FTR Now

Bill 148 and Pay Equity: A Changing Landscape and Increasing Scrutiny of Ontario Employers

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As part of the 30th anniversary of the *Pay Equity Act* (Act), the Pay Equity Office has implemented several new initiatives in 2017 in support of its mandate to administer and enforce the Act. These initiatives, coupled with pending legislative changes under Bill 148, present significant changes and potential risks to employers across the province.

The purpose of this *FTR Now* is to consider the pay equity risks posed by Bill 148, to raise awareness of the new Pay Equity Office initiatives and to review the pay equity challenges that currently face Ontario employers.

Bill 148 and Pay Equity

On June 1, 2017, the Ontario government introduced Bill 148, the *Better Workplaces, Better Jobs Act, 2017* (Bill 148). If passed, Bill 148 will introduce broad legislative changes to the *Employment Standards Act, 2000* (ESA) and the *Labour Relations Act, 1995*. Bill 148 is scheduled to receive Second Reading upon the legislature's return on September 11, 2017. Subject to any amendments and Third Reading, the Ontario government remains on track to pass Bill 148 this Fall.

Bill 148 will amend the ESA in two ways that are potentially significant from a pay equity perspective. First, Bill 148 seeks to increase minimum wage to $14.00 per hour on January 1, 2018, and $15.00 per hour on January 1, 2019. These are significant increases, and employers must consider how such increases impact on male comparator job classes under their respective pay equity plans. While minimum wage increases raise the floor of any compensation structure, they can also result in concomitant increases to jobs that are not tied to minimum wage; such increases often result from an employer's attempt to maintain the hierarchy of an existing compensation scheme. Where those related changes impact male comparators, it can often result in the creation or expansion of wage gaps. Accordingly, given the significant increases to the minimum wage proposed under Bill 148, employers should carefully consider whether changes to their wage structures will result in pay equity liabilities.

Second, Bill 148 will implement a general rule, effective April 2018, that no employee may be paid less than what is paid to a full time employee of the same employer who performs the same job. In short, this new rule seeks to ensure equal pay between full time employees and part time, casual, temporary and seasonal employees. This aim is substantively different from that of the Act notwithstanding the use of similar "equal pay for equal work" terminology. In contrast, the Act ensures that employees in female-dominated job classes are paid at least as much as employees in male-dominated job classes of comparable value. Notwithstanding these different purposes, Bill 148's "equal pay" provisions could carry pay equity implications where male job comparators receive a wage increase as a result of increases based on employment status under Bill 148.

While neither of these amendments are intended to address an employer's pay equity status or compliance, they may nevertheless result in unintended increases to pay equity liabilities. Employers who are considering changes to their compensation structures in light of Bill 148 or who have not reviewed the status of their pay equity maintenance recently are strongly encouraged to speak with their legal counsel to determine whether the changes have any pay equity impact in the workplace, on top of the other costs related to Bill 148.

Pay Equity Office Initiatives

In recognition of the 30th anniversary of the Act, the Pay Equity Office (PEO) is pursuing a number of new initiatives that impact Ontario employers. These initiatives include targeted reviews of particular employer groups in 2017, 2018 and beyond. The PEO's commitment to ensuring compliance with the Act is reflected not only by these initiatives, but by its recent hiring of approximately 25 new Review Officers.

1.

Federal Contractors Program Monitoring

The Federal Contractors Program (FCP) was introduced in 1986 to ensure that contractors who do a certain level of business with the federal government achieve and maintain a workforce that is representative of Canada. As of 2013, the FCP applies to contractors that have at least 100 employees, and that receive an initial goods and services contract, a standing offer, or a supply arrangement valued at $1 million or more.

In June 2016, the federal government received a report from the *House of Commons Special Committee on Pay Equity* (House Committee) that made a number of recommendations to address pay equity at the federal level. One of those recommendations was that the federal government introduce gender pay equity legislation for federally regulated employers and any companies that participate in the FCP. The Committee further recommended that *provincially* regulated companies that participate in the FCP be exempted from any federal pay equity legislation provided such companies can demonstrate compliance with the provincial pay equity legislation that applies in their jurisdiction.

In anticipation of the federal government acting upon the recommendations of the House Committee at some time in the future, the PEO has launched a monitoring program (Monitoring Program) targeted at Ontario employers that participate in the FCP. While the PEO characterizes its interest in FCP employers as a Monitoring Program, the Program is effectively a short list of companies that the PEO intends to audit over the coming months.

Ontario employers participating in the FCP Monitoring Program can expect to receive a notice from a PEO Review Officer requesting that they complete and return a Monitoring Program Checklist, as well as arrange a meeting with the Review Officer to discuss the status of the company's pay equity plan and compliance obligations. Employers are being advised that such reviews may conclude quickly or require upwards of 12 months to complete, and may require the production of payroll records and other documentation respecting current and former employees. At the conclusion of the review, the PEO Review Officer will issue a Decision setting out his or her findings regarding the company's pay equity compliance. Notably, the PEO will now publish Decisions on its website, a step not previously accessible to the general public.

