

Employment and Labour Law Reporter

VOLUME 31, NUMBER 3

Cited as (2021), 31 E.L.L.R.

JUNE 2021

• GETTING READY FOR THE NEW FEDERAL PAY EQUITY ACT •

Claire Vachon, Counsel, Jackie VanDerMeulen, Partner, and Brenda Chang, Associate, Fasken Martineau DuMoulin LLP.

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Pay equity ensures that men and women receive equal pay for work of equal value. Due to a host of systemic reasons that are not attributable to any single employer, work that is predominantly done by women continues to be under compensated in the Canadian marketplace.

In an attempt to correct for these systemic forces, the *Pay Equity Act*, SC 2018, c. 27, s. 416 (“Act”), was enacted as part of the *Budget Implementation Act No. 2, 2018*, SC 2018, c. 27, in December 2018. Once the Act and its Regulations come into force (anticipated to be later in 2021), employers in the

federal sector with ten or more employees will have three years to develop a pay equity plan that identifies and corrects gender-based wage gaps for incumbents of predominantly female job classes. This pay equity exercise must be carried out in committee for employers with 100+ employees who are unionized.

We anticipate this committee process will be particularly challenging for unionized employers who have multiple bargaining units, given the diversity of interests and the number of decision points. Employers are encouraged to begin planning now for what could be a long and bumpy road ahead.

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ESTABLISHING A PAY EQUITY COMMITTEE

Employers with 100+ employees or unionized employees must establish a pay equity committee to develop the required pay equity plan. Non-unionized employers with fewer than 100 employees may voluntarily establish a pay equity committee, upon notice to the Pay Equity Commissioner (“Commissioner”). Committee members will work together to develop the process for identifying and correcting any gender-based wage gaps for predominantly female job classes, in accordance with the requirements of the Act.

The required composition of these committees is prescribed in the Act; they must include at least three members, with 2/3 of the members representing

EMPLOYMENT AND LABOUR LAW

Employment and Labour Law Reporter is published monthly by LexisNexis Canada Inc., 111 Gordon Baker Road, Suite 900, Toronto ON M2H 3R1 by subscription only.

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ISBN 0-409-91093-7 (print) ISSN 1183-7152
 ISBN 0-433-44669-2 (PDF)
 ISBN 0-433-44383-9 (Print & PDF)

Subscription rates: \$700.00 per year (Print or PDF)
 \$815.00 per year (Print & PDF)

Please address all editorial inquiries to:

General Editor
 Edward Noble, B.A., LL.B.
 Content Development Associate
 LexisNexis Canada Inc.
 E-mail: edward.noble@lexisnexis.ca

LexisNexis Canada Inc.
 Tel. (905) 479-2665
 Fax (905) 479-2826
 E-mail: ellr@lexisnexis.ca
 Web site: www.lexisnexis.ca

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employees under the plan and half of the members being women. Each bargaining unit, if applicable, will also be entitled to appoint a committee member.

Importantly however, the employee members, as a group, and the employer representatives, as a group, each only have one vote. If the members of the employee group are unable to agree on a particular issue, the employer's vote prevails. The Act also permits the parties to approach the Commissioner to determine an issue if they are unable to agree.

DEVELOPING AND IMPLEMENTING A PAY EQUITY PLAN

The Act focuses on job classes rather than individuals, with the aim of ensuring that predominantly female job classes are compensated at least as well as predominantly male job classes. To achieve this goal, employers (or the pay equity committee, if applicable) must develop a pay equity plan. The default under the Act is that each employer will have a single pay equity plan — including executive and managerial employee job classes. The Act suggests that the “employer” will typically be the corporate entity, rather than the broader commercial enterprise. Employers may apply to the Commissioner within 12 months of the Act coming into force for approval to create multiple plans.

