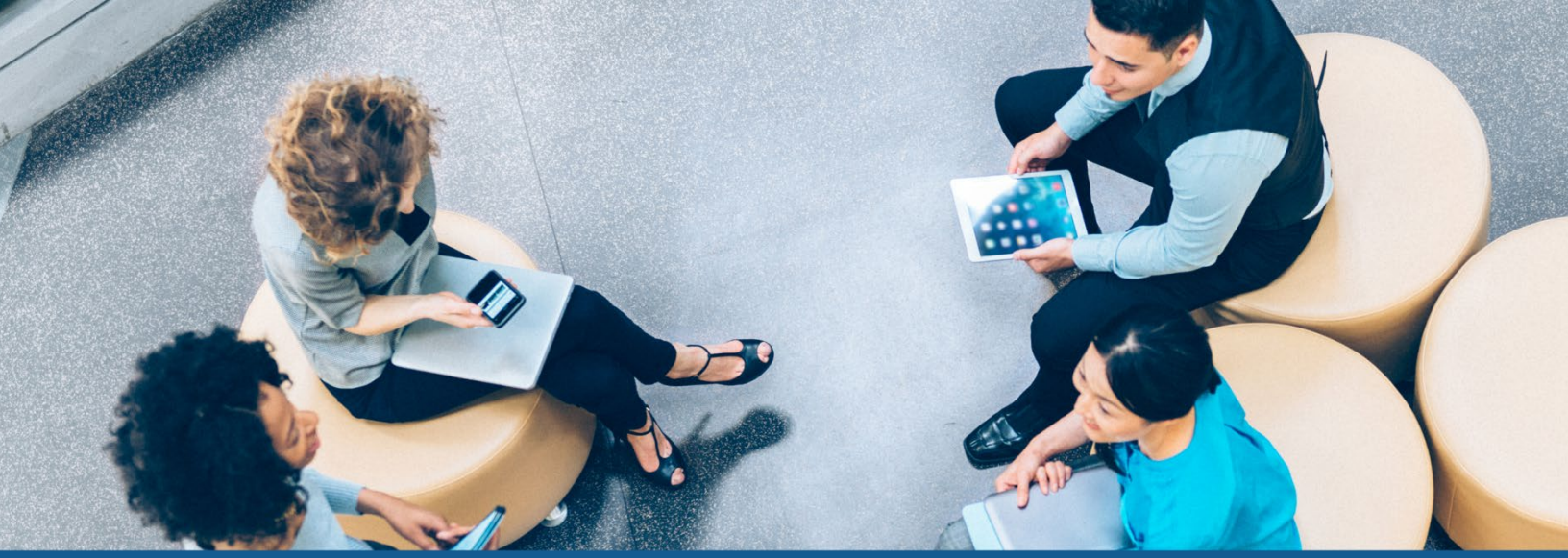

What's New in HR Law

Ontario Employers, Pay Equity or Pay the Price: Comply Now or Face Potential Liability Retroactive to 1988

June 25, 2024| By Alyssa Johnson

Bottom Line

Pay equity is a broad concept based on the idea that different jobs can be valued and compared to redress systemic gender discrimination in compensation. It is an ongoing process applicable to most Ontario employers, and requires more than simply a lack of discrimination in wages between men and women (also referred to as "equal pay for equal work"), or paying "market wages".

Employers run a serious risk of significant financial consequences if pay equity is overlooked, forgotten, or completed incorrectly. This "hidden liability" compounds over time. Depending on the length of non-compliance and number of affected employees, retroactive liability may be hundreds of thousands or even millions of dollars. To manage the potential costs, employers should take a proactive approach to developing a new Pay Equity Plan (the "Plan") if none has yet been created, or to reviewing existing Plans to ensure continued compliance.

Note: Various Canadian jurisdictions have pay equity legislation requiring certain employers to assess and address compensation for male- and female-dominated jobs. This Insight addresses an employer's obligations only under the Ontario legislation.

If you are a federal employer, see our earlier Insight identifying important obligations and deadlines.

If you are an employer in another Canadian province or territory, please contact your regular lawyer at the firm to discuss what pay equity obligations you have, if any.

Who Has *Pay Equity Act* Obligations?

In Ontario, since January 1, 1988, all public sector employers and all private sector employers with 10 or more employees have obligations under the *Pay Equity Act* (the "*Act*") to ensure jobs of equal value receive equal pay.

Why is Pay Equity Compliance Important?

Hundreds of Thousands of Dollars in Retroactive Compensation

The financial consequences for non-compliance may be devastating. There is no limitation period on pay equity, meaning that an employer can be ordered to pay retroactive adjustments to the date the adjustment should have first been paid. This date can be as early as 1988, depending on when the employer became subject to the *Act* and when the non-compliance occurred, plus interest. These retroactive adjustments are payable not only to current employees, but also to former employees.

In addition, the Pay Equity Hearings Tribunal ("Tribunal") has said that financial hardship does not excuse employers from their duty under the *Act* to provide pay equity adjustments. For example, in *Touchstone Youth Centre v George*, the employer was ordered to make pay equity adjustments between 1994 and 2010, which resulted in liability of approximately $298,000. The employer requested variance of this order and the 90-day timeframe in which to pay, as it would have to close down operations in order to make these payments. The Tribunal declined to vary the order, and required compliance within 30 days of the decision.

