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LEGISLATIVE UPDATE

November 2019

Backgrounder

Bill 124: Protecting a Sustainable Public Sector for Future Generations Act, 2019

Context

On November 7, 2019, the provincial government passed Bill 124, the *Protecting a Sustainable Public Sector for Future Generations Act, 2019*. Bill 124 makes a series of legislative changes including, among other things, establishing different three-year moderation periods for various employee groups, and limiting salary rate and compensation increases to a maximum of one per cent per year over the three-year moderation period.

The Ontario Hospital Association (OHA) has prepared this backgrounder to provide members with a high-level overview of the changes in Bill 124. For further information on Bill 124, please refer to the provincial government's news release and accompanying documents (link).

The OHA has also prepared a ***Frequently Asked Questions*** document to provide additional details on Bill 124. The OHA recommends that this document be read alongside the backgrounder.

Key Highlights of the Legislation

Bill 124 is a significant labour relations development for broader public sector (BPS) organizations across Ontario. Bill 124 enacts the *Protecting a Sustainable Public Sector for Future Generations Act, 2019* (the "Act"). The stated purpose of the Act is to ensure that increases in public sector compensation reflect the fiscal situation of the Province, are consistent with the principles of responsible fiscal management and protect the sustainability of public services.

The legislative changes which impact both unionized (represented) and non-unionized (non-represented) employees at hospitals include the following:

- Salary rates and compensation increases for employees covered by Bill 124 are limited to a maximum of one per cent per year over the three-year moderation period, subject to limited exceptions in the legislation;
- The applicable moderation period will depend, among other things, on an employee's status (unionized or non-unionized) and whether a collective agreement is in force as of June 5, 2019;
- Bill 124 permits the Management Board of Cabinet to issue directives requiring hospitals to provide a range of information relating to collective bargaining and compensation;
- The Minister (President of Treasury Board) may also make an order declaring that a collective agreement or an arbitration award is inconsistent with the Act, subject to procedural rules in the Act; and
- Bill 124 does not set out any express penalty provisions with respect to an employer's failure to comply with the Act, its regulation(s) or any directives. However, an "anti-

avoidance rule" prohibits any payments made by an employer to employees in an effort to avoid the restraint measures that would otherwise apply under Bill 124.

I. Applicable Employers and Employees

Bill 124 applies to a wide range of BPS employers, including the government and all types of Crown agencies, boards, or commissions; public hospitals; universities and colleges; school boards; licensees under the *Long-Term Care Homes Act, 2007*, unless they operate on a for-profit basis; children's aid societies; not-for-profit organizations that received at least $1,000,000 in funding from the government of Ontario in 2018; and any other organization prescribed by future regulations.

Subject to the exceptions discussed below, Bill 124 would apply to almost all employee groups of the employers subject to the Act. This includes both unionized and non-unionized employees, regardless of which bargaining organization represents those employees.

The legislation does not apply to municipalities; local boards established under the *Municipal Act, 2001* or the *City of Toronto Act, 2006*; authorities, boards, commissions, corporations, offices or organizations of persons, a majority of whose members, directors or officers are appointed or chosen by or under the authority of the council of a municipality; and organizations that undertake their activities for the purpose of profit to their shareholders (subject to any regulations providing otherwise). Bill 124 also does not apply to an "Indigenous community" as defined in the legislation or a range of organizations and entities as defined under the *Indian Act (Canada)*.

Bill 124 also expressly excludes "designated executives" within the meaning of the *Broader Public Sector Executive Compensation Act, 2014* (BPSECA), classes of employees as set out in any future regulations, and employees of an organization that undertakes its activities for the purpose of profit to its shareholders [see subsections 5(2)(4), 6(2)-(3)].

The scope of employers and employees under Bill 124 means that any "designated executives" which are covered by the existing BPSECA executive compensation rules will continue to be governed by this framework and remain outside of the permitted increases allowed under Bill 124. Another notable observation is the potential impact that Bill 124 may have on employee compensation in Ontario Health Teams (OHTs). For example, Bill 124 establishes limitations for hospitals employee compensation, whereas other private for-profit organizations fall outside the scope of Bill 124. This means that any future OHTs which include both for-profit and not-for-profit health care partners may have different salary rate and compensation limits applied to each OHT partners' respective employees.

II. Moderation Periods and Compensation Limitations

Calculating the Moderation Period

Section 9 of Bill 124 sets out detailed rules governing moderation periods for unionized employees. For these employees, the three-year moderation period would not override current collective agreement obligations and begins at the expiry of the collective agreement that is in force as of June

5, 2019. In the case of expired collective agreements, the moderation period begins on the day immediately following the day the previous collective agreement expired and ends on the day that is three years later. If the parties are bargaining for a first collective agreement on June 5, 2019, the moderation period begins on the commencement date of the collective agreement and ends on the day that is three years later. Further detailed rules are provided for circumstances where no collective agreement is in operation on June 5, 2019, and the parties are, or have been, in arbitration to resolve all outstanding matters related to concluding the collective agreement [see subsection 9(1)].

As part of the legislative process, the provincial government approved a number of amendments related to these moderation period rules for unionized employees. These amendments, found in subsections 9(2) – 9(6), clarify the law on collective bargaining agreements entered into *prior* to the introduction of Bill 124 and also to the period of time between the Bill's introduction and when it was passed into law (November 7, 2019). Specifically, Bill 124 will *not* impose moderation periods on collective agreements where:

1. a settlement was reached, in good faith, on or before June 5, 2019, but not ratified as of November 7, 2019;
2. an arbitration award was issued between June 5, 2019, and November 7, 2019; or
3. the Minister exempts the agreement through regulation provided that the settlement was reached, in good faith, after June 5, 2019, and before November 7, 2019, and the agreement expires no later than December 31, 2021.

