



Addressing Unique Challenges Faced by Federally Regulated Employers

| Tuesday, November 2, 2021

Agenda



- Post-Election Update
- Workplace Harassment and Violence Regulations: Lessons from a Changed Landscape

What Have We Learned Since the Regulation Took Effect

- Complying with New Proactive Pay Equity Rules
- Complaints and Adjudication



Post-Election Update

- Jonathan Kalles, Senior Consultant, Québec
McMillan Vantage

Post-Election Update

Q&A





Workplace Harassment and Violence Regulations: Lessons from a Changed Landscape

What Have We Learned Since the Regulation Took Effect

- Kyle M. Lambert, Partner, Ottawa

| What We Will Cover

- Brief overview of the Regulation
- Existing requirements
- Pending obligations
- Lessons learned
 - Occurrence management
 - Adapting policies to address key concerns
- Return to office considerations

| The new regime: Background

- *Canada Labour Code*
 - Amended pursuant to Bill C-65
- *Work place Harassment and Violence Prevention Regulations (“**Regulations**”)*
 - Replace Part XX of the *Canada Occupational Health and Safety Regulations*
- *Code and Regulations* must be read together
- Overall, the legislation requires employers to be more proactive
- Changes took effect on January 1, 2021
 - Other key deadlines in the first 15 months

| Investigating and resolving complaints



Notice of Occurrence

Official “start” of the process.

Key question:
Was there an “occurrence”?



Negotiated resolution

Your goal!

Key question:
What is the principal party’s objective?



Conciliation

Option 1
(if negotiation fails)

Key question:
How can you approach the principal party differently?



Investigation

Option 2
(if negotiation fails)

Key question(s):
What must be provided to the investigator? / What’s next?

| Your Obligations in Year 1

- Confirm and begin working with your Applicable Partner
 - Health and safety representative
 - Workplace health and safety committee
 - Policy committee
- Policy
 - Must include a process for resolution of occurrences, among other things
- Workplace Assessment
 - Identification of risks and preventions
- Pending:
 - First annual report
 - **January 1, 2022** – Provide harassment and violence prevention training to all employees hired before January 1, 2021
- Ongoing – Managing the occurrence process

| Workplace assessments

- Every employer is required to work with its Applicable Partner to jointly carry out a workplace assessment that requires you to identify risk factors and develop and implement preventative measures
- No hard deadline, but the Regulation contemplates early timeline, particularly since updates are required every three years
- Must be reviewed if:
 - An occurrence is not resolved and the principal party ends the process early,
 - If the responding party is no longer an employee, or
 - There are multiple occurrences involving substantially the same matters
- Overall: Should be done ASAP if not done yet; chance to update one(ish) year in

Annual Report

- On or before March 1 of each year – due in 4 months
- Must include:
 - the total number of “occurrences”, itemized by whether sexual harassment and violence or not
 - the number of occurrences that resulted in the death of an employee,
 - if known, the number of occurrences that fell under each prohibited ground of discrimination set out in the [*Canadian Human Rights Act*](#),
 - the locations where the occurrences took place, specifying the total number of occurrences that took place in each location,
 - the types of professional relationships that existed between the principal and responding parties, specifying the total number for each type,
 - the means by which resolution processes were completed and, for each of those means, the number of occurrences involved, and
 - the average time, expressed in months, that it took to complete the resolution process for an occurrence

Lessons Learned in Year 1

The “occurrence” process

- The Regulation spells out step-by-step requirements, but there are gaps
 - Partially, but not entirely, filled by the Labour Program’s guidance
- What amounts to a “notice of occurrence”?
- Responsibilities to responding parties:
 - Monthly updates, but only after the responding party is first contacted
 - But, the Regulation is not clear on when you first need to contact a responding party
- Can you negotiate while an investigation is ongoing?
 - In a word, “yes”
 - Caution is required – circumstances in which ongoing discussion will be worthwhile are limited
 - Employers can ensure that a notice of occurrence has enough information to permit a response
 - Once a report is out, the “resolution” cannot be by negotiation or conciliation

| Higher level: Managing “occurrences”

