Ontario Introduces Wage Restraint Legislation

Bill 124, the *Protecting a Sustainable Public Sector for Future Generations Act, 2019*

Introduction

On June 5, 2019, the President of the Treasury Board introduced the *Protecting a Sustainable Public Sector for Future Generations Act, 2019* (Bill 124) into the Legislative Assembly. If passed, Bill 124 would impose a series of 3-year "moderation periods" (in the form of salary and compensation caps) on a variety of unionized and non-unionized workplaces. During these periods, increases to both salary rates and to existing or new compensation requirements (including salary rates) would be capped at 1% per year, subject to certain exceptions described below.

However, Bill 124 does not apply to override compensation increases provided for in existing collective agreements or arbitration awards, so long as those agreements are in effect and/or awards made on or before June 5, 2019.

Bill 124 also purports to prohibit any salary or compensation increases before or after the moderation period, where they are designed to make up for the salary and compensation restraints imposed by the Act.

This overview is restricted to providing an explanation of the provisions of Bill 124 itself. However, given the extent to which Bill 124 can be seen to interfere with the right to free collective bargaining (including the right to strike, or to interest arbitration in the case of essential service workers - rights which the Supreme Court of Canada has now found to be constitutionally protected under section 2(d) of the *Canadian Charter of Rights and Freedoms*), it can be anticipated that challenges will be brought to the constitutionality of Bill 124, if and when it is enacted.

Who Does Bill 124 Apply to?

Bill 124 applies to a wide range of employers, employees and unions. The Act would apply to the following employers:[1]

- The Crown in Right of Ontario;
- Every agency of the Crown;
- School Boards;

[1] Section. 5(1). Unless otherwise noted, all citations are to the provisions of Bill 124 as it read at first reading on June 5, 2019.

- Universities and Colleges;
- Public Hospitals;
- Non-profit long-term care homes;
- Children's Aid Societies;
- Ontario Power Generation and its subsidiaries;[2]
- Ornge (the province's air ambulance and medial transport authority);
- Every authority, board, commission, corporation, office or organization of persons where a majority of its directors, members or officers are selected or appointed by Cabinet or a Minister of the Crown (for example, the Independent Electricity Systems Operator);
- Certain transfer payment recipients (i.e. every authority, board, commission, corporation, office or organization that is not-for-profit and, in 2018, received at least one million dollars in funds from the government of Ontario); and
- Any other authority, board, commission, committee, corporation, council, foundation or organization that may be prescribed by regulation.

Bill 124 would not, however, apply to municipalities, local municipal boards, or boards, authorities, offices or other organizations whose members are chosen or appointed under the authority of a municipal council.[3] It would also not apply to "for-profit" entities, unless a regulation under the Act were made to extend its application.[4]

In terms of bargaining agents, Bill 124 would apply to the workers and their bargaining agents in workplaces covered by the legislation.[5] This includes certified and voluntarily recognized bargaining agents under the *Labour Relations Act*, the *Crown Employees Collective Bargaining Act, 1993*, the *School Boards Collective Bargaining Act 2014*, the *Colleges Collective Bargaining Act, 2008*, the *Ontario Provincial Police Collective Bargaining Act, 2016*, as well as any organization that collectively bargains or negotiates terms and conditions of employment relating to compensation or that has a framework for collectively bargaining over compensation.

In turn, "collective agreement" is broadly defined to include a collective agreement within the meaning of the *Labour Relations Act, 1995*, as well as "an agreement, whether negotiated or the result of an arbitration award, between an employer or an employers' organization and a bargaining organization to which the Act applies, in respect of compensation for employees".[6]

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[2] Sections 34-35 (inserting s. 190 into the *Labour Relations Act, 1995* and s. 143 into the *Employment Standards Act, 2000*).
[3] Section 5(2).
[4] Section 5(2)(4).
[5] Sections 6, 8.
[6] Section 2.

The legislation does not, however, apply to various judicial officers, including judges, justices of the peace and masters,[7] or to designated executives within the meaning of the *Broader Public Sector Executive Compensation Act, 2014*.[8] The Minister also has the power to exempt the application of the Act to any employees or classes of employees.[9]

When are the "Moderation Periods" Established Under Bill 124?

The restraint imposed by Bill 124 applies to what the Bill defines as "moderation periods", which will last for 3 years. However, these periods commence at different times for different employers and employees, depending for the most part on whether a collective agreement was in effect on June 5, 2019.

Unionized Workplaces:

For unionized workplaces, the start of a moderation period depends on the status of the applicable collective agreement or arbitration awards as of June 5, 2019 (the date the legislation was introduced in the Legislative Assembly), as follows:[10]

- Where a collective agreement is in force on June 5, the moderation period begins the day after that agreement expires.

