

The Dentons logo consists of the word "DENTONS" in a bold, white, sans-serif font, enclosed within a white arrow-shaped graphic pointing to the right. The background of the slide is a vibrant, abstract image of coral or sea anemones in shades of purple, blue, and orange, with a dark purple semi-transparent overlay on the left side.

DENTONS

WEBINAR SERIES
LEGAL UPDATES
FOR CANADIAN EMPLOYERS

Cross-Canada Labour and Employment update

May 31, 2024

Grow | Protect | Operate | Finance

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Employees vs. independent contractors

Maggie Sullivan

Consequences of misclassification

Employers may be subject to liability with respect to the following:

Canada Revenue Agency

- Employer tax deductions; fines for non-compliance.

Provincial Workplace Safety and Insurance/Workplace Compensation Boards

- Investigation into your workplace; repayment of outstanding premiums; significant fines for both the Company and Directors and Officers personally; a provincial offence.

Employment Standards

- Vacation pay; overtime pay; leave entitlements; termination pay;
- Potential fines and criminal sanctions;
- Personal Director liability.

Is your contractor really an employee?

The nature of the relationship

The 2001 Supreme Court of Canada case of *671122 Ontario Ltd. v. Sagaz Industries Canada Inc. (Sagaz)* remains the leading case on distinguishing between an employee and an independent contractor. The Court said:

- “The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker’s activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker’s opportunity for profit in the performance of his or her tasks. It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.”

Is your contractor really an employee?

The nature of the relationship

Factors which are indicative of a contractor relationship include the following:

- Contractors will not work full time nor exclusively for one organization;
- Contractors will have control over the timing and performance of their work;
- Contractors will generally supply their own tools and equipment;
- Contractors will not be given a job title;
- Contractors will not be offered benefits typically extended to employees;
- Contractors will be responsible for remitting their own taxes, and no employment source deductions will be taken from the payments made to contractors.

Is your contractor really an employee?

Ontario - Business/Information technology consultants

As of **January 1, 2023**:

In order to be exempt from the *Employment Standards Act, 2000* (“ESA”) business consultants and information technology consultants must:

1. Provide their services through a personal service corporation or a sole proprietorship as opposed to in their own name;
2. Be paid a fee of \$60/hour or greater; and
3. Have a written agreement setting out the foregoing.

Is your contractor really an employee?

Ontario - Business/Information technology consultants

Business Consultant

- Someone who provides advice or services to a business or organization on its performance, including advice or services in respect of 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

- Someone who provides advice or services to a business or organization on its information technology systems, including planning, designing, analyzing, documenting, configuring, developing, testing, and installing.

Dependent contractors

The middle ground between employee and independent contractor

A person may be found to be a dependent contractor when:

- There is near or complete exclusivity between the individual and the company; and
- The individual is economically dependent on the company such that the working arrangement accounts for “substantially more than a majority” of the contractor’s income.

Consequences of being deemed a dependent contractor:

- Dependent contractors are entitled to common law reasonable notice upon termination



If the assessment leads to the conclusion that the person fits or may fit the definition of dependent contractor, then it is likely best to insist on an employment relationship and employment agreement instead.



Common employer-sponsored work permit categories

Heelan Kwon

Employer sponsorship

Supporting a work permit application

- Open vs closed (i.e., employer-sponsored) work permits
- Who is responsible for supporting the closed work permit of a temporary foreign worker (TFW)?

Employer sponsorship

Temporary Foreign Worker Program & International Mobility Program

A) Temporary Foreign Worker Program

- Addresses temporary labour needs that cannot be locally met;
- Led by Employment and Social Development Canada (ESDC); jointly administered with Immigration, Refugees and Citizenship Canada (IRCC);
- Employer must obtain a Labour Market Impact Assessment (LMIA) from ESDC before the TFW can apply for a work permit.

B) International Mobility Program

- Supports the broader economic, social, and cultural interests of Canada;
- Led by IRCC;
- LMIA-exempt; only a work permit application with an offer of employment is required.

Temporary Foreign Worker Program

Labour market impact assessment

- A positive LMIA indicates a temporary need (i.e., up to three years) for a TFW to fill a specific job position, and that there are no Canadian citizens or permanent residents available to fill the position.
- Requirements:
 - Workplace compliance & business legitimacy;
 - Wage floor;
 - Transition plan;
 - Recruitment and advertisement.
- Employer compliance.
- Various streams: High and low-wage; primary agriculture; caregiver; Global Talent Stream, etc.

Temporary Foreign Worker Program

Global talent stream LMIs

- The Global Talent Stream provides facilitated processing of LMIs and exemption from the recruitment requirement in exchange for an employer's commitment to beneficial activities for the Canadian labour market.
- Labour Market Benefits Plan.
- Category A requirements:
 - Innovative company seeking unique and specialized talent;
 - Referral from Designated Referral Partner.
- Category B requirements:
 - Occupation list.

