

## FTR Now

# Ontario Budget 2019: Protecting What Matters Most – Key Human Resources Highlights

**Date:** April 15, 2019

On April 11, 2019, the Ontario government tabled its 2019 Budget, [Protecting What Matters Most](#) (Budget), and introduced supporting implementation legislation, Bill 100, the *Protecting What Matters Most Act (Budget Measures), 2019* (Bill 100).

The Budget outlines key initiatives around broader public sector compensation, reforms within the healthcare sector, registered pension plans, freedom of information, and more. In this *FTR Now*, we highlight the proposals that are of particular interest to employers, pension plan administrators and human resources professionals.

## Broader Public Sector Compensation

The government is proposing a different approach to regulating compensation for designated executives covered by the *Broader Public Sector Executive Compensation Act, 2014* (BPSECA).

Both the Budget and proposed amendments to the BPSECA set out in Bill 100 indicate that the government will be establishing sector-specific performance standards (“performance assessment indicators”) that designated executives will need to achieve. It appears that the purpose of these standards would be twofold: (1) the standards could be integrated into an executive’s compensation plan for the purpose of determining payment of compensation (e.g. whether a bonus has been earned and is payable), and (2) the standards could be used to determine whether executives should be provided salary increases or increases in performance pay. The authority to establish the standards would be granted to the Management Board of Cabinet, but only where a compensation framework specifically sets out that authority.

The BPSECA amendments would also give the government the authority to set a range of limits on increases to compensation, including:

- Limiting the amount of salary or pay-for-performance increases;
- Limiting the number of executives to whom BPS organizations may give salary increases or pay-for-performance; and
- Limiting the time periods for which increases may be given.

The authority to establish limits would be granted to the Minister, but again only where a

compensation framework specifically sets out that authority.

The BPSECA amendments also include the establishment of three new general principles that will apply to the compensation plans of designated executives:

- When a compensation framework takes effect, the compensation plan for each designated executive that was in effect immediately prior to the new framework remains in effect, subject to two exceptions.
- The first exception is that any element of compensation in an existing compensation plan that exceeds what is permitted under the new framework will be grandfathered until no later than August 13, 2021.
- The second exception is that if an executive's compensation plan allows for compensation increases, those increases cannot be provided except to the extent that an increase is permitted under the applicable framework.

These new rules will have the effect of maintaining the compensation freeze currently in place under Ontario Regulation 406/18 until the government either amends the current framework to permit compensation increases or replaces it with a new framework (or frameworks) that allow for such increases. In either case, this would require new or amended regulations. In light of the statements in the Budget, it can be anticipated that any new or revised framework(s) may well grant authority to Management Board of Cabinet to establish performance standards, and to the Minister to establish limits on increases that may be paid.

By specifying a date for the end of the grandfathering period, the amendments suggest that if any future frameworks result in existing compensation plans providing overpayments to executives, the grandfathering period for such overpayments will also end no later than August 13, 2021 – i.e. less than 3 years from now. It is important to note that the BPSECA amendments give the government the authority to shorten the grandfathering period for any designated executive to a date earlier than August 13, 2021. Conversely, the government could also provide an exemption from the rule to a date beyond August 13, 2021.

Other changes to the BPSECA establish rules that will apply to newly created employers only.

The government will also be cleaning up earlier compensation restraint legislation by: (i) repealing Part II.1 of the *Broader Public Sector Accountability Act, 2010* (BPSAA), (ii) repealing the *Public Sector Compensation Restraint to Protect Public Services Act, 2010*, and (iii) repealing certain transitional provisions in the *Excellent Care for All Act, 2010* that permitted the compensation plans of hospital executives to be amended to include performance pay (which continues to be a requirement under that Act).

There is little indication in the Budget as to when new or revised frameworks will be implemented. The government appears to have committed to consulting with employers in setting the sector-

specific standards, and that is presumably the first step in the process to new frameworks being developed.

