

# Closing the Gender Pay Gap: Ontario's proposed Pay Transparency Act, 2018

Thursday, April 5, 2018

On March 6, 2018, the Ontario government introduced Bill 203, *Pay Transparency Act, 2018* ("Bill 203"). Bill 203 creates certain requirements for employers regarding compensation information and its disclosure to employees and potential employees. If passed, the legislation will come into force on January 1, 2019.<sup>1</sup>

It is worth noting that Bill 203 applies to private and public sector employers, and imposes wider obligations than does Ontario's *Public Sector Salary Disclosure Act, 1996*, which requires public sector employers to make public the names, positions, salaries and total taxable benefits of employees paid \$100,000 or more in the previous calendar year.

Once in effect, Bill 203 will prohibit employers from seeking the compensation history regarding an applicant for a position, whether done by inquiring with the applicant personally or through an agent. Notably, Bill 203 does not prohibit an applicant from voluntarily disclosing this information. Where an applicant has disclosed the information regarding his or her compensation history, the employer may consider or rely on this information in determining the compensation for the applicant. "Compensation" is defined as all payments and benefits paid or provided to or for the benefit of a person who performs functions that entitle the person to be paid a fixed or ascertainable amount.

Nonetheless, Bill 203 will allow employers to seek out information regarding the ranges of compensation or aggregate compensation provided for positions comparable to the position for which the applicant is applying. In addition, Bill 203 will require that job postings include information about expected compensation or the range of expected compensation for the position.

## Transparency Reports

One of the most significant changes arising from Bill 203 is the requirement for employers to prepare a pay transparency report that complies with the regulations and contains information relating to:

- the employer;
- the composition of the workforce; and
- the differences in workplace compensation with respect to gender and other characteristics.

In addition, employers will be required to submit the pay transparency report to the Minister and post it online or in at least one conspicuous location in the workplace. The Ministry may also publish, or otherwise make available to the public the pay transparency report.

## No Reprisal

Bill 203 will also prohibit an employer from intimidating, dismissing, or otherwise penalizing an employee or threatening to do so because the employee has:

- a. made inquiries to the employer about the employee's compensation;
- b. disclosed the employee's compensation to another employee;

- c. made inquiries about a pay transparency report, or about information contained in such a report;
- d. given information about the employer's compliance or non-compliance with the requirements of the Act or the regulations to the Ministry; or
- e. asked the employer to comply with this Act or the regulations.

Where there is an employee complaint regarding an alleged contravention of the anti-reprisal provisions of Bill 203, the Bill will allow the matter to be dealt with by arbitration where a collective agreement is in place, or through the filing of a complaint with the Ontario Labour Relations Board (the "Board"). Where, on inquiry, the Board determines that an employee has been discharged or otherwise disciplined by an employer for cause and the contract of employment or the collective agreement, as the case may be, does not contain a specific penalty for the infraction, the Board may substitute such other penalty for the discharge or discipline as seems just and reasonable in all the circumstances.

### **Compliance Audits**

Under Bill 203, compliance officers may conduct compliance audits and investigations, which may include entering and inspecting any place, document, or questioning any person, on matters the officer views as may be relevant to the investigation or inspection. Bill 203 also provides for penalties that will be applicable to any contravention of the Act. The nature of the penalties is expected to be set out in the regulations to the Act.

### **The European Experience**

The European Union has been attempting to address the issue of reducing the gender pay gap in Europe for a number of years. In March 2014, the European Commission introduced Recommendation 2014/124/EU (the "Recommendation"), which suggests that every member state ought to adopt (or adapt) at least one out of four measures ensuring greater transparency of pay:

1. the individual right to request pay information;
2. compulsory company level gender pay reports for companies with more than 50 employees;
3. more analytical gender pay audits for larger companies; and
4. to 'encourage' social partners to take the matter into account in their collective bargaining.

A number of northern European countries, and the United Kingdom and Germany, have introduced pay transparency legislation in response to the Recommendation. In the United Kingdom, *The Equality Act 2010 (Gender Pay Gap Information) Regulations 2017*, came into force on April 6, 2017. The Regulations, which are expected to affect more than 15 million people, require that all companies in Great Britain with more than 250 employees report their gender pay gap to the Government Equalities Office ("GEO"). All public bodies are due to report by March 30, 2018 and all companies are due to report by April 4, 2018. Companies are also required to publish details of the proportion of men and women in the company who receive bonuses, along with the breakdown of men and women in different pay quartiles on their own website and on the website of the GEO. More than 1,000 employers have already reported these figures. Notably, under the *Equality Act 2010* c.15, it is up to the individual companies and public bodies to calculate their own gender pay gaps, and a number of companies have restated their figures to date, highlighting the importance of timing with respect to data collection and reporting.

