FTR Now

Ontario Proposes Significant Changes to Wage Restraint and Collective Bargaining in the Broader Public Sector

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On September 26, 2012, the Ontario Minister of Finance announced draft omnibus legislation, the *Protecting Public Services Act, 2012* (the "Draft Bill"), which would implement new compensation restraint measures for the Broader Public Sector ("BPS"), and would impose a significant new provincially mandated collective bargaining regime. The Draft Bill would also make changes to the interest arbitration process that applies to various portions of the BPS.

Employers in the BPS should carefully review the Draft Bill during the current consultation phase, as, if introduced and passed, it would have a significant effect on your workplace. While municipalities, local boards, and the like, are generally outside the scope of the new compensation restraints and collective bargaining regime, they would apply to some municipal operations, namely, municipal boards of health and long-term care homes.

For school boards, the main impact of the Draft Bill would arise from the proposed wage restraint measures described below, but we would expect that these would impact a limited number of school board employees. In addition, the Draft Bill would apply to the government-funded not-for-profit sector and, in limited circumstances, to for-profit organizations that deliver certain government services.

In this *FTR Now*, we will review the various elements of the Draft Bill, highlighting aspects that will be of greatest concern to employers.

THE *PROTECTING PUBLIC SERVICES ACT, 2012*

The Draft Bill, the *Protecting Public Services Act, 2012,* is omnibus legislation, which means that it would enact and amend a number of different pieces of legislation. A lengthy Preamble sets out the Government's purposes and priorities in proposing and enacting the legislation. The Preamble reflects the Government's stated goals of containment of government expenditures and preservation of public services.

The Draft Bill is then comprised of eight Schedules, each of which enacts new legislation or amends existing legislation. These can be grouped into three categories:

- Schedule 1 would enact the *Public Sector Compensation Restraint Act, 2012,* and would impose new wage restraint measures on employees in the BPS who do not collectively bargain.
- Schedule 2 would enact the *Respecting Collective Bargaining Act (Public Sector), 2012,* and would create a new framework for provincial control of collective bargaining in the BPS.
- Schedules 3 to 8 of the Draft Bill would amend aspects of the interest arbitration process set out in various statutes applicable to the following sectors or organizations: ambulance, fire, police, hospitals, the Toronto Transit Commission and the Ontario Provincial Police.

We will consider each of these areas in turn.

A NEW COMPENSATION RESTRAINT REGIME

Schedule 1 of the Draft Bill would enact the *Public Sector Compensation Restraint Act, 2012* (the "PSCRA"). The PSCRA

would enact the new compensation restraints announced last week by the Finance Minister, as reported in our *FTR Now*, "Government Announces New Compensation Restraints."

If introduced and enacted, the PSCRA would replace the current wage restraints that are found in Part II.1 of the *Broader Public Sector Accountability Act, 2010* ("BPSAA"). That is, Part II.1 of the BPSAA would be repealed, and the "designated executive" and "performance pay envelope" regime would be replaced by the restraints described below.

There are a number of important differences between the current wage restraints of the BPSAA and those being proposed under the PSCRA. **However, as with each of the previous wage restraint statutes, the PSCRA would apply only to non-bargaining employees, and not to those employees who engage in collective bargaining with their employers.** (Employees who collectively bargain will be impacted by Schedule 2 of the Draft Bill, discussed below.) We note that the term "employee" should be understood to include "office holder" as well.

SCOPE OF THE COMPENSATION RESTRAINTS

The compensation restraints in the PSCRA would apply to a much wider swath of the BPS, including not-for-profit organizations. In terms of scope, this marks a return to the original compensation restraint measures found in the *Public Sector Compensation Restraint to Protect Public Services Act, 2010*, though it would extend beyond that scope. Organizations that would be subject to the proposed new restraints include:

- the government and all manner of Crown agencies, boards, commissions, etc.;
- universities and colleges;
- school boards;
- public hospitals;
- all boards of health, including municipal boards of health, even where a municipality or local board is the board of health (unless excluded by regulation);
- licensees under the *Long-Term Care Homes Act, 2007*, unless they operate on a for-profit basis, including long-term care homes operated by municipalities (unless excluded by regulation);
- community care access centres ("CCAC");
- any not-for-profit organization that provides services directly to the public, which are funded (at least in part) by a CCAC (there is no stated minimum funding for this category);
- Hydro One, Ontario Power Generation and the Independent Electricity System Operator, and their subsidiaries;
- any not-for-profit organization that received at least $1,000,000 in funding from the Government of Ontario in 2011; and
- any organization prescribed by regulation.

