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A Guide for Non-Unionized Employees to the new Federal *Pay Equity Act*

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Introduction

In Canada, the gender pay gap is a serious problem of inequality. Based upon average annual earnings, by gender, for both full-time and part-time workers, women workers in Canada earned an average of 69 cents for every dollar earned by men in 2016.² The gendered pay equity gap is wider for women who face multiple barriers to equality, such

¹ This initial guide builds upon the pay equity expertise at Cavalluzzo LLP and years of litigating many leading pay equity cases, particularly in Ontario and the federal sector.

² This calculation is based on "earnings" and not hourly wages from the 2016 census. The "earnings" measure captures all women's and men's earnings, including contract and part-time work – a crucial variable as about two-thirds of part-time workers are women.



as Indigenous women, racialized women, those who are 2SLGBTQI+, newcomer women, and women living with disabilities. Canada is ranked as having the 8th highest gender pay gap out of a list of 43 countries examined by the OECD, based on 2016 data.

Pay equity laws are remedial tools which place obligations on employers to examine their compensation structures for gendered inequality.

As of August 31, 2021, the Federal government's new *Pay Equity Act* ("Act")³ and the accompanying Regulation are now in effect.

This new proactive Act now requires employers to develop a pay equity plan to redress systemic wage discrimination in their workplaces. The new statutory regime enables proactive enforcement of the fundamental human right to gender equality in compensation - *equal pay for work of equal value*.

Non-union employees have important rights and entitlements under the legislation. The new *Act* requires that employers establish a single pay equity plan for all of their employees.⁴

By **November 1, 2021**, employers, are required to post a notice in their workplaces which outlines their obligation to create a pay equity plan and organize a pay equity committee depending upon their size, with representation of non-unionized employees as well as unionized employees. In workplaces with a pay equity committee, non-union employees will have an opportunity to sit side-by-side on the committee with their unionized co-workers to ensure gender equality in the workplace's compensation structures.

The employer, working with the committee, must ensure that the pay equity plan is completed no later than **September 3, 2024**. Any pay equity adjustments owed must start to be paid out no later than **September 4, 2024**.

The following guide provides a brief overview of some of the *Act's* key concepts for non-unionized employees to assist in knowing more about your rights.

³ The link to the *Pay Equity Act* (S.C. 2018, c. 27, s. 416) is here <https://laws-lois.justice.gc.ca/eng/acts/P-4.2/page-1.html>. The federal *Pay Equity Act* was first passed in December 2018 but not declared in effect until the *Act's* Regulations were proclaimed. The Pay Equity Regulation (SOR/2021-161) was proclaimed through an order in council in June 2021 which declared the *Act* in effect as of August 31, 2021. The link to the Pay Equity Regulation here is <https://laws-lois.justice.gc.ca/eng/regulations/SOR-2021-161/index.html>.

⁴ The plan requires a single plan for single employer. However, under s. 30 (1) of the *Pay Equity Act*, an employer or bargaining agent or a non-unionized employee of the employer may apply to the Pay Equity Commissioner to approve the establishment of more than one pay equity plan.

This guide is not exhaustive. A non-union employee should refer to the *Pay Equity Act* for guidance (<https://laws-lois.justice.gc.ca/eng/acts/P-4.2/page-1.html>). As well, the new Pay Equity Commissioner has developed interpretative guidelines and educational materials which will assist in better understanding the Act (see <https://www.payequitychrc.ca/en>).

1. What is pay equity?

Pay equity is a fundamental human right to correct the deeply held notion that “women’s work” is of less value than “men’s work”.

Pay equity requires that employers pay men and women the same total compensation (including the total of wages, bonuses, benefits and other forms of compensation) if the work performed or the position is of *equal value*. For example, a technician's job historically and stereotypically is dominated by men. A clerical job is historically and stereotypically dominated by women. If these two different jobs are of the same value, pay equity requires that their compensation is equal.

Pay equity laws are designed to rectify and prevent the persistent and systemic discrimination in wages and compensation practices experienced by women. Pay equity laws aim at ensuring gender equality. The *Act's* purpose section refers to the aim of achieving "pay equity through proactive means by redressing the systemic gender-based discrimination in the compensation practices and systems".

