New Framework Regulation Ontario Capping Salary and Performance Pay for Broader Public Sector

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On September 6, 2016, the Ontario Government introduced *Regulation 304/16: Executive Compensation Framework* (the "Framework") under the *Broader Public Sector Executive Compensation Act, 2014* ("BPSECA") for broader public sector executive compensation. The Framework sets out requirements that all designated employers must follow for establishing and posting executive compensation programs. It also caps salary and performance-related payments for designated executives. As discussed below, the Framework becomes effective with respect to a designated employer when the designated employer posts a compliant executive compensation program on its website which must be no later than September 5, 2017.

The Government has also published an *Executive Compensation Framework Guide* (the "Guide") which provides designated employers with further information and guidance on the requirement established by the Framework.

Designated Employers and Executives

The Framework applies to designated employers and designated executives under the BPSECA. Designated employers include public hospitals, universities, colleges, schools boards, all community care access corporations, independent Electricity System Operator and Ontario Power Generation, Ornge, and other prescribed public bodies.

Designated executives are employees or office holders who are entitled to receive or could potentially receive cash compensation of $100,000 or more in a calendar year, including the head of a designated employer regardless of title (such as a CEO, or president), vice-president, chief administration officer, chief operating officer, chief financial officer, holder of any other executive position, the director of education or a supervisory officer of a school board.

Restrictions on Compensation

The Framework provides that a designated employer shall not provide an element of compensation, other than salary and performance-related pay, to a designated

executive unless the element is also generally provided, in the same manner and relative amount, to non-executive managers. Non-executive managers are defined in the regulation as employees and office holders who exercise managerial functions and who directly report to one or more designated executives.

The Framework strictly prohibits the following types of compensation, unless required for the performance of the executive's job or for critical business reasons:

- signing bonuses;
- retention bonuses;
- cash housing allowances;
- insured benefits that are not generally provided to non-executive managers; and
- payments or other benefits in lieu of perquisites.

It also caps the following elements of compensation:

- termination payments that equal more than 24 times the average monthly salary of the designated executive;
- termination or severance payments that are payable in the event of termination for cause;
- paid administrative leave may only be provided to the head of a college or university or another designated executive who is part of or will return to the faculty at a college or university;
- paid administrative leave cannot be accrued at a rate that exceeds 10.4 paid weeks per year; and
- administrative leave may not be paid out in lieu of time off.

Written Executive Compensation Program

Designated employers are required to establish a written executive compensation program setting out the compensation that may be provided to its designated executives. The program must include information on the compensation philosophy, salary and performance-related pay caps, comparative analysis details and other elements of compensation.

The Framework regulation caps salary and performance-related payments for designated executives at no more than the 50th percentile of at least eight appropriate comparators. The process for determining maximum salary and performance-related pay involves selecting appropriate comparators and conducting a comparative analysis. For each designated executive position or class of designated executive positions, comparable positions must be selected for analysis from at least eight different organizations. The regulation sets out criteria to assist with the selection of comparator organizations and comparable positions. Comparators can also be from the private sector and/or outside of Canada if there is a demonstrable need to use comparator organizations from outside the Canadian public sector or broader public sector. In all cases, at least one Canadian public sector or broader public sector comparator organization must be included in the comparative analysis.

Approval from the Minister responsible for the administration of BPSECA (President of the Treasury Board) must be sought before comparator organizations from outside the Canadian public sector or broader public sector can be used. There is a process in

place to obtain approval. To seek approval, designated employers must submit a business case completed on the "Request For Approval To Use Private Sector and/or International Comparators form" (available from the Treasury Board Secretariat) to their overseeing ministry setting out the reasons why the designated employer cannot be compared solely to organizations in the Canadian public sector or broader public sector. Overseeing ministries will be responsible for reviewing the application with the Centre for Public Sector Labour Relations and Compensation at the Treasury Board Secretariat. The decision to approve will be made by the President of the Treasury Board.

Public Consultations

When implementing a new executive compensation program, designated employers must ensure compliance with any existing government approval mechanisms for executive compensation and must consult the public on the manner in which executive compensation elements are determined.

Designated employers are required to post draft executive compensation programs on their website for a minimum of 30 days to allow a reasonable opportunity for members of the public to comment on the manner in which the designated employer determines the compensation it provides to designated executives. Designated employers are also required to establish a process for collecting feedback for consideration when finalizing executive compensation programs and retaining such feedback until the conclusion of the compensation program and two subsequent programs in the event that it is requested by the overseeing Ministry or the Treasury Board Secretariat.

Effective Date and Going Forward

The Framework becomes effective when the designated employer posts a compliant executive compensation program to its website, no later than September 5, 2017. The existing freeze on salaries for executives under the *Broader Public Sector Accountability Act, 2010* remains in effect until the designated employer posts its final executive compensation program to its website.

The Guide indicates that once the Framework is in place, designated employers may need to provide salary increases to executives based on either the initial calculation of caps or the recalculation of caps. In all other cases, the average rate of increase in salary for designated executives in a given year must not exceed the average rate of increase in salary for non-executive managers in that year.

Under BPSECA, once the Framework is in effect for a designated employer, newly hired designated executives and existing employees who change designated executive positions will be subject to the terms of the Framework. After the third anniversary of the posting of a designated employer's first compensation program under the Framework, all compensation elements for all designated executives must fall within the limits permitted by the Framework. There is therefore a three-year grand-parenting period for designated executives hired prior to the effective date into a role.

Compliance

Designated employers are required to submit reports attesting that the compensation for their designated executives complies with the Framework. The BPSECA includes audit and penalty provisions that may be used to ensure compliance with the Framework. A failure to comply could therefore lead to penalties.

What Designated Employers Should Do Now

If you are a designated employer, you should consider the following steps:

1. Identify the designated executive positions that will be subject to the terms of the Framework, and who the non-executive managers are for the purposes of assessing.
2. Identify and carefully consider who your appropriate comparators should be. Seek approval if comparators outside of the Canadian public sector or broader public sector are required.
3. Begin developing an executive compensation program in compliance with the Framework.
4. Post a draft executive compensation program on your website for a minimum of 30 days to allow a reasonable opportunity for members of the public to comment.
5. Collect feedback from the public for consideration in the final executive compensation program and retain such feedback.
6. Post a compliant executive compensation program to your website by no later than September 5, 2017.

If you have any questions or comments, please contact Michelle S. Henry, Rob W. Weir, or any member of our Labour and Employment Group. We will be pleased to assist.

By

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