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Amendments to the *Pay Equity Act*: What are the changes to expect?

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On April 10, 2019, came into force several long-awaited amendments to the *Pay Equity Act*, which are mainly intended to improve the pay equity audit process.

These amendments follow last year's Supreme Court of Canada ("SCC") judgment[1]. We discussed these judgments in a previous bulletin.

It should be recalled that the SCC, in its decision of May 10, 2018, essentially declared certain provisions of the *Pay Equity Act* unconstitutional, stating that:

1. Compensation adjustment, in the context of a pay equity audit conducted every five years, must be retroactive;
2. The information to be included in the posting of the audit results was insufficient to allow employees to properly understand the process followed by the employer during the audit and did not include the date on which inequity manifested itself.

In fact, the amendments to the *Pay Equity Act* go much further than most of the adjustments required by the Supreme Court of Canada, despite public consultations and numerous comments from employer groups in this regard.

The following is a brief summary of the most significant amendments to the *Pay Equity Act* that your organization should review in order to quickly ascertain their repercussions:

1. Pay equity audit: Events leading to adjustments

Compensation adjustments, following the pay equity audit process, will now have to be paid retroactively, back to the date of the event leading to the adjustment.

The *Pay Equity Act* does not provide any clarification as to the notion of the event leading to the adjustment.

In practice, the employer will therefore have to examine the events that have affected pay equity on a case-by-case basis.

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One can imagine that this amendment will not be easy to apply and that in the case of several events and adjustments, retroactivity will have to be applied on different dates.

The retroactive payment required as a result of the pay equity audit will be payable in a lump sum. However, in some cases, for persons still employed by the employer, this lump sum may be spread over several payments, after consultation with the pay equity audit committee or the certified union representing employees, as the case may be.

In addition, the employer must indicate the date of the event on the posting of the audit results.

With respect to the date on which an employer must perform the pay equity audit, the *Pay Equity Act* now provides that the five (5) year time limit is established from the first posting and not the second posting, whether for an initial pay equity exercise (through a program or not) or a previous audit.

2. Pay equity audit: Participation of employees and certified associations

Another major change is the introduction of an employee participation process in cases where the initial exercise was conducted by a committee or where there is at least one certified union representing employees.

One of the consequences of this participation process is that the employer is obliged to provide information about the audit work, including written documents. The *Pay Equity Act* provides that persons with access to this information are required to maintain its confidentiality.

The employer must also institute consultation measures so that the certified union or employees can ask questions and submit comments.

The employer also has an obligation to allow employees to meet at the workplace to determine who will be designated in the participation process. In any event, employees are deemed to be at work for the purposes of this process.

Finally, the employer will have to include questions or comments submitted as part of the participation process in the posting and show how they were considered in the audit.

3. Retention of documents

Documents used to achieve pay equity or to perform the pay equity audit must now be kept for a period of six (6) years instead of five (5).

In the case of a complaint or investigation, the employer is required to keep these documents until a final decision is made or until the investigation is closed.

4. End of posting notices

Good news: In order to somewhat streamline the posting process, it will no longer be necessary for employers to issue a notice stating that a pay equity posting is in progress.

5. Creation of a complaint form

The *Commission des normes, de l'équité, de la santé et de la sécurité du travail* ("CNESST") has created a complaint form that employees will have to use to file a complaint.

This complaint must briefly state the reasons for which it is being filed.

6. Grouping complaints and conciliation

The *Pay Equity Act* now provides the possibility for the CNESST to group complaints if they have

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the same juridical basis, are based on the same facts or raise the same points of law, or if circumstances permit.

In addition, when more than one certified union represents employees in the same job class and one of these unions files a complaint, the process requires the appointment of a conciliator.

In the case of a group of complaints or a complaint filed by a certified union in an enterprise, an employee who has also filed a complaint must receive a copy of the agreement that has been reached, and this employee may refuse to be bound by this agreement. In the event that no agreement has been reached, the *Commission des normes, de l'équité, de la santé et de la sécurité du travail* ("CNESST") must then determine the measures that must be taken to ensure that pay equity is achieved or maintained.

Transitional measures

Second postings related to a pay equity audit made prior to April 10, 2019, continue to be governed by the previous provisions of the *Pay Equity Act*.

However, in the case of a first posting made before April 10, 2019, the second posting must include the date of each event leading to an adjustment, in accordance with the changes made:

> A period of 90 days (until July 9, 2019) is allowed to make this second posting.
> Note: Adjustments resulting from this second posting will be due as of the date of the event that generated these adjustments and will therefore be retroactive according to the ministère du Travail, de l'Emploi et de la Solidarité sociale.

An employer that must issue a posting related to the pay equity audit by July 9, 2019, is not required to implement a participation process under the new provisions of the *Pay Equity Act*, even if a pay equity committee had been formed when pay equity was achieved or if a certified union represents all or some of the employees concerned.

If an employer was authorized by the CNESST before February 12, 2019, to conduct its pay equity audit after April 10, 2019, and, if not for that authorization, the posting of the audit would have been done before April 10, 2019, then the previous provisions of the *Pay Equity Act* will apply.

For pay equity audits to be completed by April 10, 2020, the new reference dates for calculating audit periods will only apply as of the next pay equity audit.

What employers should do Right now?

The Quebec government had to amend the *Pay Equity Act* to reflect the SCC's decision. These amendments will give rise to a number of practical difficulties that employers will have to anticipate.

Pay equity audit

Although the maintenance of pay equity must be audited every five years, we believe that employers will have to institute a mechanism to periodically identify major changes within the company that could lead to pay inequities for predominantly female job classes.

It will be necessary to keep a history of these events in order to be able to determine which ones have led to adjustments, if any, when posting the audit results. In any case, a history of the work should be kept, whether or not it was done by a committee, in order to ensure a certain continuity within the enterprise in the event of a change of manager.

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Since it requires continuous monitoring of the payline to comply with legal requirements, the audit process itself will become less onerous.

Employee participation

With respect to employers now required to institute an employee participation process, it will also be prudent to have employees who participate in the audit process sign a confidentiality agreement and make them aware of the sensitive nature of the information to which they have access.

Posting

Employers will have to ensure adequate disclosure of information in the postings, which will enable better understanding of the audit results and potentially minimize the risk of complaints.

Training and communication

It will be essential to train managers on pay equity in order to ensure a good understanding of the legislation and avoid inconsistencies in the implementation of the audit process.

In short, although pay equity is a value that has reached a point of consensus in our society, the fact remains that the law imposes a restrictive and formal framework that will have to be put in place.

Our Labour and Employment team can provide you with valuable support in this exercise and we invite you to contact us.

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1. *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux, 2018 SCC 17*

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