- Where it all starts: *Was the incident an “occurrence” / Is the principal party alleging workplace harassment or violence?*
- Process:
 - Response team
 - “Designated Recipient”
 - “Person who is designated”
 - Others that need to be involved
 - Identification of interests and goals
 - Sound too much like “Getting to Yes”? It should! Don’t lose sight of the fact that this is a people-driven process!
 - Know your deadlines
 - Lots of time to achieve a negotiated resolution

Timeline: Requirements After a Notice of Occurrence



Policies: Opportunities for revision

- All employers should have a workplace harassment and violence prevention policy
- Must be developed jointly with your applicable partner
 - Must be reviewed with your applicable partner and updated at least once every three years and following any change to an element
- The annual review is an opportunity to assess what has worked and what can be improved upon
- A few considerations:
 - Are you casting your net too widely?
 - Do all involved know their roles?

Return to office: Potential for greater risk?

- Return to office (RTO) issues remain front of mind
 - Really, they have been for over a year
 - Focus has largely been on two things: (1) COVID; and (2) ability to mandate RTW for workers that may not want to return
- Consider less immediate implications of employees being back in a traditional workplace
 - Added sensitization to mental health concerns
 - Employees may be more likely to raise complaints if they do not want to RTO
 - Employees have been at home, on their own time (somewhat) and acting as they please (except on video calls, hopefully)
 - Increased harassment, disproportionate to increased numbers in the office, is a risk

RTO and harassment: Points to consider

- Review your policy with your applicable partner
 - Does the policy need to address RTO considerations or changed balance between work from home and in-office work?
 - Would a written reminder to employees suffice?
- Consider a training refresher
 - Recall that all employees hired prior to January 1, 2021 must be trained by January 1, 2022, then every three years
 - Even if all mandatory training is complete, would a refresher help?
 - Opportunity: Limit your exposure under the Regulation by guiding employees on where various issues can be raised

Workplace Harassment and Violence Regulations: Lessons from a Changed Landscape

Q&A





Complying with New Proactive Pay Equity Rules

- Marie-Eve Jean, Associate, Ottawa

| What We Will Cover

- **How is the *Pay Equity Act* enforced?**
 - Who oversees the regime?
 - Commissioner's mandate
 - Commissioner's Role and Responsibilities
- **Tools and Resources to Support Employers**
- **What Should Employers be Doing?**
 - Forming a Pay Equity Committee
 - Building a Pay Equity Plan
- **Administrative Monetary Penalties and Fines**
 - What are they?
 - How does it work?
 - How much?
 - Other enforcement tools
- **Key Takeaways**

| How is the *Pay Equity Act* Enforced?

What is the Current Situation?

Based on recent data, in Canada, for every dollar earned by a man, a woman earns 89 cents, as measured in hourly wages for full-time and part-time workers.

| Who Oversees the Regime?

- Pay Equity Commissioner – Karen Jensen
 - Full-time member of the Canadian Human Rights Commission
- Supported by a specialized Pay Equity Unit
 - Officers and employers of the Canadian Human Rights Commission



| Pay Equity Commissioner's Mandate

- The Commissioner's mandate is to (s 104(1)):
 - a) ensure the administration and enforcement of the *Act*;
 - b) assist persons in understanding their rights and obligations under the *Act*; and,
 - c) facilitate the resolution of disputes relating to pay equity.

| The Commissioner's Mandate, cont.

- In carrying out this mandate, the Commissioner must (s 104(2)):
 - a) monitor the implementation of the *Act*, including the establishment and updating of pay equity plans;
 - b) offer assistance to employers, employees and bargaining agents in relation to pay equity matters and applications, including in relation to complaints, objections and disputes, and decide any matter or application over which he or she has jurisdiction under the *Act*;
 - c) develop tools to promote compliance with the *Act*;
 - d) educate and inform employers, employees and bargaining agents of their rights and obligations under the *Act*;
 - e) undertake and publish research related to pay equity matters; and
 - f) maintain close liaison with similar bodies or authorities in the provinces in order to coordinate efforts when appropriate.