PERMANENT SALARY CAP

The PSCRA would impose a "permanent salary cap" on the wages of any non-bargaining employee employed by an organization covered by the statute. As widely reported in the media, the cap would be set at two times the annual salary of the Premier of Ontario. Since the Premier currently earns a salary of roughly $209,000, it is estimated that the cap would initially be set at $418,000. The cap would only be applied to employees hired after the new statute comes into force or to existing employees who accept new positions with their employer after that date. As currently proposed, the cap would not be time-limited.

The nomenclature of a "**salary** cap" is somewhat misleading, as the cap is described as the "annual salary, including performance pay and bonuses," paid to the employee. Thus, it appears that, except for benefits and allowable perquisites, employees would be capped at $418,000 for salary, performance pay and bonuses (subject to increase as the Premier's annual salary increased).

The statute would give the Lieutenant Governor in Council (i.e. Cabinet) the authority to pass a regulation exempting

individual positions from the cap where appropriate “because of labour market conditions.” There is no guidance in the Draft Bill about what labour market conditions might justify such a regulation.

TEMPORARY RESTRAINT MEASURES

The PSCRA would also create a number of temporary restraint measures that would apply for a two-year period only, beginning on the date that the new statute comes into force. **These temporary restraint measures would apply to any employee who is eligible to receive performance pay under their current compensation plan.** Thus, contrary to earlier reports, these measures would not just apply to “managers.”

First, the PSCRA would prohibit any increases in an employee’s “rate of pay” (i.e. salary for most employees), including increases or movement through existing pay ranges. However, as currently drafted, the PSCRA contains a new exception where an employee’s job responsibilities “increase substantially” during the restraint period, in which case increases would be permitted “**within the applicable pay range in effect**” on the day the restraint period begins.

Second, the PSCRA would replace the current restrictions on performance pay and the current “performance pay envelope” regime with a different set of rules. The employer would first look at the 12 months that preceded the introduction of the Draft Bill in the Legislature, and would then apply the following principles:

- if an employee had received no performance pay in that 12-month time frame, the employer could not pay the employee any performance pay during the restraint period;
- if an employee had received performance pay that had increased his or her salary, the employer could not pay the employee any performance pay during the restraint period;
- if an employee received performance pay in some form other than a salary increase (e.g. a lump sum payment), the employer could pay performance pay in each year covered by the restraint measures, but no more than the amount paid in the 12-month period preceding the date the Draft Bill is introduced in the Legislature;
- if an employee received performance pay both as a salary increase and in some other form, his or her performance pay would be restricted to the amount paid in that other form.

BENEFITS, PERQUISITES AND OTHER PAYMENTS

The PSCRA would include a prohibition on providing new, or increasing existing, benefits, perquisites or other payments during the restraint period. However, it would reintroduce a limited exception to the prohibition where the new or increased benefit, perquisite or other payment is in the employee’s current compensation plan, and is based on:

- length of time in employment; or
- successful completion of a program or course of professional or technical education.

Note that this would be a more restrictive exception than the one found in the original wage restraint legislation, both because this restriction would only apply to benefits, perquisites and other payments (and not salary increases), and because it does not contain a performance-based exception.

CONTRACT RENEWALS AND NEW EMPLOYEES

As before, the renewal of an employment contract would not permit a compensation increase during the wage restraint period. Where a new employee was hired, the elements of the employee’s compensation plan could not be more than those provided to employees in similar positions.

Significantly, the PSCRA would also prohibit new hires from being paid any performance pay during the wage restraint period. Similarly, if an existing employee moves to a new position within the organization, their performance pay eligibility

would be determined by what they had received in their previous position.

ANTI-AVOIDANCE MEASURES

The PSCRA contains significant anti-avoidance measures, including the proposed subsection 13(1):

13. (1) An employer shall not provide compensation ***before or after the restraint period*** *to an employee or office holder for compensation that the employee or office holder will not, does not or did not receive as a result of the temporary restraint measures in this Act.*

This appears to be intended to prohibit employers from paying out compensation prior to the restraint period coming into effect, or after it ends, in an effort to avoid restraint measures that would otherwise apply. As with the current BPSAA wage restraint, there would be limits on using restructurings to avoid the wage restraints, and any restructurings would need to be "bona fide" for reasons unrelated to the restraints.

REPORTS, STUDIES AND GENERAL PROVISIONS

The PSCRA would permit the Minister to issue directives requiring compliance reports to be filed. As with the current BPSAA provisions, directives can also be passed requiring compensation studies to be performed and posted.

The PSCRA contains numerous provisions to restrict challenges to the restraint provisions. For example, employees could not claim a constructive dismissal, nor an expropriation, nor bring any other form of proceedings related to the statute. Moreover, the PSCRA would prevail over any compensation plan to which it applies.

