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LEGAL ALERT

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# PUBLIC SECTOR COMPENSATION RESTRAINT BILL RAISES QUESTIONS

*Rob Weir and Wendy Litner*

On March 25, 2010, the Ontario government introduced the *Public Sector Compensation Restraint to Protect Public Services Act, 2010* (the “*Restraint Bill*”) as part of the 2010 provincial budget. The *Restraint Bill* contemplates salary freezes and spending restraints in the public sector to eliminate the current deficit by 2018 and to help “redirect up to \$750 million toward sustaining schools, hospitals and other public services.” This is not the first time in Ontario that a provincial government has sought by legislation to restrain public spending related to wages and other forms of compensation. The *Restraint Bill* is also not the only proposed piece of legislation dealing with wages in the public and quasi-public sector. The Ontario government recently announced an intention to link executive pay in hospitals to certain as yet undefined performance criteria. And perhaps most interestingly, Bill C-470, a private members bill, is currently before the House of Commons in Ottawa. Bill C-470 seeks to cap the pay of any employee employed by a registered charity at \$250,000 and would give the Canada Revenue Agency the power to de-register charities who do not comply.

The *Restraint Bill* remains at first reading as of April 8, 2010. Accordingly, clients should be aware that further amendments may be forthcoming. As one would expect, the *Restraint Bill* has raised a number of questions amongst employers in the public sector, some of which we attempt to address here.

## **To Whom Does the *Restraint Bill* Apply?**

The *Restraint Bill* seeks to freeze the compensation plans for employees who do not engage in collective bargaining in the broader public sector, including the Ontario Public Service and non-bargaining political staff, for two years as of March 24, 2010. Pursuant to section 3(1) of the *Restraint Bill* this includes:

- every university and college of applied arts and technology and post-secondary institution in Ontario;

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- every hospital referred to in the list of hospitals and their grades and classifications maintained by the Minister of Health and Long-Term Care under the *Public Hospitals Act*; and
- every school board as defined in the *Education Act*; and
- an authority, board, commission, corporation, office or organization that received at least \$1 million in funding from the provincial government in 2009, as determined for the purposes of the *Public Sector Disclosure Restraint Bill, 1996*, that does not carry on its activities for the purpose of gain or profit to its members or shareholders.

Municipalities are excluded from the proposed legislation.

## Which Employee Groups Are Excluded?

The *Restraint Bill* excludes employees represented by trade unions and other employee organizations that engage in collective bargaining, including:

- trade unions certified or voluntarily recognized under the *Labour Relations Act, 1995*;
- an organization that represents employees under the *Crown Employees Collective Bargaining Act, 1993*;
- an organization that represents employees under the *Colleges Collective Bargaining Act, 2008*;
- an organization that has, before March 24, 2010, collectively bargaining with the employer terms and conditions of employment relating to compensation that were implemented by the employer; and
- an organization that, before March 24, 2010, has an established framework for collective bargaining the terms and conditions of employment related to compensation with the employer.

For employees who bargain collectively, the government has provided assurances that it will respect all current collective agreements. When these agreements expire and new contracts are negotiated, however, the government will work with transfer payment partners and bargaining agents to seek agreements of at least two years' duration that do not include net compensation increases. According to Ontario Finance Minister Dwight Duncan, "[T]hese agreements should help manage spending pressures, protect public services that Ontarians rely on and provide no net increase in compensation." The Minister's sentiment of fiscal restraint is reflected in its current fiscal plan which provides for no funding for compensation increases for future collective agreements.

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## When Do the Wage Restraints Take Place?

Once adopted, the *Restraint Bill* will be retroactive to March 25, 2010.

## How are Employees and Employers Affected?

The legislation requires the compensation plans of all affected employees to remain as they stood on March 24, 2010, up to and including March 31, 2012. "Compensation Plan" is defined by the *Restraint Bill* as the "provisions, however, established, for the determination and administration of a person's compensation." The *Restraint Bill* further defines "compensation" as "all forms of payment, benefits and prerequisites paid or provided, directly or indirectly, to or for the benefit of a person who performs duties and functions that entitle him or her to be paid, and includes discretionary payments."

According to a FAQ document published by the government, this definition encompasses all aspects of an employee's compensation including base pay, merit pay, vacation and other time off, pension, health and other benefits. "In short," says the government, "there will be no across-the-board increases and salary ranges are limited to existing levels."

## Are Any Compensation Increases Permitted?

Employers may increase the compensation of employees only within an existing pay range and only in respect of:

1. an employee's length of time in his or her employment;
2. an assessment of the employee's performance;
3. an employee's successful completion of a program or course of professional or technical education.

Such increases are only permitted if they are authorized by the compensation plan that existed as of March 24, 2010.

Effectively, pay ranges for all affected employees and office holders are frozen on March 24, 2010. However, individual increases may be made within the range based on one or more of above three factors provided the compensation plan that existed on March 24, 2010 authorized such increases. Further, the renewal of an employee or office holder's contract cannot change the compensation plan, as it existed on March 24, 2010. The *Restraint Bill* will restrict retroactive increases after the wage restraint period expires.

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## Are There Reporting Requirements?

The *Restraint Bill* contemplates that affected employers will be required to provide the Minister of Finance with compliance reports for the purpose of demonstrating compliance with applicable restraint measures.

## Conclusion

It is important to emphasize that the *Restraint Bill* is at first reading. It will not be law, nor will it have assumed its final form, prior to third reading, which will occur as part of the larger budget approval process in the House. Already, a number of issues have emerged. For example, many employers wonder whether some managerial employees, although not unionized, who nonetheless engage in or have a framework for collective bargaining are exempted from the wage restraints. At present, there is considerable uncertainty with respect to which employee groups are exempt.

Public education officials also wonder at the long-term impact of the *Restraint Bill*. As teachers' collective agreements do not expire until August 31, 2012 and contain healthy increases that will not be affected by the *Restraint Bill*, many school boards have noted that, if principals and vice-principals are included in the compensation restraints (and this is an open question at this time), some teachers could be earning more income than their vice-principals at the end of the two year freeze. School boards wonder how they will be able to recruit individuals into these important management positions in our publicly funded schools.

Hospitals and universities wonder about the impact of the *Restraint Bill* on their ability to attract and retain top-level scientists, researchers and professors in a wage freeze environment.

Many employers wonder about the fairness of a legislative freeze that impacts only employees who do not engage in collective bargaining. In fairness to the government, there may be constitutional reasons why the imposition of a unilateral wage freeze on existing and even future collective agreements is problematic. In 2007, the Supreme Court of Canada issued the *B.C. Health Services* decision. This decision afforded constitutional protection to certain procedural aspects of collective bargaining. The Court determined that government action that interferes with collective bargaining may interfere with the freedom of association rights under the *Canadian Charter of Rights and Freedoms* where the action is taken without meaningful consultation. The government's announcement that it intends to take a consultative approach with public-sector unions may, in part, be an effort to fulfill its *Charter*

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obligations in the event that unions will not agree to wage restraints. In such event, the government may seek to legislate restraints for unionized employees. Again, as with so much in the *Restraint Bill*, it is still too early to say.

Finally, broader public sector employers whose employees do not engage in collective bargaining are already reporting union organizing drives. The union exemption in the *Restraint Bill* could provide an incentive to unionization. If unions cannot promise potential members wage increases, they can at least promise that they will have the attention of the government.

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