



Breakfast Seminar Series

**PAY EQUITY
Are You Compliant?**

November 15, 2017

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As a boutique labour and employment law firm, Emond Harnden has represented the interests of management in both official languages for over 30 years.

Originally rooted in the Ottawa community, we have grown to represent employers in all territories and provinces of Canada.

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ABOUT

Raquel Chisholm is a Partner with the firm and advises employers at both the Ontario and Federal jurisdictions in all areas of labour and employment law, with a particular focus on human rights, disability management, and pay equity.

Raquel provides a wide variety of services including drafting employment contracts, management training, legal opinions, collective bargaining, and policy writing. She represents clients at labour arbitrations, as well as human rights hearings before the Human Rights Tribunal of Ontario ("HRTO"). Raquel's experience before the HRTO has led to her appointment on the HRTO's Practice Advisory Committee. Raquel also advises clients during investigations by the Canadian Human Rights Commission. Raquel has a great wealth of experience in the area of pay equity. Having knowledge and experience in both the provincial and federal sectors, she has aided clients with pay equity audits, conducted seminars for employers, negotiated pay equity plans, responded to and settled pay equity complaints, and assisted clients with addressing and managing their pay equity obligations both in achieving and maintaining pay equity.

Before embarking on her legal career, Raquel worked for The War Amputations of Canada and earned her Certified Association Executive ("CAE") designation through its Association Management Education Program. Raquel uses this experience to advise her charity and not-for-profit clients on corporate governance matters such as corporate law compliance, by-law revisions and conflict of interest matters.



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ABOUT

Sarah graduated cum laude from the University of Ottawa French Common Law Program in 2011 and was called to the Ontario Bar in 2012.

Sarah joined Emond Harnden as an Associate after having articulated with the firm. Fully bilingual, Sarah practices in all areas of labour and employment law, including privacy, education and human rights law.

Sarah provides labour and employment law support to a variety of clients in both the public and private sectors, including federally and provincially regulated employers. Her services include the preparation of employment agreements, legal advice regarding employment and labour law matters, drafting and review of workplace policies, defence against wrongful dismissal claims, representation in human rights matters, interpretation of collective agreement matters, responding to grievances and preparation for arbitration.

Sarah has appeared before administrative tribunals and courts in respect of both civil litigation and administrative law matters, including proceedings before the Small Claims Court, the Superior Court, the Federal Court, the Federal Court of Appeal, the Public Service Labour Relations and Employment Board, the Ontario Labour Relations Board and the Human Rights Tribunal of Ontario.



Pay Equity – Overview

What is Pay Equity?

- Objective is to address systemic gender-based discrimination in wages
 - In 2015, women earned 82 cents for every dollar earned by men
- The underlying premise is “equal pay for work of equal value”
- Not about paying men and women the same for doing the same job – about trying to assess the relative value of different jobs
 - e.g., nurses as compared to police officers



What is Pay Equity?

- Requirement to compare how employees are paid for doing work of equal or comparable value
- Value of jobs is based on the levels of **skill, effort, responsibility and working conditions** involved in doing the work
- Where female jobs are found to be of **equal or comparable value** to male jobs, they must be paid at least the same
 - You cannot reduce the wages of the male jobs but must raise the wages of the female jobs



How is Pay Equity Achieved?

- Different legislative approaches in different jurisdictions
- Ontario, Quebec, Manitoba and all three Maritime provinces have established a proactive regime for addressing pay equity under the *Pay Equity Act*
 - Explicit and specific frameworks that must be adopted in order for them to meet their obligations
- Federally – current regime is a complaints-based approach under s. 11 of the *Canadian Human Rights Act*, but changes are coming!





Pay Equity – Ontario

Pay Equity in Ontario

- Ontario's *Pay Equity Act* was implemented January 1, 1988
- Employers have two main obligations under the Pay Equity Act:
 - Establish (achieve) pay equity
 - Maintain pay equity
- First pay equity adjustments were required by 1994 at the latest
 - Could be phased in at 1% of payroll, but no longer for most employers
 - Immediate compliance is required



Who must comply?

- **Public sector** employers
 - Core public service
 - Broader public service
 - Listed in the Schedule and Appendix of the Act
- **Private sector** employers with ten (10) or more employees as of December 31, 1987, employees and bargaining agents
- **Unions** have joint obligations with the employer under s.7(2) of the Act:
 - No employer or bargaining agent shall bargain for or agree to compensation practices that, if adopted, would cause a contravention of subsection (1)



Where do you achieve pay equity?

- Employers are required by subsection 7(1) of the Act to establish and maintain compensation practices that provide for Pay Equity in "every establishment of the employer."
- An establishment is defined as all employees of an employer who work in a **geographic division** in Ontario
 - County, territorial district or regional municipality described in Ontario's Territorial Division Act
- You can agree with a union to expand the establishment to more than one geographic division
 - Same jobs? Same rates of pay?
 - Careful of comparisons



For whom must employer achieve pay equity?