The PSCRA also states that the Attorney General would not be barred from bringing legal proceedings to require employers to comply with the statute, a provision not included in previous compensation restraint legislation.

In addition, the PSCRA contains provisions that would ensure that it would not be applied to reduce an employee's rights or entitlements under the *Human Rights Code, Pay Equity Act* or sections 42 or 44 of the *Employment Standards Act, 2000.*

A NEW COLLECTIVE BARGAINING REGIME

Schedule 2 of the Draft Bill would enact the *Respecting Collective Bargaining Act (Public Sector), 2012* (the "RCBA"), which would create an entirely new framework for provincial oversight of collective bargaining in the BPS. While it expressly limits neither the right to bargain collectively nor the right to strike, the Government would play a prominent new role in public sector collective bargaining by establishing enforceable bargaining mandates and by holding a standing power to impose a collective agreement following consultation with the parties.

SCOPE OF THE *RESPECTING COLLECTIVE BARGAINING ACT (PUBLIC SECTOR), 2012*

The RCBA would apply to virtually all of the same organizations in the BPS that would be subject to the proposed new compensation restraint provisions of the PSCRA (see page 3 of this *FTR Now* for the full list). Nevertheless, there are some notable distinctions that we address here.

Similar to the Draft Bill's compensation restraint provisions, the RCBA would also apply to any not-for-profit organization that received at least $1,000,000 in funding from the Government of Ontario during the previous year. However, the RCBA would also apply to **for-profit** organizations in the following contexts:

- for-profit licensees under the Long-Term Care Homes Act, 2007; and
- for-profit organizations that provide services directly to the public, which are funded, at least in part, by a CCAC.

The RCBA would not apply to the collective bargaining relationships held by municipalities, local boards and school boards (the latter of which are governed by the *Putting Students First Act, 2012*).

However, as with the proposed compensation restraint legislation, the RCBA would apply to the employees of boards of health and long-term care homes that are operated by municipalities or local boards. The RCBA would only apply to employees employed in these parts of the municipality's or local board's organization, and who engage in collective bargaining with the employer. Where these employee groups are covered by a collective agreement that applies to other municipal employee groups, the RCBA sets out a rather complex set of rules to determine which parts of the collective agreement are subject to the RCBA.

DURATION OF THE COLLECTIVE BARGAINING RESTRAINTS

As currently drafted, the RCBA would apply only to the first collective agreement confirmed or imposed during the period of time beginning with the coming into force of the RCBA and ending on the "termination date." The "termination date" would be specified by regulation, and can occur no sooner than two years after the RCBA comes into effect, and no later than the elimination of the provincial deficit.

BARGAINING MANDATES

The RCBA would establish a means by which the Management Board of Cabinet could establish enforceable bargaining mandates to meet two stated goals – deficit elimination and protection of the delivery of public services. The mandates could be issued by sector, by class of employer, by particular employer or by class of employee. They would include "criteria," including criteria relating to "matters of compensation and service delivery." Employers would be required to negotiate collective agreements consistent with any applicable mandates and the Government's stated goals.

MANDATORY SETTLEMENT REVIEW PROCESS

If a mandate applied to a collective agreement, any settled agreement (including those settled by way of interest arbitration) would not come into operation until either confirmed or imposed by the Minister or his or her delegate.

To facilitate this process, parties to settled agreements covered by a mandate would be required to promptly report them to the Minister so they could be reviewed. Unless modified by regulation, the Minister would have up to 40 business days to conduct the review (failing which the collective agreement would be deemed confirmed).

The Minister would be required to confirm collective agreements that were either:

- compliant with the applicable mandate; or
- otherwise consistent with the goals of deficit elimination and protection of the delivery of public services.

If the Minister did not confirm a collective agreement, it would be sent back to the parties for amendment, and the parties would be given notice that a collective agreement could be imposed by the Minister.

If agreements were sent back for amendment, in most cases the parties would be deemed to return to the pre-settlement bargaining stage. If an interest arbitration award had been issued, the RCBA would deem the award to cease to be binding, would deem the collective agreement not to have been settled, and would deem no conciliation officer to have been appointed and no report issued.

Parties would be given up to 40 business days to amend the collective agreement before the Minister could begin the process to impose a collective agreement.

POWER TO IMPOSE A COLLECTIVE AGREEMENT

Ultimately, the Minister could impose a collective agreement if “it appears to [the responsible Minister] that the parties are not likely to be able to reach a collective agreement that would be consistent with the Province’s goals to eliminate the deficit and protect the delivery of public services.”