The Budget also addresses other aspects of compensation in the broader public sector. [As we previously reported](#), the government announced consultations with public sector employers and bargaining agents on how to best manage compensation growth in the public sector, with a view to exploring how compensation growth can be managed “in a way that results in wage settlements that are modest, reasonable and sustainable.” Stakeholders may also ask questions and provide feedback in writing by May 24, 2019.

## “Double Dipping” In The Post-Secondary Sector

The Budget outlines government concerns respecting an increase in the average retirement age of faculty, and possible implications that may follow from slower employee renewal, including delayed introduction of new teaching methods, reduced employee diversity and higher payroll costs. To address this concern, the Budget proposes a new regime that would allow for the reduction, limitation and alteration of compensation paid to employees of post-secondary institutions who are in receipt of pension benefits related to post-secondary employment (often referred to as “double dipping”). [\[1\]](#)

To implement this regime, Bill 100 proposes amendments to the *Ministry of Training, Colleges and Universities Act* (MTCU Act) which would authorize regulations:

- respecting the reduction, limitation or alteration in the compensation payable to an employee of a post-secondary institution where the employee is continuing to be employed or is otherwise engaged, having either commenced receipt of a pension or made an election to transfer the commuted value of the employee’s pension benefit out of a pension plan, where those pension benefits were derived from post-secondary employment, and
- establishing procedures, rules and methods that the employer is to use to reduce, limit or alter the amount, form or timing of compensation to be paid to the employee.

The amendments would also authorize regulations to:

- focus the application of these rules on specific employers and/or groups of employees.
- specify that the regulations prevail over any collective agreement, employment agreement or other agreement, including any such agreement in place when the regulations are made;
- authorize or require the disclosure, use and direct or indirect collection of personal information, including employment history and financial information, by the Minister, a post-secondary institution or any other person; and
- prescribe the employer’s use of any savings resulting from the reduction to compensation and which place restrictions on the employer’s ability to provide other compensation or

benefits in lieu of the compensation that is reduced pursuant to the new rules.

The proposed amendments indicate that any regulations made pursuant to these new rules will apply notwithstanding provisions of the BPSAA, BPSECA, *Colleges Collective Bargaining Act*, *Labour Relations Act, 1995*, *Employment Standards Act, 2000* and any other Act that is prescribed, except that the *Pension Benefits Act (PBA)* will continue to apply to the pension benefits earned by the employee.

The proposed amendments to the MTCU Act will, if adopted, come into force on Royal Assent. In the meantime, the government has indicated that it will consult with the post-secondary sectors on supporting regulations.

## Health Sector and PSLRTA

Bill 100 would make significant changes to the *Public Sector Labour Relations Transition Act, 1997* (PSLRTA). On the day that Bill 100 receives Royal Assent, it will repeal those provisions of PSLRTA that create an expanded notion of “health services integration” and replace it with a more limited scope of application to two types of events:

- The amalgamation of two or more health service providers; and
- The transfer of all or substantially all of the assets of one health service provider to another.

Consequential amendments will repeal provisions in the *Connecting Care Act, 2019* that addressed how PSLRTA was to apply under the new healthcare regime being put in place by the government, thereby ensuring that the more limited scope of application set out above prevails. The *Connecting Care Act, 2019* will be enacted by Bill 74, which is currently at Third Reading in the Legislature. See [our prior FTR Now](#) for more information on this initiative.

The effect of these changes should be a narrower range of healthcare integrations to which PSLRTA will apply, and the new scope of application should mean that PSLRTA will not apply to the mere transfer of services from one health provider to another. Of note, the government is not proposing to limit the application of the “partial integration” rules of PSLRTA, which may create some ambiguity in relation to how those provisions are intended to interact with the new limited scope of the Act. Similarly, where PSLRTA does not apply, trade unions may still allege a sale of business under the *Labour Relations Act, 1995* in relation to a health services integration.

## Reforms Affecting Registered Pension Plans

The Budget touches on a number of proposed initiatives respecting registered pension plans and Bill 100 contains a number of proposed amendments to the PBA, as further described below. On April 11, 2019, the government also posted draft regulations under the PBA to implement long-outstanding amendments to the PBA that allow for defined contribution (DC) pension plans to

provide variable benefits, and to support technical amendments made to the PBA in the Fall of 2018 to clarify the annuity discharge provision. We are preparing a separate update regarding these draft regulations.