Responsibilities: Pay Equity Commissioner

- The Commissioner's primary role is to provide leadership and direction for the administration and enforcement of the *Act*.
- She is working to develop tools and resources that will provide employers with support to implement the *Act*.
- The Commissioner believes that:
 - Pay equity is a tool, rather than an impediment, to economic recovery following the COVID-19 pandemic.
 - Pay equity should be used as a tool to build stronger businesses, governments and economies.
 - It is all about cooperation, collaboration and compromise.

Role of the Pay Equity Commissioner

- The Canadian Human Rights Commission says the role of the Office of the Pay Equity Commissioner is:
 - Responding to questions about pay equity;
 - Deciding on requests to modify how the workplace applies the *Act*;
 - Dealing with any complaints of discriminatory practice related to pay equity under section 11 of the *Canadian Human rights Act*;
 - Assisting workplace parties to resolve disputes; and,
 - Monitoring and auditing compliance with the *Act*.

The Commissioner's Approval Responsibilities

- The Pay Equity Commissioner is responsible for approving requests, including requests:
 - For a group of employers to be recognized as a single employer;
 - For an employer to establish multiple pay equity plans;
 - For an employer to establish or update a pay equity plan without a pay equity committee in limited circumstances;
 - For an employer to set up a pay equity committee with different membership requirements or to allow a pay equity committee with different membership requirements to continue its work;
 - For an employer to use another method to compare compensation; and,
 - For an employer to extend the deadline for posting a pay equity plan or extend the deadline for phasing in increases in compensation.

Enforcement: Pay Equity Plans

- If a dispute regarding a pay equity plan arises within a workplace, the Pay Equity Commissioner is responsible for assisting the parties through a dispute resolution process such as mediation
- If the dispute is not resolved, then the Commissioner may make a decision regarding any matter in dispute after hearing relevant evidence
 - A party to the dispute may request that the Commissioner review their decision.
 - Upon a request, the Commissioner must review the decision.
 - The Commissioner may also refer a matter to the Chairperson of the Tribunal

Tools and Resources to Support Employers

- Online tool to assist small and medium employers to build their Pay Equity Plan from start to finish.
- Step-by-step Guide on how to use the online tool, together with short educational videos.
- Online dispute resolution platform.
- Interpretation policy to help employers address pay equity for non-binary individuals.

Notice of Obligations Under the *Act* - What's New?

- Employers must post a notice informing employees of their obligations under the *Act*.
- Deadline: November 1.
- Content: depends on type of employer.
- Form: must indicate date of posting.
- Must remain posted until the plan is completed or a new version of the notice is required.

| What Should Employers Do?

- If you have not done so already, post a notice as soon as possible
- Leave the notice posted until you have completed your pay equity plan or your obligations change



| Pay Equity Committee - What's New?

- Mandatory for all employers with 100 or more employees and all unionized employers with more than 10 employees.
- Optional for smaller employers.
- Purpose
 - Engage in collaborative exercise with management to:
 - Develop a Pay Equity Plan.
 - Review and update job descriptions.
 - Develop a job evaluation tool.

| Pay Equity Committee - What's New?

- Composition:
 - Employee and employer representatives.
 - Bargaining unit in unionized workplaces.
 - 66% must be employee representatives.
 - 50% must be women.
- Each represented group is entitled to one vote on the Committee.

| What Should Employers Do?

- Evaluate strategic considerations, such as geography.
- Identify management representatives.
- Consider process to elect non-unionized employee representatives.
- Consider creating confidentiality agreements to protect confidential information.

| Pay Equity Plan - What's New?

- Develop and post a single comprehensive Pay Equity Plan.
- Timeline: 3 years.
- Purpose:
 - Identify all job classes in the workplace.
 - Determine the gender predominance of those classes.
 - Define the value of the work based on:
 - The skill and effort required to perform the work.
 - The responsibility required in performing the work.
 - The conditions under which the work is performed.
- Ultimate goal: Ensure that female workers are compensated equally for work of equal value performed by male counterparts.

Pay Equity Plan - What's New?

