

## FTR Now

# BPS Executive Compensation – New Framework Takes Immediate Effect

**Date:** August 14, 2018

On August 13, 2018, the Ontario government implemented a new Compensation Framework (New Framework) under the *Broader Public Sector Executive Compensation Act, 2014* (BPSECA) that came into immediate effect.

The New Framework applies to all Broader Public Sector (BPS) organizations covered by the BPSECA, and will impose an immediate, hard freeze on compensation for designated executives. Specifically, it applies both to BPS organizations that had already implemented Executive Compensation Programs (Program(s)) under the former BPSECA regulations and those that had not (and thus remained under the wage freeze imposed by Part II.1 of the *Broader Public Sector Accountability Act, 2010* or BPSAA).

In this *FTR Now*, we will review the New Framework and what it means for organizations in the Ontario BPS.

## Overview of the Changes

The New Framework now applies instead of any Programs already implemented under the BPSECA. It also applies instead of the BPSAA wage freeze.

To appreciate the wholesale nature of the change implemented by the government, it will assist to recall that BPS organizations were facing a range of compensation restraint rules depending on the progress they had achieved under the prior BPSECA framework set out in Ontario Regulation 304/16 (O. Reg. 304/16):

- Some organizations had developed and posted a Program before June 8, 2017, and were governed by the original BPSECA framework regulations. Organizations in this group were able to implement their new Program upon posting, and the BPSECA took effect on that date.
- Another group of organizations had developed and posted a final, approved Program under the revised BPSECA framework regulations that came into effect on June 8, 2017. Many organizations in this group would have posted their Program by February 28, 2018, which permitted a limited retroactive compensation adjustment. As with the prior category, the BPSECA took effect on the date of posting of the final Program.

- Some organizations had not yet posted a Program under the BPSECA, and remained subject to the compensation restraint provisions under Part II.1 of the BPSAA. For these organizations, the BPSECA had not yet taken effect.
- Yet another group of organizations had not been subject to the BPSAA, but were required to develop Programs under the BPSECA. Some of these organizations had developed Programs, while others remained (in principle) outside formal compensation restraint rules.

The New Framework applies to all BPS organizations to whom the BPSECA applies, regardless of which of these categories they fall into. Thus, as previously stated, the New Framework now applies instead of any Programs already implemented under the BPSECA. It also applies instead of the BPSAA wage freeze.

The New Framework was implemented in a new regulation – [Ontario Regulation 406/18: Compensation Framework](#) (O. Reg. 406/18 or “new regulation”).

O. Reg. 406/18 repealed O. Reg. 304/16, which set out the prior framework, and implemented the New Framework for all BPS organizations. This was accomplished by setting a common “effective date” for all organizations covered by the BPSECA. The effective date is August 13, 2018.<sup>[1]</sup> Thus, the New Framework is already in effect for BPS organizations subject to the BPSECA.

In the next few sections, we will review the content of the New Framework and will then briefly discuss some of the implications for BPS organizations.

## The New Compensation Framework

The New Framework establishes a hard freeze on the compensation paid to designated executives governed by the BPSECA. It does this by establishing three sets of rules that apply to (i) salary, (ii) performance-related pay, and (iii) all other elements of compensation. We will review each in turn.

### (i) Salary

Salaries paid to designated executives are now under a hard freeze, and the new rules establish the following “salary caps” that apply going forward:

- If a position was occupied on August 13, 2018, the salary cap for that position is the salary that was in effect on August 13, 2018.
- If a position was vacant on August 13, 2018, but was previously occupied (i.e. it is not a new position), the salary cap for that position is the salary that was in effect when it was most recently occupied. That is, the salary cap is the salary paid to the last incumbent.
- For any other position (e.g. a new position), the salary cap is set at the salary that is being paid to the designated executive in the “most similar” position at that employer. This is to be determined by the organization’s “governing entity” (e.g. board of directors, board of

governors, board of trustees, etc.), and precludes comparisons to outside organizations or other market factors.

The new regulation makes it clear that no salary increases are permitted under the New Framework. The salary is capped at the actual rate on the effective date, and cannot include raises that would have occurred at a later date and cannot be another amount within any applicable salary ranges that is higher than the rate that was in effect on August 13, 2018.

## **(ii) Performance-related Pay**

The New Framework creates a performance-related pay envelope (Envelope) to govern the payment of performance pay to designated executives. This new Envelope is different than both the performance-related pay envelope that applied under Part II.1 of the BPSAA and the salary and performance-related pay envelope that was in the prior BPSECA regulation.

Essentially, the Envelope is the aggregate of performance pay actually paid out to designated executives in the most recent pay year that preceded August 13, 2018. This aggregate amount caps the amount of performance-related pay that can be paid to designated executives as a group in subsequent pay years. That is, in no pay year can the total amount of performance pay paid to designated executives exceed the Envelope.