Employee/Union Complaints and Pay Equity Commission Audits Can Occur At Any Time

Employees and unions can bring a complaint at any time, and the Pay Equity Commission (the "Commission") proactively audits employers for compliance with the *Act*.

Employees, former employees, and/or unions may bring complaints to the Commission if they believe the Plan is non-compliant with the *Act* either at the outset when it is created, or if it ceases to be compliant. Because the *Act* has no limitation period, employees or unions can bring such complaints at any time.

Unions also frequently request to see an employer's Plan either as part of collective bargaining, or outside of bargaining as a way to achieve wage increases that could not be secured through direct bargaining. Unions, too, have obligations under the *Act* to ensure the employer has achieved and maintained pay equity, and are entitled to sufficient information to meet these obligations.

The Commission also runs a pro-active compliance program auditing employers. Employers are increasingly being contacted by the Commission with audit and disclosure requests and tight timelines.

It is therefore important for employers to take proactive steps towards compliance so that, when pay equity information is requested by and disclosed to the Commission or a union, it is available and establishes compliance with the *Act*.

Compliance Checklist

Consider the following preliminary questions: Does your company have a Plan? What date was the company supposed to comply with the *Act*? Did you meet this deadline? If the company does have a Plan, but it was created many years ago, do you still have the Plan and all accompanying documents? Have you reviewed these documents and assessed ongoing compliance since the Plan was created? Is your workplace exactly the same as when the Plan was developed (i.e. no restructuring, unionization, or other significant organizational changes)?

If you answered no or are unsure of the answers to any of these questions, or are otherwise unsure of the pay equity compliance process, you may be at risk of non-compliance.

The *Act* requires employers to take the following steps:

1. Achieve pay equity by creating a Plan and making any necessary pay adjustments.
2. Maintain pay equity, once achieved, by ensuring new wage gaps are not created.
3. Amend the Plan if the employing organization undergoes changes that render the original Plan inappropriate.

1. Achieving Pay Equity

According to the Commission, employers are required to develop and post Plans by the following dates:

- Private sector employers which started their organization after January 1, 1988: the day the 10th employee is hired.
- Private sector employers with fewer than 10 employees on January 1, 1988: the day the 10th employee is hired.
- Public sector employers which started their organization after January 1, 1988: immediately upon start-up.
- All other public sector employers and private sector employers with 10 or more employees on January 1, 1988 should have posted Plans and achieved pay equity in accordance with the applicable deadlines outlined in the *Act* and in the Plan.

Employers must take the following steps by these deadlines to achieve pay equity:

1. Determine the number of **establishments** and **pay equity plans** required.
2. Identify the **job classes**, based on duties, qualifications, recruitment procedures, and compensation structures.
3. Determine which job classes are **female dominant**, which are **male dominant**, and whether any are **gender neutral**.
4. Using a **gender-neutral job comparison system**, determine the value of job classes.
5. **Compare** job classes using a prescribed method of comparison.

6. **Prepare a Plan** identifying the foregoing criteria and whether any wage adjustments are required.

7. Make pay equity **adjustments**.

Many of these steps towards achieving pay equity are governed by specific rules, procedures, and definitions outlined in the *Act*, which also must be followed to ensure compliance.

In addition, in a unionized environment, wage increases negotiated in collective bargaining are not typically considered to be pay equity adjustments. Pay equity adjustments must be added in to the wage grid, often retroactively.

2. Maintaining Pay Equity

Compliance with the *Act* at one point in time does not guarantee future ongoing compliance. Employers must continue to ensure that gender-based differences in compensation do not emerge.

Changes in the following factors (and possibly others) may require a pay equity reassessment and a further adjustment in compensation:

- Changes to the duties and responsibilities of a job class;
- The creation or elimination of a job class, in particular, a male comparator job class; and
- Changes in the gender dominance of a job class.

3. Amending the Pay Equity Plan

The *Act* also requires employers to amend the Plan where there has been a change of circumstances such that the Plan is no longer appropriate.

This may occur where there has been a reorganization, restructuring, sale of business, merger, acquisition, or amalgamation.

Unionization may also be a change of circumstances under the *Act*.

Takeaway

If your company is subject to the *Act* and has not created a Plan, if you have developed a Plan but have not recently reviewed it to ensure continued compliance, or if there have been changes in your workplace which may require amendments to an existing Plan, now is the time take action to avoid the costly consequences of non-compliance.

Our Pay Equity Team can assist on all aspects of pay equity, including responding to questions from employees or unions, advising on and drafting Plans, evaluating job values and job classes, advising on pay equity maintenance, and litigating pay equity disputes.

Need More Information?

For more information or assistance with pay equity, contact Alyssa Johnson at ajohnson@filion.on.ca, one of our pay equity team leads, Carol Nielsen at cnielsen@filion.on.ca and Melanie McNaught at mmcnaught@filion.on.ca, or your regular lawyer at the firm.

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