

## Equal pay for equal work regardless of employment status provisions of Bill 148 coming into effect on April 1, 2018

**Date :** March 29, 2018

The *Employment Standards Act* (ESA) currently prohibits employers from paying employees different rates of pay based on sex if they perform equal work. Effective April 1, 2018, there will be new provisions added to the ESA that will extend this equal pay requirement to employees whose employment status is different but who nevertheless perform substantially the same kind of work. A difference in employment status refers to a difference in the number of hours regularly worked (e.g., full-time vs. part-time) or a difference in the term of employment (e.g., permanent vs. temporary, casual or seasonal). This new equal pay requirement will also apply to assignment employees of temporary help agencies vis-à-vis employees of the agency's clients. To be prepared for this change, employers (including temporary help agencies) should be reviewing their existing pay practices to make sure they will not run afoul of the new law when it comes into effect.

Effective April 1, 2018, employers will be required to pay part-time, casual, temporary and seasonal employees at the same rate of pay as their full-time co-workers if they perform "substantially the same work" for the employer. Whether the work performed by two employees is to be considered "substantially the same" will depend on whether the work:

- is performed in the same establishment;
- requires substantially the same skill, effort and responsibility; and
- is performed under similar working conditions.

If any of these factors are different as between two employees, then differences in their rates of pay will be justified. This will make it important for employers to maintain up-to-date job descriptions that accurately describe the work that is actually being performed.

The term rate of pay is not defined in the ESA. However, according to the Ministry of Labour's *Your guide to the Employment Standards Act*, a difference in rate of pay would include differences in the hourly rate, salary, overtime rate or commission rate paid to employees, but would not include differences in employee benefits.

There will be exceptions to the new equal pay obligations where differences in rates of pay are based on any of the following:

- a seniority system;
- a merit system; or
- a system that measures earnings by quantity or quality or production.

This new equal pay for equal work requirement will not apply to firefighters, students under the age of 18 who work less than 28 hours per week or during school holidays or persons in the recorded visual and audio-visual entertainment production industry. The Act will also include a catch all exception stating that differences in rates of pay based on any factor other than sex or employment status will continue to be permissible.

An employee who believes that their employer is not complying with these new obligations will be entitled to ask their employer to review their rate of pay compared to that being paid to full-time, permanent employees. For assignment employees, this request should be made to the temporary help agency. Faced with a request for such a review, an employer (or temporary help agency) will be required to respond by either adjusting the employee's pay or by providing them with a written explanation setting out the employer's reasons for believing that a pay adjustment is not required.

Employers (and temporary help agencies) will not be permitted to reduce any employee's rate of pay in order to bring it into compliance with these new obligations. For employers with unionized employees, the ESA will include transitional provisions. If a collective agreement in effect on April 1, 2018 contains language that permits differences in pay based on employment status (e.g., different pay scales for full-time and part-time or casual employees) then the collective agreement provisions will be allowed to remain in effect until the earlier of: (i) the date the collective agreement expires, or (ii) January 1, 2020.

The Minister of Labour will be required to conduct a review of these new equal pay rules before April 1, 2021.

## **In Our View**

While the intention behind these new rules may be clear, their practical application could prove challenging (and potentially costly) for some employers. Despite the uncertainty that remains around specific aspects of these new rules (for example, what other factors besides the ones listed might be permissible grounds for differences in pay?) employers should be reviewing their current job descriptions to ensure that they accurately reflect the work that is being performed by different employees within their organization. Any differences in how part-time, casual or seasonal employees are being paid as compared to full-time, permanent employees should be examined to determine whether they can be justified based on one or more of the exceptions to be set out in the Act. After April 1<sup>st</sup>, employers who continue to pay different rates of pay to employees who appear to be doing similar work will need to be prepared to justify those differences and to show that they are not based on differences in employment status.

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