

WHAT ONTARIO EMPLOYERS NEED TO KNOW FROM A PAY EQUALITY PERSPECTIVE

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Primer

Upon the 30th anniversary of the *Pay Equity Act* in 2017 the Pay Equity Office implemented several new initiatives to support its administration and enforcement of the *Pay Equity Act*. These initiatives included a hiring surge of Pay Equity Officers and the following monitoring programs: Federal Contractors, Vendor of Record (for Ontario ministries), New Employer (i.e., newly formed Ontario employers who have been in business for 3 years, have at least 10 employees and operate in either Western, Eastern or Northern Ontario), and Innovative Sector (i.e., new employers in the bio-economy and clean technologies, advanced health technologies, digital media and information technology and pharmaceutical research sectors). This coincided with a hiring surge of Pay Equity Officers. Layered upon the same are the legislated additions to the Ministry of Labour's powers under Bill 148 and Bill 203.

In line with these changes, there has been a noticeable increase in equal pay for equal work and pay equity claims and audit files (i.e., where no claim has been made).

We do not expect this spike in activity to decline any time soon. As such, this article outlines for you the legislative pay equality framework that all employers in Ontario need to be aware of to ensure that they proactively have the right pay equality plans, programs and maintenance efforts in place to avoid potential claims and to be prepared for a possible audit, particularly if their organization falls under one of the noted Pay Equity Office initiatives or had a resolved equal pay for equal work or pay equity claim.

Equal Pay For Equal Work

Falls under the *Ontario Employment Standards Act* and is enforced by the Ontario Labour Relations Board (OLRB). Equal pay for equal work addresses situations in which men and women working for the same employer performing substantially the same work are receiving equal pay when doing the same job or substantially the same job. As of April 1, 2018 additional requirements under the *Fairer Workplaces, Better Jobs Act*, 2017's Bill 148, Equal Pay For Equal Work are applicable. recall that Bill 148 extend protections not just from difference between the sexes but also to differences in workers' employment status. Meaning that employers and temporary help agencies must pay their casual, part-time, temporary and seasonal workers at least equal that paid to their full-time or permanent employees if they do substantially the same kind of work, their working conditions are similar or their work requires

substantially the same skill, effort and responsibility, with exceptions for seniority and merit systems or systems that base earnings on production quantity or quality.

Pay Equity

Falls under the *Ontario Pay Equity Act* and is enforced by the Pay Equity Office. Pay equity addresses **systemic gender discrimination for women** in relation to the compensation they receive for work that they perform for the same employer in historically, stereotypically or currently occupied female job classes (e.g., receptionists, assistants) through ensuring that workers in male (dominated) and female (dominated) job classes, involving different jobs that have the same relative value to their employer, receive equal pay for work of equal value.

The new and most recent addition to this framework is *Bill 3, An Act respecting transparency of pay in employment*.

Bill 3, An Act respecting transparency of pay in employment – the newest and most recent addition to this framework

After being first introduced on March 6, 2018, Bill 3, formerly Bill 203 has now been enacted. The purpose of this legislation has been expanded from providing measure to assist with closing the wage gap between male and female workers to: (a) promote gender equality and equal opportunity in employment and in the workplace, including equality of compensation between women and men, through increased transparency of pay and workforce composition; (b) increase disclosure of inequalities related to employment and compensation that women and other Ontarians may experience in the workplace to encourage the removal of inequalities to promote the full and equal participation of women and other groups in the workplace; (c) promote, amongst employers, the elimination of gender and other biases in hiring, promotion, employment status and pay practices; (d) support open dialogue and workplace consultation between employers and employees on issues concerning employment, compensation and equal opportunity; and (e) support economic growth through the advancement of equity in employment and in the workplace for women and other groups. This Bill is also enforced by the OLRB.

Bill 3's measures include:

- a prohibition against prospective employers seeking compensation history from candidates for a position, including through an agent.
- a requirement that all employers in public job advertisements or postings include information about the expected compensation or range of compensation for the position.
- a requirement that all employers who have 100 or more employees or are a prescribed employer shall collect prescribed information for the purposes of preparing and posting online or in the workplace no later than May 15 each year a pay transparency report that complies with the requirements in the regulations (not yet released) and that contains the prescribed information relating to the employer, its workforce composition and differences in compensation in its workforce based on gender and other prescribed characteristics. First reports for organizations with: (i) 100 or more but fewer than 250 employees are due by May 15, 2021; and (ii) 250 employees or greater by May 15, 2020. Such

submitted reports shall be published, which includes on the Internet, or otherwise made available to the public by the Ministry.

- an anti-reprisal provision that prohibits employers or their agents from intimidating, dismissing or otherwise penalizing their employees for engaging in such conduct as making compensation inquiries, disclosing their compensation or asking their employers to comply with their obligations under this Act and its regulations.
- compliance audit powers that enable a compliance officer to enter and inspect, without a warrant, any place in order to conduct a compliance audit or investigate: (i) a possible contravention of this Act; or (ii) to ensure compliance with this Act.
- power of a compliance officer to issue a notice of contravention or make any decision under this Act that has the same force as a judgment or order of the court so long as the last occurrence or default upon which the contravention was based occurred no more than one year prior. The amount or ranges in the amount of a penalty for contravention will be determined by the regulations (not yet released). In exercising their powers under Bill 3, compliance officers are not required to hold a hearing and the Minister may publish, including on the Internet, or otherwise make available to the public the name of the person, including an individual deemed to have contravened the Act, the date and a description of the contravention as well as the penalty imposed for the contravention, which all is deemed to be in compliance with clause 42(1)(e) of the *Freedom of Information Act*. Such notices are reviewable in a hearing before the OLRB if the affected person makes a written application within 30 days of service of the notice.

For more information or assistance with proactively avoiding the risks and liabilities that could flow from this legislative pay equality framework, please contact one of our employment lawyers who will be pleased to discuss your issues and concerns along with your strategic options to achieve and maintain pay equality compliance.