In developing a pay equity plan, an employer (or committee, where required) must:

1. **Identify the job classes** in the workplace and **determine the gender predominance of the job classes** based on prescribed factors. Where there is no predominantly male job class in a workplace, the employer may use either the “proxy” or “typical job classes” methods to establish their pay equity plans. The Regulations, which are still in draft form, set out the requirements of these two methods.
2. **Determine the value of work performed** by the job class, considering the skill, effort, and responsibility associated with or required to perform the work and the conditions under which the work is performed.
3. **Identify the total compensation** for each job class. Total compensation includes contributions

to pension funds and benefits plans, bonuses, leave entitlements, etc. Committee members are required by the Act to protect the confidentiality of compensation information they receive in this exercise.

4. **Compare the total compensation** of the predominantly female job classes with the compensation of the predominantly male job classes, using the “equal average,” “equal line,” or another method approved by the Commissioner. The draft Regulations set out the formulas for the two prescribed methods and provide further instructions regarding the comparison exercise.
5. **Identify wage gaps** for predominantly female job classes.

Once complete, employers must post a draft of their pay equity plan to facilitate a 60-day period for employee feedback. Employers (or pay equity committees, where applicable) must consider any employee comments when preparing the final version of the pay equity plan and post the final version no later than three years after the Act comes into force. Employers are then required to **make any necessary compensation adjustments** by the day after this date. The adjustments may be phased in over prescribed periods if they amount to more than 1% of an employer’s total annual payroll.

Unionized employers must ensure that their collective agreements are consistent with the pay equity plan; in the event of an inconsistency, the pay equity plan will prevail. Further, any compensation increases that an employer makes under its pay equity plan are deemed to be incorporated into applicable collective agreements. The draft Regulations contain additional instructions for how to proceed where a statutory freeze is in effect.

PAY EQUITY MAINTENANCE AND REPORTING

Employers must submit annual statements to the Pay Equity Commissioner regarding their pay equity plans and maintenance activities.

The Act also requires employers to review and update pay equity plans at least once every five years

to identify and close pay equity gaps that may arise over time. As part of this pay equity maintenance process, employers are required to collect data, analyze workplace information (*i.e.* changes to job class structures, gender predominance, duties, responsibilities, working conditions of a job class, and compensation), compare compensation, and make any required compensation adjustments. These pay equity maintenance activities must be carried out by the pay equity committee, if applicable.

START PLANNING NOW!

Developing a pay equity plan will be a mammoth task for many employers, particularly those with multiple bargaining units. Employers are encouraged to start planning now, including:

- Assessing whether to apply to the Commissioner for authorization to develop multiple pay equity plans;
- Considering the potential composition of their pay equity committee, including identifying employer representatives;
- Developing draft terms of reference for the pay equity committee;
- Reviewing existing compensation data and tools and considering whether they can be used in light of the specific requirements of the Act;
- Engaging a pay equity consultant through internal or external counsel to conduct a privileged pay equity analysis.

If you have questions or need assistance at any stage in the pay equity process, please contact the authors or your regular Fasken lawyer.

[Claire Vachon assists clients in all areas of labour and employment law in both official languages. She is licensed to practice law in Québec and in Ontario. Claire is the former leader of Fasken’s Labour, Employment and Human Rights Practice Group. With experience in major pay equity litigation, Claire’s knowledge of the technical processes involved in achieving pay equity, such as job evaluation and regression analysis, allows her to bring highly

focused, strategic advice to clients, in addition to sound legal advice. Whether assisting in audits or developing proactive monitoring mechanism, Claire ensures ongoing pay equity compliance is achieved.

Jackie VanDerMeulen regularly represents employers in labour arbitrations, interest arbitrations, federal and provincial labour board matters, human rights proceedings, employment litigation, and applications for judicial review. Jackie has also

developed a particular expertise in federal and provincial accessibility and pay equity laws, including any resulting litigation.

Brenda Chang practices broadly in labour, employment, and human rights law. She assists unionized and non-unionized employers in the provincial and federal sectors on matters involving employment standards, human rights, grievance arbitration, and litigation.]

This article appeared in the *Employment and Labour Law Reporter*, Vol. 31, No. 3.
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