

FTR Now

Ontario Government Proposes New Public Sector Compensation Restraint Legislation

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On Monday, March 24, 2014, the Ontario government introduced Bill 179, the *Public Sector and MPP Accountability and Transparency Act, 2014*. If passed, Bill 179 would give the government the authority to create comprehensive compensation frameworks for certain employers in the broader public sector (“BPS”), and would implement a number of measures to enhance “accountability and transparency” in the government and the public sector.

In this *FTR Now*, we will review some of the key changes that would impact employers in the BPS.

COMPENSATION RESTRAINT – A NEW STATUTE

Bill 179 would effect changes to the compensation restraint measures contained in Part II.1 of the *Broader Public Sector Accountability Act, 2010* (“BPSAA”) [these changes were introduced in the 2012 Budget, and implemented by Bill 55]. To accomplish this, Bill 179 would enact a new statute called the *Broader Public Sector Executive Compensation Act, 2014* (“BPSECA”) which would complement the BPSAA.

But for one significant addition, the BPSECA would primarily apply to the same BPS organizations that are currently subject to Part II.1 of the BPSAA -hospitals, school boards, universities and colleges, Hydro One, the Independent Electricity System Operator, the Ontario Power Authority and Ontario Power Generation (collectively, “designated employers”).

Of significance, the BPSECA would also apply to **community care access corporations**, which are not subject to Part II.1 of the BPSAA. As with the current legislation, the BPSAA could be extended to other organizations by regulation.

The BPSECA would also apply only to “designated executives”. This term is defined in a similar fashion to the BPSAA definition, and would apply to any of the following individuals who make at least \$100,000 in compensation on an annualized basis:

- the head of the organization (whatever his or her title);
- a vice president, chief administrative officer, chief operating officer, chief financial officer, chief information officer or other executive; or
- a director of education or supervisory officer of a school board.

Noticeably absent from the definition of “designated executive” are full-time members of board of directors, board of governors and board of trustees, as well as provosts and deans of colleges and universities. We will consider the potential implications of this change below. As with the current compensation restraint legislation, the BPSECA would not apply to employees who collectively bargain.

The BPSECA would not itself establish restraints on compensation; rather, it would give the government the authority to do so in the future by directive and regulation. The key features of BPSECA can be summarized as follows:

- the Management Board of Cabinet would have the authority to issue directives to BPS organizations requiring them to provide detailed information related to compensation and other payments made to designated executives, including information of specific individuals;

- the Lieutenant Governor in Council (i.e. Cabinet) could make regulations establishing “compensation frameworks” that could apply to all designated employers and designated executives, or could apply on a more limited class or specific individual basis;
- a compensation framework would govern the compensation that could be paid by a designated employer to a designated executive, and could establish limits on any element of the compensation plan, including salary, benefits, perquisites, bonuses, incentives, etc.; and
- compliance with a compensation framework would be mandatory, and could be enforced through a number of measures (for hospitals, a compensation framework would take precedence over section 9 of the *Excellent Care for All Act, 2010*).

There are several key points to note regarding compensation frameworks. First, it appears that any limits established by compensation frameworks would not apply to reduce the compensation plans of current designated executives who remain in their existing positions (though they could apply to prevent future increases). However, the framework would apply to persons who become designated executives after any frameworks established under the BPSECA came into effect, or who accept a new designated executive position after that date.

Second, if a compensation framework applied to a BPS organization, that organization would no longer be subject to Part II.1 of the BPSAA (though it would remain subject to other parts of that statute). That is, the existing compensation restraints would cease to apply to that organization and any of its employees. This would have several important effects:

- for all designated employers made subject to a compensation framework, they would cease to be subject to the “performance pay envelope rules” of the BPSAA;
- in addition, for all designated employers made subject to a compensation framework, the members of their boards would cease to be subject to any compensation restraints (due to the narrower definition of “designated executive” in the BPSECA); and
- for colleges or universities made subject to a compensation framework, provosts and deans would cease to be subject to any compensation restraints (again due to the narrower definition of “designated executive” in the BPSECA).

Of final note, the BPSECA would have significantly strengthened enforcement mechanisms. For example, there would be a new audit power that would permit the government to appoint a public accountant to confirm whether an organization was complying with any applicable compensation frameworks. Overpayments of compensation to a designated executive would be deemed to be debts owed to the Crown by the designated employer, and could be deducted from future financing. The BPSECA also confirms that overpayments would be deemed to be debts owed by the designated executive to the employer. In addition, the BPSECA would contain a limited offence provision.

BPSAA AMENDMENTS

In addition to introducing the new BPSECA, Bill 179 would amend the BPSAA to add a new Part V.1. Under the new part, Management Board of Cabinet could issue directives requiring designated BPS organizations to prepare and publish business plans as well as any other business or financial documents specified in the directives. For publicly funded organizations under the BPSAA, the government could publish guidelines for the preparation and publication of business plans and other business and financial documents.

FREEDOM OF INFORMATION

Bill 179 would also amend the *Freedom of Information and Protection of Privacy Act* and the *Municipal Freedom of Information and Protection of Privacy Act*. In particular, the statutes would both be amended to require institutions to put in place reasonable measures for the preservation of records within the custody and control of the institution, in accordance with any record-keeping or records retention requirements that apply to the institution.

In addition, the statutes would be amended to create a new offence where a person altered, concealed or destroyed (or caused another person to do so) a record with the purpose of denying a right to access the record or the information in it.

EXPANDED OMBUDSMAN POWERS

Bill 179 would also increase accountability through expanded ombudsman powers. First, the Bill would grant authority to the provincial Ombudsman to investigate matters related to:

- school boards;
- universities; and
- “municipal sector entities” – including municipalities, local boards and municipally-controlled corporations.

The amendments would impose some limits on the new powers, and a series of new provisions address how the provincial Ombudsman’s authority would intersect with the authority of a municipally-appointed ombudsman.

Second, Bill 179 would amend the *Excellent Care for All Act, 2010* to create a new position of “patient ombudsman”, which would operate with respect to hospitals, community care access centres and long-term care homes. The functions of the new position would include:

- receiving and responding to complaints from patients and former patients;
- facilitating the resolution of complaints;
- undertaking investigations of health sector organizations, either in response to a complaint or on the patient ombudsman’s own initiative; and
- making recommendations following investigations.

MISCELLANEOUS PROVISIONS

In addition to the measures discussed above, Bill 179 would also enact a variety of other changes, including:

- amending the *Lobbyists Registration Act, 1998* to create greater oversight of the activities of lobbyists;
- requiring public disclosures of the expenses of MPPs and (in some cases) their staff; and
- making amendments to the powers of the Integrity Commissioner under the *Public Sector Expenses Review Act, 2009*.

CONCLUSION

As can be appreciated from this review, Bill 179, if passed, could have a significant impact on employers in the broader public sector, which may find themselves subject to broad, new oversight powers. We remind readers, however, that the governing Liberals still control only a minority of the Legislature, so they will need the buy-in of one of the other parties to ensure passage of the Bill. Based on previous experience, this could result in changes to the Bill as it goes through the legislative process. We will continue to monitor Bill 179 and report on its progress.

If you would like to discuss with us how Bill 179 might affect your organization, please contact your [regular Hicks Morley lawyer](#).

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