

FTR Now

New BPS Compensation Restraint Law to Come Into Force March 16

Date: March 10, 2015

The Ontario government's new compensation restraint legislation – the *Broader Public Sector Executive Compensation Act, 2014* (or "BPSECA") – will come into force on **Monday, March 16, 2015**. While the proclamation of the Lieutenant Governor has not yet been published in *The Ontario Gazette*, it is listed in the government's online listing of proclamations and the e-Laws website has been updated to reflect the proclamation date.

The BPSECA will complement, and in some cases, replace the compensation restraint measures contained in Part II.1 of the *Broader Public Sector Accountability Act, 2010* ("BPSAA"), and promises to change the landscape in Ontario regarding compensation restraint in the broader public sector (or "BPS").

In this *FTR Now*, we will review the BPSECA and what it may hold for organizations in the BPS in Ontario.

SCOPE OF APPLICATION

The BPSECA will apply to a wide variety of BPS organizations, including all organizations that are currently subject to Part II.1 of the BPSAA. The following organizations have been identified as "designated employers" for the purposes of the BPSECA:

- hospitals and the University of Ottawa Heart Institute;
- school boards;
- universities, colleges of applied arts and technology and various post-secondary institutions;
- Hydro One Inc. and its subsidiaries;
- the Independent Electricity System Operator;
- Ontario Power Generation Inc. and its subsidiaries;
- community care access corporations;
- every body prescribed as a public body under the *Public Service of Ontario Act, 2006* that is not also prescribed as a Commission public body under that *Act*; and
- Ornge (or, the Ontario Air Ambulance Services Co.).

As with all previous compensation restraint statutes, the BPSECA can 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, regardless of title; or
- a director of education or supervisory officer of a school board.

The government can designate additional "designated executive" positions by regulation.

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. However, it must be emphasized that all of these groups of employees remain subject to the current wage freeze under Part II.1 of the BPSAA, and will remain so indefinitely until such time as a compensation framework applies to their organization (or the province no longer runs a budget deficit).

As with the current compensation restraint legislation, the BPSECA will not apply to employees who collectively bargain through a representative organization, such as a trade union.

NEW GOVERNMENT POWERS

The BPSECA does not itself establish restraints on compensation; rather, it provides the government with the authority to do so in the future by directive and regulation.

Upon proclamation of the statute on March 16, 2015, the Management Board of Cabinet will have the authority to issue directives to designated employers requiring them to provide detailed information related to compensation and other payments made to designated executives, including information of specific individuals. Presumably, this power would be exercised to gather the information necessary for the development of compensation frameworks.

The Lieutenant Governor in Council (i.e. Cabinet) will 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 covered by the framework. Moreover, the framework could establish limits on any element of a compensation plan, including salary, benefits, perquisites, bonuses, incentives, etc.

Compliance with a compensation framework will be mandatory, and can be enforced through a number of measures.

COMPENSATION FRAMEWORKS

There are several key points to note regarding compensation frameworks.

The BPSECA provides a limited “grandparenting” provision for individuals who are designated executives at the time that a compensation framework is introduced. For a period of three years after a framework comes into effect, it will not apply to reduce the compensation plans of current designated executives who remain in their existing positions (though it could apply to prevent future increases). Any element of a compensation plan that exceeds what can be paid out under an applicable compensation framework will cease to be payable three years after the framework comes into force. This could require designated employers to reduce or otherwise amend compensation paid to designated executives at that time.

With respect to persons who become designated executives after any compensation frameworks established under the BPSECA come into effect, or who accept a new designated executive position after that date, the applicable compensation framework will apply immediately to that individual.

If a compensation framework begins to apply to a designated employer that is currently subject to Part II.1 of the BPSAA, that organization will no longer be subject to Part II.1 of the BPSAA as of that date (though the organization would remain subject to the 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 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 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, most deans would likely cease to be subject to compensation restraints, while provosts would remain subject if

they hold a designated executive position (such as Vice-President) that is made subject to a compensation framework.

ENFORCEMENT

The BPSECA has significant enforcement mechanisms. For example, the government will have the power to appoint a public accountant to confirm whether an organization is 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 to be debts owed by the designated executive to the employer, and also contains a limited offence provision.

IMPLICATIONS FOR BPS ORGANIZATIONS

It is important to stress that, in terms of compensation restraint, the BPSECA will only have an impact on an organization if a compensation framework is passed that applies to that organization. Absent such a framework being passed, the status quo applies, and BPS organizations currently governed by Part II.1 of the BPSAA remain subject to that Part. Similarly, as noted at the outset, all current "designated executives" remain subject to the ongoing wage freeze.

All potential BPSECA designated employers will want to monitor any directives issued by the Management Board requiring compensation information to be provided to the government, and to carefully monitor the development, and assess the implication, of any compensation frameworks that may apply to your organizations.

Your [Hicks Morley lawyer](#) would be happy to assist you with this new legislation.

The articles in this Client Update 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. ©