Federal Post

Employment Equity Act Task Force Releases Final Report

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On December 11, 2023, the federal *Employment Equity Act* Review Task Force (Task Force) released its final report titled *A Transformative Framework to Achieve and Sustain Employment Equity* (Final Report). The Final Report included 187 recommendations on improving the federal *Employment Equity Act* (*Act*) and its framework.

The Process

The *Act* came into force in 1986 in an effort to achieve substantive workplace equality. Section 44(1) of the *Act* mandates a "comprehensive review of the provisions and operations" of the *Act.* This regular review was intended to assess the effectiveness of its provisions.

The Task Force was formed in July 2021. Its mandate was to advise the federal Minister of Labour on how to modernize and strengthen the framework of the *Act*. The Task Force reviewed the *Act* and its supporting programs, focusing on the following four areas:

- equity groups
- supporting equity groups
- improving accountability, compliance and enforcement
- improving public reporting

The supporting programs include the Legislated Employment Equity Program, the Federal Contractors Program and the Workplace Opportunities: Removing Barriers to Equity Program.

As a part of its review process, the Task Force engaged with interested parties about their employment equity experience through a formal consultation process in early 2022.

The review conducted by the Task Force is the first of its kind in the history of this legislation.

The Recommendations of the Task Force

In its comprehensive Final Report, the Task Force provided detailed reasons for each of its 187 recommendations. With an emphasis on the proactive and transformative aims of the *Act,* the recommendations "recast" the *Act*'s purpose "to achieve and sustain substantive equality in the workplace through the three pillar framework, that is, implementation through barrier removal, meaningful consultations and regulatory oversight."

It is not possible in this *Federal Post* to discuss all the recommendations. Set out below are a number of recommendations (set out as bullet points) which will be of interest to federally regulated employers.

Groups Under the *Act*

- The term "designated groups" should be replaced with "employment equity groups."
- Members of employment equity groups should be referred to as "workers."
- The term "Aboriginal" should be replaced with "Indigenous" through a distinctions-based approach of First Nations,

Inuit and Métis.
- The creation of two new employment equity groups, one each for Black workers and 2SLGBTQI+ workers.
- The term “visible minority” should be replaced with “racialized worker.”
- “Women” should remain an employment equity group.
- The definition of “disability” in the *Accessible Canada Act* should be adopted in the *Act*.

Eliminating Workplace Barriers

- There should be a proactive requirement on workplaces to examine their implementation of employment equity.
- The *Act* should be amended to define barriers as “practices that affect equity groups in a disproportionately negative way.”
- The *Act* should be amended to require employers to demonstrate that they have implemented their employment equity plans, or have made reasonable progress in doing so, and to sustain employment equity once it has been achieved; these obligations should be incorporated into collective agreements where applicable, and should encourage, rather than limit, “collective bargaining that deepens equitable inclusion, notably on staffing or classification.”
- The concept of “merit” should be examined and not assumed to be “neutral or objective” as a “close look at merit can lead to more rigorous but also more relevant requirements to redress inequality.”
- Subsection 6(a) of the *Act* currently states, “The obligation to implement employment equity does not require an employer (a) to take a particular measure to implement employment equity where the taking of that measure would cause undue hardship to the employer…” The notion of ‘undue hardship’ in this subsection “should be defined to mean that it would be impossible to take the reasonably necessary measure without ‘undue hardship.’”
- The *Employment Equity Regulations* or guidelines should provide support on how to remove barriers and reporting obligations.
- The *Employment Equity Regulations* or guidelines should provide support to workplaces on “how to prioritize employment equity initiatives on those employment equity groups and subgroups that are the most underrepresented in the workplace, while retaining responsibility for achieving employment equity for all employment equity groups.”

Who Should the *Act* Apply To?

- The *Act* framework should apply to federal workplaces with 10 or more employees.
- Federal employers with between 10 and 49 employees “should be required to achieve reasonable progress on attaining representation of employment equity groups consistent with labour market availability” and should be provided with meaningful access to training and support.
- Federal employers with “50 or more employees and all covered employers in the federal public service should be required to assume the existing employer obligations under the current *Act*, with an appropriate transition window for reporting” and should be provided with meaningful access to training and support.
- Recommendations are made with respect to other specified federal employers.

Federal Contractors Program (FCP)

- For contractors to whom the FCP applies, the implementation requirements for employment equity should be equivalent to the implementation requirements for employers covered under the *Act*.
- The monetary threshold for inclusion of contractors under the FCP should be $100,000.
- Colleges and universities should be required to agree to participate in the FCP to be eligible to apply for federal research grants and research funding as well as to participate in research granting councils.
- No contractor should be able to cumulate contracts that total more than $200,000 without subscribing to the FCP; this includes legal services providers eligible to be included in the Open Government Canada online directory with individual contracts of $100,000 or cumulative contracts that total more than $200,000.

Joint Employment Equity Committees

- Joint Employment Equity Committees should be established. The committees should:
    - be incorporated into the *Act*'s framework
    - be mandatory for the largest employers and voluntary for others
    - be harmonized with existing models for pay equity and occupational safety and health
    - have a clearly defined mandate
    - play a key role in reporting obligations and ensuring accountability
- Depending on the size or the employer or whether public or private, the establishment of the committee may be mandatory or voluntary; different requirements may apply where there is at least one bargaining agent.