- Where there is no collective agreement in force as of June 5 because the last agreement has expired, the moderation period begins on the day following the expiry of the previous agreement.

- Where there is no collective agreement in force as of June 5 because the parties are bargaining their first collective agreement, the moderation period begins on the commencement date of the first collective agreement.

In addition, when it comes to interest arbitration awards, the legislation provides that if, as of June 5, the parties have been or are engaged in interest arbitration, the start of the moderation period depends on whether an award was issued on or before June 5. If no award had yet been issued, the moderation period begins as of the commencement of the collective agreement that results from arbitration, so that the arbitration award would be subject to the restrictions in the Act. If an award had been issued by June 5, the moderation period begins the day following the expiry of the agreement that results from the arbitration process.

Non-Unionized Workplaces:

For non-unionized workers, the moderation period can begin on any date selected by the employer that is on or before January 1, 2022.[11] The only exception is where a non-unionized

[7] Section 7.
[8] Section 6(3). That statute already establishes a separate system for regulating the compensation of certain senior executives working in the broader public sector.
[9] Section 6(2).
[10] Section 9.

employee's compensation increases in step with increases provided to other workers under a collective agreement. In that case, the moderation period for the non-unionized worker is required to line up with the moderation period applicable to the collective agreement.[12]

What are the Restrictions Imposed During the Moderation Period?

Bill 124 imposes limits to increases to salary rates, as well as incremental increases to any existing or new compensation entitlements during the three-year moderation period, whether as a result of negotiation, collective bargaining, or interest arbitration.

Limit to Salary Rate Increases:

Salary rates are defines as including "a base rate of pay, whether expressed as a single rate of pay, including a rate of pay expressed on an hourly, weekly, bi-weekly, monthly, annual or some other periodic basis, or a range of rates of pay."[13]

Bill 124 would impose a ceiling of 1% on any increases to these salary rates during each 12-month period in a moderation period. The Bill also provides that increases may be less than 1%.[14]

However, this limit does not apply to increases under either a collective agreement or a compensation plan that permits salary increases due to length of time in employment, an assessment of performance, or the worker's completion of a program or course of professional or technical education.[15] In effect, what this means is that workers may still move up pre-existing salary grids or receive merit increases, but that the grids themselves may not be altered beyond the annual 1% caps imposed during the moderation periods.

Limits on Overall Compensation Increases:

Bill 124 imposes a separate 1% annual cap on any incremental increases to existing or new compensation entitlements (including increases to salary rates).[16] Compensation is a broader concept than salary. It is defined to include salary, but also all other payments provided to or for the benefit of workers, including benefits, perquisites and all other forms of discretionary or non-discretionary payments.[17]

The legislation provides that the 1% cap on incremental increases to compensation is to be calculated on the basis of the average for all employees covered by a collective agreement or, in the cases of workers not represented by a union, all unrepresented workers in the workplace.

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[11] Section 14(1).
[12] Section 14(2).
[13] Section 2
[14] Sections 10(1) (unionized workers) and 14(1) (non-unionized workers).
[15] Sections 10(2) (unionized) and 14(2) (non-unionized).
[16] Sections 11(1) and (2) (unionized) and 16(1) and (2) (non-unionized).
[17] Section 2, definition of "compensation".

There is also an important exception for situations where the cost to an employer to maintain an existing benefit at the same level increases. In that case, so long as the benefit itself does not change, any increase in the cost of providing that benefit does not count as an incremental increase in compensation for the purposes of the 1% cap.[18]

Importantly, salary increases based on length of service, performance or educational programs – which as set out above do not count against the 1% cap on salary increases – would also not count against the 1% cap on overall compensation increases.[19]

Can Lost Increases to Salary or Compensation During a Moderation Period be Made Up Later?

Bill 124 also purports to regulate increases to salaries and compensation outside of moderation periods. The legislation would prohibit increases – either before or after a moderation period – that are intended to make up for increases that would have been provided but for the legislation.[20]

In other words, Bill 124 prohibits employers from providing larger salary or benefit increases before or after a moderation period in order to make employees "whole".

As a practical matter, it may be difficult in any particular case to determine whether a given increase is due in whole or in part to a desire to make up for depressed increases during a moderation period. However, as discussed below, the Minister has broad discretion to decide whether or not a given salary increase is designed to make up for the restrictions imposed during the moderation period.

How Will the Government Monitor Compliance with Moderation Period Rules?

