Ontario introduces legislation to limit compensation increases in the public sector

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On June 5, 2019, the Ontario government introduced Bill 124 – *An Act to implement moderation measures in respect of compensation in Ontario's public sector*. The legislation follows a two-month consultation period that commenced April 4, 2019 (see Ontario government launches public sector compensation consultations – wages to be "modest, reasonable and sustainable*")*.

Short-titled as the *Protecting a Sustainable Public Sector for Future Generations Act, 2019*, the explanatory note prefacing the legislation states that its purpose is "to ensure that increases in public sector compensation reflect the fiscal situation of the Province, are consistent with the principles of responsible fiscal management and protect the sustainability of public services."

The preamble to Bill 124 further sets the financial stage for the legislation. It notes that Ontario's accumulated debt is amongst the largest subnational debts in the world. Ontario's debt to GDP ratio is stated to be 40 per cent, while interest on debt payments represents Ontario's fourth largest line item expenditure after health care, education and social services.

Application to Employer and Employees

With this as the fiscal back-drop, the proposed legislation would operate to limit compensation increases for both unionized and non-unionized employees in the Ontario public service and the broader public sector. Specifically, the proposed legislation would apply to the following organizations and their employees:

- the Ontario government and all of its agencies, boards, commissions and corporations;
- school boards under the *Education Act*;
- universities and colleges;
- hospitals under the *Public Hospitals Act* and the University of Ottawa Heart Institute;
- licensees under the *Long-Term Care Homes Act*, 2007 (unless the licensee is a for-profit organization);
- Ornge;
- children's aid societies;
- not-for-profit organizations that received at least $1 million in funding from the Government in 2018; and
- any other organization that is prescribed by regulation.

The proposed legislation also specifies a number of organizations and classes of employees that are not captured by the Act. These include:

- municipalities;
- local boards as defined in the *Municipal Act, 2001*;
- authorities, boards, commissions, corporations, offices or organizations, a majority of whose members, directors or officers are appointed or chosen under the authority of the council of a municipality;
- for profit organizations (unless otherwise specified by regulation);
- employees or classes of employees that are specified by regulation;
- designated executives under the *Broader Public Sector Executive Compensation Act, 2014*; and
- judges, deputy judges, justices of the peace, masters or case management masters.

A Three-Year Moderation Period

The mechanics of the proposed moderation measures begin with a three year "moderation period." The start of the moderation period will vary for different employees based on whether they are unionized or not, and, for unionized employees, the status of their collective agreement as follows:

- Collective agreements that are in place as of June 5, 2019 will not be impacted by the proposed legislation for the duration of their term. Upon the expiry of such collective agreements, the three year moderation period will begin.
- Collective agreements that are expired as of June 5, 2019: the moderation period commences on the day following the expiry of such agreements.
- For first collective agreements: the moderation period will begin on the commencement date of that collective agreement.
- Where the parties are or have been in arbitration to conclude a collective agreement, and:
    - an arbitration award has not been issued on or before June 5, 2019: the moderation period begins on the commencement date of the collective agreement that gives effect to the arbitration award. If the parties reach a settlement during the arbitration proceedings, the moderation period begins on the commencement of the collective agreement.
    - an arbitration award has been issued on or before June 5, 2019: the moderation period begins on the day immediately following the day on which the collective agreement that gives effect to that award expires and ends three years later.

For non-union employees, the moderation period begins on the earlier of a date that is selected by the employer, or January 1, 2022. An exception to this rule occurs if a non-union employee's salary increases are tied to salary increases in a collective agreement. In such a case, the moderation period will correspond to the moderation period applicable to the collective agreement.

During the moderation period, Bill 124 would limit salary rate and compensation increases to a maximum of 1 per cent for each 12 month period of the moderation period. Bill 124 defines "compensation" as "anything paid or provided, directly or indirectly, to or for the benefit of an employee, and includes salary, benefits, perquisites and all forms of non-discretionary and discretionary payments". The compensation limit would apply to both union and non-union employees throughout the applicable moderation period.

There are however certain salary rate increases that would not be limited by the proposed legislation. Bill 124 carves out salary increases in respect of the length of time in employment, an assessment of performance, or the successful completion of a program of education, provided however that these increases are provided for in the collective agreement, or, in the case of a non-union employee, the compensation plan.

Another exception to the statutory limit applies to an employer's cost of providing a benefit. If the cost of providing that benefit increases during the moderation period, that increase is not considered to be an increase in compensation for the purposes of the Act. This also applies to both union and non-union employees.

Anti-Avoidance Measures and Oversight Mechanisms

Proposed Bill 124 is rounded out with a number of anti-avoidance measures and oversight mechanisms. In the case of the former, the proposed legislation prohibits employers from, both before and after the applicable moderation period, providing compensation to an employee in respect of compensation that the employee did not receive as a result of the moderation measures.

In terms of compliance and oversight, under proposed Bill 124, the Management Board of Cabinet would have the authority to issue directives to employers and to employers' organizations requiring them to provide information to ensure compliance with the legislation. This authority extends to various types of information, including:

- compensation;
- collective agreements, employer bargaining mandates, negotiated settlements and submissions to arbitrators;
- an employer's costing with respect to collective agreements, proposed or negotiated changes to collective agreements, compensation plans and proposed changes to

compensation plans;
- the moderation periods;
- employer agreements relating to compensation; and
- compensation policies, plans, guidelines and programs.

In addition to the authority to compel information, the President of Treasury Board (the "Minister") would have the authority to make an order declaring that a collective agreement or arbitration award is inconsistent with the Act. Before issuing the order, the Minister would be required to provide notice to the affected parties and such parties are afforded 20 days to make submissions to the Minister. Once the 20-day period expires, if the order is issued, the parties would be subject to the terms and conditions that applied prior to the commencement of the collective agreement or arbitration award that was declared to be inconsistent with the Act. In the case of an arbitration award, the arbitrator or arbitration board remains seized and is required to make an award that is consistent with the Act. In all cases, the parties would be required to conclude a new collective agreement that is consistent with the Act following the issuance of the Minister's order.

The proposed legislation would also operate to limit the jurisdiction of labour arbitrators and the Ontario Labour Relations Board ("OLRB"). Under the proposed legislation, arbitrators and the OLRB are explicitly prohibited from inquiring into, or making a decision, in respect of the constitutional validity of the Act, or whether it conflicts with the *Human Rights Code*.

The proposed legislation also contains a number of provisions to insulate the government from legal challenge. It expressly precludes claims relating to the enactment or repeal of the legislation, as well as almost anything done under it. Similarly, the proposed Bill precludes constructive dismissal claims under the *Employment Standards Act, 2000*, and the common law by stating that an employer's compliance with the legislation shall not be considered to be constructive dismissal.

In our view

As can be seen, proposed Bill 124 will have a significant impact on labour relations in the public sector. The government has indicated that it is seeking feedback from stakeholders relating to Bill 124, and there may be amendments as the proposed Bill goes through the various readings. Bill 124 is not scheduled for second reading until October 28, 2019 when the Ontario legislature returns from an extended break. Impacted organizations should be aware that moderation periods may be retroactive to June 5, 2019. This means that salary rate or compensation increases that are made after that date, to the extent they are inconsistent with proposed Bill 124, could be clawed back once the legislation is in force.

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