

THE PUBLIC SECTOR AND MPP ACCOUNTABILITY AND TRANSPARENCY ACT, 2014 BECOMES LAW

On December 9, 2014 the Ontario legislature passed Bill 8, the *Public Sector and MPP Accountability and Transparency Act, 2014*. Bill 8 gives the government the authority to establish new “compensation frameworks” for certain senior public sector executives and implement new accountability and transparency measures for the broader public sector (“BPS”). Bill 8 was previously introduced as Bill 179, but died on the order paper.

Bill 8 contains amendments to several acts, including the *Broader Public Sector Accountability Act, 2010* (“BPSAA”), and creates a new statute called the *Broader Public Sector Executive Compensation Act, 2014* (“BPSECA”). The government has indicated that Bill 8 will act to expand oversight of government agencies and the broader public sector.

BPSECA applies to designated broader public sector employers, including school boards, hospitals, universities, colleges, Hydro One, the Independent Electricity System Operator, the Ontario Power Authority, Ontario Power Generation, and community care access corporations. In committee, the government amended BPSECA to also apply to additional organizations, most notably Ornge, Metrolinx, and the LCBO. BPSECA applies to employees and office holders who are “designated executives,” defined as persons who make at least \$100,000 in compensation per year, or who could potentially receive \$100,000 per year, and who are:

- the head of an organization;

- vice president or other executive (e.g., chief operating officer, chief administrative officer, chief information officer), regardless of title; or
- a director of education or supervisory officer of a school board.

Designated executives do not include full-time members of a board of directors, board of governors or board of trustees, or provosts and deans of colleges and universities.

BPSECA authorizes the government to make regulations establishing “compensation frameworks” that could impose compensation restraints on all designated executives, a limited class, or even a specific individual. These compensation frameworks could create limits on any aspect of an employer’s compensation plan, including salary, benefits, bonuses, or perquisites. These compensation frameworks would replace the existing freeze on salaries for designated executives, and may include sector specific hard caps.

A designated executive that is subject to a compensation framework cannot be paid more than is authorized by the compensation framework. However, there is an exception for designated executives holding office immediately prior to the effective date of the compensation framework. For three years following the effective date of the relevant compensation framework, executives who continue to be employed in the same position are entitled to continue under their previous compensation plan, even if the compensation under the plan exceeds the amount provided for in the compensation framework. After the third anniversary of the effective date, all designated executives will be subject to the maximum compensation provided for in the relevant compensation framework.

The government has indicated that it plans to rollout these compensation frameworks in phases, beginning approximately six months after the passing of the legislation. In devising these frameworks, the government has committed to:

- Consulting and liaising with stakeholders, including broader public sector representatives;
- Collecting and analyzing compensation information;
- Identifying and building in sector-specific considerations; and
- Using a range of comparators to determine target median compensation, with a focus on public sector comparators.

In addition, BPSECA gives the government the power to issue directives to BPS organizations, requiring these organizations to provide detailed compensation information with respect to one or more designated executives.

ENFORCEMENT OF COMPENSATION RESTRAINT MEASURES

A series of proposed measures would ensure that organizations are in compliance with any applicable compensation framework. These measures include:

- Providing the government with the ability to conduct audits;

- Requiring heads of organizations to attest to compliance with the compensation frameworks through a reporting period;
- Offence provisions to address wilful false reports, statements or attestations; and
- Overpayment provisions under which employers could be required to repay any amount that exceeds what is authorized under the Act.
- To ensure that BPS organizations would comply with their obligations under BPSECA, the Bill provides for a number of enforcement mechanisms, including:
 - New audit power that allows the government to appoint a public accountant to confirm an organization's compliance with the applicable compensation frameworks.
 - New offences resulting in a fine of up to \$5,000 for:
 - wilfully failing to provide report, statement or attestation under BPSECA;
 - wilfully providing a false report, statement or attestation under BPSECA; or
 - obstructing an auditor in the performance of their auditing functions under the Act.
 - New liability for "overpayments":
 - the executive to whom an overpayment has been made can be held personally liable for a corresponding debt to the organization; and
 - the organization that made an overpayment can be held liable for a corresponding debt to the Crown, which can be deducted from future financing.

For example, a compensation framework might institute a hard salary cap for a designated executive of an organization. Exceeding that salary cap could have serious consequences for both the executive and/or the organization. The executive could be held personally liable for the debt to the organization and/or the amount could be deducted from the organization's future funding in order to account for its debt to the government.

ACCOUNTABILITY MEASURES

Bill 8 builds on existing measures under the BPSAA, and contains several amendments to the BPSAA, including:

- Government-issued directives requiring certain BPS organizations, which include hospitals, school boards, universities and colleges, to prepare and publish business plans and/or other business or financial documents specified in the directive; and
- Government-issued guidelines with respect to how publicly funded organizations must prepare and publish business plans and other financial documents.