- All unionized and non-unionized employees working in its establishment, including managers
- For unionized employees, employer is required to negotiate a separate Pay Equity Plan for each bargaining unit with the union
- Once the union and employer have agreed on pay equity plan, it is “deemed approved” by the Pay Equity Commission pursuant to s. 14(5) of the Act



Pay Equity Plans

- Pay Equity Plans must include:
 - Establishment
 - Job classes and their respective genders
 - Description of the Job Evaluation Tool
 - Results of the job evaluation
 - Any exceptions which permit differences in compensation
 - Adjustments required
 - When adjustments will be made
- Not every employer is required to “post” their plans



What is required to achieve pay equity?

Step One: Determine job classes

- Employer required to make comparisons between “job classes”
- A job class defined as one or more positions which:
 - Have similar duties and responsibilities;
 - Require similar qualifications;
 - Are filled by similar recruiting procedures; and
 - Have the same compensation schedule, salary grade or range of salary rates
- For unionized employees, you need the union’s agreement
 - Classification scheme may determine “job classes”



What is required to achieve pay equity?

Step Two: Determine gender predominance

- You need the Union’s agreement when establishing pay equity for the first time
- Three tests that must be applied:
 - The percentage of female or male incumbents in a job class (current incumbency – technically from early 1990s)
 - 60% female incumbents makes a class female
 - 70% male incumbents makes a job class male
 - Otherwise, gender neutral
 - Historical incumbency; and
 - Gender stereotype (key in single incumbency jobs)
- Genders rarely change over time



What is required to achieve pay equity?

Step Three: Conduct gender-neutral job evaluation

- Choose a job evaluation tool (need union's agreement)
 - Reflect your specific workplace, industry...
 - What do you value?
 - What do you pay for?
- Collect data
 - Make sure your job descriptions are up to date and accurate
 - Careful of setting qualifications too high for your needs



Three Job Comparison Methodologies

(i) Job-to-job comparison methodology

Determine whether the job rate of the female job class is at least the same as the job rate for its male comparator job class usually using pay bands. Look within a bargaining unit first, then outside

(ii) Proportional value methodology

Determine whether female job classes bear the same relationship between job value and job rate as the representative group of male job classes using regression analysis and wage lines



Three Job Comparison Methodologies

(iii) Proxy Method

- Broader public sector employers without sufficient male job classes
- Need to be deemed a proxy seeking employer by Pay Equity Commission
- Commission sets the proxy
- Employer required to identify “key female job class(es)” and compare them to similar job(s) within proxy employers (e.g., hospitals and municipalities)
- Start working towards the target rates using 1% of payroll
- Economic adjustments get added on to target rates



What is required to achieve pay equity?

Step Four: Make pay equity adjustments

- If it is determined that one or more female job classes are not earning the same job rate as the male comparator job classes in their respective pay band, or that their rate falls below the male wage line, Pay Equity adjustments will have to be made to those rates
- The “Pay Equity adjusted rates” become the new wage rates for those employees (male or female) who work in the female dominated job classes
- Retroactive payments and interest may be owed
- Some exceptions under the Act, but rarely applicable



Negotiating pay equity with Unions

- Employers have the obligation to bargain in good faith with the Unions (similar obligation as under *Labour Relations Act*)
- The parties have to “endeavor to agree” on two matters:
 - Gender-neutral job comparison system (job evaluation tool)
 - A pay equity plan (non-union plan may work)
- No need to negotiate with a new union following a raid – the old plan is valid



Negotiating pay equity with Unions

- In a unionized workplace:
 - Pay equity should be bargained with the union separate from collective bargaining
 - Pay equity should be negotiated prior to negotiating other monetary items (e.g., general wage increases)
 - S.7(2) of the Act
 - Budgeting – 1.4% on what??
 - Be clear what is and is not a pay equity adjustment



What is required to maintain pay equity?

