

Protecting a Sustainable Public Sector for Future Generations Act, 2019
Executive Summary

November 2019

On November 8, 2019, Ontario's Bill 124 - the *Protecting a Sustainable Public Sector for Future Generations Act, 2019* (the "Act") – was proclaimed in force. The Act was introduced and passed First Reading on June 5, 2019 and moved quickly through Second and Third Reading. It received Royal Assent on November 7, 2019.

The stated intent of the Act is to ensure public sector compensation increases are consistent with the principles of responsible fiscal management and sustainability of the public service.

Within hours of receiving Royal Assent, the Act received criticism from a variety of public sector unions, many of which stated an intention to challenge the Act's constitutionality before the courts.

In its current form, the Act will have a significant impact on employers in the public and broader public sector. This Executive Summary breaks down the key points for employers.

Entities Covered

The Act covers a range of public and broader public sector entities, including:

1. The Government of Ontario, including any Crown agency.
2. Any university, college or post-secondary institution where enrolment is counted for the purpose of calculating annual operating grants and entitlements.
3. A board within the meaning of the *Education Act*.
4. A hospital under the *Public Hospital Act*, and the University of Ottawa Heart Institute.
5. A licensee under the *Long-Term Care Homes Act, 2007* unless it operates on a for-profit basis.
6. Ornge.
7. Any children's aid society.
8. Any non-profit organization that received at least \$1,000,000 in funding from the Government of Ontario in 2018 (or any later year specified by regulation).
9. Ontario Power Generation Inc. and its subsidiaries.
10. Any other prescribed organization.

The Act expressly does not apply to:

1. A municipality, or any authority, board, commission, corporation, office or organization where a majority of the members, directors or officers are appointed by or under the authority of the council of a municipality.
2. A local board under the *Municipal Act, 2001* or the *City of Toronto Act, 2006*.
3. An Indigenous community, or any authority, board, commission, corporation, office or organization where a majority of the members, directors or officers are appointed by or under the authority of one or more Indigenous communities.
4. A police governing authority under the *Police Services Act*¹.
5. Any for-profit organization, unless provided for by regulation.

Compensation Restraint Measures Imposed by the Act

The previous Ontario Government introduced, through the *Broader Public Sector Executive Compensation Act, 2014*, compensation restraint legislation specifically targeting executive employees. The Act targets the remaining public sector employees.

Unionized Employees

The Act imposes compensation limits on parties to a collective agreement. Specifically:

1. A collective agreement or arbitration award may not provide a salary rate increase for a position or class of positions in a collective agreement that exceeds 1% for each 12-month period of the applicable “moderation period” (described in more detail below).
2. A collective agreement or arbitration award may not provide for any incremental increase to other existing compensation entitlements or new entitlements that exceed 1% on average for all employees covered by the collective agreement for each 12-month period of the applicable moderation period.
3. There can be no salary increase where a collective agreement has expired and no collective agreement is in operation during the applicable moderation period.

Each public sector employer must determine the applicable “moderation period” for each collective agreement in its workplace. The moderation period will always be **three years**. However, the commencement date of the three year period varies depending on the status of the collective agreement:

¹ This exemption will be amended to apply to a police governing authority, First Nation board or First Nation O.P.P board under the *Community Safety and Policing Act, 2019* when that act is declared in force.

1. **If a collective agreement is in force on June 5, 2019**, the moderation period begins on the day immediately following the expiry of the collective agreement.
2. **If no collective agreement is in force on June 5, 2019** and the prior agreement has expired, the moderation period begins on the day immediately following expiry date of the prior agreement.
3. **If the parties are in bargaining for a first collective agreement on June 5, 2019**, the moderation period begins on the commencement date of the collective agreement ultimately agreed upon.
4. **If the parties are, or have been, in interest arbitration to resolve the collective agreement and the arbitration award has not been issued on or before June 5, 2019**, the moderation period begins on the commencement date of the collective agreement that gives effect to the arbitration award. If the parties settle the collective agreement in the course of the interest arbitration, the moderation period begins on the commencement date of the collective agreement ultimately agreed upon.
5. **If the parties are, or have been, in interest arbitration to resolve the collective agreement and the arbitration award was issued on or before June 5, 2019**, the moderation period will commence on the day immediately following expiry of the collective agreement that gives effect to the award.