If your organization participates in the FCP, we strongly encourage you to assess the status of your organization's pay equity compliance now, rather than await receipt of a Monitoring Program notice from the PEO. The Act imposes strict obligations to achieve and maintain pay equity. For those employers who have ignored pay equity and/or their maintenance obligations, it is not uncommon to face substantial retroactive liabilities in the tens or hundreds of thousands of dollars. Such liabilities owed to current and former employees cannot be paid in phased installments over time, but must instead be paid immediately. Given these risks, it is imperative that FCP participants proactively assess their pay equity status and seek advice *before* responding to the Monitoring Program notice.

2.

Vendor of Record Monitoring

Similar to FCP monitoring, the PEO also intends to target for review any Ontario employer that acts as a Vendor of Record (VOR) for an Ontario ministry. If your organization has successfully bid through an RFP to provide goods or services to one or more provincial ministries under a VOR arrangement, then your organization should expect to receive a Monitoring Program notice that is substantially similar to those issued to FCP employers as explained above.

As with FCP employers, we strongly encourage Ontario businesses that act as a VOR to proactively assess the status of their pay equity compliance. This includes reviewing your organization's pay equity plan and supporting documentation to determine whether your business achieved and maintained pay equity as required by the Act. Given the PEO's investigative powers, and the short time lines that many new Review Officers are imposing, we recommend an early assessment of the risks and liabilities that your organization may face.

3.

New Employer Monitoring

The PEO is also turning its attention to newly formed Ontario employers; in particular, Ontario employers that have been in business for three (3) years, have at least 10 employees, and operate in Western, Eastern or Northern Ontario. While it is far more difficult to determine whether your organization may be subject to review as part of this broader Monitoring Program, we nevertheless encourage new employers to consider whether the Act applies to their operations and what, if any, steps are necessary to ensure compliance. As a new employer, it is important to ensure that pay equity compliant compensation rates are determined as early as possible to avoid creating ongoing unknown liability. The obligations of new employers under the Act are procedurally different than those of employers that first existed when the legislation came into force in the early 1990s and it is important to understand the extent of those obligations.

4.

Innovation Sector Monitoring in 2018 and Beyond

Looking to the future, the PEO has identified a number of innovation sectors that will be subject to increased pay equity monitoring in the coming years. These innovation sectors are tied to Ontario's innovation agenda, which calls for the investment of close to $3 billion over the next eight (8) years in new companies and industries. In particular, the PEO has identified the following as focus industries: bio-economy and clean technologies; advanced health technologies; pharmaceutical research; and digital media and information technologies. The PEO's attention in these areas will likely be aimed at ensuring that the capital investment made by Ontario's government is consistent with the Act's purpose to eliminate gender economic inequality.

5.

Engagement Survey for Unionized Workplaces

Finally, the PEO has implemented an online Engagement Survey for employers with unionized workplaces. The Engagement Survey requests employers to complete an ostensibly anonymous and voluntary online survey. The survey asks a variety of questions, most of which focus on when the parties typically address pay equity, the challenges that they face, how often pay

equity is reviewed, and whether the employer has had any contact with the PEO. The nature of the survey's questions appear to presume a joint negotiation process for maintenance. This is significant in that the Act does not require a joint negotiation process for the maintenance of pay equity.

It is our understanding that the PEO is drawing on the Ministry of Labour (MOL) collective agreement database to serve as a resource to identify expiring collective agreements and management members who signed the collective agreement. This information appears to be used to generate the invitation to participate in the survey.

Based on this pattern, it is unlikely that the Monitoring Program is random or entirely anonymous. As such, many employers have raised concerns about participating and, in particular, whether a refusal to do so could have repercussions for their organization.

The survey does not request an employer to identify itself, and the survey is expressly held out by the PEO as an anonymous tool. As such, even a response that acknowledges non-compliance with the Act should not attract a direct response from the PEO. Similarly, should an employer choose not to respond at all, the lack of individual identifiers likely means that no direct response will flow from such action.

Further, if the aggregate response data is insufficient, or if the survey response data suggests to the PEO that many employers are not complying with their obligations under the Act, then it is highly likely that the PEO will proceed with broader inspection audits of these targeted employers. The fact that the PEO has gathered management email contact information based on the MOL collective agreement database information should raise a cautionary note that it is time to review the status of your pay equity maintenance. Put simply, if your organization is contacted by the PEO to participate in the Engagement Survey, your organization likely faces a greater risk of a future audit regardless of whether you respond. Accordingly, even if your organization chooses not to participate in the survey, we strongly encourage you to review the status of your pay equity plan and maintenance efforts in the coming months in anticipation of a possible audit.

The Road Ahead

The PEO is more active now than it has been in more than a decade. The hiring surge of PEO Review Officers, coupled with new and expansive monitoring efforts, has led to a remarkable spike in audit files across both the private and public sectors in Ontario. If Bill 148 is passed this Fall, it could also carry significant unintended pay equity consequences for employers; consequences that are all the more likely to be discovered as part of the PEO's redoubled enforcement efforts.

Given the risks and liabilities that often flow from pay equity, we encourage you to contact your Hicks Morley lawyer or our Pay Equity Group – comprised of Carolyn Kay, Lauri Reesor, Craig Lawrence and Stephanie Jeronimo – and we will be pleased to discuss these issues and review your strategic options to achieve or maintain compliance with the Act.

For more information on Bill 148, see our *FTR Nows* of June 7, 2017 Bill 148 and the ESA – Changes are on the Horizon for Ontario Employers and June 5, 2017 Ontario Proposes Legislative Overhaul of *Labour Relations Act, 1995* – Are you Prepared?