International Mobility Program

Intra-company transferees

- International companies may temporarily transfer qualified employees to its Canadian operations for the purpose of improving management effectiveness, expanding Canadian exports, and enhancing competitiveness in overseas markets.
- Requirements:
 - Corporate relationship between the Canadian and foreign employer;
 - Period of employment outside of Canada;
 - Qualifying positions: (1) Executive, (2) senior managerial, or (3) specialized knowledge capacity;
 - Business establishment; start-up companies.
- Maximum duration:
 - Executives and senior managers: **seven years**.
 - Specialized knowledge workers: **five years**.

International Mobility Program

Professionals

- Certain professionals may temporarily work in Canada if they are citizens of countries that are party to the following free trade agreements:
 - Canada-United States-Mexico Agreement (CUSMA);
 - Free Trade Agreements with: (1) Peru, (2) Colombia, (3) Korea, and (4) Panama;
 - Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP);
 - Canada-European Union Comprehensive Economic and Trade Agreement (CETA);
 - Agreement on Trade Continuity between Canada and the United Kingdom of Great Britain and Northern Ireland (CUKTCA);
 - General Agreement on Trade in Services (GATS).
- Examples of eligible occupations: (a) Engineers, (b) Computer Systems Analysts, (c) Management Consultants, (d) Scientific professionals, (e) Medical professionals, and (f) Scientific Technicians/Technologists.
- Educational/credential/licensing requirements.

International Mobility Program

Reciprocal employment

- TFWs may temporarily work in Canada when Canadians have similar reciprocal opportunities abroad, resulting in a neutral labour market impact.
- Examples
 - International Experience Canada program;
 - Academic institutions; professional/semi-professional coaches and athletes; cultural agreements;
 - Under a **corporate human resources plan or global mobility policy**:
 - General order of magnitude of exchanges on an annual basis;
 - Employment duration and job level.

International Mobility Program

Other categories

- There are many other work permit categories in support of various Canadian interests and principles:
 - Protecting the safety/health of Canadians, e.g., Emergency repair or repair personnel for out-of-warranty equipment;
 - Industry-specific, e.g., Essential workers for the production stage of television and film;
 - Promotion of minority official language, e.g. Francophone mobility;
 - Significant benefit to Canada.

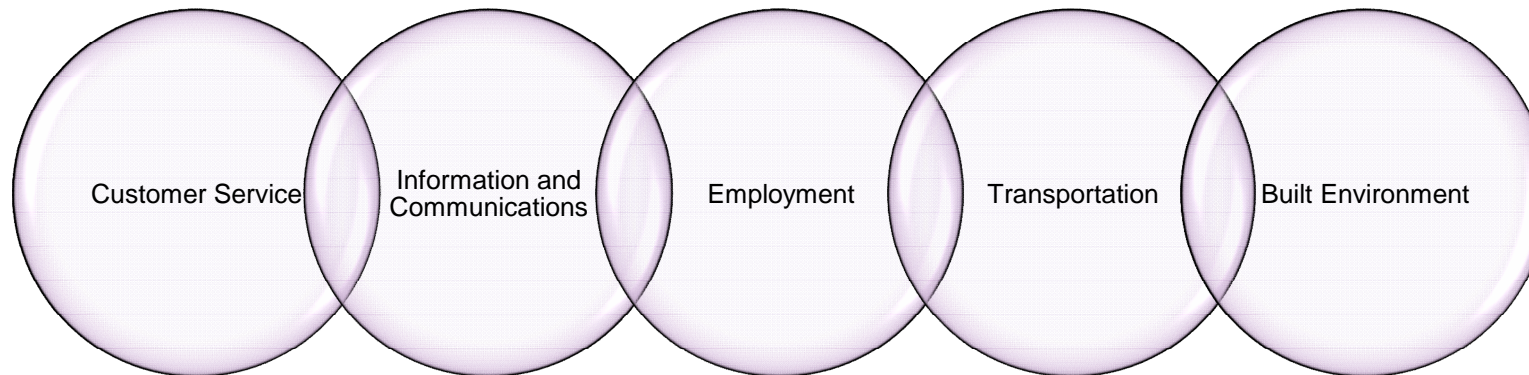


Update on accessibility in the workplace

Julia Dales

Accessibility For Ontarians With Disabilities Act, 2005 (AODA)

- Goal of the AODA was for Ontario to be fully accessible **by 2025**
- AODA set out accessibility standards for:



- The standards are set out in the Integrated Accessibility Standards Regulation (IASR)
- Organization's obligations under AODA depend on number of employees

1-19 Employees (“Small Organizations”)

Obligations

- Accessibility policy including accessible customer service plan;
- Training;
- Accessible feedback process;
- Accessible emergency response information, if applicable;
- Provide accessible information on request;
- Individualized emergency response procedure;
- Notification in recruitment and offers of employment of availability for accommodation ;
- Notice of temporary disruption;
- Take accessibility needs into account during employment (accommodation, performance management, redeployment, career development);
- Physical space accessibility (parking, service counters, waiting areas, queues) .