Criticisms of the U.K. legislation include the fact that there are currently no plans to levy a penalty against companies that have a wide gender pay gap. However, the British government has stated that it will publish sector-specific league tables, highlighting companies that have failed to address pay differences between men and women. Notably, when the BBC published its 2017 figures, in January 2018 one of its key journalists, Carrie Gracie, resigned due to inequality of pay, highlighting the potential impact of public disclosure even in the absence of specific penalties.

In a similar vein, Germany recently introduced *The Transparency of Remuneration Act* which came into force in July 2017, and stipulates that men and women who do the same jobs must be paid the same amount. The Act creates a right for individual employees of employers with at least 200 employees to be informed about the remuneration of other employees within one comparison group. If an individual employee finds indications that the remuneration of at least six other colleagues of the opposite sex for the same or similar performance is higher, he or she can request to have his or her own salary compared to the average income of the named colleagues. Where the employer fails to provide the requested information within three months, the presumption of unequal treatment will arise, unless the employer puts forward a reasonable justification for the disparity in pay.

Another feature of *The Transparency of Remuneration Act* is the requirement that employers with more than 500 employees undertake operational audit procedures. The reports of these audits must include the measures that are taken to promote equality and produce equal payment, along with the number of full and part-time employees.

### **Significance**

Based on the evolution of pay transparency in Europe, it is perhaps not surprising that the Ontario government has undertaken to put legislation with similar goals in place. Notably, Bill 203 goes further than does the European legislation, at least in part because it provides for penalties in the event of contravention. If enacted, Bill 203 will represent an expansion of employer obligations during hiring and compensation processes, and will likely result in culture shifts in some Ontario workplaces. Considering the European experience with pay transparency legislation, which in some cases has publicly highlighted companies who have failed to address pay equity, it is to be expected that pressure to address pay gaps will also come from companies' own employees. While monitoring the progress of Bill 203, employers should consider performing internal pay equity audits, consulting with legal advisors with respect to strategic considerations relating to audits and reporting, and ensuring that hiring and compensation policies are being applied objectively and in a non-discriminatory manner.

<sup>1</sup> On March 15, 2018, the Ontario legislature was prorogued and an announcement made that the new session of the legislature would open with a Throne Speech on March 19, 2018. As a result of the prorogation, any bills which were not passed died on the order paper, including Bill 203, the *Pay Transparency Act, 2018*. However, it is expected that Bill 203 will be reintroduced in substantially the same form as that discussed in this article following the reopening of the legislature.

### **AUTHOR**

**Maria Gergin**  
T 416.367.6449  
[MGergin@blg.com](mailto:MGergin@blg.com)



## **BLG OFFICES**

### **Calgary**

Centennial Place, East Tower  
520 3rd Avenue S.W.  
Calgary, AB, Canada  
T2P 0R3

T +1.403.232.9500  
F +1.403.266.1395

### **Montréal**

1000 De La Gauchetière Street West  
Suite 900  
Montréal, QC, Canada  
H3B 5H4

T +1.514.954.2555  
F +1.514.879.9015

### **Ottawa**

World Exchange Plaza  
100 Queen Street  
Ottawa, ON, Canada  
K1P 1J9

T +1.613.237.5160  
F +1.613.230.8842

### **Toronto**

Bay Adelaide Centre, East Tower  
22 Adelaide Street West  
Toronto, ON, Canada  
M5H 4E3

T 416.367.6000  
F 416.367.6749

### **Vancouver**

1200 Waterfront Centre  
200 Burrard Street  
Vancouver, BC, Canada  
V7X 1T2

T 604.687.5744  
F 604.687.1415

The information contained herein is of a general nature and is not intended to constitute legal advice, a complete statement of the law, or an opinion on any subject. No one should act upon it or refrain from acting without a thorough examination of the law after the facts of a specific situation are considered. You are urged to consult your legal adviser in cases of specific questions or concerns. BLG does not warrant or guarantee the accuracy, currency or completeness of this publication. No part of this publication may be reproduced without prior written permission of Borden Ladner Gervais LLP. If this publication was sent to you by BLG and you do not wish to receive further publications from BLG, you may ask to remove your contact information from our mailing lists by emailing [unsubscribe@blg.com](mailto:unsubscribe@blg.com) or manage your subscription preferences at [blg.com/MyPreferences](http://blg.com/MyPreferences). If you feel you have received this message in error please contact [communications@blg.com](mailto:communications@blg.com). BLG's privacy policy for publications may be found at [blg.com/en/privacy](http://blg.com/en/privacy).

© 2018 Borden Ladner Gervais LLP. Borden Ladner Gervais LLP is an Ontario Limited Liability Partnership.