FTR Now

Perquisites Directive Issued by Ontario Government Now in Effect

Date: June 1, 2011

INTRODUCTION

Management Board of Cabinet ("MBC") has issued a "Perquisites Directive" effective June 1, 2011 ("OPS Directive") establishing rules regarding the provision of perquisites and an accountability framework for decision-makers. The OPS Directive will apply to certain public service employees and appointees of, for example, all ministries of the Ontario Government. It will *not* apply to "designated broader public sector organizations" within the meaning of the *Broader Public Sector Accountability Act, 2010* ("*BPS Act*"). However, the Ontario Government has signaled its intention to issue substantially similar perquisite directives for designated broader public sector ("*BPS*") organizations as well.

This *FTR Now* discusses the OPS Directive and its application to OPS employers, as well as its potential implications for *BPS* employers.

THE OPS DIRECTIVE

APPLICATION

Effective June 1, 2011, the OPS Directive immediately applies to all employees and appointees of all ministries (which generally includes ministers' offices), all classified agencies and all public entities prescribed by regulation under the *Public Sector Expenses Review Act, 2009*. Examples of these public entities include Hydro One, Metrolinx, Ontario Energy Board, Ontario Power Generation Inc. and the Ontario Lottery and Gaming Corporation.

The OPS Directive does not apply to the following:

- provisions of collective agreements;
- insured benefits;
- items generally available on a non-discriminatory basis for all or most employees (e.g., pension plans or employee assistance programs);
- health and safety requirements (e.g., the provision of personal protection equipment);
- employment accommodations made for human rights and/or accessibility considerations (e.g., special workstations, work hours, religious holidays);
- the Rules Governing the Expenses of Cabinet Ministers, Opposition Leaders and Other Persons; and
- expenses covered under the Travel, Meal and Hospitality Expenses Directive.

While the OPS Directive does not prevail over legislation or a collective agreement, it does prevail over a memorandum of understanding between a minister and the head of an agency, as well as any existing employment agreement.

PERQUISITES

"Perquisites" in the OPS Directive captures employment terms that fall within the following definition:

- a privilege that is provided to an individual or to a group of individuals; and
- that provides a personal benefit; and

- that is not generally available to others; and
- is not a business-related requirement.

SPECIAL CONSIDERATION

With respect to items that are captured by the perquisites definition set out above, in limited and exceptional circumstances, “special consideration” may be granted to allow employers to provide an individual or group with a particular perquisite. Prior approval of the Government, supported by a business case, must be obtained before offering or providing any special consideration. An allowable special consideration is not considered to be a perquisite because it is a business-related requirement for the effective performance of an individual’s job and is based on an approved business case.

The OPS Directive requires that information regarding these allowable special considerations must be publicly available. It also sets out an “accountability framework”, which establishes who has authority for approval of special considerations provided within an organization.

The following perquisites are not allowed in any circumstances, and cannot be provided even as a special consideration:

- club memberships for personal recreation or socializing purposes, such as fitness clubs, golf clubs or social clubs;
- seasons tickets to cultural or sporting events;
- clothing allowances not related to health and safety or special job requirements;
- access to private health clinics – medical services outside those provided by the provincial healthcare system or by the employer’s group insured benefit plans;
- professional advisory services for personal matters, such as tax or estate planning.

These perquisites cannot be provided by any means, including an offer of employment letter, an employment contract, or a reimbursement of an expense.

BPS ACT

The OPS Directive does not apply to *BPS* employers. However, it is anticipated that any subsequently issued directive applicable to *BPS* employers will be substantially similar to the OPS Directive.

A *BPS* directive will find its authority in the *BPS Act*. That *Act* imposes new rules and higher accountability standards for the *BPS* around the use of external lobbyists, consultants and expenses. Of relevance to this discussion are the recent amendments to the *BPS Act* which pertain to perquisites applicable to the “designated broader public sector”, as set out below.

“Designated broader public sector organization” is a defined term in the *BPS Act* and includes, among other groups, hospitals, school boards, universities and colleges, children’s aid societies as defined by subsection 15 (2) of Part I of the *Child and Family Services Act*, community care access corporations, publicly funded organizations that received 10 million dollars or more in public funding in the previous fiscal year from the Government of Ontario and other prescribed organizations.

The *BPS Act* is now in force (with the exception of certain provisions relating to freedom of information).

SCHEDULE 4 OF THE *BUDGET ACT*

In its March 2011 Budget, the Government proposed an amendment to the *BPS Act* through Schedule 4 of the *Better Ontario for Tomorrow Act (Budget Measures), 2011* (“*Budget Act*“). Schedule 4 of the *Budget Act* has received Royal Assent but, as of yet, has not been proclaimed into force.

