporation or partnership exemption, a Declaration of Exemption must be filed which will take effect on the day the WSIB receives it. If after a corporation or partnership submits a signed declaration of exemption to the WSIB, its circumstances change and the exemption no longer applies, the corporation/partnership, as the case may be, must notify the WSIB within 10 days after the material change in circumstances occurs.

The Principal's Obligation when Retaining a Deemed Worker

A Principal is someone who hires a contractor or subcontractor in the construction industry to perform construction work (i.e., an owner). Prior to a contractor or subcontractor commencing construction work on a project, a Principal who hires a contractor or subcontractor must require the contractor or subcontractor to provide a WSIB

Clearance Certificate. This requirement will impact the requirements in contracts and bid documents. A Principal must require or obtain from a contractor/subcontractor a WSIB Clearance Certificate that is valid for a six month period of time at the time of or immediately prior to any construction work being commenced on a project. It would be good practice for the Principal to obtain this information at the time of accepting bids or as a condition of entering into a contract for the commencement of the work. If, for any reason, there is a delay in the time frame within which the work commences on a project from when the contract was entered into (thereby exceeding the six month period of validity of the WSIB Clearance Certificate received), the Principal must obtain an up-to-date WSIB Clearance Certificate from the contractor or subcontractor.

If you are a Principal or employer who hires subcontractors/contractors, including Deemed Workers, here are some steps that you should take in light of Bill 119 (and generally as it relates to your obligations under the WSIA):

- (a) You should implement WSIA-related policies and requirements with which contractors or subcontractors whom you retain must comply;
- (b) You should have a written contract with contractors/subcontractors that sets out the contractual obligations, including the requirement to provide a Clearance Certificate before commencing work and a continuing obligation to provide a valid Clearance Certificate, failing which would result in a breach of the contract;
- (c) Obtain a clearance certificate as a requirement of the bid documents, prior to the commencement of the construction work, with each invoice for payment and at the conclusion of the project;
- (d) Build into the contract an amount to be retained to cover any failure on the part of the contractor/subcontractor to pay WSIB premiums, which would be released once the work is completed and a valid WSIB Clearance Certificate is provided; and

- (e) Build into the contract a requirement that invoices or the contract price break down the price for labour, material and applicable taxes. This will allow you to determine the premiums that the contractor/subcontractor must pay to the WSIB for the project.

What if a Deemed Worker Fails to Register and/or Comply?

If a Deemed Worker does not register or fails to provide the Principal (i.e., owner) with a WSIB Clearance Certificate, the Deemed Worker will not be able to start construction work on a project. The law requires that a Principal obtain a WSIB Clearance Certificate or the Principal may refuse to allow the Deemed Worker to commence work on the project. A WSIB Clearance Certificate can only be obtained from the WSIB if you have registered and paid your premiums.

Non-compliance with Bill 119 could result in charges being laid and a person being found guilty of an offence as follows:

- (a) A person or corporation may be charged with an offence under the WSIA which can result in charges being laid under the *Provincial Offences Act* and the following penalties could be imposed:
 - i. a person who is convicted could face:
 1. a fine up to a maximum of \$25,000; and/or
 2. a prison sentence not to exceed six months.
 - ii. a corporation that is convicted could be fined up to a maximum of \$100,000.
- (b) A person who directly retains the contractor or subcontractor who fails to pay WSIB premiums or has outstanding amounts owing to the WSIB may be liable.

Although registration and payment of premiums is mandatory as of January 1, 2013, the WSIB has advised that it will not be prosecuting non-compliance or laying charges before the end of December 2013; rather, the WSIB will be focusing on ensuring that construction industry

One of the top Ontario Regional Law Firms as chosen by the readers of *Canadian Lawyer* magazine.

participants are aware of the changes and register where necessary. There are expected to be no further indulgence after the end of December 2013.

Should you have any questions related to the new mandatory registration requirements, please do not hesitate to contact us.

Maria Ruberto is a member of the Construction Practice.



Jeffrey Percival is a member of the Labour & Employment Practice.



Pallett Valo LLP Construction Practice

Litigation risk management in the construction industry requires the advice and guidance of experienced construction lawyers. The Pallett Valo LLP Construction Practice has particular expertise in the resolution of all types of construction disputes. Their practical and timely advice assists our construction clients in meeting their day to day challenges.

Contact Members of the Construction Practice

Anna Esposito aesposito@pallettvalo.com
Direct Dial: 905.273.3022 Ext. 260

Paul Guaragna pguaragna@pallettvalo.com
Direct Dial: 905.273.3022 Ext. 281

Francesca Maio fmaio@pallettvalo.com
Direct Dial: 905.273.3022 Ext. 210

Scott Price sprice@pallettvalo.com
Direct Dial: 905.273.3022 Ext. 221

Maria Ruberto mruberto@pallettvalo.com
Direct Dial: 905.273.3022 Ext. 206

Pallett Valo LLP Labour & Employment Practice

We have the legal expertise and rich experience to provide employers with creative and pragmatic solutions for a wide variety of legal issues. We offer support to management in drafting employment contracts and company policies, collective bargaining, collective agreement administration, grievance arbitration and advice and representation for WSIB, Ontario *Human Rights Code* and *OHSA* matters. Our advice minimizes the time, cost and disruption associated with labour and employment issues.

Contact Members of the Labour & Employment Practice

Andy Balaura abalaura@pallettvalo.com
Direct Dial: 905.273.3022 Ext. 225

Jeffrey Percival jpercival@pallettvalo.com
Direct Dial: 905.273.3022 Ext. 254

Pamela Yudcovitch pamyudco@pallettvalo.com
Direct Dial: 905.273.3022 Ext. 218

This article provides information of a general nature only and should not be relied upon as professional advice in any particular context. For more information about Construction Law or Labour & Employment Law, contact a member of our **Construction Practice or Labour & Employment Practice** at **905.273.3300**.

If you would prefer to receive your bulletins by email, visit www.pallettvalo.com/signup or send an email to marketing@pallettvalo.com.