



Comments on the Proposed Pay Transparency Reporting Requirements

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Submitted by: Ontario Bar Association



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Introduction

The Ontario Bar Association (“**OBA**”) appreciates the opportunity to provide feedback on the Proposed Pay Transparency Reporting Requirements, proposal number 19-MOL005 (the “**Consultation**”). As noted in the consultation documents, the government seeks “feedback on proposed pay transparency reporting requirements, which would require certain employers to report on differences in compensation between men and women and on workforce composition with respect to gender.”

The OBA

The OBA is Ontario’s largest legal advocacy organization, representing lawyers, judges, law professors and students from across the province, on the frontlines of our justice system and in no fewer than 40 different sectors. In addition to providing legal education for its members, the OBA assists government and other decision-makers with several legislative and policy initiatives each year - both in the interest of the profession and in the interest of the public.

These submissions have been prepared with input from the OBA’s Labour and Employment Law section. Members from this section serve as legal counsel to both employers and employees and are experts with respect to employment law, labour law, human resources and human rights law. Such experience and expertise includes Ontario’s pay equity and pay transparency legislation and related efforts.

Overview

Under the leadership of President Lynne Vicars, the OBA has made advancing gender equality in the legal professional a priority in the 2018-2019 term. Through inclusive engagement efforts and innovative programming, such as our recently launched Solution Circles, we have been collecting member and stakeholder perspectives on barriers to entry,



advancement and participation for women in law, which whether systemic or attitudinal, may contribute to the failure of the profession to retain women at the same levels as their male counterparts. Our goal has been to not only to devise immediate, incremental steps that can be taken to eradicate barriers but also to identify opportunities for action that will address inequality on a larger scale. Pay transparency has emerged as an important component of any profession-wide strategy for advancing equality.

Given this, and following the passage of Bill 57, *Restoring Trust, Transparency and Accountability Act, 2018*, the OBA is pleased to see that the Ministry of Labour is engaging in consultations with respect to the *Pay Transparency Act, 2018*. The OBA's submissions will address the following questions included in the Consultation:

- Question 1: In order to capture a more accurate picture of the differences in compensation between men and women at an organization, which additional wage gap calculations should be required (e.g., bonuses, overtime pay, commissions)?
- Question 2: Given your answer to question 1, how should these gaps be calculated?
- Question 3: What reporting period would you prefer to use to calculate average and median hourly gender wage gaps (e.g., calendar year, a prescribed period such as a pay period or specific week [please specify the date/period], fiscal year, etc.)? Please explain.

Comments and Suggested Revisions

Our comments respecting each of the related questions are as follows:

1. Capturing true compensation differences

It is understood that the Ministry of Labour is considering the substance of a regulation for the *Pay Transparency Act, 2018* that would set out gender wage gap reporting requirements and would include provisions on how any gender wage gaps should be calculated. Specifically, the Pay Transparency Consultation Paper suggests that “the gender wage gap



would be calculated by finding the difference between women's and men's pay as a percentage of hourly earnings”.

The OBA submits that simply considering hourly earnings or wages does not correctly report an employee's true compensation in his or her employment and as such, gender wage gap reporting requirements should consider all forms of compensation.

Specifically, hourly wages is one form of compensation and is often referred to as “base salary” upon which additional forms of compensation are added. In many industries, employees are also compensated with bonuses (both discretionary and non-discretionary), commissions, incentives and car allowance. In fact, such additional forms of compensation are so fundamental to the employment relationship that courts have generally recognized that but for specific language in an employment contract or subsequent agreements, they are included in entitlement calculations for pay in lieu of notice upon dismissal.

Similarly, the *Pay Equity Act*, although recognized as being distinct from the *Pay Transparency Act, 2018*, defines compensation 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”. As such, the OBA recommends that a similar approach be considered when drafting any regulation regarding how the gender wage gap must be calculated in an organization's report requirements. To be clear, it is the OBA's position that all forms of compensation, including but not limited to hourly wages, bonuses, commissions, incentives and car allowances be included in gender wage gap calculations.

The OBA recognizes that by including an employee's total compensation in any gender wage gap calculation, the numbers may suggest that males are compensated at a higher level than their female counterparts. The OBA further recognizes that when including additional compensation such as bonuses and commissions, any gender wage gaps may be for a variety of reasons such as child care responsibilities and related leaves of absences. That said, the OBA emphasizes that the purpose of pay transparency legislation ought not to be to shame



or punish employers for such differences. Rather it is to start a dialogue and bring attention to any differences that can be systemically addressed.

In support of its position, the OBA draws upon the guiding principles of pay transparency reporting outlined in the Pay Transparency Consultation Paper:

The objective of any further regulation to prescribe pay transparency reporting requirements is to encourage and foster a dialogue between workplace parties about existing compensation and business practices, especially relating to gender. Employers can then decide to implement workplace-specific policies to address any gender gaps.

Further, the OBA notes and supports at this time, that the *Pay Transparency Act, 2018*, as it is currently drafted, does not provide for any repercussions for a report that demonstrates gender wage gaps and the Pay Transparency Consultation Paper suggests employers would be permitted to provide additional metrics or commentary with respect to any reported gender gaps.

The OBA submits that to truly understand gender gaps, the entire picture must be considered.

2. Calculation of Gender Gaps

The OBA has considered the Pay Transparency Consultation Paper's reference to the pay transparency reporting requirements in the United Kingdom ("UK") and in particular, notes that organizations in the UK provide statistics on hourly wage rates, but also bonuses.

The OBA supports the separation of the different classifications of compensation to account for some of the issues raised in the above section.

The OBA has no further recommendations on how gender wage gaps ought to be calculated.



3. Reporting Period

Given the OBA's response to Question 1, the OBA recommends that the reporting period used to calculate gender wage gaps be based on a calendar year.

In support of this recommendation, the OBA states that a calendar year will inevitably capture a more complete and accurate picture of an employee's true compensation and will more likely include compensation in addition to hourly wages, such as commissions and bonuses.

If, however, the government does not agree that an employee's entire and complete compensation ought to be calculated for the purposes of a gender wage gap analysis, the OBA submits that it is not likely to matter which reporting period is selected and could very well be a pay period of a specific week. Typically, hourly wages do not fluctuate in the same way as the other forms of compensation previously discussed.

Conclusion

We appreciate the opportunity to provide submissions on this important topic on behalf of our members and we would welcome the opportunity to provide additional information or answer any questions you may have.