## Clarifying Pension Contribution Holiday Rules

The Ontario government announced in the Budget that it intends to amend the PBA to clarify the rules regarding contribution holidays taken by employers. [In May 2018, provisions in the PBA came into force](#) which restrict the use of surplus to reduce normal cost contributions and contributions with respect to the provision for adverse deviation (PfAD) in respect of normal costs. In January 2019, the current Ontario pension regulator, the Financial Services Commission of Ontario (FSCO), published a policy position indicating that the new contribution holiday rules governed the application of prior year credit balances. Prior year credit balances allow an employer to apply excess contributions or pre-funded contributions to reduce normal cost contributions and contributions in respect of the PfAD, as well as special payments on any past service deficits. FSCO's policy position limits an employer's ability to apply a prior year credit balance where the conditions applicable to contribution holidays were not satisfied (i.e. the plan does not have available actuarial surplus). Historically, prior year credit balances could be applied regardless of whether or not a pension plan was in a surplus position.

Upon Royal Assent, Bill 100 will amend the PBA to clarify that the contribution holiday rules are not intended to restrict other provisions of the PBA or the PBA Regulations under which an employer may otherwise reduce normal costs contributions and contributions in respect of the PfAD. This clarification will be welcome news to employers.

## Expanding the Target Benefit Plan Framework

The Budget contains a commitment to respond to stakeholder feedback to move forward with extending the previously announced target benefit framework to more MEPPs, including those with non-unionized members. If passed, Bill 100 would amend the PBA to allow an employer's obligation to contribute to the target benefit plan in fixed amounts to be outlined in either a collective agreement or other document(s) that creates or supports the plan, subject to other conditions that may be prescribed. The Budget indicates that this proposal is intended to apply to the not-for-profit sector.

## Multi-Employer Pension Plan (MEPP) Exemption

Also applicable to the not-for-profit sector, Bill 100 contains an amendment to the PBA to clarify that if all the participating employers of a pension plan are affiliates within the meaning of either the Ontario *Business Corporations Act* or, subject to it coming into force, the Ontario *Not-for-Profit Corporation Act, 2010*, the plan will not qualify as a MEPP.

## Embracing Electronic Communication

The Budget indicates that the government is considering amending the PBA to permit plan administrators to default to the use of electronic communications to provide members and other plan beneficiaries with prescribed communications, unless a hardcopy communication is requested. Currently, the PBA allows prescribed information to be sent by electronic means only if the requirements of the Ontario *Electronic Commerce Act, 2000* are satisfied and the recipient has provided consent to receive communications by electronic means in advance.

## Expanding Use of Electronic Beneficiary Designations

Bill 100 also includes proposed amendments to the Ontario *Insurance Act* that will, if passed, allow insurers to accept electronic beneficiary designations, without reference to the requirements of Ontario's *Succession Law Reform Act*. The Budget indicates that these changes are meant to provide consistency with the [previously reported](#) changes to the PBA, which were recently made to permit pension plan administrators to accept electronic beneficiary designations.

The proposed amendments to the *Insurance Act* would subject an insurer's ability to accept electronic beneficiary designations to further prescribed requirements in the *Insurance Act*, the requirements of the Ontario *Electronic Commerce Act, 2000*, and any rules imposed by the Financial Services Regulatory Authority of Ontario (the soon-to-be new financial services sector regulator, replacing FSCO).

## Freedom of Information

Bill 100 addresses freedom of information in two ways.

First, Bill 100 would enact a new statute, the *Tribunal Adjudicative Records Act, 2019*, which would govern access to records related to adjudicative tribunals and their decision-making processes. Certain records – for example, applications, written submissions and transcripts of oral evidence, among others – would be publicly available, subject to any confidentiality order made in accordance with a test set out in new Act. Other records, including personal notes, draft decisions, draft orders and communications related to draft decisions or draft orders, would be excluded from the scope of the new Act.