The RCBA appears to contemplate that collective agreements would generally be imposed, if at all, following the settlement/review process outlined above. However, the RCBA also contains provisions under which the Minister could intervene in ongoing negotiations and initiate the process for imposing a collective agreement at any time following the expiry of a collective agreement or the acquisition of bargaining rights.

To impose a collective agreement, the Minister would be required to first give the parties notice and a right to participate in a “consultation.” The RCBA suggests that the process for consultation would be set out in regulations.

ENFORCEMENT AND RELATED MATTERS

As with the *Putting Students First Act, 2012*, the RCBA would place significant limits on the remedial authority of the Ontario Labour Relations Board and labour arbitrators. The Board would have the authority to determine whether the RCBA applied to a particular employer or bargaining organization. However, neither the Board nor an arbitrator could adjudicate challenges to the statute on the basis of either the *Canadian Charter of Rights and Freedoms* or the *Human Rights Code.*

Similarly, the RCBA would impose limitations on the ability of courts to judicially review decisions made under the statute, though such jurisdiction could not likely be ousted altogether.

We also note that the RCBA, like the PSCRA, would have significant anti-avoidance provisions, including a provision prohibiting employers from paying out compensation amounts prior to the restraint period coming into effect, or after it expires, in an effort to avoid restraint measures that would otherwise apply.

In addition, and also like the PSCRA, the RCBA contains provisions that would ensure that it would not be applied to reduce an employee’s rights or entitlements under the *Human Rights Code, Pay Equity Act* or sections 42 or 44 of the *Employment Standards Act, 2000.*

ADJUSTING THE INTEREST ARBITRATION PROCESS

As discussed above, the RCBA would give the Minister the authority to determine whether collective agreements in the BPS settled by way of interest arbitration comply with any applicable mandates (and where this is determined not to be the case, the effect would be to negate the award). However, this authority would not apply to interest arbitrations in the municipal and related sectors.

Rather, the Draft Bill would re-introduce changes that had been proposed to various interest arbitration statutes in the original Budget Bill – Bill 55. These changes are found in Schedules 3 to 8 of the Draft Bill and would amend the following statutes:

- *Ambulance Services Collective Bargaining Act, 2001* (Schedule 3);
- *Fire Protection and Prevention Act, 1997* (Schedule 4);
- *Hospital Labour Disputes Arbitration Act* (Schedule 5);
- *Police Services Act* (Schedule 6);
- *Toronto Transit Commission Labour Disputes Resolution Act, 2011* (Schedule 7); and
- *Ontario Provincial Police Collective Bargaining Act, 2006* (Schedule 8).

Some of the key process changes include:

- requiring parties to file written submissions where a party intends to request that the arbitrator provide written reasons on an issue;
- requiring the arbitrator to provide written reasons that clearly show that the arbitrator considered the submissions that were made;
- the creation of a 16-month time limit on the issuance of an arbitration award (subject to a limited extension of up to two further months granted by the Ontario Labour Relations Board in exceptional circumstances); and
- permitting the Ontario Labour Relations Board to issue an award if the arbitration award is not rendered in a timely fashion.

CONCLUDING THOUGHTS

If introduced and enacted, the *Protecting Public Services Act, 2012* would have a significant impact on labour and employment relations in the Ontario Broader Public Sector. It would permit a centralization of oversight of the collective bargaining process, and would require organizations to seek approval for market rate salaries where these exceeded two times the salary of the Premier of Ontario. Given that this legislation would come on the heels of the recently enacted Bill 55, and the wage restraints enacted by that Bill, all public sector organizations will once again have to review their compensation practices to ensure compliance with the new rules.

Moreover, the full impact of the Draft Bill on collective bargaining in the BPS cannot be assessed in the absence of actual “mandates” being developed and published by the Management Board of Cabinet. When the mandates are developed, affected employers will have to review them very carefully to determine how they might affect your bargaining proposals and strategy.

It is important to emphasise that the Draft Bill has not yet been introduced in the Legislature. Rather, it has been released publicly for consultation purposes. At the time of writing, no formal consultation process has been announced, nor has the Government indicated how long it will hold open this consultation phase. For comparison purposes, a similar consultation period for Bill 115, the *Putting Students First Act, 2012,* lasted eleven days this past August. However, the current consultation period may not be that long. Therefore, in addition to reviewing the Bill for its specific implications with respect to your organizations, BPS employers should consider whether to contact your government representative to provide feedback on the Draft Bill.

Furthermore, because this is a Draft Bill, it could still be amended either during the consultation period or throughout the legislative process that has yet to begin. Hicks Morley will be carefully monitoring the development of the Draft Bill, and will be reporting on any amendments of note.

If you have any questions about the Draft Bill and its application to your organization, please contact your regular Hicks Morley lawyer.

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