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## Employers' Advisor

# WORKPLACE NEWS COAST TO COAST

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**INSIDE:**



## Public Sector Wage Restraint Legislation Introduced in Ontario

On June 5, 2019, the Ontario government introduced the *Protecting a Sustainable Public Sector for Future Generations Act*, 2019 ("Bill 124"). If passed, this legislation would have a significant impact on most public sector employers. Bill 124 would impose three-year periods of salary moderation and compensation restraint measures for unionized and non-unionized employees working in the Ontario government, Crown agencies, the broader public sector, and a range of organizations that receive funding from the Ontario government. During these three-year periods, salary increases and compensation rates would be capped at 1% per year, subject to certain exceptions.

**Who does Bill 124 apply to?**

Bill 124 would apply to a wide variety of public sector employers, employees, and unions. A non-exhaustive list of those affected by Bill 124 includes:

*(i) Employers*

- the Ontario government and all manner of Crown agencies, boards, commissions, etc.;
- school boards;
- public hospitals;
- universities and colleges;
- children's aid societies;
- Ornge;
- Ontario Power Generation and its subsidiaries;
- non-profit long-term care homes;
- any not-for-profit organization that received at least $1,000,000 in funding from the government of Ontario in 2018; and
- any other authority, board, commission, committee, corporation, council, foundation or organization that may be prescribed by regulation.

However, Bill 124 would not apply to:

- municipalities and local municipal boards;
- boards, authorities, offices or other organizations whose members are chosen or appointed under the authority of a municipal council; and
- "for-profit" entities.

*(ii) Employees and Unions*

Bill 124 would apply to all groups of workers and their bargaining agents in workplaces subject to the Act. This pertains to non-union employees, as well as all unionized and organized employees (including certified and voluntarily recognized bargaining agents).

The legislation would not apply to various judicial officers or to "designated executives" within the meaning of the *Broader Public Sector Executive Compensation Act*, 2014 ("BPSECA"). Bill 124 would also provide the President of the Treasury Board

(the "Minister") with the power to exempt employees or classes of employees from the Act.

**What does Bill 124 do?**

*(i) Salary Moderation*

The wage restraints imposed by Bill 124 apply to "moderation periods," which run for three-year periods. During the applicable moderation period, two basic compensation restraints would apply:

1. Salary Rate Increases:

   Bill 124 would restrict salary rate increases to 1% during each 12-month period for any position or class of positions within each moderation period. This restriction applies whether the salary increase was found in a compensation plan, a collective agreement, or an arbitration award.

   However, this limit does not apply to increases under a collective agreement or a compensation plan that permits salary increases related to length of employment, performance, or education. Therefore, employees may still move up pre-existing salary grids or receive merit increases, but the grids themselves may not be altered beyond the annual 1% caps within the moderation periods.

2. Overall Compensation Increases:

   Bill 124 would impose a 1% annual cap on incremental increases to new or existing compensation entitlements averaged over all employees in a group or bargaining unit. Compensation includes salary, benefits, and other discretionary or non-discretionary payments.

For unionized employees, the salary moderation period would not override any collective agreement that was in force as of June 5, 2019, but would apply for a period of three years following the expiry of such a collective agreement. In the case of expired collective agreements and first collective agreements, freely negotiated agreements and interest arbitration awards entered into or rendered after June 5, 2019 would be subject to the restraints described above, including the 1% annual compensation cap.

For non-union employees, Bill 124 provides some leeway for employers to determine when the moderation period begins after June 5, 2019. However, the moderation period could begin no later than January 1, 2022.

*(ii) Compliance*

The Bill empowers the Minister with the broad authority to declare that any collective agreement or interest arbitration award is non-compliant with the legislation. Should such an order be made, the Bill contains a number of remedial steps that must be taken.

The Bill also contains anti-avoidance measures, which are designed to prohibit employers from paying out compensation both prior to the moderation period and after the moderation period as a means of avoiding restraint measures that would otherwise apply.

**How does this impact Employers?**

If passed and proclaimed into force, Bill 124 will have a substantial impact on the Ontario public sector. All public sector organizations will need to ensure their compensation practices comply with the new rules - which are drafted to have retroactive effect. For example, any collective agreements or interest arbitration awards made after June 5, 2019, will be subject to Bill 124's restrictions.