Bill 124 provides an extensive directive-making authority for the Management Board of Cabinet, enabling it to collect, disclose and use a wide range of information in order to ensure compliance with the Act.[21]

Management Board is empowered to direct employers governed by the Act to provide any information related to collective bargaining or compensation that Management Board considers appropriate for the purpose of ensuring compliance with the Act. This may include (but is not limited to) information respecting collective agreements, bargaining mandates, costing information, submissions to arbitrators, and compensation policies.[22]

[18] Section 11(3) (unionized) and 16(3) (non-unionized).
[19] While the legislation does not explicitly state this, it is the necessary implication of sections 11(2) and 16(2), which provide that salary increases other than these types of exempted increases *do* count as increases to total compensation. The fact that these non-exempted salary increases are specifically included in the calculation of compensation increases suggests that exempted salary increases would not be included. Moreover, including salary increases based on seniority, merit or training in the calculation of total compensation increases would, in the vast majority of cases, render the salary cap exemption meaningless.
[20] Section 18.
[21] Section 19.
[22] Section 19(2).

These directives may be general or specific in their application,[23] and must be complied with by any employer to whom they are directed.[24]

The directive may require that the information be provided to any persons that the Management Board considers appropriate,[25] including even political staffers in a Minister's Office.[26]

Directives issued under the Act take precedence over Ontario's privacy legislation.[27] Any employer who provides personal information in accordance with a directive is deemed to comply with both the *Freedom of Information and Protection of Privacy Act* and the *Municipal Freedom of Information and Protection of Privacy Act*.[28] While those statutes otherwise require that persons whose personal information is being disclosed be notified prior to disclosure, Bill 124 would override this requirement, merely providing that the information collected by way of a directive is to be kept confidential and only be used for the purposes authorized in the directive itself.[29]

All directives made under Bill 124 would have to be published on a public website.[30]

How Will the Government Enforce Compliance with Bill 124?

Apart from section 13 of the Bill, which provides that the Act prevails over any collective agreement or arbitration award, the Bill would grant broad and sweeping powers to the Minister[31] to review collective agreements and arbitral awards to determine if they comply with the Act.

The Minister is empowered, in his or her "sole discretion", to make an order that a collective agreement or arbitral award is inconsistent with the Act.[32] However, parties to an agreement or award must be given notice that the Minister may exercise their power and be given 20 days to make submissions.[33] After those 20 days, the Minister may make an order without any further notice to the parties.[34]

Where the Minister has made an order declaring that a collective agreement or arbitral award is not consistent with the Act, the agreement or award is rendered void, and is deemed to have

[23] Section 31(2).
[24] Section 31(1).
[25] Section 19(5).
[26] Section 19(5)(a)(ii).
[27] Section 19(6). In particular, directives issued under s. 19 prevail over the provisions of both the *Freedom of Information and Protection of Privacy Act* and the *Municipal Freedom of Information and Protection of Privacy Act*. We note, however, that they do not take precedence over the *Personal Health Information Protection Act*. While there are likely to be few cases where a directive would call for the disclosure of personal health information, were one to do so, it may be that *PHIPA* would take priority.
[28] Section 19(3).
[29] Section 19(4).
[30] Section 31(5).
[31] The Minister is defined as the President of the Treasury Board or another Cabinet Minister granted the powers of the President of Treasury Board.
[32] Section 20(1).
[33] Section 20(2).
[34] Section 20(3).

never had any effect.[35] As drafted, it may be that this means that the entire collective agreement or award would be void, and not merely the terms that exceed the 1% increases permitted by the Act.

In these circumstances, the parties are required to return to the same stage in bargaining as they were at immediately before they settled the terms of their agreement, and are required to bargain a new agreement that complies with the Act. While this takes place, the terms and conditions of employment that existed immediately before the voided agreement came into force apply.[36]

Similarly, where the Minister voids an arbitral award, the parties are required to conclude a new agreement. The arbitrator who issued the voided award remains seized and may issue a new award that complies with the Act, or the parties may negotiate a compliance collective agreement. As where the Minister voids a collective agreement, the terms and conditions of employment that existed immediately prior to the issuance of the award apply.[37]

Power to Exempt Employees or Collective Agreements from the Application of Bill 124

Notably, the power given to the Minister to determine whether a collective agreement or award is inconsistent with the Act suggests that the Minister may, in some circumstances, decline to make such an order.

As well, the Bill provides that regulations may be enacted exempting any employee or class of employees from the application of the Act[38] or exempting any collective agreement from the application of the Act.[39]

As such, parties making submissions to the Minister under the process discussed above are not limited to arguing that their agreement's comply with the Act's caps. They may also wish to consider advocating for the Minister to issue regulations exempting their agreements.

