

CLEARING-UP WSIB CLEARANCE CERTIFICATES

Landlords often require that tenants deliver WSIB clearance certificates from contractors engaged in the improvement of the tenant's premises. It is not uncommon for the delivery of these certificates to be a pre-condition to payment of a tenant allowance. While most landlords and tenants are aware that, where these certificates are not obtained there is potential liability for each of them, these liabilities are not well understood. This News ReLease will clear that up.

THE STATUTORY FRAMEWORK

All Canadian provinces and territories have government-run workplace safety insurance programs that provide no-fault insurance coverage to a wide range of workers for workplace injuries. The Workplace Safety and Insurance Board ("WSIB") operates such a program in Ontario, established under the *Workplace Safety and Insurance Act, 1997* (the "Act"), and for the purposes of this News ReLease, we will highlight the Ontario legislative framework. However, it should be noted that the rules of engagement are quite similar from province to province (and in the territories).

Participation is only required for those employers engaged in the industries listed in the general regulations to the Act. There are hundreds of jobs listed in the regulations, including many retail, agriculture, manufacturing, and transportation businesses. For almost all persons engaged in the construction industry, participation is mandatory – even if they don't employ any workers! When used in this News ReLease, the term "employer" includes independent contractors working in construction. Affected employers must pay premiums to WSIB and in return (i) WSIB provides benefits to the workers, and (ii) the Act absolves the employer of liability to all other participating employers and employees.

The key takeaway of this News ReLease is: Where an employer has unfulfilled WSIB obligations (such as unpaid

premiums), a party who retains the employer is liable to WSIB for these amounts. This is where clearance certificates come in. A clearance certificate confirms that the employer's WSIB account is in good standing and thereby confirms that the retaining party will not incur liability in respect of the employer's WSIB obligations.

CERTIFICATES IN CONSTRUCTION

Section 141.1 of the Act imposes liability on "a person who **directly retains** a contractor or subcontractor to perform construction work" for that party's unfulfilled WSIB obligations. Section 141.2 creates a positive obligation on the hiring party to obtain a clearance certificate for contractors and subcontractors it directly retains, and prohibits the hiring party from permitting construction to occur if it is aware that no certificate is in effect. Breaching Section 141.2 is an offence under the Act, the consequence of which may include a penalty for directors and officers of the hiring party (if they acquiesced in commission of the offence).

Clearance certificates are readily available on the WSIB website and are valid for up to 90 days, with fixed expiry dates on the 20th day of February, May, August, and November each year.

Section 142 of the Act expands the hiring party's potential liability beyond the obligations of those directly retained. It states that if the employer is **entitled to a lien** under the *Construction Lien Act* (the "*Lien Act*"), then the "owner" (as defined under the *Lien Act*) is liable to WSIB for the employer's unfulfilled WSIB obligations. So, when hiring a contractor for construction, in addition to the requirement to obtain a clearance certificate from the party directly retained, it is wise to also obtain clearance certificates from all subcontractors and other parties entitled to a lien in respect of the construction work, such as material suppliers and architects.

In the case of tenant fit-outs, the tenant will be the “owner” under the *Lien Act* and should obtain clearance certificates from all parties engaged in that work. On the other hand, the landlord would in most cases not qualify as an “owner” under the *Lien Act* with regard to the tenant’s fit-out and would therefore typically not be exposed to liability for the construction team’s WSIB premiums. Nevertheless, the test for who constitutes an “owner” under the *Lien Act* can be murky. Since clearance certificates are generally easy to obtain, it makes sense for landlords (and sublandlords) to minimize their exposure by insisting on certificates from **all contractors and subcontractors** that provided labour or materials in connection with the tenant’s (or subtenant’s) work.

CERTIFICATES NOT IN CONSTRUCTION

While clearance certificates most often arise in commercial leases in the context of a tenant’s construction activities, landlords and tenants may be surprised to learn that retaining non-construction employers that are required to participate in the WSIB program (or have opted-in) also imposes obligations on the retaining party. For example, where a landlord retains a janitorial or snow removal company, under Section 141 of the *Act*, the landlord may be **deemed to be the employer** of the service company’s employees and if so, would be liable for any unpaid premiums in respect of these employees.

While the *Act* provides the retaining party with a right to indemnification and set-off vis-à-vis the service company, this statutory right may be of limited value where, for example, the company is insolvent or has already been paid when the issue comes to light. Where a party retains a service company who participates in the

WSIB program, it is prudent for the retaining party to minimize liability by obtaining a clearance certificate to confirm the company has no outstanding WSIB obligations.

PARTIES THAT DO NOT PARTICIPATE IN WSIB

Retaining an employer that is not required to (and does not) participate in the WSIB program won’t expose the hiring party to the liabilities described above. If the hired party’s employees are injured on the job and the employee sues the hiring party, the hiring party’s liability policy will generally cover the defence and liability to the employee, if any. However, where a party is sued by its **own employee**, the party’s liability policy is unlikely to respond. This is because most commercial general liability policies contain an exclusion for liability arising from workplace injury to the insured’s employees. For this reason, it is wise for all non-WSIB participating employers to obtain an “employee liability endorsement” to ensure their liability policy provides coverage for employees who are injured on the job. Given that WSIB participation is mandatory in many high risk vocations, these non-WSIB-participating workers will generally be considered to have a low risk of injury, with the result that the endorsement is available at little to no cost.

CONCLUSION

It is prudent and proactive of landlords (and sublandlords) to protect themselves from the risk of liability for the unfulfilled WSIB obligations of their tenants and subtenants. This can be done through obtaining WSIB clearance certificates prior to remitting payment to any contractor.

This publication is a general discussion of certain legal and related developments and should not be relied upon as legal advice. If you require legal advice, we would be pleased to discuss the issues in this publication with you, in the context of your particular circumstances.



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MARY ANN BADON
416-598-7056
mbadon@dv-law.com

FRANCINE BAKER-SIGAL
416-597-8755
francine@dv-law.com

JEANNE BANKA
416-597-0830
jbanka@dv-law.com

CANDACE COOPER
416-597-8578
ccooper@dv-law.com

DENNIS DAOUST
416-597-9339
dndaoust@dv-law.com

BITALI FU
416-598-7053
bitalif@dv-law.com

GASPER GALATI
416-598-7050
ggalati@dv-law.com

S. RONALD HABER
416-597-6824
rhaber@dv-law.com

PAETRA KAUFMANN
416-479-4357
pkaufmann@dv-law.com

WOLFGANG KAUFMANN
416-597-3952
wolfgang@dv-law.com

LYNN LARMAN
416-598-7058
llarman@dv-law.com

MIMI LIN
416-597-8493
mimil@dv-law.com

MELISSA M. MCBAIN
416-598-7038
mmcbain@dv-law.com

JENNA MORLEY
416-597-9225
jmorley@dv-law.com

PORTIA PANG
416-597-9384
ppang@dv-law.com

JAMIE PAQUIN
416-598-7059
jpaquin@dv-law.com

BRIAN PARKER
416-591-3036
bparker@dv-law.com

DINA PEAT
416-598-7055
dpeat@dv-law.com

ALICE PERALTA
416-597-1536
aperalta@dv-law.com

KEN PIMENTEL
416-598-7049
kpimentel@dv-law.com

LUCIA TEDESCO
416-597-8668
ltedesco@dv-law.com

NATALIE VUKOVICH
416-597-8911
nvukovich@dv-law.com

DANIEL WALDMAN
416-597-9306
dwaldman@dv-law.com

DEBORAH A. WATKINS
416-598-7042
dwatkins@dv-law.com