Bill 124 will not likely be passed before the Legislature returns from its summer recess. Therefore, the Bill could still be amended throughout the legislative process. Mathews Dinsdale will be carefully monitoring the progress of the Bill, and will provide updates on any important developments.

If you have any questions regarding the potential impact of Bill 124 on your business, please do not hesitate to contact a Mathews Dinsdale lawyer.

## Childcare Choices: When Should Employers Be Concerned about Family Status Discrimination?

The law surrounding family status discrimination as it applies to childcare obligations has evolved considerably in recent years. Provinces across Canada remain divided on the applicable legal test to determine whether discrimination has been established.

Courts in British Columbia take an approach known as the "*Campbell River*" test. This test was recently affirmed by the BC Court of Appeal in *Envirocon Environmental Services, ULC v Suen*, 2019 BCCA 46 ("*Envirocon*").

In *Envirocon*, a BC father had refused an assignment from his employer to work in Manitoba for a 2-month period, as it would require him to be away from his wife and four-month-old daughter. His employment was terminated shortly thereafter. Despite the father's argument that the *Campbell River* test was "too restrictive", the BC Court of Appeal declined to overrule it.

The required elements for establishing family status discrimination under the *Campbell River* test are as follows:

1. The employer imposed a change to a term or condition of employment; and
2. The change resulted in a serious interference with a substantial parental or family duty or obligation of the employee.

In considering the application of the *Campbell River* test in *Envirocon*, the BC Court of Appeal held that the assignment to work temporarily in Manitoba did not meet the threshold of "serious interference." While the father's desire to remain close to home was understandable and commendable, the Court concluded he was "no different than the vast majority of parents", many of whom are also required to be away from home for extended periods for work-related reasons. There was no evidence to suggest his child would not be well cared for in his absence.

That the *Campbell River* test requires "serious interference" with a "substantial" duty or obligation is the key feature that differentiates the BC approach to family status discrimination from the approaches applied elsewhere in Canada. In the federal jurisdiction, for example, the Federal Court of Appeal declined to follow the *Campbell River* test in *Canada (Attorney General) v. Johnstone*, 2014 FCA 110 ("*Johnstone*"), instead favouring a lower threshold approach to establishing family status discrimination.

In *Johnstone*, an employee working as a border security agent sought a full-time fixed work schedule (rather than her usual rotating shifts) upon her return from maternity leave. The employee's husband was also a border security agent and worked rotating shifts, making childcare arrangements difficult. The employee's request was declined, with the employer maintaining that only part-time employees could obtain fixed work schedules.

Rejecting the need for "serious interference" and a "substantial" duty or obligation, the Federal Court of Appeal concluded that a *prima facie* case of family status discrimination could be established where the following elements were met:

1. A child is under the employee's care and supervision;
2. The childcare obligation engages the individual's legal responsibility for that child;
3. The employee has made reasonable alternative efforts to meet those childcare obligations; and
4. The interference with the childcare obligation is more than trivial or insubstantial.

Where those elements are met, the employer could still justify the workplace rule by demonstrating that the rule serves a *bona fide* occupational requirement.

In the case of Ms. Johnstone, family status discrimination was established. In particular, she had investigated numerous possible childcare arrangements such as regulated childcare providers, family members, and a live-in nanny, and no alternative solutions were reasonably available. The employer in *Johnstone* did not assert that full-time rotating shifts were a *bona fide* occupational requirement.

Neither the *Johnstone* nor the *Campbell River* approaches have been adopted unequivocally in other Canadian jurisdictions, though they have been cited in some decisions. Recent claims in Alberta and Ontario have been determined using the fundamental test for all forms of human rights discrimination set out by the Supreme Court of Canada in *Moore v British Columbia (Education),* [2012] 3 SCR 360 ("*Moore*"). The *Moore* test requires the following to establish *prima facie* discrimination:

1. A characteristic that is protected from discrimination;
2. An adverse impact; and
3. The protected characteristic was a factor in the adverse impact.

Regardless of jurisdiction, the approach taken by an employer in responding to a request for accommodation can have a significant impact on the outcome of a claim for family status discrimination. Where an employee makes a request for accommodation of a childcare obligation, an employer in any jurisdiction should make sure that it understands the nature of the request and to consider whether it is feasible, from an operations perspective, to accommodate the request. It may also be helpful to determine whether the employee investigated other possible childcare arrangements before making the request.