- Employers have an obligation to maintain pay equity once achieved
 - To ensure female job rates remain at least the same as job rate of equal or comparable male job class
- If employer's actions or lack of action result in widening of pay equity gap or creating new gap, this is a breach of maintenance obligations
 - New jobs
 - Changed jobs



Pay Equity – Recent Developments

Maintenance Obligations

- Pay equity maintenance is the **employer's obligation**; no requirement to negotiate maintenance with the union unless there are **changed circumstances**
- Test of employer's actions is "reasonableness"
- If employer chooses to negotiate pay equity maintenance with the union, employer can proceed unilaterally in the event of an impasse
 - *CUPE, Local 2219 v. Perth and Smiths Falls District Hospital* (2014 – P.E.H.T.)
- Old terms of reference may be void



Maintenance Obligations – Proxy Method

- Continue making your 1% of payroll adjustments
- Be careful of new jobs
 - Have to pay them the target rates immediately
- Maintenance of pay equity requires comparisons between job classes within the employer's establishment
 - Employers not required to go back to proxy organization
 - Maintenance of the relationship between the value of a job class to the employer and the compensation attached to that value – internal relativity is key
 - Dollar per point



Bill 148 – Implications for Pay Equity

- Bill 148 – two aspects that may impact pay equity:
 - Increase in minimum wage
 - Requirement to eliminate differences in pay based on employment status (e.g., full-time, part-time, casual)
- Employers must consider how any wage increases impact male comparator job classes under their pay equity plans
 - Have any increases in wages of some employees resulted in new or expanded wage gaps between male and female job classes?



Pay Equity – Federal Jurisdiction

Current Federal Pay Equity Obligations

- In contrast to the Ontario regime, there is no separate administrative system dedicated to Pay Equity at the federal level
- Instead, Pay Equity is integrated into the overall human rights regime



Obligations under the CHRA

- Complaints-based regime under s. 11 of the CHRA:
 - 11. (1) It is a discriminatory practice for an employer to establish or maintain differences in wages between male and female employees employed in the same establishment who are performing work of equal value.*
- The Commission does not proactively initiate investigations to determine if cases of pay inequity exist
 - Complaints from employees and/or unions



Equal Wages Guidelines

- These are regulations under the Canadian Human Rights Act
- Not as detailed as Ontario's *Pay Equity Act*
- Like the Ontario system, evaluation of the work is based on skill, effort, responsibility and working conditions
- Genders are determined looking at the year preceding a complaint and the percentage depends on the size of the occupational group in question
- There are some exceptions where wage differences are permitted
- There is no guidance on the proper methodology to use



Canada Labour Code Obligations

- Complaints can also be filed by Human Resources and Skills Development Canada ("HRSDC")
- The *Canada Labour Code* states at subsection 182 (2) that:

Where an inspector has reasonable grounds at any time for believing that an employer is engaging or has engaged in a discriminatory practice ... the inspector may notify the Canadian Human Rights Commission or file a complaint with that Commission under section 40 of the *Canadian Human Rights Act*.
- These provisions of the CLC empower HRSDC to monitor compliance with section 11 of the CHRA as it would monitor any other provision of the CLC



Recent Federal Developments

- 2009 – *Public Sector Equitable Compensation Act*
 - Would have established separate equal pay for work of equal value regime for federal public sector
 - Never brought into force



New Federal Legislation on the Horizon...

- In 2004, the federal Pay Equity Task Force issued its report, “Pay Equity: A New Approach to a Fundamental Right”
- In June 2016, the Special Committee on Pay Equity filed its Report, “It’s Time to Act”
- It endorsed much of the 2004 Report



New Federal Legislation on the Horizon...

The Committee issued 31 recommendations including:

- Repealing the *Public Sector Equitable Compensation Act*
- Draft proactive pay equity legislation
 - Based on Ontario and Quebec schemes
 - To apply to public service, Crown corps, federally regulated private sector employers, and those in the Federal Contractors Program
 - To cover all unionized, non-unionized employees including FT, PT, casual, seasonal and temporary employees
 - Similar language to s. 7(2) of the Ontario *Pay Equity Act*
 - Unlike Ontario, require pay equity committees for larger organizations and mandate union involvement in maintenance



Report of the Special Committee on Pay Equity

More Recommendations:

- Obligation to create a pay equity plan
- Duty to maintain pay equity
- Considering fixed time-lines to achieve pay equity, with scalable measures for smaller employers
- New Pay Equity Commission and Pay Equity Tribunal
- Suggested one year for implementation



Report of the Special Committee on Pay Equity

The Proposed Pay Equity Commission would have authority to:

- Receive complaints
- Initiate proactive investigations
- Issue compliance orders
- Investigate complaints
- Conduct compliance audits



Report of the Special Committee on Pay Equity

The Proposed Pay Equity Tribunal would have authority to:

- Award a broad range of remedies, including compensation for intimidation or reprisal
- Order the disclosure and publication of information
- Prosecute and impose fines and sanctions
- File and enforce orders through the Federal Court
- Award costs



Recent Federal Developments

- 2016 – Government tables response to the Report of the Special Committee on Pay Equity
 - Government will: (i) consult with stakeholders; and (ii) develop a new, proactive pay equity regime
 - Government has promised legislation by end of 2018



Questions ?

**AN INTEGRAL
PART OF
YOUR TEAM**

**PARTIE
INTÉGRANTE
DE VOTRE
ÉQUIPE**



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