20-49 Employees

Obligations

Everything in prior slide plus:

- File compliance report every 3 years, only regarding customer service accessibility (last filing due date was **December 31, 2023**).

50+ Employees (“Large Organizations”)

Obligations

Everything in prior slide plus:

- File compliance report every 3 years.
- Publically available Statement of Organizational Commitment.
- Publically available Multi-Year Accessibility Plan (review/update every 5 years).
- Individual accommodation plans.
- Return to work process.
- Website published after Jan 1, 2012 must conform with WCAG 2.0 Level A & AA (except live video captioning and pre-recorded video audio descriptions).

Obligations for large organizations

Summary

General	<ul style="list-style-type: none">• Training• Publicly available Statement of Organizational Commitment• Publicly available Multi-Year Accessibility Plan (review/update every 5 years)• File compliance report every 3 years (latest due date was Dec 31, 2023)• Accessibility policy including accessible customer service plan
Employment	<ul style="list-style-type: none">• Individual accommodation plans• Return to work process• Individualized emergency response procedure• Notification in recruitment and offers of employment of availability for accommodation• Take accessibility needs into account during employment (accommodation, performance management, redeployment, career dev.)
Information/ Communications:	<ul style="list-style-type: none">• Website published after Jan 1, 2012, must conform with WCAG 2.0 Level A & AA Customer service• Accessible customer service plan• Accessible feedback process• Accessible emergency response information, if applicable• Provide accessible information on request• Notice of temporary disruption
Design of public spaces	<ul style="list-style-type: none">• Physical space accessibility (parking, service counters, waiting areas, queues)

AODA Training

- Must train anyone who is an employee or volunteer of the organization, who participates in development of organization's accessibility policies, or provides goods or services on behalf of organization.
- Must document dates training provided and number of individuals trained.
- Training topics must include:
 1. Requirements of accessibility standards as appropriate in light of individual's duties;
 2. Disability provisions in the *Human Rights Code*; and
 3. Interacting with persons with various types of disabilities, and persons who may use a support animal or have a support person, how to use assistive devices on premises, and what to do if someone is having difficulty accessing organization's goods/services.

Penalties for non-compliance

Inspections

Order to comply

Administrative
penalties

\$500 - \$15,000 daily for
corporations dependent
on impact and
contravention history

Criminal
prosecution

fines up to \$100,000
daily for corporations

Accessibility Across Canada

Jurisdiction	Status of Accessibility Legislation
Manitoba	<i>In force with accessibility standards</i>
Nova Scotia	<i>In force- standards in development</i>
Quebec	<i>In force- applies only to public sector</i>
BC	<i>In force- standards in development- currently applies only to public sector</i>
Alberta and PEI	<i>No general accessibility statute</i>
Newfoundland and Saskatchewan	<i>In force- standards in development</i>
New Brunswick	<i>Proposed</i>

The Accessible Canada Act & Regs

Federally regulated organizations

- Exemptions for organizations with less than 10 employees.
- Specific standards are in development / draft form.
- Current general requirements:
 - Prepare and publish accessibility plans (update **every three years**) in consultation with persons with disabilities.
 - Establish feedback process.
 - Providing accessible formats on request in prescribed time.
 - Prepare and publish progress reports.

The Accessible Canada Act & Regs

Federally regulated organizations

Accessibility plans should include:

- Mandatory headings (“General”, Headings re: Section 5 of the Act, “Consultations”).
- **General:** Position/title of individual who receives feedback & how public can communicate with organization.
- **Section 5 headings:** employment, built environment, information and communication technologies (ICT), communication other than ITC, procurement, design/delivery of goods and services, transportation:
 - Organization’s policies, programs, practices and service relating to identification/removal of barriers and prevention of same.
 - Any actions taken to remove barriers or plans on how that will be achieved.
 - Any training provided to employees.
- **Consultations:** Explanation of how persons with disabilities were consulted in creation of plan.

The Accessible Canada Act & Regs

Federally regulated organizations

Deadlines and other requirements:

- Large organizations (100+ employees) must have published by **June 1, 2023** (so must publish first progress report in **2026**).
- !• Small organizations (10-99 employees) must publish by **June 1, 2024**.
- Notify Accessibility Commissioner within **48 hours** when Accessibility Plan or Progress Report has been published.
- Plan and Progress reports must be published in compliance with WCAG Level AA and be provided in accessible format on request within **15 days** (small orgs) days or **20 days** (large orgs) but **45 days** for braille or audio formats.
- Retain plans/reports/feedback processes for **7 years**.



