

# Ontario pushes for greater pay transparency

## *Province looking to bridge gender compensation gap*

BY SARAH DOBSON

**LOOKING** to “advance women’s economic empowerment and build fairer, better workplaces,” the Ontario government has introduced legislation to increase pay transparency. This means employers would be required to track and publish information about compensation at their organizations.

They would also be barred from asking a job candidate about past compensation, while job postings would have to include a salary rate or range.

“It’s been more than 30 years since Ontario first passed pay equity legislation, but we are still working to close the gap,” said Premier Kathleen Wynne.

“We know that too many women still face systemic barriers to economic advancement. When women face increased harassment, violence, poverty and discrimination, it hurts our society and our economy. It’s time for change.”

If passed, Bill 203, Pay Transparency Act, 2018, will have significant implications for employers in Ontario, and it will become the first province to legislate pay transparency, according to Lisa Talbot, a partner at Torgys in Toronto.

“Despite the fact that this province has had pay equity legislation in place since 1987 and equal pay for equal work legislation in place, and the Employment Standards Act, it hasn’t moved the needle in terms of the gender wage gap for some time,” she said.

“Really, what the (pay) transpar-

ency is all about, ultimately, is for an employer to be accountable.”

But there are several concerning issues that stand out from this initial announcement, according to Amanda Boyce, an associate at Stringer Management Lawyers in Toronto, especially when it comes to the requirements around data collection and reporting, and publicizing compensation.

### **Stubborn wage gap**

While there had been equal pay for equal work provisions in the employment standards and human rights legislation since the 1960s, it was rare to have a clear comparison between a female and a male employee, so when the Pay Equity Act came into force, it was a big step, said Jordan Kirkness, senior associate at Baker McKenzie in Toronto.

But now it’s out of date, he said, and the government’s proactive approach makes sense.

“Oftentimes, it is much more effective, I think, to ask employers to demonstrate that they have the policies and procedures to do that, as opposed to going after them randomly or even on a complaint-based basis to see about whether they have complied.”

There certainly remains a stubborn wage gap between the sexes, ranging from 12 to 30 per cent, depending on the workplace, said Talbot.

“The purpose of pay equity is to redress gender discrimination and compensation for work that’s usually done by women compared to

work that’s usually done by men. The Pay Equity Act does not address the concept of equal pay for equal work... so it has limited impact and, honestly, limited application to the concept of equal pay for equal work.”

And while the Employment Standards Act (ESA) has provisions to ensure employees receive equal pay for performing essentially the same job, these haven’t been effective in closing the wage gap.

“We’ve seen this wage gap really not move for a good decade now,” she said. “There’s probably not been sufficient attention paid to the enforcement of those provisions, or really the true meaning behind those provisions.”

### **Job postings**

With Bill 203, employers would have to include information about the expected compensation, or the range of expected compensation, for a position in external job postings. And by compensation, the government means “all payments and benefits paid or provided to or for the benefit of a person who performs functions that entitle the person to be paid a fixed or ascertainable amount.”

That’s really broad — broader than public sector restraint legislation, as it goes beyond bonuses and salaries to include benefits and, presumably, pensions, said Kirkness.

“That’s going to be significant because every time you have a vacancy that you’re trying to fill, you’re going have to do some level of analysis,” he said. “Most employers, what they

will do is they’ll have an idea and it’s usually based on what the previous person was paid (and the) types of candidates, and then they make a very individual assessment, after they know who’s in the pool, about what they’d be willing to pay for each individual. And that is inherently biased... you have a problem with subjective elements creeping into the analysis there.”

“By requiring employers to do it before they post the job, I think you’re going to see more objective analysis.”

Compensation could include commissions and bonuses if they are fixed or “ascertainable,” but the salary ranges can still be broad, as long as they’re not attributable to gender, said Talbot.

“Those salary ranges can exist because of seniority, merit, commissions, output that can be tracked. Those broad salary ranges simply can’t be a result of gender distinctions or employment status.”