Depending on the nature of the request, and the jurisdiction where the employee is working, the employer may be entitled to additional information, such as whether the request arises from a specific medical or other need for the child. Employers are advised to review their human rights policies in order to ensure that an appropriate process is followed in the event that an employee makes a request for accommodation of childcare obligations.

# Public Inquiry Into the Wettlaufer Case Results in Various Recommendations for Long-Term Care Homes

On June 1, 2017, Elizabeth Wettlaufer pleaded guilty to eight counts of first degree murder, four counts of attempted murder and two counts of aggravated assault. None of the offences had been under investigation until Wettlaufer confessed in September 2016. Wettlaufer had been working as a Registered Nurse in a number of long-term care homes and in private home care settings, and had committed the offences on patients under her care between 2007 and 2016. In each case, Wettlaufer had intentionally injected her victim with an overdose of insulin. Following her guilty plea, Wettlaufer was convicted and sentenced to life in prison with no chance of parole for 25 years.

The Wettlaufer case led the provincial government to establish a public inquiry into the events and circumstances surrounding the offences. The Inquiry was established on August 1, 2017, and delivered its four-volume Final Report on July 31, 2019.

The Inquiry was conducted in two parts. Part one involved inquiring into the offences and uncovering the truth of what happened, and part two consisted of developing recommendations on how to avoid similar, future tragedies.

Based on the evidence presented in the Inquiry's public hearings, three principal findings were made in the Final Report:

1. If Wettlaufer had not confessed, the offences would not have been discovered;
2. The offences were the result of systemic vulnerabilities, and, therefore, no findings of individual misconduct were warranted; and
3. The long-term care system was strained but not broken.

The Report made recommendations that were directed at all stakeholders in Ontario's long-term care system and addressed systemic vulnerabilities in the system, as identified by the Inquiry. Some of the Inquiry's key recommendations are described below.

Prevention – the Final Report recommended that the Ministry of Health and Long-Term Care (the "MOH") expand its role and provide assistance to homes that are struggling to achieve regulatory compliance. Additionally, the Report recommended that the MOH provide bridging and laddering programs in order to increase the skills of those working in long-term care and to provide opportunities for advancement.

Awareness – the Report also recommended building awareness, throughout the health care system, of the possibility that a health care provider could intentionally harm a resident or patient in his or her care. The Report recommended that the Office of the Chief Coroner and Ontario Forensic Pathology Service conduct ongoing research on this issue and circulate key information to organizations and institutions which would, in turn, include this information in mandatory training and educational programs for healthcare providers.

Deterrence – the Report recommended the following three-pronged approach to deterring health care providers from intentionally harming residents or patients through the use of medications:

1. Strengthen the medication management system in long-term care homes through infrastructure changes, the use of technology, and increasing the role of pharmacists. It was also recommended that the MOH expand the funding parameters of the nursing and personal care envelope to permit long-term care homes to use funds to pay for a broader spectrum of staff, including pharmacists and pharmacy technicians.
2. Improve medication incident analysis in long-term care homes. The Final Report recommended that long-term care homes implement a standardized, rigorous incident analysis framework.
3. Increase the number of registered staff in long-term care homes.

Detection – the Final Report recommended strengthening Ontario's death investigation process, as it related to residents in long-term care homes, so it would be better equipped to detect intentionally-caused resident deaths. It was recommended that the Office of the Chief Coroner and the Ontario Forensic Pathology Service increase the number of resident death investigations, based on a redesigned, evidence-based Institutional Patient Death Record and based on data analytics on deaths in long-term care homes performed by the MOH.

All four volumes of the Inquiry's Final Report can be found here.

It will be interesting to see how Ontario's Provincial Government responds to the substantial recommendations made by the Final Report. If you have any questions regarding the impact of these potential changes to Ontario's long-term care system, please do not hesitate to contact a Mathews Dinsdale lawyer.

About Mathews Dinsdale

Mathews Dinsdale is Canada's only national boutique labour and employment law firm. With six offices across Canada, and connections to the Ius Laboris global network of HR law firms, we are uniquely positioned to assist employers with all their local, national or international workplace law needs

If you have questions about any of these topics or any other questions relating to workplace law, please do not hesitate to contact a Mathews Dinsdale lawyer.