Federal Pay Equity Act – Regulations Will Come into Force on August 31, 2021

Date : July 15, 2021

On July 7, 2021, the federal government announced that the *Pay Equity Act* (the "Act") will come into force on August 31, 2021.

As discussed in a previous Focus article, the Act aims to ensure equal compensation for men and women who perform work of equal value in the same establishment. Equal pay is to be achieved through compensation increases, to be paid where a pay equity plan demonstrates a difference in compensation between predominantly female job classes and comparable predominantly male classes.

Subject employers are required to prepare and post a pay equity plan within three (3) years of the Act coming into force, to make the required increases to compensation identified by the plan, and to maintain (update) the plan thereafter.

Readers of Focus will recall a previous detailed discussion about the publication of proposed Regulations (the "Proposed Regulations") under the Act. The final version of the *Pay Equity Regulations* (the "Regulations") have now been published. A great deal of the Regulations remain unchanged, but there have been amendments to some of the proposed language in response to issues raised during consultation. Those changes are discussed in detail below.

Proposed vs. Final Regulatory Requirements – What Has Changed?

Posting Notice Within 60 Days

Employers (or a group of employers) who are required to establish a pay equity committee, or who voluntarily establish a pay equity committee, are required to post a notice regarding their obligations under the plan. Instead of requiring employers to do so "as soon as feasible," the Regulations now specify that posting must be done within 60 days after the employer or group of employers becomes subject to the Act. For most subject employers, that will be 60 days following August 31, 2021.

The notice must remain posted until the employer posts the final version of the pay equity plan, until it is required to post a notice of its obligations if it leaves or joins a group of employers, or until it is required to establish more than one pay equity plan. The last ground was added so that an employer in those circumstances would be permitted to take down its original notice and replace it with a new one reflecting its new obligations.

Similarly, an employer required to post a notice about establishing a pay equity plan without a pay equity committee must now do so within 60 days after the day on which the Pay Equity Commissioner provides approval for the employer to establish a plan without a committee, and no longer “as soon as feasible.”

Removal of Time Limits for Submitting Notices and Applications to the Commissioner

The Regulations remove proposed time limits for submitting notices and applications to the Pay Equity Commissioner. For example, the Proposed Regulations included a requirement for an employer or group of employers who voluntarily established a pay equity committee to notify the Commissioner within 60 days of posting its notice. However, concerns were raised during consultations that the 60-day period could be confusing. Not wishing to be overly restrictive with employers who voluntarily created pay equity committees, the deadline was removed.

Additionally, the Proposed Regulations included a requirement for an employer who wished to establish more than one pay equity plan to submit its application to the Commissioner within 12 months after the day on which the employer became subject to the Act.

The 12-month deadline for applying to establish multiple plans was noted by employer stakeholders to be overly restrictive, and by employee stakeholders to be too long and potentially delaying. However, considering that employers must post their plans within three years of being subject to the Act no matter when their application for multiple plans is submitted, and considering the Act’s protective measures, the deadline was removed to provide flexibility to employers with complex workplaces in need of multiple plans.

The Proposed Regulations also included a deadline for employers to apply to the Commissioner for a longer period in which to phase in a compensation increase, namely the day before the day on which the employer posts a notice about the increases. However, this deadline was removed from the final version of the Regulations so that employers would have the flexibility to apply whenever the employer’s financial circumstances so required. Any potential for abuse of the provision was seen to be mitigated by the Commissioner’s discretion, in that an employer would have to demonstrate extreme financial hardship in order to obtain approval.

Calculation Methods Clarified, Commissioner Guidance to Come

Following feedback that it was very complex, the description of the Equal Line Method in the Proposed Regulations has been clarified. While the government notes that the substance of the formula has not changed, the wording has been changed to make it more easily accessible. The

government has advised that the Commissioner will provide guidance materials in relation to the use of the formula.

It should be noted that while no changes were made to the language of the Regulations dealing with the process applicable to crossed regression lines, the government has indicated that the Commissioner will also provide guidance on that process once the Act and Regulations are in force.

Annual Workplace Information "Snapshots"

The Proposed Regulations required employers to collect information about the workplace on a specific calendar day (generally either March 31 or the last day on which the fiscal year ends, depending on the employer) for each year between the posting of a pay equity plan and the posting of a revised pay equity plan.

The purpose of obtaining this information was to help employers identify changes that might have an impact on pay equity. Employers would be required to use this information during the process to update the pay equity plan.

Concerns were raised during consultation that requiring an employer to obtain such information on a specific calendar day could be too onerous. For example, a business could be closed on that particular calendar day in a given year. As such, the wording was changed so that the information-gathering obligations would have to be fulfilled in respect of a specific calendar day each year (in other words, to use that date as a marker to determine the start and end date of the one-year period for which the information was being gathered) but not necessarily **on** that date.