- Single plan vs multiple plans?
- Pay Equity Plan supersedes collective agreement.
- Draft Pay Equity Plan must be posted before it can be finalized.
 - Notice to employees – Right to provide comments.
- If a wage gap exists, employer must increase compensation for a predominantly female job class.
- Pay adjustments must be increased within the same 3-year period.
 - Exception: employers facing an increase greater than 1%.
- Continuing obligations:
 - Review and update Pay Equity Plan every 5 years.
 - Submit an annual statement.

| What Should Employers Do?

- 1) Evaluate the need and opportunity for multiple plans.
- 2) Review and update job descriptions and any employee data.
- 3) Review available job evaluation tools.



| What Should Employers Do?

- 4) Undertake the job evaluation process.
 - Identify different job classes in the workplace.
 - Identify which job classes are predominantly female, predominantly male or gender neutral.
 - Determine the value of work performed in each class.
 - Calculate the total compensation for each predominantly male and predominantly female class.
 - Compare compensation for each class and determine whether a wage gaps exists.

| What Should Employers Do?

- 5) Consider engaging external consultants to help analyze data.
- 6) Identify any issues in the data collected.
- 7) Post a draft of your Pay Equity Plan and notify employees.
- 8) Collect any comments on the draft Pay Equity Plan.
- 9) Finalize and post the final Pay Equity Plan.

| What Should Employers Do?

- 10) If a wage gap exists, increase compensation for a predominantly female job class.
- 11) Pay the increase within 3 years, unless the increase is greater than 1%.
- 12) Review and update your Pay Equity Plan every 5 years.
- 13) Submit an Annual Statement to the Commissioner.

AMPs under the *Pay Equity Act*

How does it work?

- Violations and penalties may be set by the Governor in Council.
 - Violations and penalties not yet canvassed
- Every employer who commits a violation is liable to a penalty.
- Investigation/audit process. The Commissioner may:
 - a. Enter any place, other than a house, where there are reasonable grounds to believe there is any relevant record, report, electronic data or other document;
 - b. examine any record, report, electronic data or other document;
 - c. use any computer system at the place to examine any electronic data;
 - d. reproduce any document from any electronic data;
 - e. take the record, report or other document for examination or copying;
 - f. use any copying equipment at the place to make copies of any document; and
 - g. order any person in the place to establish their identity to the Pay Equity Commissioner's satisfaction

AMPs under the *Pay Equity Act* ***How does it work?***

- Notice of violation
 - Facts surrounding the violation
 - Penalty and terms of payment
 - Right to contest: facts, penalty, or both
- Payment of the penalty = deemed to have committed the violation.
- Request to review the notice of violation – 30 days.
- Failure to pay the penalty or request a review within the appropriate time frame = deemed to have committed the violation and must pay the penalty.

AMPs under the *Pay Equity Act*

How does it work?

- Request to review
 - Commissioner must determine whether the employer committed the violation and/or whether the penalty is reasonable/accurate.
 - Notice of decision.
- Possible outcomes following Commissioner's decision.
 - Finding that the employer did not commit the violation: end of the process.
 - Finding that the penalty is not the appropriate amount: correction of penalty amount.
 - Finding that the violation and penalty are valid: employer must pay the penalty within the appropriate time frame.
 - Full payment of penalty: end of process.
- The Commissioner's decision is final and is not to be questioned or reviewed in any court.

AMPs under the *Pay Equity Act* *How much?*

- Section 127(1): Governor in Council has authority to set regulations regarding penalties for failing to comply with the *Act*.
 - Includes power to make regulations classifying violations, setting out penalties for violations, and setting out the time and manner for paying a penalty.
- The Governor in Council has not yet made regulations under section 127(1).
- Government of Canada says that: "Consultations with federally regulated employers and employees and their representatives, as well as special interest groups are expected in 2021. **The proposed regulations are anticipated to be pre-published in Part I of the Canada Gazette in 2022.**"

AMPs under the *Pay Equity Act*

How much?

