Pay Equity Act: Key points for private sector employers and considerations for M&A

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Overview

The Ontario *Pay Equity Act* requires private sector employers to establish and maintain compensation practices that provide for pay equity in their establishment(s). For most employers, this requirement is triggered on the day they hire or hired their tenth employee.

To meet the minimum requirements and to show that pay equity has been achieved, employers MUST have carried out each of these activities for each of their establishments:

1. Determine job classes, including the gender and job rate of job classes.
2. Determine the value of job classes based on factors of skill, effort, responsibility and working conditions.
3. Conduct comparisons for all female job classes to an equal or comparable male job class using either the job-to-job or proportional value method.
4. Adjust the wages of underpaid female job classes so that they are paid at least as much as an equal or comparable male job class or classes.

Further, the *Pay Equity Act* requires the following private sector employers to post a pay equity plan:

- Private sector employers that had 100 or more employees on January 1, 1988; and
- Private sector employers who employed 10 to 99 employees on January 1, 1988, and chose to post a plan before December 31, 1993.

Pay Equity Act considerations in M&A transactions

The obligations under the *Pay Equity Act* are often overlooked in M&A Transactions. However, considerations under the *Pay Equity Act* should be one of the main labour and employment-related considerations in a transaction considering (1) the potentially

liabilities associated with non-compliance with the *Pay Equity Act*; and (2) specific statutory obligations that must be met in a “sale of business”.

Retroactive liability

Under the *Pay Equity Act*, an employer can be ordered to pay retroactive adjustments to the date the adjustment should have first been paid. There is no limitation period prescribed by the *Pay Equity Act*. This means that employers may be ordered to pay retroactive adjustments (plus interest) from the time the non-compliance occurred, which can be as early as 1988, depending on when the employer became subject to the *Pay Equity Act*. These retroactive adjustments are payable to all affected employees, including former employees.

In turn, if the seller has not complied with the *Pay Equity Act*, this potential retroactive liability may be transferred to the purchaser. Such considerations would be especially important in share purchase transactions where the entity that is sold continues to operate on a status quo basis.

Further, the *Pay Equity Act* explicitly notes that if an employer who is bound by a pay equity plan “sells a business”, the purchaser must make any compensation adjustments that were to be made under the plan in respect of those positions in the business that are maintained by the purchaser, and further the purchaser must do so on the date on which the adjustments were to be made under the plan.

Given that the term “sells a business” broadly includes leases, transfers and any other manner of disposition, the retroactive adjustments required under an already established pay equity plan can also be transferred to purchasers for other types of transactions, such as asset purchases.

Changes required to the pay equity plan

Following a transaction, an existing pay equity plan may no longer be appropriate due to:

- changes in workforce composition;
- the addition of new job classes; or
- structural changes to the organization.

Where that occurs, a new pay equity plan may be required. In non-unionized workplaces, the employer prepares the new plan. In unionized workplaces, the employer and bargaining agent must jointly develop it.

This issue is often assessed after closing, once the impact of the transaction on the workforce is known, but it should be considered during due diligence.

Key transaction considerations

In light of the above, parties to a transaction should consider:

- whether the seller has complied with its pay equity obligations and whether outstanding adjustments remain;
- what contractual protections should be included in the purchase agreement, including representations, warranties, and indemnities; and
- whether the transaction may require post-closing adjustments to the purchaser's own pay equity practices.

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