FTR Now

Pay Equity: The Implications of the Gender Wage Gap Program

Date: March 2, 2011

The Ontario Pay Equity Office (PEO) recently launched its Gender Wage Gap Program. If you are an employer in the Ontario private or not-for-profit sectors, please continue reading this *FTR Now*, as the Program could have a significant impact on your organization.

The Program is designed to measure the extent of gender wage gaps in private sector Ontario workplaces, with its purpose being to determine how effective the *Pay Equity Act* has been in moving organizations to more equitable compensation practices in the last twenty years. Many of our clients have queried whether they are obliged to co-operate with the PEO in its implementation of this Program.

Although it is not without risk, there is an argument to be made that employers cannot be compelled to participate. The consequences of such a decision, however, must be carefully weighed.

BACKGROUND TO THE PROGRAM

In January the PEO began sending letters to private-sector employers asking them to provide information about their pay-equity practices. Among other things, the PEO asked for wage rates by job title and gender information broken down by job class. The PEO is administering the Program under the guise of research and has said that it will analyze the information provided to see if there appears to be current gender wage gaps in an employer's establishment. If a potential wage gap is identified, or if an employer fails to provide the PEO with the requested information within 45 days of the request, an employer's file, the letter says, "may be referred for further review". Presumably, this means referral to a Review Officer of the Pay Equity Commission.

AN OBLIGATION TO ASSIST?

The issue, however, is whether employers have an obligation to assist the PEO in its research by providing the requested data.

Section 33 of the *Act* certainly gives the PEO jurisdiction to conduct research concerning any aspect of pay equity and related subjects. But while it may be able to ask employers for information for that purpose, if an employer chooses not to provide the requested data, the PEO has no independent enforcement mechanisms available to it under the Act to force compliance. The PEO may refer a file to a Review Officer if the employer fails to provide the requested information, but a Review Officer's duties are limited by section 34 to monitoring the preparation and implementation of pay equity plans and investigating complaints.

Accordingly, we would argue that neither the PEO or a Review Officer has jurisdiction to compel an employer to cooperate with the Program by providing the requested data.

What this means practically, however, is that if an employer chooses not to provide the PEO with the requested data, a Review Officer will likely be assigned to the file. But even if our interpretation of the *Act* is correct, and the Review Officer does not have jurisdiction to compel the employer to respond to the PEO's request for data, he or she would certainly have the authority to insist that the employer provide evidence that it has a valid pay equity plan in effect for all of its employee groups and that pay equity has been maintained to date.

Therefore, the risk of not cooperating with the PEO's request for information is that a Review Officer will be assigned to the file and may find that an employer is not in compliance with the *Act*.

So while there is risk associated with non-compliance, there is equally a risk if an employer chooses to provide the PEO with the requested data. Currently, employers only come to the attention of the Pay Equity Commission for pay equity audit purposes through the random Monitoring Program (which tends to be sector and geographic specific) or in response to a complaint filed by either an employee or a union.

By providing the PEO with the requested research data, an employer runs the risk of identifying itself to the Commission as an employer who has not achieved or maintained pay equity. This would, in turn, likely result in the assignment of a Review Officer who could conduct an investigation and issue appropriate orders or decisions.

PRACTICAL CONSIDERATIONS

Although we would argue that employers do not have an obligation to comply with the Gender Wage Gap Program, how much risk an employer is prepared to take will be very much dependent on their state of compliance with the *Act* and their confidence in being able to demonstrate compliance to a Review Officer assigned to the file.

Given that there are risks associated with both the production and non-production of the requested data, many employers are not producing the requested data and are taking a "wait and see" approach to see what the PEO does when faced with non-disclosure.

In view of the number of employers who have been targeted for the Program, we do not anticipate that it will be very long before an employer is put into the position of having to formally challenge the PEO's jurisdiction to compel the production of research data. We will certainly be monitoring the situation and updating clients as we learn more.

If you have any questions regarding the Wage Gender Gap Program or any other issue concerning your obligations under the *Pay Equity Act*, please contact any member of our pay equity practice group including Carolyn Kay at 416.864.7313, Lauri Reesor at 416.864.7288, Craig Lawrence at 416.864.7532, Thomas Agnew at 416.864.7227 or your regular Hicks Morley lawyer.

The articles in this *FTR Now* provide general information and should not be relied on as legal advice or opinion. This publication is copyrighted by Hicks Morley Hamilton Stewart Storie LLP and may not be photocopied or reproduced in any form, in whole or in part, without the express permission of Hicks Morley Hamilton Stewart Storie LLP. ©