Bill 100 would amend the *Freedom of Information and Protection of Privacy Act* (FIPPA) to ensure that the records excluded from the new Act would also be excluded from the application of FIPPA.

Second, Bill 100 would amend FIPPA to allow for the creation of government “data integration units,” which would be authorized to collect and use personal information and personal health information for the purpose of compiling information to enable analysis in relation to:

- Management or allocation of resources
- Planning for the delivery of programs and services
- Evaluation of programs and services.

Data integration units would be either wholly situated within a government ministry or shared between ministries. They would be able to collect information from a range of sources, including institutions under FIPPA and institutions under the *Municipal Freedom of Information Protection of Privacy Act* (MFIPPA). The units would be permitted to collect certain types of excluded information, including information related to:

- Labour and employment information of the employees of institutions governed by FIPPA;
- Information held by the Archives of Ontario and the archives of educational institutions;
- Prosecution records; and
- Adoption records.

The amendments contemplate significant oversight by the Information and Privacy Commissioner, including the establishment of data standards that must be applied.

## Regulatory Reform

### Financial Services Regulatory Authority (FSRA)

The Budget identifies June 2019 as the month by which FSRA will be fully operational, including the amalgamation with the Deposit Insurance Corporation of Ontario (DICO). The Budget reiterates that FSRA will be focused on regulating more efficiently and reducing regulatory burden, and also indicates that the government is considering providing FSRA additional rule-making authority in its role as Ontario's pension regulator.

In addition, Bill 100 proposes amendments to the *Financial Services Regulatory Authority Act, 2016* (FSRA Act), *Financial Services Commission of Ontario Act, 1997* (FSCO Act) and PBA that, if adopted, would address certain transitional and operational matters, including:

- **Rule-Making Authority:** When exercising its rule-making authority, FSRA will be required to provide a notice containing a qualitative and quantitative analysis of the anticipated costs and benefits of each proposed rule. This will be in addition to the existing requirement under the FSRA Act to post a notice that includes a description of the anticipated costs and benefits of a proposed rule;
- **Business Plans:** FSRA will be required to prepare annual business plans and to provide these to both the Minister of Finance and the public; and
- **PBGF:** Amongst other things, FSRA will be authorized to collect PBGF contributions and to enforce PBGF contribution requirements.

## Provincial Drug, Health and Benefits

[As previously reported](#), effective April 1, 2019, children and youth under the age of 25 who are not covered by private plans will continue to receive Ontario Drug Benefit Program (ODP) coverage for eligible prescription medications, while claims for those who have coverage under a private plan, such as benefit plans provided by employers, must be submitted through the private plan.

The Budget introduces new commitments to:

- further redesign the ODP to improve access times to new clinically proven medicines at lower costs, improve oversight of payments to pharmacies, and reduce the applicable regulatory burden on clinicians;
- increase oversight of the Ontario Health Insurance Plan (OHIP) to reduce the potential for misuse and to provide for the correction of incorrect billings; and
- introduce provincial dental coverage for low income seniors who do not have coverage under a private plan.

## Other Legislative Reforms of Interest to Employers

The *Modernizing The Skilled Trades and Apprenticeship Act, 2019* will come into force on a date to be proclaimed.

On a date to be proclaimed, the *Ontario College of Trades and Apprenticeship Act, 2009* (OCTAA) will be repealed. Bill 100 contains a proposed new legislative framework for the governance and practice of skilled trades in Ontario that is substantially similar to the *Trades Qualification and Apprenticeship Act*, legislation that preceded OCTAA.

## Continuing to Monitor Developments

As always, we are continuing to monitor developments announced in the Budget and reflected in Bill 100. We will provide further updates as the supporting regulations and frameworks discussed in this *FTR Now* are released by the government.

Should you have any questions or require further information about the Budget, please contact [your regular Hicks Morley lawyer](#).

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[1] Such circumstances can arise where the terms of the pension plan permit an employee to commence receiving a pension while working past age 65, where an employee has terminated or retired and returned to work after beginning to receive a pension or pension payout, or where the



employee is required to commence receiving a pension upon reaching the maximum pensionable age in accordance with the *Income Tax Act*.

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