For a collective agreement that satisfies one of the above-mentioned criteria, the moderation period will begin on the day after that collective agreement expire and ends three years later. These amendments will have no impact on the vast majority of hospitals and do not apply to any centrally bargained agreements.

For non-unionized employees, section 14 of Bill 124 states that the three-year moderation period begins on the earlier of: (i) a date to be selected by the employer that is after June 5, 2019; or (ii) January 1, 2022. If any non-unionized employee compensation plans are tied to increases to the salary rate of unionized employees, subsection 14(2) states that the moderation periods for non-unionized employees must line up with the unionized employees' moderation period.

As previously mentioned, the OHA's ***Frequently Asked Questions*** document provides further clarity on this topic and poses several scenarios for your consideration.

Salary Rate and Compensation Restraints

Bill 124 limits salary rate increases to no more than <u>one per cent per year</u> over the three-year moderation period, subject to limited exceptions in the legislation. This limit applies to all employees, regardless of whether increases are found in collective agreements, arbitration awards or individual compensation plans.

The phrase "salary rate" is defined in the Act as "a base rate of pay, whether expressed as a single rate of pay, including a rate of pay expressed on an hourly, weekly, bi-weekly, monthly, annual or

some other periodic basis, or a range of rates of pay, or, if no such rate or range exists, any fixed or ascertainable amount of base pay."

Bill 124 also limits incremental increases to "existing compensation entitlements or for new compensation entitlements" to no more than one per cent per year averaged over all employees covered by a specific collective agreement or over the employer's non-unionized employee group.

The term "compensation" is defined in the Act as "anything paid or provided, directly or indirectly, to or for the benefit of an employee, and includes salary, benefits, perquisites and all forms of non-discretionary and discretionary payments."

Notwithstanding the above limitations, Bill 124 states that a salary rate limit will not apply where the increase is related to (i) the employee's length of time in employment (e.g. movement through a collective agreement wage grid); (ii) an assessment of performance; or (iii) the employee's successful completion of a program or course of professional or technical education in the compensation plan.

If an employer's cost of providing a benefit as it existed on the day before the beginning of the moderation period *increases* during the moderation period, this increase will also not constitute an increase for the purposes of the maximum one per cent compensation limit [see subsections 11(3), 16(3)].

Furthermore, amendments to Bill 124 create additional exceptions for voluntary exit programs, pension contribution offsets and prescribed payments [see sections 12.1 – 12.3]. These sections have been added to Bill 124 to exempt payments to employees made in accordance with voluntary exit programs that have been approved by the Management Board of Cabinet. Similarly, where an employer converts from a single employer pension plan to a jointly sponsored plan in accordance with the *Pension Benefits Act*, any associated incremental increase to existing compensation entitlements or new compensation entitlements will not be considered "compensation" for the purposes of the moderation period.

To the extent that either of these situations arises during a moderation period, the OHA recommends hospitals receive specific advice prior to implementation.

III. Directives and Minister's Orders

Directives related to Collective Bargaining or Compensation Information

Section 19 of Bill 124 allows the Management Board of Cabinet to issue directives requiring employers to provide information "relating to collective bargaining or compensation that the Management Board of Cabinet considers appropriate", including information with respect to:

- compensation;
- collective agreements, employer bargaining mandates, negotiated settlements and submissions to arbitrators;

- the employer's costing with respect to collective agreements, proposed or negotiated changes to collective agreements, compensation plans and proposed changes to compensation plans;
- the moderation periods that apply to represented and non-represented employees;
- agreements between an employer and one or more employees relating to compensation; and
- compensation policies, plans, guidelines and programs.

Pursuant to subsection 19(5) of Bill 124, Management Board of Cabinet directives may authorize disclosure of the above-noted information to a range of other persons employed or engaged by the government including, without limitation, a "consultant or advisor retained to provide advice or services in relation to compensation matters."

Minister's Orders

Section 20 of Bill 124 provides that the Minister may, in the Minister's sole discretion, make an order declaring that a collective agreement or an arbitration award is inconsistent with the Act. No express definition of "inconsistent" or "consistent" is included in the Act.

If the Minister determines that a collective agreement or arbitration award is inconsistent with the Act, subsections 20(4) and (5) of Bill 124 provide for a range of potential consequences, including (i) forcing the parties to return to bargaining; (ii) forcing the arbitrator or arbitration board to reach an award that is consistent with the Act; (iii) returning to prior terms and conditions of employment; and (iv) concluding a new agreement that is consistent with the Act. The parties will also have the opportunity to provide the Minister with written submissions pursuant to the procedural requirements set out subsection 20(2).

Bill 124 does not set out any express penalty provisions with respect to an employer's failure to comply with the Act, its regulation(s) or any directives. However, section 18 does establish a significant anti-avoidance rule which requires that no employer provide "compensation before or after the applicable moderation period to an employee for compensation that the employee will not, does not or did not receive as a result of the temporary moderation measures in this Act." In other words, hospitals will not be permitted to provide payments to employees in an effort to avoid the restraint measures that would otherwise apply under Bill 124. Section 31 of Bill 124 also allows for the creation of general or particular directives, while section 32 allows the Lieutenant Governor in Council to make regulations for carrying out the purposes and provisions of the Act.

Timeline and Next Steps

Bill 124 has been proclaimed into force, with the limited exception of sections 39, 40, 41(2) and 42(2). This means that the key requirements of Bill 124 are now law and have taken effect.

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The OHA will continue to monitor developments related to Bill 124's implementation and will provide members with additional updates and further supports as the Bill's implementation period continues.

For more information, please contact Adam Pennell at apennell@oha.com at 416.205.1304.