Regulatory Oversight

- An Employment Equity Commissioner (Commissioner) should be established, with adequate funding and staffing.
- The Commissioner should have a broad range of legislative responsibility to ensure responsibility for regulatory oversight, which includes workplace auditing.
- Guidelines and training should be developed and updated by the Commissioner; this should include training on artificial intelligence use across the employment lifecycle with particular attention to recruitment and hiring.
- The *Act* should provide the Commissioner with sufficient remedial and enforcement powers to ensure the *Act*'s purposes can be fulfilled.
- An advisory and review panel should be established to inform the work of the Commissioner.

Complaints, Investigations and Enforcement

- Any worker in a covered employer's workplace should be able to bring a complaint to the Commissioner on the grounds that an employer is not respecting its implementation obligations under the *Act.*
- The *Act* should provide for corresponding mechanisms for dealing with that complaint.
- Penalties should be updated and harmonized with comparable penalties under the *Pay Equity Act* and the *Accessible Canada Act.*
- The penalties should be scaled to the size and nature of the employer and to the level of non-compliance.
- The Commissioner should have the power to investigate complaints and propose alternative resolutions, as well as to dismiss a complaint.

Reporting Obligations

- Legislative amendments should be made which allow the Accessibility Commissioner and the Commissioner to streamline reporting as it relates to the removal of barriers to accessibility in employment.
- With respect to workers, self-identification should remain voluntary under the *Act*'s framework; while completion of a self-identification survey should be mandatory, "the survey should include the option not to self-identify under each question related to membership in an employment equity group or sub-group."
- Reporting under the *Act* should include dependent contractors, consistent with the *Pay Equity Act* and the *Canada Labour Code.*
- The *Employment Equity Regulations* or guidelines should require employers to report on workplace harassment and violence policies and their preventative actions. Lists may be anonymized to respect privacy and may include, for example:
    - the number of harassment and discrimination complaints, identified by category
    - whether complainants, respondents or perpetrators are members of one or more employment equity groups and, if so, which ones
    - the number of non-disclosure agreements (NDAs) that were concluded by the workplace as part of the mandated workplace climate scan

- The *Employment Equity Regulations* should be amended to:
  - "require employers to report on the number of NDAs signed with categories regarding the broad subject matter and potential barriers that they covered"
  - "provide for the use of artificial intelligence in recruitment or other forms of worker evaluation or assessment to be reported upon in employers' employment systems reviews"

Data Collection

- Employment equity data collection and benchmarks eliminate barriers and foster data justice.
- Legislation intersecting with the *Act* should be reviewed and amended as appropriate to clarify that data protection should be seen through a human rights approach.
- The Employment Equity Data Steering Committee should be considered part of the *Act*'s framework.

Training

- Training in employment equity should prioritize Truth and Reconciliation Commission "calls to action on education and support learning about positive initiatives to promote Indigenous economic prosperity."
- Leadership training in the federal public service should include training on "systemic discrimination including systemic racism, substantive equality and equitable workplace inclusion."

Consultations Generally

- The federal government should enter into consultations with representatives off federal employers and workers, as well as concerned communities, with respect to amending the *Canada Labour Code* "to enable religious minorities to avail themselves of one or more annual paid leave days reasonably available to them to observe religious high holidays."
- In consultations with concerned groups, the federal government "should consider amending the *Canadian Human Rights Act* and the *Canada Labour Code* to ensure that NDAs are not misused for the purpose of silencing human rights complainants or whistleblowers."

Achieving Employment Equity

The Task Force recommends that the *Act* be amended to clarify that the Minister of Labour is responsible for achieving employment equity by January 1, 2040.

Initial Commitments Made by the Government

On the same day the Final Report was released, the federal Minister of Labour announced the government's initial commitments to modernize the *Act*. As stated in the announcement, these include:

- creating two new designated groups under the *Act*: Black people and 2SLGBTQI+ people
- replacing the term "Aboriginal Peoples" with "Indigenous Peoples," and updating the definition to include First Nations, Métis and Inuit and to ensure it is consistent with the *United Nations Declaration on the Rights of Indigenous Peoples Act*
- replacing the term "members of visible minorities" with "racialized people" and updating the corresponding definition
- aligning the definition of "persons with disabilities" with the *Accessible Canada Act* to make it more inclusive

Going Forward

It is clear from the foregoing that the Task Force has recommended sweeping changes to the *Act*'s framework, and as well has recommended related changes to other federal employment-related legislation.

The federal government announced its intention to consult with affected parties on how to best implement these changes and other Task Force recommendations, with a view to introducing legislation amending the *Act*.

We will monitor for any consultations which are announced, and we will also monitor for any legislative amendments made as a result of the recommendations of the Task Force.

Should you have any questions about the Final Report, please contact Njeri Damali Sojourner-Campbell, Jodi Gallagher Healy or your regular Hicks Morley lawyer.