
Ontario Budget proposes public sector compensation restraint

On March 25, 2010 the provincial government tabled Bill 16 (the Budget Bill) and introduced the new *Public Sector Compensation Restraint to Protect Public Services Act* (the Act). If passed, the Act will establish restraint measures that will apply to all non-bargaining employees in the broader public sector, including the Ontario Public Service. Organizations falling within the application of the Act will be prohibited from providing net compensation increases until March 31, 2012. Public sector employees who bargain collectively are exempted from the application of the Act, and the government states that current collective agreements will be honoured. Nevertheless, even for unionized government workers the government has expressed an approach of restraint for future collective agreements. As these agreements expire, the government states that it will seek to negotiate compensation freezes for two years. If passed, the proposed legislation will be effective from March 25, 2010 to March 31, 2012.

THE RESTRAINT MEASURES

The Act operates to prohibit any increase in compensation for a period of two years. "Compensation" is defined broadly in the Act to include "all forms of payment, benefits and perquisites paid or provided, directly or indirectly, to or for the benefit of a person who performs duties and functions that entitle him or her to be paid and includes discretionary payments." A Ministry of Finance FAQ sheet states that "a compensation plan consists of all aspects of an employee's compensation including base pay, merit pay, time off such as vacation, pension, health and other benefits." Employees falling within the application of the Act will generally see their rates of pay, pay ranges, and their benefits frozen at the level in effect as of the effective date (March 24, 2010). These restraint measures will also apply to contract renewals and newly hired employees.

The Act does provide exceptions for certain increases in rates of pay and benefits. For example, if an employee's rate of pay falls within a pay range that is in effect for the position on the effective date, or March 24, 2010, the employee's rate of pay may be increased (within that pay range) provided that the increase is authorized by the applicable compensation plan and provided that the increase is in recognition of one of the following factors:

- The employee's length of time in employment or office;
- An assessment of the employee's performance; or
- The employee's successful completion of a program or course of professional or technical education.

Similarly, an employee's benefits may be increased based on the factors listed above if the increase is authorized by a compensation plan in effect on the effective date. A potential gap in the legislation may arise as a result of the fact that the Act does not directly address compensation increases that were decided, but not implemented, before the effective date. It is not clear yet how these situations will be resolved, making these areas ripe for contention.

The Act provides a further exception to pay restraint where an employee's or office holder's rate of pay falls below the minimum wage established under the *Employment Standards Act, 2000* (ESA). In such circumstances the rate of pay may be increased to match the minimum wage. The Act also states that its provisions cannot be applied, or interpreted, to reduce employee rights under sections 42 and 44 of the ESA. These ESA provisions respectively address equal pay for equal work, and prohibit differentiation in benefit plans based on discriminatory grounds. Similarly, rights under the *Pay Equity Act* and the *Human Rights Code* are expressly preserved by the proposed legislation.

APPLICATION OF THE ACT

The restraint measures in the Act will apply to virtually all of the organizations covered by the *Public Sector Salary Disclosure Act, 1996*, with the exception of municipalities and certain other organizations subject to municipal oversight. The following groups and employees are subject to the Act:

- Members of the Provincial Parliament, non-bargaining political staff and non-bargaining employees across the broader public sector and the Ontario Public Service; and
- Non-bargaining employees in the Ontario Public Service, hospitals, boards of health, schools, colleges, universities, Hydro One, and Ontario Power Generation.

Notably the Act specifically deems directors and officers of an employer to be employees of the employer, and therefore subjects such directors and officers to the compensation freeze in the Act.

EXEMPTIONS FROM THE ACT

The Act exempts from its application employees who are represented by the following organizations for the purpose of collectively bargaining terms and conditions relating to compensation:

- A trade union under the *Labour Relations Act, 1995*.
- An organization representing employees under the *Crown Employees Collective Bargaining Act, 1993*.
- An organization representing employees under the *Education Act*.
- An employee organization under the *Provincial Schools Negotiations Act*.
- An organization representing employees under the *Colleges Collective Bargaining Act, 2008*.
- An association recognized under the *Police Services Act*.
- The Association as defined in section 1 of the *Ontario Provincial Police Collective Bargaining Act, 2006*.
- An association recognized under Part IX of the *Fire Protection and Prevention Act, 1997*.
- An organization that, before the effective date applicable to the employer, has collectively bargained, with the employer, terms and conditions of employment relating to compensation that were implemented by the employer.
- An organization that, before the effective date applicable to the employer, has an established framework for collectively bargaining with the employer terms and conditions of employment relating to compensation.
- Another prescribed organization.

The exemption from the Act for employees who are part of a union, or who bargain collectively, is likely a result of the Supreme Court of Canada's decision in *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] (*BC Health Services* Decision). Readers of Focus may recall that in this landmark decision, the Supreme Court gave the collective bargaining process *Charter* protection. In that case, legislative provisions enacted by British Columbia invalidated provisions of existing collective agreements and operated to preclude meaningful collective bargaining on a number of issues for future collective agreements. The Supreme Court held that section 2(d) of the *Charter* protects the collective bargaining process and that employees have the right to unite and to present demands to government employers collectively, as well as to engage in discussions in an effort to reach workplace-related goals. Government employers have the corresponding duty to meet with the employees to discuss those goals. Legislation that interferes with, or precludes, this process is unconstitutional.

As a result of the *BC Health Services* Decision, it is likely that legislation subjecting unionized employees to the restraint measures would be seen to violate the *Charter*-protected collective bargaining process. The Ontario government has therefore committed to honouring the terms of existing collective agreements. It has however stated that the current fiscal plan does not provide any funding for compensation increases for future collective agreements. As collective agreements expire, Ontario states that it will work with transfer payment partners and bargaining agents to seek agreements of at least two years' duration that do not include net compensation increases.

THE PUBLIC SECTOR COMPENSATION RESTRAINT BOARD

The Act establishes an adjudicative tribunal called the Public Sector Compensation Restraint Board (the Board). The Board is granted the authority to make final and binding orders declaring whether the Act applies to an employer, employee or office holder. Applications to the Board for such orders may be made by employers, or by employees where the application is in respect of a matter that affects the employee personally. The Board is prevented from making orders relating to compensation plans, but otherwise has the typical powers of an administrative tribunal, including the ability to obtain information and to compel witnesses and disclosure. Orders of the Board may be filed in a court of competent jurisdiction. Orders will then be enforceable as a judgment or order of the court.

In Our View

Under the *BC Health Services* Decision, the collective bargaining process is protected, and the legislative framework within which the unions bargain is unchanged, notwithstanding the proposed Act. Nevertheless the current tone of restraint expressed by the government will likely significantly impact the negotiation of collective agreements that expire prior to March 31, 2012. The government expects unionized government workers to “do their part” and to consider collective agreements without increases to wages or benefits. Collective bargaining agents will certainly feel the pressure to moderate wage demands. The parties will be faced with the challenge of attempting to negotiate improvements without funding. Where there is an interest arbitration to renew or establish a new collective agreement, government employers could make “(in)ability to pay” arguments before the interest arbitration boards.

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