

FTR Now

Ontario Re-Introduces BPS Accountability, Transparency Legislation (Formerly Bill 179)

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On July 8, 2014, the Ontario government re-introduced broader public sector (“BPS”) accountability and transparency legislation. If passed, proposed measures in Bill 8, the *Public Sector and MPP Accountability and Transparency Act, 2014*, would give the government the authority to create comprehensive compensation frameworks for certain employers in the BPS, and would implement a number of measures to enhance “accountability and transparency” in the government and the public sector.

With one notable exception, Bill 8 is virtually identical to Bill 179, which the Minority Liberal government previously introduced in March of this year. The one notable change is that Bill 8 incorporates reforms to the *Ambulance Act* in respect of air ambulances. These changes were previously part of Bill 11, *Ambulance Amendment Act (Air Ambulances), 2014*. That legislation died on the order paper when the House was dissolved prior to the election.

For your convenience, this *FTR Now* provides an updated overview of the key changes that would impact employers in the BPS should this legislation pass, which we highlighted in our previous publication.

COMPENSATION RESTRAINT – A NEW STATUTE

Bill 8, if passed, will change 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]. Bill 8 contains a new statute called the *Broader Public Sector Executive Compensation Act, 2014* (“BPSECA”) which will complement the BPSAA.

The BPSECA will 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”).

The one significant addition is that the BPSECA will 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 will 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 boards of directors, boards of governors and boards 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 will not apply to employees who collectively bargain.

NEW GOVERNMENT AUTHORITY

The BPSECA will not itself establish restraints on compensation; rather, it provides the government with 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 will 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) will also have the authority to establish regulations creating “compensation frameworks” that could apply to all designated employers and designated executives, or could apply on a more limited class or specific individual basis;
- any compensation framework created will govern the compensation that could be paid by a designated employer to a designated executive. Moreover, the framework could establish limits on any element of a compensation plan, including salary, benefits, perquisites, bonuses, incentives, etc.; and
- compliance with a compensation framework will 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*).

COMPENSATION FRAMEWORKS

There are several key points to note regarding compensation frameworks. First, it appears that any limits established by compensation frameworks will 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 will 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 is applied to a BPS organization, it will no longer be subject to Part II.1 of the BPSAA (though it would remain subject to other parts of that statute). In other words, the existing compensation restraints would cease to apply to the organization and any of its employees. This will have several important effects:

- for all designated employers made subject to a compensation framework, they will 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 will 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 be subject to the framework if they held executive-level positions that were captured by the framework.

Of final note, the BPSECA will have significantly strengthened enforcement mechanisms. For example, the government will have the power to appoint a public accountant to confirm whether an organization was complying with any applicable compensation frameworks. In addition, 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 will be deemed as 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 8 amends the BPSAA to add a new Part V.1. Under the new part, Management Board of Cabinet can 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 also publish guidelines for the preparation and publication of business plans and other business and financial documents.

FREEDOM OF INFORMATION

Bill 8 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 will 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 8 will also increase accountability through expanded ombudsman powers. First, Bill 8 grants 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.

Second, Bill 8 amends 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 8 also enacts a variety of other changes, including:

- amending the *Ambulance Act* to allow for the designation of “air ambulance service providers” and increased provincial oversight mechanisms, including the appointment of special investigators and whistle-blower protections;
- 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 8, if passed, will have a significant impact on

employers in the broader public sector. Bill 8 will subject them to a broad array of new oversight powers. Since the Liberals now have a majority in the Legislature, this suggests that this legislation is likely to pass. However, like all proposed legislation, Bill 8 may be subject to changes as it moves through the legislative process. We will continue to monitor Bill 8 and report on its progress.

If you would like to discuss with us how Bill 8 might affect your organization, please contact your [regular Hicks Morley lawyer](#).

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