Pay equity is not equal pay for equal work. Equal pay requires employers to pay men and women the same compensation for doing the same job, at the same workplace.

Pay equity is a very significant remedial tool because it recognizes that discrimination arises because of women's labour market occupational segregation. Women tend to work in different jobs than men. Women-dominated jobs are generally less paid and less valued than male-dominated jobs. The longstanding prejudices and stereotypes, sustained by labour market practices, which funnel women into certain jobs, meant that women's work was under-described, under-valued and underpaid relative to men and their work.

Pay equity is about adjusting the job rate of jobs dominated by women to the job rate of jobs dominated by men where the jobs are of equal value.⁵

⁵ See the two recent Supreme Court of Canada cases: *Centrale des syndicats du Q Québec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 (CanLII), [2018] 1 SCR 464, <https://canlii.ca/t/hrx1n> and *Québec v. Québec (Attorney General)*, 2018 SCC 18 (CanLII), [2018] 1 SCR 522, <https://canlii.ca/t/hrx1q>.

2. The application of the Act

i. The Employers

The federal pay equity legislation covers *federally regulated* businesses and industries, both in the public and private sector, with 10 or more employees. Section 3 (2) of the Act defines "employer" with reference to key federal jurisdictional statutes, such as the *Canada Labour Code*, the *Financial Administration Act*, the *Royal Canadian Mounted Police Act*.

A few examples of private sector employers to which the Act applies include banks, radio and television broadcasters, telecommunications, such as, telephone, internet, and cable systems, transportation and shipping, railway, airlines and airports.

Indigenous governing bodies are exempt from application of the Act until a regulation specifies that the Act applies. Similarly, the government of the Yukon, Northwest Territories and Nunavut are identified as employers, but are exempt until a date is specified by Regulation.

The Act provides that a "group of employers", two or more employers, may apply to the Pay Equity Commissioner to be recognized as a "single employer" for the purpose of establishing a pay equity plan.

The Commission then has discretion under section 106 of the Act, to recognize a group of employers if the employers are "part of the same industry", have "similar compensation practices" and have "positions with similar duties and responsibilities".

ii. The Employees

The Act applies to most workers employed in the federal public service, officers or non-commissioner members of the Canadian Forces, and persons employed by a private (i.e. non-governmental) employer in connection with the operation of any "federal work, undertaking or business" listed in section 2 of the *Canada Labour Code*.

The Act also applies to dependent contractors. A dependent contractor, as defined under the *Canada Labour Code*, section 3(1) generally refers to persons who, whether or not employed under a contract of employment, performs work or services for another person on terms and conditions that they are in a position of economic dependence or and under an obligation to perform duties for, that other person.

Your superior or manager may refer to you as an independent contractor. It is important to seek independent legal advice on this question to ensure you access all of your rights as an employee.

iii. The Act applies to non-unionized employees

Defined in section 3(1) of the Act, a non-unionized employee refers to an employee who is not a member of a bargaining unit and is not declared to be in a managerial or confidential position in matters relating to industrial relations. This definition is particularly relevant as we describe the pay equity committee structure below.

3. The Employer's notice by November 1, 2021

Federally regulated employers have until November 1, 2021 to post a Notice stating:

- i. its obligation to establish a pay equity plan;
- ii. its obligation or intention (if voluntary) to establish a pay equity committee;⁶
- iii. for any non-unionized employees, their right to choose the committee members who will represent them;
- iv. if there are any unionized employees, the right of their bargaining agent to select committee members who will represent them.

The posting must be printed or electronic, in accessible formats, and must remain visible to employees until a pay equity plan is in place no later than September 3, 2024.

4. A Pay Equity Committee under the *Pay Equity Act*

An employer's obligations under the *Act* vary depending on the size of the workplace (i.e. 10-99 vs. 100+ employees), the type of employer and whether some or all of the employees are unionized.

Employers or groups of employers with over 100 employees, or 10-99 employees if at least some workers are unionized, must make all reasonable efforts to establish a pay equity committee (a "committee").⁷

Employers that have between 10 and 99 employees, with no unionized employees, are not required to establish a pay equity committee in order to develop their pay equity plan. In other words, the employer may do so unilaterally. However, the Pay Equity Commission recommends that it is a good practice to establish a pay equity committee.