Additionally, if information collected during a "snapshot" in respect of a certain date includes a salary rate that, after that date but before the final version of the revised pay equity plan is posted, is changed with retroactive effect starting before or on that date, the employer or pay equity committee is required to use the retroactive salary rate that applies to that date, and not the rate that was collected in the snapshot, or calculated pursuant to the frozen compensation provisions (to be discussed in more detail below).

Job Classes Not Treated as Part of a Group

Where an employer has treated a group of job classes as a predominantly female job class in its most recent pay equity plan, the Regulations now include clarified criteria about when an employer is prevented from continuing to treat that job class as a group, based on information collected in the

annual “snapshots.”

For the period in which the information is collected, and for each period after that until the final version of the updated pay equity plan is posted, an employer cannot, for the purposes of the maintenance review, continue to treat a group of job classes as a group if the information collected shows that any of the following have occurred:

1. Less than 60% of the positions in the group are occupied by women;
2. A job class has been created since the most recent posting of the pay equity plan and added to the group; or
3. A job class within the group has been combined with another job class within or outside the group.

“Frozen” Compensation

The Proposed Regulations included provisions prohibiting the comparison between rates of pay that have been “frozen” (subject to statutory freezes under certain provisions of the *Federal Public Sector Labour Relations Act* or the *Canada Labour Code*) and those that were “active.” The definition of “active” has now been removed from the Regulations, having caused confusion about potentially including non-unionized employees in its application. Clarifying language has been added to confirm that “non-frozen” rates of pay are only in respect of positions held by unionized employees.

Additionally, the Proposed Regulations included two potential approaches to comparing compensation between frozen and non-frozen job classes. One was the **historical analysis approach** (explained alongside the **administrative rate approach** in our previous Focus article), which required the employer or committee to find the most recent year in which 50% or less of the gender-predominant job classes representing 50% or less of the population covered by the pay equity plan were subject to a statutory freeze, and to use rates of pay from that year for comparison of compensation.

However, in consultations, concerns were raised by employee stakeholders, advocacy groups and pay equity experts that this approach could prevent workplaces from addressing current pay equity gaps because it used rates from a previous year. Additionally, concerns were raised that gaps in pay could be introduced when classes whose pay rates were calculated using the historical analysis approach were compared to job classes comprised of non-unionized employees with current pay rates. The Regulations therefore omitted the historical approach, and the **administrative rate approach** is used as the default.

The pay equity committee retains the ability to use a different method to determine salary that

minimizes, to the extent possible, compensation differences resulting only from the frozen compensation of a job class.

Predetermined Values of Work

The Act allows an employer or pay equity committee to determine that the value of work performed in a predominantly female job class has already been determined by some other means, so long as that method complies with the requirements set out in the Act. Stakeholders raised concerns that the inclusion of such language could make it easier to perpetuate discriminatory pay practices.

The government noted that the legislative criteria for such methods included a prohibition on discrimination on the basis of gender, as well as a requirement that the method make it possible to determine the relative value of the work performed in all of the predominantly female job classes and all of the predominantly male job classes chosen to determine differences in compensation.

However, language was also added to the Regulations to require that if the employer or pay equity committee determines that the value of work has already been determined, then the pay equity plan must include an indication to that effect. That information must also be included in the employer's annual statement to the Commissioner.

Modern Treaty Obligations and Indigenous Engagement and Consultation

The government noted that the Act will not automatically apply to First Nations band councils as employers. They will not be included in the application of the Act unless the Governor in Council, by order, specifies a date for the application of the Act to these employers. There will be a separate collaborative engagement process between the Labour Program and Indigenous partners.

However, Indigenous-owned federally regulated private-sector businesses will be subject to the Act when it comes into force. The government noted that stakeholders representing Indigenous-owned federally regulated businesses have been involved throughout the consultation process.

In Our View

Employers have now been provided with a concrete date on which the three-year clock begins to run. The legislative and regulatory requirements are numerous and detailed, and employers need to be familiar with their obligations.

Raquel Chisholm, a partner at Emond Harnden who specializes in pay equity issues, will be

hosting a pay equity webinar alongside Pay Equity Consultant Sandra Haydon on September 16, 2021. We invite employers looking for guidance regarding their obligations and what they should be doing now in order to meet the requirements to keep an eye on communications from our firm for further details.

We also note that the Canadian Human Rights Commission's website has a Pay Equity section with resources that may be of assistance to employers.

For more information, please contact Raquel Chisholm at 613-940-2755 or Mélissa Lacroix at 613-940-2741.