In addition, Bill 8 amends the *Excellent Care for All Act*, which applies to hospitals, to create the Patient Ombudsman. The Patient Ombudsman has the power to receive and investigate complaints from patients and former patients and make recommendations to the health sector organization.

Bill 8 also amends the *Municipal Freedom of Information and Protection of Privacy Act* to require institutions to put “reasonable measures” in place to preserve records within their custody and control. The Bill also creates a new offence where a person has altered, concealed or destroyed a record in order to deny a right of access to the record or the information contained in it.

Finally, Bill 8 amends the *Ombudsman Act*, expanding the Ombudsman’s powers to apply to matters related to school boards, universities and certain municipal entities. The Ombudsman would have the power to investigate complaints about these entities, make recommendations, and report on his findings. This new Ombudsman oversight could result in increased public scrutiny of school boards’ policies and practices.

CONCERNS

Stakeholders have raised various concerns with respect to Bill 8 and, in particular, with the upcoming introduction of the compensation frameworks. Apprehensions have been voiced with respect to the apparent blanket application of the legislation across the various, unique sectors. There is also concern that the compensation frameworks may disadvantage provincial public bodies in their ability to compete with municipalities and the private sector for talent. Furthermore, it remains to be seen how the government will address equity, regional and inflationary concerns in fashioning the compensation frameworks.

AUTHORS

Eric M. Roher
416.367.6004
eroher@blg.com

Rachael Belanger
416.367.6191
rbelanger@blg.com

LABOUR AND EMPLOYMENT LAW GROUP

Calgary

Sharon E. Borgland	403.232.9452
Duncan Marsden	403.232.9722
Landon Miller	403.232.9771
Brian D. Portas	403.232.9705
Laurie M. Robson	403.232.9482

Montréal

Stuart S. Aronovitch	514.954.2549
Robert Bonhomme	514.954.2540
Alexandre W. Buswell	514.954.2541
Shawn Connelly	514.954.2563
Corrado De Stefano	514.954.2535
Frédéric Desmarais	514.954.3117
Valérie Dufour	514.954.2567
Marie Garel	514.954.3131
Michael D. Grodinsky	514.954.3143
Danny J. Kaufer	514.954.2579
Justine B. Laurier	514.954.2558
Myriane Le François	514.954.2542
François Longpré	514.954.2543
Frédéric Massé	514.954.3168
Katherine Poirier	514.954.3175
Jean-René Ranger	514.954.2548
Alexis Renaud	514.954.3109
André Royer	514.954.3124
Maryse Tremblay	514.954.2648
Patrick Trent	514.954.3154
Philippe C. Vachon	514.954.3134
Maria Valente-Fernandes	514.954.2559

Ottawa

S. Margot Blight	416.367.6114
Noëlle Caloren	613.787.3536
Jacquie Dagher	613.369.4785
Carmen Francis	613.787.3532
Roberto Ghignone	613.369.4791
Morton G. Mitchnick	613.787.3568
Dan Palayew	613.787.3523

Toronto

S. Margot Blight	416.367.6114
Lisa Cabel	416.367.6217
Naomi Calla	416.367.6129
Matthew L.O. Certosimo	416.367.6068
Kate Dearden	416.367.6228
Bethan Dinning	416.367.6226
Jennifer M. Fantini	416.367.6726
James Fu	416.367.6513
Maria Gergin	416.367.6449
Adam Guy	416.367.6601
Clifford J. Hart	416.367.6580
Michelle Henry	416.367.6531
Morton G. Mitchnick	416.367.6413
Brian D. Mulroney	416.367.6009
Eric M. Roher	416.367.6004
Melanie A. Warner	416.367.6679
Robert W. Weir	416.367.6248
Stephanie Young	416.367.6032

Vancouver

Lisa Carlson	604.632.3521
Brandon Hillis	604.632.3401
Shelley-Mae Mitchell	604.640.4160
Gabriel M. Somjen	604.640.4013
Steve M. Winder	604.640.4118

BORDEN LADNER GERVAIS LAWYERS | PATENT & TRADE-MARK AGENTS

Calgary

Centennial Place, East Tower
1900, 520 – 3rd Ave S W, Calgary, AB, Canada T2P 0R3
T 403.232.9500 | F 403.266.1395

Montréal

1000 De La Gauchetière St W, Suite 900, Montréal, QC H3B 5H4
T 514.879.1212 | F 514.954.1905

Ottawa

World Exchange Plaza, 100 Queen St, Suite 1300
Ottawa, ON, Canada K1P 1J9
T 613.237.5160 | F 613.230.8842 (Legal)
F 613.787.3558 (IP) | ipinfo@blg.com (IP)

Toronto

Scotia Plaza, 40 King St W, Toronto, ON, Canada M5H 3Y4
T 416.367.6000 | F 416.367.6749

Vancouver

1200 Waterfront Centre, 200 Burrard St, P.O. Box 48600
Vancouver, BC, Canada V7X 1T2
T 604.687.5744 | F 604.687.1415

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