Where a pay equity committee is voluntarily established, the employer must notify the Pay Equity Commissioner that they have voluntarily established a pay equity committee.

A pay equity committee must have a minimum of three committee members. At least two-thirds of the committee members must represent employees to whom the pay equity plan relates. At least 50% of committee members must be women.

⁶ See s. 14 of the Act for more information on the required content of this notice.

⁷ Act, ss. 16(1), 17(1).

At least, one employee is to represent all non-union employees. Non-unionized employees will sit on the committee with unionized members. The non-unionized employee representative is to be selected by a vote of non-unionized employees. The employer is required to provide access to workplace space and equipment and paid time for the non-union employee voting process.

It is very important for employees to work together on the Committee. A decision of the employee group counts as a vote *only* if it is unanimous. If the employee representatives cannot, as a group, reach a unanimous decision on a matter, that group forfeits its right to vote. The employer's vote prevails. Employees understand the work that they do on a day-to-day basis better than anyone else in their workplace. Employees are in the best position to know the skill, effort, responsibilities and working conditions associated with their work. The Pay Equity Committee enables employees to have a voice on the development of the pay equity evaluation tool and ensure it encompasses the fully identifies the value of their work, among other things. This means that non-unionized and unionized workers working together can contribute to important decision making throughout the pay equity process to ensure gender equality in the workplace.

An employer must provide the pay equity committee with any information in the employer's possession that the committee considers necessary for the establishment of the pay equity plan. In addition, the employer is to provide the committee members with paid time to conduct the work of the Committee. The work of the Committee is confidential.

5. Developing the Pay Equity Plan

A single pay equity plan will apply to all employees in a single workplace, unless the Commissioner has approved the establishment of multiple plans.⁸

The employer is responsible for ensuring compensation practices are pay equity compliant. The pay equity committee, or an employer, if a committee is not required (workplaces with 10-99 employees where there is no union), is responsible for developing the pay equity plan.

In addition, the employer may seek to rely on a previous pay equity plan or a "prior value" to a job which meets the gender-neutral requirements of the Act. If your employer seeks to apply a "prior value" plan, it is important to examine the new plan in close detail. When was the prior plan established and last implemented? Does the prior plan truly value women's work?

In very general terms, there are four broad steps to developing the pay equity plan:

⁸ Act, s. 30.

1. Identify the job classes and whether the job class is dominated by women or men:
 - a. Positions are generally considered to be part of the same "job class" where they have similar duties, responsibilities, required qualifications, and compensation plans or salary ranges.⁹
 - b. The gender dominance of a job class is determined by examining the current or the historical incumbency of the position or the job class is commonly associated with women due to gender-based occupational stereotyping.¹⁰ At least 60% of the position must have been/be occupied by women to be a female job class.

2. Determine the Value of Work, Calculate and Compare Compensation:
 - a. The employer, or committee, must determine the value of the work performed by each job class, based on the skill, effort and responsibility required to perform the work, and the conditions under which it is performed. The value of the job class is determined through a job evaluation process and relies upon a gender-neutral comparison method.
 - b. The compensation associated with each female job class and each male job class is assessed using a total compensation approach. This means that wages, bonuses, benefits and pensions are included in the assessment of compensation.¹¹
 - c. The employer, or committee, must then compare the compensation of each female-dominated job class to a male-dominated job class. The purpose is to determine whether there is any difference in compensation between the male job classes and the female job classes.
 - d. The calculation methods are set out in the *Act* and Regulations. The first comparison method is the *equal average method* (section 49 of the *Act*). Under this method, the average hourly compensation of all predominantly female and male job classes that fall within the same band of job values are compared to determine the increase in compensation owed to predominantly female job classes. The second comparison method is the *equal line method* of comparison which compares the female wage line to the male wage line.¹²

3. Post the Pay Equity Plan: The employer must post a draft of the pay equity plan and notify employees of their right to provide feedback for 60 days which it will consider in preparing the final version. The final version of the plan must be

⁹ Act, s. 32.

