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PUBLICATION

Mandatory WSIB Coverage in the Construction Industry

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Conventional wisdom would lead most people in Ontario to assume that Workers' Compensation is something that applies to anybody who has a job, most particularly in an industry where they might be at risk of getting hurt. Conventional wisdom however, is wrong.

Since the dawn of workers' compensation legislation in Ontario almost 100 years ago, there have been many exemptions from mandatory workers' compensation coverage. For reasons best known to the people who invented the system all those years ago, some businesses such as photographers and funeral homes were expressly excluded from the start, while other businesses have simply been inexplicably left out, including undertakings such as golf courses and detective agencies. Most significantly perhaps, and most problematic, (given the risks of such work), are the omissions that have existed in the construction industry.

While employees in construction are generally covered, many individuals who work on construction sites and are exposed to the same risks of injury as anyone else who is there, have been excluded. This includes independent operators (commonly referred to as independent contractors) who work as subcontractors on a jobsite, and have no employees. Because they are not employees of the contractors to whom they provide service, they have not been required to have Workers' Compensation Board (WSIB) coverage. The same lack of coverage has applied to executive officers of companies in the construction industry and partners in a partnership working on site.

This has created a fundamental imbalance in the competitive marketplace in the industry, since these non-compulsory groups were able to operate outside of the workers' compensation system, and bid competitively for work while not being required to pay premiums that can hit levels as high as 17% of the cost of labour at current rates. This arguably unfair competitive edge, combined with the fact that when such individuals are injured they have no recourse to income protection (unless they have purchased private insurance), led the province to introduce

legislation to bring all such people within the workers' compensation system. The province recently announced that the effective date for this change will be January 1, 2013.

Under this new system of mandatory coverage in the construction industry there will be two primary changes. The first of these will be the requirement for independent operators, executive officers and partners in a partnership working in construction to secure and pay for WSIB coverage effective at the beginning of next year. The second change will require any person who directly retains a construction contractor or subcontractor to obtain a WSIB-issued certificate confirming that the contractor or subcontractor is registered with the WSIB and in compliance with its payment obligations under the Act.

It is to be noted that none of these changes apply to home renovators who are contracted directly by the occupier of the residence, provided that the renovator works exclusively in home renovation.

Implementation of Mandatory Coverage

In anticipation of the implementation of mandatory coverage in the construction industry, the WSIB has issued a number of notices on its website and has started a process of pre-registration for affected employers, so that all arrangements can be in place, to come into effect at the beginning of next year. Such registration will not create a liability to pay premiums or result in coverage during 2012.

The WSIB has **not**, to date, published the more detailed policies that will be necessary for new registrants and their legal advisors to fully understand the way in which the Board intends to manage this process.

Requirement for Clearance Certificates

At present, the issuance by the WSIB of "Clearance Certificates" is a common practice in construction. It serves to protect those who retain contractors and subcontractors in the field from the operation of section 141 of the *Workplace Safety and Insurance Act*, which would otherwise make those parties responsible, if their contractors fail to pay their premiums to the WSIB. The process has to date, however, been entirely optional, and certainly many people who retain contractors and subcontractors have taken the risk that no problems will result.

Under the mandatory coverage system, however, and in an effort to prevent anyone from "flying under the radar", the new provisions will require these clearance certificates (or their 2013 equivalents) to be provided **before** the person retaining these services permits the contractor or subcontractor to begin construction work. These certificates will expire from time to time, and people who hire such contractors will need to implement a system whereby new certificates are put on file by the time the older certificates expire. Moreover, a person who receives these certificates will be obliged to keep them on file for at least 3 years after the date on which they are obtained and to produce them for inspection as the Board or its representative may require.

If the contractor or subcontractor goes into default with respect to payments to the Board, the Board may revoke a certificate at any time, and the contractor or subcontractor will be prohibited from doing further construction work until the situation is resolved. Those who hire contractors and subcontractors will be prohibited from permitting them to do construction work, if they become aware of the revocation.

Non-compliance with any of these obligations will constitute an offence, with fines of up to $25,000 for individuals and of up to $100,000 for corporations. Individuals are also exposed to the risk of up to 6 months of imprisonment.

Again the exemption described above with respect to home renovation will apply.

Conclusion

Plainly, we are early in this process, and a lot of the details have yet to be provided by the WSIB. At the present time, construction businesses that may be affected by the new requirements may wish to consider pre-registration, and start to consider changes they may need to make with respect to costing future work in light of the forthcoming obligation to pay WSIB premiums.

At the same time, all participants in the construction industry would be well-advised to start to plan for the process of obtaining and retaining current clearance certificates (or whatever the new terminology be) from everyone who will be providing construction services to them on or after January 1, 2013.

We will, of course, be providing further updates as information becomes available, and can provide more specific and direct assistance to any construction business that may require it.