Schedule 4 amends the *BPS Act* to authorize the MBC to issue directives requiring designated *BPS* organizations to establish rules about perquisites. Specifically, it amends the *BPS Act* by adding Part IV.1, “Perquisites”. The new section 11.1(1) states that the MBC “may issue directives requiring designated broader public sector organizations to establish rules about perquisites”. Allowable perquisites are defined as those which meet the requirements set out in the rules made under the directives; non allowable perquisites are defined as those that do not meet those requirements.

Pursuant to section 11.1(4), the directives may require designated *BPS* organizations to establish certain rules, such as imposing restrictions on who may receive perquisites, requiring specific information to be supplied in support of a perquisite or establishing procedural requirements for providing or using perquisites. Compliance is mandatory for the designated *BPS* organizations to which the directives apply (s. 11(5)).

Section 11.2 permits the MBC “to make guidelines with respect to allowable perquisites for publicly funded organizations”. “Publicly funded organization” is also a defined term and means “every authority, board, commission, committee, corporation, council, foundation or organization that received public funds in the previous fiscal year of the Government of Ontario”, but the definition sets out certain exclusions, including all ministries and agencies of the Government. Compliance with the guidelines issued in respect of publicly funded organizations that received less than 10 million dollars in the prior year will be voluntary.

IMPLICATIONS

OPS

The OPS Directive is effective June 1, 2011. OPS employers should now be reviewing existing employment arrangements and policies to determine if there are existing perquisites, and whether such perquisites would require approval as a special consideration to be continued.

If it is determined that a perquisite is no longer allowable, notice of its discontinuance should immediately be given to the affected employee. If special consideration for a perquisite is required, steps should be taken to gain the requisite approval.

BPS

It is reasonable to assume that the directive to be issued under the *BPS Act* will contain substantially similar restrictions and processes for approval of allowable perquisites.

Any directive issued under the *BPS Act* will likely be made public before its effective date. It is also likely that the list of perquisites no longer allowed under the OPS Directive will apply equally to other sectors. In this respect, *BPS* employers should keep the list of perquisites in the OPS Directive in mind while reviewing existing employment arrangements and policies, to determine whether, under this framework, any current perquisites are disallowed or would require approval as a special consideration.

Of particular note to employers engaging in a review of existing employment arrangements is section 21 of the *BPS Act*. It states that any provision in an agreement that conflicts with a requirement under Part IV.1 (as well as other Parts) “is not valid or enforceable by any party to the agreement, **whether the agreement was entered into before or after** the coming into force of that Part” (emphasis added). Further, section 23(1) states that there can be <u>no</u> compensation arising from the invalidity or unenforceability of an agreement by virtue of the operation of section 21.

This suggests that any perquisites in an employment arrangement currently in existence can be removed without compensation paid by the employer.

In addition, an employer’s liability with respect to the changes to employment contracts resulting from the legislation is

limited. The *BPS Act* precludes any action or other proceeding seeking any remedy or relief arising, directly or indirectly, out of an employer's compliance with the terms of that *Act* and its regulations or with any directives or guidelines issued under it.

Part VII of the *BPS Act* contains enforcement provisions for non-compliance. If an organization fails to comply with any directive issued under it, the Attorney General may bring an application to require compliance by that organization.

The *BPS Act* also contains certain deeming provisions. Obligations of a local health integration network or a hospital under the *Act* are deemed to be obligations they are required to comply with under the terms of accountability agreements required under the applicable sections of the *Local Health Systems Integration Act, 2006* (sections 17,18).

In addition, every obligation of a *BPS* organization under the *BPS Act* is "deemed to be an obligation it is required to comply with under the terms of every agreement or other funding arrangement between the organization and the Government of Ontario or between the organization and an agency of the Government of Ontario" (section 19). These agreements or funding arrangements are enforceable by virtue of subsection 22(6). Therefore, depending on the specific terms or conditions of the agreements or funding arrangements, an organization's funding or other arrangement may become contingent on compliance with the *BPS Act*, including compliance with a directive regarding perquisites, once it comes into force.

CONCLUSION

OPS employers should now be aware of the OPS Directive and be reviewing existing employment arrangements to ensure compliance with that directive.

BPS employers will want to have an understanding of the current OPS Directive, as it is likely that any *BPS* directive will be substantially similar in content.

For more information on the *BPS Act* or the perquisites directive requirements, please contact your regular Hicks Morley lawyer.

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