

## Legal update

### Coming soon to federally regulated employers: robust, proactive pay equity legislation

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**Employment And Labour**

#### Background

Federally regulated employers can now add compliance with proactive pay equity to their to-do lists for 2018. On October 29, the federal government tabled [Bill C-86](#), an expansive budget bill set to bring in a number of changes in the federal sphere, including the introduction of new standalone pay equity legislation. The *Act to Establish a Proactive Pay Equity Regime within the Federal Public and Private Sectors (Pay Equity Act)* (the *Act*) aims to provide employees in predominantly female job classes equal compensation for work of equal value performed by their predominantly male counterparts.

As previously discussed in our [April 2018](#) and [April 2016](#) publications, the new *Act* is largely inspired by the provincial pay equity regimes in Ontario and Quebec, in that it requires federally regulated employers with 10 or more employees to proactively develop a pay equity plan for their organizations. This stands in contrast to the current pay equity regime under the *Canadian Human Rights Act*, which requires employers to be compliant with pay equity, but does not require proof of that unless a complaint against the employer is lodged.

Once passed, the proposed legislation will apply to all federally regulated employers with 10 or more employees in the private and public sectors, as well as in cabinet and parliamentary offices<sup>1</sup>. Although employers with fewer than 10 employees will not be caught by the *Act's* new provisions, these smaller employers will remain subject to the complaint-based framework under section 11 of the *CHRA*.

#### Overview of newly tabled obligations

Depending on the employer's size and whether it is unionized, the *Act* contemplates a number of new obligations. Although the *Act* is subject to further amendments in both the House of Commons and Senate, the following provides employers with an overview of what future pay equity obligations may look like, based on how the *Act* reads today:

- **Joint Pay Equity Committees:** Larger employers (with 100 or more employees) and all unionized workplaces with greater than 10 employees will be required to establish a pay equity committee for the purposes of developing a pay equity plan. Under the proposed *Act*, both employer- and employee-side representatives will form the committees, of which two-thirds are composed of employees. Fifty percent of the committee must be made up of women. In unionized workplaces, the representation of all bargaining agents is mandatory. When making decisions, each represented group will be entitled to one vote on the committee. For smaller employers with fewer than 100 non-unionized employees, establishing a pay equity committee would be optional under the new *Act*.

- **Pay Equity Plans:** Within three years of the new *Act* coming into force, or becoming applicable, the committee will be required to develop and post a pay equity plan. Similar to the Ontario and Quebec provincial systems, the plan's purpose will be to identify all job classes in the workplace, determine the gender predominance of those job classes, define the value of the work of those job classes based on the skill and effort required to perform the work, the responsibility required in performing the work, and the conditions under which the work is performed. Based on the job evaluation process, the predominantly female job classes are then compared to the predominantly male job classes to determine if a wage gap exists.
- **Achieving Pay Equity:** Where the pay equity exercise reveals a discrepancy in the compensation received by a predominantly female job class in relation to the male comparators, the new *Act* would require the employer to increase the predominantly female job class's compensation to eliminate the inequity. Generally, the *Act* provides that the increase in compensation would become owing on the day after the third anniversary of this legislation's enactment. However, where the total amount of the increase in compensation is greater than 1% of the employer's payroll for the year, the *Act* contemplates a phase-in approach with incremental increases in accordance with the prescribed rules and schedules. Of note, as currently prohibited under the *CHRA*, the new *Act* would also bar employers from decreasing the compensation of a predominantly male job class to achieve pay equity. Finally, where there is an inconsistency between a collective agreement and the pay equity plan, the plan will prevail and any increases in compensation will be deemed to form part of the collective agreement.
- **Maintaining Pay Equity:** As part of its proactive approach, the new *Act* will impose a five-year maintenance cycle for employers to review their plans and identify and close any pay gaps that may have emerged during that time. Additionally, all employers subject to the new *Act* will be required to submit an annual statement containing all prescribed information to facilitate sufficient oversight by the Pay Equity Commissioner, the *Act*'s newly created regulator, whose position is discussed further below.

As currently constructed, the *Act* would see a Pay Equity Commissioner appointed within the Canadian Human Rights Commission (CHRC). The commissioner would wear the hats of both educator and enforcer, and be responsible for assisting employers, employees and bargaining units to understand their rights and obligations under the *Act*, and facilitate the resolution of disputes related to pay equity. The *Act* would also empower the commissioner to initiate audits, investigate disputes, objections, and complaints, and issue orders and monetary penalties.

In addition, the commissioner would be authorized to make public the name of an employer or bargaining agent that is deemed to have committed a violation under the *Act*, as well as the nature of the violation, the amount of the penalty imposed, and any other information specified by the regulations.

The budget bill also provides for the creation of a Pay Equity Unit, as well as a Pay Equity Division within the Canadian Human Rights Commission. The Pay Equity Unit would comprise CHRC officers and employees who support the commissioner in fulfilling his or her duties under the *Act*. The Pay Equity Division would address complaints of discriminatory practice related to pay equity in federally regulated workplaces.

Finally, the *Act* provides that certain decisions made by the commissioner or his or her agents could be subject to an appeal process before the Canadian Human Rights Tribunal, and thereafter challenged by judicial review in Federal Court.

## Takeaways

The *Act* is still at the beginning of the legislative process and therefore, it remains to be seen what further changes and amendments will be made as it makes its way through the Parliament's lower and upper chambers and committees. Although the *Act* does not prescribe a day for its coming into force, the government has signalled that passing this legislation is a priority, and expects to do so within the next year.

Certainly, once the *Act*'s language is finalized and passed into law, its obligations will have a significant impact on the vast majority of federally regulated employers, both in the public and private sectors.

Achieving and maintaining pay equity can be challenging, but the new *Act* provides clearer direction to pay equity committees than does provincial legislation. The important point to realize is that the pay equity exercise under the new regime will be a collaborative process between the employer and the employees. In preparation for this exercise, employers would do well to carefully examine their compensation practices and consider whether any internal compensation inequities will affect their ability to achieve and sustain pay equity in the near future.

We will keep monitoring developments in this area very closely in the coming months.

(Please see our [legal update](#) for an overview of other changes in Bill C-86 that will affect labour relations for federally regulated employers.)

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*The authors wish to thank Meaghan Farrell, articling student, for her contributions to this legal update.*

## Footnote

- <sup>1</sup> The *Act* as it applies to Parliament will be enforced differently than in the private and public spheres, so as to take into account parliamentary privilege.

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