Despite these provisions, the Act exempts certain agreements negotiated, and arbitration awards issued, in the period between the date the Act was introduced and when it was proclaimed into force (November 8, 2019). Specifically:

1. If, **on or before June 5, 2019**, the parties in good faith entered into a written: (1) memorandum of settlement for a collective agreement ratified after June 5, 2019, or (2) collective agreement ratified on or before June 5, 2019 that comes into operation after that date, or (3) agreement to renew a collective agreement in operation on June 5, 2019 for a single specified term, the moderation period will commence on the day immediately following expiry of that agreement.
2. If, **between June 6 and November 7, 2019 (inclusive)**, the parties in good faith enter into a written: (1) memorandum of settlement for a collective agreement that expires no later than December 31, 2021, or (2) collective agreement that expired no later than December 31, 2021, or (3) agreement to renew a collective agreement in operation on June 5, 2019 for a single specified term expiring no later than December 31, 2021, the moderation period will commence on the day immediately following expiry of that agreement.
3. If, **between June 6 and November 7, 2019 (inclusive)**, an arbitration award is issued, the moderation period will commence on the day immediately following expiry of the collective agreement that gives effect to the award.

Non-Unionized Employees

As with unionized employees, the Act provides that no employer may provide a salary rate increase for a non-unionized position or class of positions that exceeds 1% for each 12-month period of the applicable moderation period. Similarly, no employer may provide for incremental increases to other existing compensation entitlements or new entitlements that exceeds 1% on average for all non-unionized employees employed by the employer for each 12-month period of the applicable moderation period.

However, if employees are non-unionized, the Act provides the employer greater flexibility when establishing the applicable moderation period. In this case, the moderation period is a three-year period that begins on the earlier of: (1) a date selected by the employer that is after June 5, 2019, or (2) January 1, 2022. However, if a compensation plan for a non-unionized employee provides a salary rate increase proportionate to an increase in the salary rate of employees under a collective agreement, the moderation period for the non-unionized employee will be the moderation period applicable to the corresponding collective agreement.

Exemptions and Limitations

Compensation Exemptions

The Act broadly defines compensation 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.”

In light of this broad definition, the Act exempts certain compensation increases from its application:

1. Any salary increase authorized under a collective agreement or compensation plan in recognition of: (1) seniority, (2) performance, or (3) successful completion of a program or course of professional or technical education.
2. Any increase during the moderation period to the cost of providing an existing benefit (*e.g.*, an increase in group health or dental premiums).
3. Any payment made under a voluntary exit program approved by the Management Board of Cabinet.
4. If an employer is converting from a single employer pension plan to a jointly sponsored plan in accordance with the *Pension Benefits Act*, any compensation increase provided in exchange for an increase in member-required contribution.
5. If specified by regulation, any other compensation to reduce long-term compensation costs.

Limitations on Jurisdiction

The Act may not be interpreted or applied so as to reduce a right or entitlement under the *Human Rights Code*, *Employment Standards Act, 2000* (as it relates to minimum wage, equal pay and benefit plans) or the *Pay Equity Act*. The Act also insulates an employer from any claim the failure to increase compensation in accordance with the Act constitutes a constructive dismissal and generally insulates the Government or its ministers, employees or appointees from any cause of action arising out of the Act.

Anti-Avoidance and Oversight Mechanisms

Prohibition on Anti-Avoidance

An employer may not provide any compensation increase to an employee, prior to or following the applicable moderation period, to compensate the employee for compensation not received as a result of the restraint measures in the Act.

Oversight Mechanisms

The Management Board of Cabinet may require any employer or employer organization provide it with information on collective bargaining or compensation as required to ensure compliance with the Act. The President of the Treasury Board retains the discretion to make an order declaring a collective agreement or arbitration award inconsistent with the Act. In that case, the parties are required to return to the same stage of bargaining at which they were at immediately before the collective agreement was settled, with the terms and conditions of employment reverting back to that point in time. The parties are required to conclude a new collective agreement consistent with the Act.

If an arbitration award is declared non-compliant with the Act, the arbitration board that issued the award will remain seized and the terms and conditions of employment will revert back to those in place immediately before the date of the arbitration, and the parties are required to conclude a new agreement (through bargaining or arbitration) consistent with the Act.

For assistance understanding and addressing the impact of the Act on your workplace, contact Sherrard Kuzz LLP.

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