Bill 124 also allows for regulations to govern any transitional matters that arise from the enactment of the Act. Any transitional regulation would take precedence over the provisions of Bill 124 itself.[40]

Restriction on Legal Challenges to Bill 124 or to Decisions Made Under Bill 124

Bill 124 contains an unusually lengthy set of rules that appear designed to limit the ability of both individual workers and unions to challenge the legislation itself or decisions made under it.

With respect to direct challenges to the law, Bill 124 removes the jurisdiction of either the Ontario Labour Relations Board or labour arbitrators to inquire into either the constitutionality of the Act or its consistency with the *Human Rights Code*.[41] While somewhat unusual in Ontario,

[35] Section 13.
[36] Section 20(4).
[37] Section 20(5).
[38] Section 6(2).
[39] Section 21.
[40] Section 32(4)-(5).
[41] Section 23.

provisions limiting tribunals' jurisdiction in this manner are valid and enforceable.[42] However, these provisions would not prevent a party from challenging the constitutionality of Bill 124 before the Superior Court.

Bill 124 also provides that the power of the Minister to void collective agreements or arbitration awards is to be exercised in the Minister's "sole discretion". While any such decision would still be subject to challenge by way of judicial review in the Divisional Court,[43] it can be expected that the Minister will argue that, by providing that decisions are to be made in the Minister's sole discretion, a court should extend the Minister's decisions considerable deference on any judicial review application.

Bill 124 also contains a number of provisions designed to prevent persons from seeking legal remedies for losses that result from the operation of the law. Specifically, Bill 124 provides that:

- Compliance with the Act is not constructive dismissal either at common law or under provisions of the *Employment Standards Act*;[44]

- Acts done in compliance with the Act do not constitute expropriation or the tort of injurious affliction;[45]

- There is no cause of action against the government or an employer for any acts done are a direct or indirect result of Bill 124, regulations made under it, or directives issued by the Management Board, and no proceeding may be instituted or maintained based on any such acts;[46]

- No person is entitled to any compensation for any loss or damages occasioned directly or indirectly as a result of Bill 124;[47]

- Nothing in Bill 124 alters any existing employment relationship or creates an employment relationship between the Crown and affected employees;[48]

- No complaint under the *Employment Standards Act* may be made or investigated in respect of any provision of Bill 124.[49]

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[42] See *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, [2003] 2 SCR 504; *Tranchemontagne v. Ontario (Director, Disability Support Program)*, [2006] 1 SCR 513; *R. v. Conway*, [2010] 1 SCR 765.
[43] See *Judicial Review Procedure Act*, RSO 1990, c. J.1, ss. 2(1), 6(1). See also *Crevier v. A.G. (Quebec)*, [1981] 2 SCR 220.
[44] Section 24.
[45] Section 25.
[46] Section 26(1) and (2). While drafted in broad terms, this provision would appear to be limited to proceedings of a civil nature, seeking damages or other equitable remedies. As a matter of constitutional law and principle, they are best read as not purporting to bar proceedings for judicial review, or challenges to the constitutionality of the legislation itself.
[47] Section 28.
[48] Section 30.

Protection of Certain Statutory Rights

Although as set out above, Bill 124 removes many potential avenues for redress for workers and unions, the legislation purports to preserve the right to collectively bargain and to engage in lawful strikes or lockouts.[50] Of course, these rights are clearly abrogated by the Bill's overriding restrictions on the salary and compensation increases that can be negotiated or awarded.

The Bill also contains limited provisions that preserve legal rights in relation to compensation increases that may be potentially in excess of the 1% restriction otherwise imposed. In particular, the Act provides that nothing in the Act or regulations is to be interpreted or applied so as to reduce a right or entitlement

- under the *Human Rights Code*;[51]
- under the *Employment Standards Act* prohibiting discrimination in pay or benefits on the basis of sex (or, in the case of benefits, age or family status);[52]
- to the applicable minimum wage;[53] or
- under the *Pay Equity Act*.[54]

What Comes Next?

Bill 124 was introduced in the Legislative Assembly on June 5, 2019. However, it is anticipated that the legislation would not be passed before the Legislature returns at the end of October following the summer recess. Nonetheless, it is clear that the government intends that once the legislation is passed and is proclaimed in force, it will apply retrospectively to June 5, 2019 (the date it was introduced). This means that any agreements negotiated or arbitration awards made after June 5, 2019 would be subject to the restrictions contained in Bill 124.

For those interested, the government has invited feedback to be provided to psconsultations@ontario.ca.

[49] Section 35 (inserting s. 143(3) into the *Employment Standards Act*).
[50] Sections 4 and 5.
[51] Section 22(a).
[52] Section 22(b).
[53] Section 22(c).
[54] Section 22(d).