¹⁰ Act, ss. 35-37. Note: we refer to women-dominated as the inclusive gender-identify term.

¹¹ Act, ss. 41-46; Regulations, ss. 20-25.

¹² Act, ss. 47-50; Regulations, ss. 26-29.

posted no later than three years from the date the employer became subject to the *Act*.¹³ This means that the deadline is **September 3, 2024**.

4. Increase Compensation: Most employers will have until the day following the three year posting deadline to apply compensation increases (i.e. **September 4, 2024**). If the total increase in compensation owing exceeds 1% of payroll for the previous year, the employer may opt to phase in the increase.¹⁴

6. Important Key Rights for Non-Union Employees: Anti-Reprisal Protections and Dispute Resolution Mechanisms

The *Act* provides certain key protections for non-union employees.

An employer cannot reduce the compensation of any employee in order to achieve pay equity (e.g. it cannot reduce the compensation of male job classes in order to make the female job classes pay equity compliant).¹⁵

The *Act* makes it an offence for an employer or person acting on their behalf to take a reprisal against a person for filing a complaint or exercising a right under the *Act*, testifying or participating in a proceeding under the *Act*, or taking an action in order to comply with the *Act* or refusing to take an action that would result in non-compliance with the *Act*.

Any person may file a complaint with the Commissioner if they believe a reprisal was taken against them. They must file the complaint no later than 60 days after they ought to have known the circumstances giving rise to the complaint.

In addition, any employee to whom a pay equity plan relates can file a complaint if they have reasonable grounds to believe the *Act* or Regulations have been contravened, that the employer has attempted to influence or interfere with the selection of non-unionized members of the committee, or that the employer has otherwise acted in bad faith or in an arbitrary and discriminatory manner while exercising their duties and functions under the *Act*. The employee must file the complaint no later than 60 days after they become aware of the alleged issue.¹⁶

¹³ Act, ss. 51-55; Regulations, ss. 33-35.

¹⁴ Act, s. 61(2).

¹⁵ Act, s. 98.

¹⁶ Act, s. 149.

An employer or member of a pay equity committee that represents non-unionized employees may notify the Commissioner of a disagreement in relation to any steps leading to the establishment or updating of a plan.¹⁷

Where there is no committee, an employee may file a notice of objection setting out the concerns with the Commissioner no later than 60 days after the final version of the plan is posted.¹⁸

The new *Act* includes an obligation for increased transparency regarding pay equity compliance. Each employer must file an annual statement with the Commissioner which includes information such as its number of employees and the number of predominantly female job classes entitled to an increase in compensation under the final plan and the amount and percentage increase owed.¹⁹ The deadline for the first annual statement to the Pay Equity Commissioner is **June 30, 2025**.²⁰ The employer must also keep records, including retaining all records, reports, electronic data and other documents relevant to the establishment of a pay equity plan.²¹

The new Pay Equity Commissioner is responsible for attempting to help the parties resolve any of the above-mentioned disputes, determining the matter is not appropriate for settlement or cannot be settled,²² or dismissing the dispute.²³ If the Commissioner substantiates an objection or complaint, including in respect of a reprisal, they must issue an order that, among other things, requires the employer to take appropriate measures.²⁴

Concluding Comments

Pay equity is an important fundamental human right. Canada first acknowledged this important right in 1972 when it signed the International Labour Organization's Convention 100 to guarantee equal pay for work of equal value. Pay equity legislation is a remedy to systemic gender wage discrimination.

The gender pay gap will not be narrowed without this important tool. Over the coming months, we anticipate the Commission and the Canadian Human Rights Tribunal will

¹⁷ Act, s. 147.

¹⁸ Act, s. 148.

¹⁹ Act, ss. 89(1)-(2).

²⁰ Act, ss. 89(3)-(5).

²¹ Act, s. 90.

²² The Commissioner may conduct an investigation (s. 156 of the Act) and they must allow the parties to present evidence (s. 157 of the Act).

²³ Act, s. 154.

²⁴ Act, ss. 157-60.

issue new interpretations and new rulings on key elements of the *Act*. We will be providing regular updates for non-unionized employees.

In the event a non-union employee has questions about pay equity, Cavalluzzo LLP is available to assist.