**What employers need to know
about *Working for Workers
Four and Five Acts***

Larysa Workewych

What are we talking about?

- Since 2021, the Ontario Government has introduced multiple *Working for Workers* acts:
 - *Working For Workers Act, 2021*;
 - *Working For Workers Act, 2022*;
 - *Working For Workers Act, 2023*;
 - *Working For Workers Four Act, 2024* (received royal assent March 21, 2024);
 - *Working For Workers Five Act, 2024* (introduced on May 6, 2024).
- Through these acts, the Government of Ontario has introduced a variety of obligations impacting Ontario employers.

Working For Workers Four Act, 2024

- Introduces amendments to the:
 - *Employment Standards Act, 2000*;
 - *Workplace Safety and Insurance Act, 1997*;
 - *Digital Platform Workers' Rights Act, 2002* ;
 - *Fair Access to Regulated Professions and Compulsory Trades Act, 2006*.
- Rationales provided for some of the legislated changes to the *Employment Standards Act, 2000* include:
 - Strengthening wage protections for restaurant, hospitality and service workers.
 - Helping workers make informed decisions about jobs.
 - Prohibiting discriminatory Canadian work experience requirements.
 - Clarifying vacation pay provisions.

Working For Workers Four Act, 2024

Rules already in effect

- The following rules came into effect on **March 21, 2024**:
 - Definition of “**employee**” revised to expressly include individuals completing a “**trial period**” for an employer.
 - Employers are prohibited from deducting from an employees’ wages where a customer leaves the establishment without paying.

Working For Workers Four Act, 2024

Rules coming into effect next month

The following rules will be coming into effect on **June 21, 2024**:

- Employers can pay wages by direct deposit if the account is selected by the employee and is in the employee's name, no person other than the employee or a person authorized by the employee has access to the account, and the account meets any further prescribed criteria.
- Tips and other gratuities must be paid only by cash, cheque payable to the employee or direct deposit:
 - If payment is by cash or cheque, then the employer must ensure payment is given to the employee at the workplace or another place agreed to by the employee.
- Where an employer has a “tip pool” or “tip sharing” policy, employers are required to put that policy in writing and post it in a conspicuous place in the workplace.
- In order to pay vacation pay using an alternate vacation pay arrangement, the employee and employer must sign a written agreement.

Working For Workers Four Act, 2024

Rules coming into effect on a future date to be named

The following rules will be coming into effect on a **date to be named**:

- Publicly advertised job postings must include expected compensation for the advertised position (or range of expected compensation).
- Job postings must be retained for three years after the posting is taken down.
- Employers are prohibited from including a “Canadian experience” job requirement.
- Employers must disclose whether they use artificial intelligence to screen, assess or select applicants for a position.

Working For Workers Five Act, 2024

- Intention is to build on the existing *Working for Workers* acts by introducing new first-in-Canada supports and stronger protections for workers.
- Includes amendments to the:
 - *Employment Standards Act, 2000*;
 - *Occupational Health and Safety Act*;
 - *Workplace Safety and Insurance Act, 1997*;
 - *Building Opportunities in the Skilled Trades Act 2021*;
 - *Fair Access to Regulated Professions and Compulsory Trades Act, 2006*;
 - *Ontario Immigration Act, 2015*.

Working For Workers Five Act, 2024

Proposed amendments to the *Employment Standards Act, 2000*

- Publicly advertised job postings must disclose whether the posting is for an existing vacancy or not (and any other information that may be prescribed).
- Employers cannot require employees to provide a medical certificate from a qualified health practitioner in support of their sick leave:
 - Employers can still request other forms of evidence reasonable in the circumstances, e.g. an attestation.
- The maximum fine for individuals convicted of violating the act will double from \$50,000 to \$100,000:
 - Penalty for repeat offenders who have contravened the same provision of the *Employment Standards Act, 2000* three times or more will also increase from \$1,000 to \$5,000.

Working For Workers Five Act, 2024

Proposed amendments to the *Occupational Health and Safety Act*

- Washrooms on construction projects must be clean and sanitary and records of cleaning must be maintained.
- Definitions of “workplace harassment” and “workplace sexual harassment” updated to include virtual forms of harassment and sexual harassment.
- Posting requirements can be satisfied by providing employees with electronic copies.
- Joint health and safety committee meetings can be held virtually.
- Confirmation that the *Occupational Health and Safety Act* applies to “telework”.
- Future regulatory changes requiring employers to provide menstrual products on construction projects with 20 or more workers and where the project is expected to last at least 3 months.

Thank you!



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