However, organizations are given some ability to adjust the value of the Envelope to take into account changes in personnel.

If positions become vacant or are eliminated, the Envelope must be prorated (i.e. reduced) by an amount reflective of the performance pay attributable to that position.

Conversely, if a vacancy is filled and a previous incumbent in that vacancy was paid performance pay, the Envelope may be prorated (i.e. increased) to reflect the amount of performance pay most recently paid to the prior incumbent. (This rule only applies if the vacancy relates to a position occupied for at least a full pay year.)

Similarly, if a vacancy does not meet the prior requirement or a new position is created, the Envelope may be prorated (i.e. increased) by an amount reflecting the performance pay paid to the designated executive in the “most similar” position at the organization in the most recent pay year.

All Envelope adjustments are the responsibility of the organization’s governing entity. Similar to the old BPSAA envelope, if one executive gets more performance pay than in the previous pay year it means another executive will necessarily get less, subject to any application of the vacancy rules.

Note that performance pay is defined to exclude performance pay that was paid out in the form of

salary increases, further reinforcing the absolute freeze on salary, and limiting the Envelope to bonus-type or similar cash payments.

### **(iii) Other Elements of Compensation**

There is also a hard freeze on all “other elements” of compensation (i.e. any element of compensation that is neither salary nor performance-related pay). The same three basic rules that apply to salary also apply to “other elements” of compensation:

- If a position was occupied on August 13, 2018, the element of compensation is capped at what was in effect for that position on August 13, 2018.
- If a position was vacant on August 13, 2018, but was previously occupied (i.e. it is not a new position), the element of compensation is capped for that position at what was in effect when it was most recently occupied.
- For any other position (e.g. a new position), the cap for any other element of compensation is equal to the cap that applies to the designated executive in the “most similar” position at that employer. This is to be determined by the organization’s governing entity.

The New Framework makes it clear that no new elements of compensation can be implemented after August 13, 2018 for designated executives.

The New Framework includes the same list of prohibited elements of compensation as appeared in previous iterations of the framework. Thus, the following elements of compensation are prohibited:

- Payments or other benefits provided in lieu of perquisites.
- Signing bonuses.
- Retention bonuses.
- Cash housing allowances.
- Insured benefits that are not generally provided to non-executive managers (note that the New Framework does not define what is a “non-executive manager”).
- Termination payments, including payments in lieu of notice of termination, and severance payments that in total equal more than 24 times the average monthly salary of the designated executive.
- Termination or severance payments that are payable in the event of termination for cause.
- Paid administrative leave, unless provided to the head of a college or university or another designated executive who is part of or will return to the faculty at a college or university.
- Paid administrative leave that accrues at a rate in excess of 10.4 paid weeks per year.
- Payments in lieu of administrative leave.

At the time of writing, the grandparenting provisions of the BPSECA have not been amended. Therefore, the three-year grandparenting period should apply to elements of compensation that are inconsistent with what is permitted under the New Framework. Assuming that an inconsistent

element of compensation was validly in effect for a designated executive on August 13, 2018, it appears that it can continue for up to three years under the grandparenting rules.

## Implications for BPS Employers

The New Framework has a number of important implications for employers in the BPS in Ontario.

First, the New Framework implements a significant new freeze on compensation that has already taken effect as of August 13, 2018. For employers who had been planning to increase compensation under posted Programs, those increases are no longer permitted.

Second, for organizations that had not yet posted a Program under the former BPSECA regulations, they are now subject to this new regulation, and are no longer bound by the wage freeze under Part II.1 of the BPSAA. While this has little material difference for many of the BPS employers and designated executives in this situation, it has a significant impact in the college and university sector.

Because of the definition of “designated executive” under the BPSAA, deans of colleges and universities were subject to the wage freeze under Part II.1 of the BPSAA. However, deans are not listed in the definition of “designated executive” under the BPSECA. With the advent of the New Framework, the former wage freeze that was imposed upon deans is now over for all colleges and universities (unless a dean can be said to otherwise be characterized as an “executive” of the organization).

Finally, it is important to note that the previous government amended the BPSECA in December 2017 to remove the “collective bargaining” exemption that had previously applied. This means that the New Framework applies to all designated executives, regardless of their collective bargaining status.

The government has incorporated a mandatory review date of June 7, 2019, which suggests that there are likely to be future changes to the framework governing executive compensation in the BPS. We will continue to monitor developments in this area, and will report on any future changes as they arise.

If you have any questions related to the New Framework, please contact your [regular Hicks Morley lawyer](#).

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[1] There are special rules that apply to BPS organizations that did not exist on September 6, 2016, or that are in the process of coming into existence at the present time. Outside of this very limited category, the effective date is August 13, 2018 for all other BPS organizations that fall within the



scope of the BPSECA.

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