But there are many legitimate reasons why organizations do not publicly advertise compensation information in job postings, especially for higher-level and executive roles, said Boyce. And if a salary range is too broad, it can be meaningless.

“A lot of companies pay their employees using commission and bonus structures and I think that the structures of those commission and bonus plans are highly confidential, and for good reason. It’s because they give... employers a competitive advantage,” she said.

## Job questions

As part of the new act, employers would not be allowed to ask a job applicant about his compensation history. However, a job candidate would be allowed to voluntarily disclose this information, and if he did so, the employer would not be prohibited “from considering or relying on such information in determining compensation.”

This change shouldn’t be too contentious, said Boyce.

“It doesn’t stop you from asking a candidate what are their salary expectations, for example — it does seem to be focused on history.”

But a lot of employers, when it comes to setting compensation for new recruits, use as their baseline the information they obtain from the leading candidate about her current compensation, said Talbot.

“Then, they’ll offer something that’s an increase in order to recruit the person,” she said. “Certainly there are a lot of roles for which market comp analyses are done, but for a number of roles, really, the starting point for many employers is to find out what the person is currently making.”

## Transparency reports

Employers would also be required to prepare a pay transparency report that contains information relating to the employer, workforce composi-

tion and differences in compensation in the workforce with respect to gender and other prescribed characteristics.

This report would have to be posted online or in “at least one conspicuous place in every workplace of the employer,” and the Ministry of Labour could end up publishing or making this report available to the public.

“There’s a risk it’s going to be very public information, and that’s significant to employers because it really increases exposure,” said Kirkness.

The intended impact is to promote accountability with a view to reducing compensation gaps, said Talbot. “We’ve seen in other countries a reduction in gender compensation gaps with the introduction of similar legislation requiring employers to track and report,” she said, citing as examples Germany and Australia.

“It does have an impact.”

But when it comes to collecting the data, it’s unclear how this will be useful, said Boyce.

“How is it going to account for things like differences in roles, responsibilities, tenure — you know, how long has someone been with an organization?”

Even the ESA recognizes that people are paid different rates and

that’s OK when they have different levels of seniority, perform different kinds of work, or their work requires different levels of skill or effort or responsibility, she said.

“They want these employers to collect this pay discrepancy data, but will it account for those factors and, if so, how? When we get into these pay discrepancy discussions, even social scientists and data scientists have trouble controlling for these variables.”

## Anti-reprisal rules

Bill 203 also contains anti-reprisal rules, meaning employers could not penalize an employee who comes forward to ask about his compensation or discloses his compensation to another worker.

Many employers have confidentiality provisions in standard form employment contracts or confidentiality policies that prohibit employees from disclosing their compensation or discussing compensation matters, internally or externally, said Talbot.

“The legislation will prohibit employers, effectively, from enforcing those provisions to the extent that they are pre-existing,” she said.

“(Employers) will have to both update their standard form contracts and policies on a going-forward basis to the extent that they provide for

that type of prohibition and to the extent they have existing contracts in place. They don’t necessarily need to open those up but the anti-reprisal protections will then mean that they wouldn’t be in a position to enforce any confidentiality provisions relating to compensation.”

But under the employment standards, there can be no reprisal against an employee who asks another about her compensation to determine if people are being paid indiscriminately by sex, said Boyce.

“You cannot be disciplined for that,” she said. “It very closely mirrors what I’ve already seen added to the ESA via Bill 148 (Ontario’s Fair Workplaces, Better Jobs Act).”

But it’s important to have this rule, said Kirkness.

“Females need to be able to raise compliance issues without fear of losing their job or being disadvantaged, or they just won’t do it. Because who’s going to stick their neck out when you might lose your job or might not get a promotion? So that’s really important and I think I think it is a key element that needs to be implemented in pay equity.”

The new measures would begin with the Ontario public service and then apply to employers with more than 500 employees, and later, employers with more than 250 employees, said the government’s announcement.