- Section 127(2) sets out the maximum penalties that can be set by the Governor in Council.
- The maximum monetary penalties that may be fixed pursuant to regulation range from \$30,000 to \$50,000 per violation.
 - Varies in accordance with number of employees
- Section 127(2) – Maximum Penalties
 - \$30,000 for an employer that has:
 - 10-99 employees
 - A bargaining agent representing some or all of the unionized employees
 - \$50,000 for an employer that has:
 - 100 or more employees
 - A bargaining agent representing some or all of the unionized employees

Beyond AMPs: Other Enforcement Tools

- Compliance audit or investigation.
- Can be triggered if an employee makes a complaint to the Commissioner alleging their employer is violating the *Act*.
 - N.B.: Anti-reprisal provisions
- If employer is non-compliant, Commissioner can give written notice to the employer setting out measures that the employer must undertake to remedy the non-compliance within a specific time-frame.
- If the non-compliance continues, the Commissioner may make a written order to the employer requiring the employer to comply within a specific timeframe.
- Internal audit to ensure compliance.
- Consequence of continued non-compliance after a compliance audit or investigation.

Key Takeaways – What Should Employers be Doing?

- November 1, 2021: Post a Notice if you have not already done so.
- Assemble an internal project team for the pay equity process.
- Develop project plans outlining key responsibilities, decision points and expected timelines.
- Gather data required to develop a Pay Equity Plan.
- Evaluate the need and opportunity for multiple plans.
- Establish a pay equity committee.

Key Takeaways – What Should Employers be Doing?

- Review available job evaluation tools.
- Review and update job descriptions and any relevant employee data.
- Continue to increase awareness of pay equity within the organization.
 - Disclose that you are engaged in a pay equity process/review.
 - Be transparent and provide honest information to employees and all stakeholders.
- Build your Pay Equity Plan(s).

Complying with New Proactive Pay Equity Rules

Q&A





Complaints and Adjudication

- Dianne Rideout, Partner, Vancouver
- Michelle McKinnon, Associate, Vancouver

| Unjust Dismissal Provisions

- Special job protections for certain federally regulated employees
- Exemptions:
 - Managers
 - Employees with less than 12 months' service

| Unjust Dismissal Provisions

- Can only terminate for cause or lack of work/discontinuance of a function
- Ousts common law

| Process and Timing

- Timeline: 90 days
- After complaint filed:
 - Mediation
 - Hearing
- Remedy: broad remedial powers, including reinstatement.

| Unjust Dismissal - Specific Issues

- Manager exclusion
 - Not defined in CLC
 - Narrowly construed
 - Not intended to capture all employees who perform managerial functions
 - Central question – significant autonomy, discretion and authority over conduct of employer's business
 - Discretion to make decisions on matters of importance, staffing decisions, supervision and control, job title and qualifications and role in labour relations
- 12 months continuous employment

| Unjust Dismissal - Specific Issues

- Lack of work
 - Can be justified based on economic reasons
 - Evidence shows nexus between economic reasons and reduction in workforce
- Discontinuance of function
 - Bundle of duties and responsibilities of position eliminated
- Employer must show:
 - a) an economic justification for the layoff; and
 - b) a reasonable, good faith explanation for the layoff of the particular employee – to show reasonable, good faith basis for decision, employer must show procedural fairness in searching for alternatives to dismissal
- Adjudicators recognize right of employer to manage its business and will not unduly interfere with legitimate actions of employer
- Decision to lay off for financial reasons possible, but must be made in good faith and genuine
- Dominant reason

| Unjust Dismissal – Specific Issues

- Just cause under the CLC
 - CLC requires “labour relations lens” and displaces the common law regime.
 - Rights that most organized employers have under collective agreements.

| Unjust Dismissal - Remedies

- “Make Whole” Principle
- Mitigation

Practical Comments / Suggestions

- Pay attention to one year anniversary
- Fully articulate reasons for termination
- Follow progressive discipline and procedural fairness
- Preparing severance offers
- Settlement agreements

| Intersection Between Claims

- Other types of potential claims: reprisal complaints, human rights complaints, harassment complaints
- Consider whether claims have the same factual basis

Complaints and Adjudication

Q&A



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