

# DS Sector Legal Update 2019

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*inclusive results*

# Agenda

## DS Sector Legal Update 2019

- Sustainability Funding & Bill 124
- Changes to the OAP
- Pay Equity Update
- Regionalizing Services – Lessons from the Health Sector
- WSIB Update
- ONCA Update
- Wettlaufer Report – Lessons for the DS Sector
- Bargaining Update

# PART 1: SUSTAINABILITY FUNDING AND BILL 124 UPDATE

# Sustainability Funding

## 1. Introduced by Liberal – May 2018

- **Purpose:** to address pressures affecting sustainability in the DS Sector
- **Key recognized pressures:**
  - Pay Equity,
  - Wages,
  - Retention and Recruitment,
  - Operating Costs (taxes, hydro, lease holds etc.)

## 2. Renewed by Conservatives – September 2019

## 3. No commitment (and cautions) for future years

## 4. Request for Services for Consultation on DS

# Bill 124

- **Effect:** Imposing 3-year moderation periods on salary and compensation increases
- **Status:** Passed first reading.
- **Purpose:**
  - Rumoured to be directed towards negotiations with teachers.
  - Clear impact on unionized employee groups – more flexibility for non-union

# “Moderation Periods”

## Unionized Workplaces

The start of a “Moderation Period” depends on the status of an organization’s applicable Collective Agreement (or arbitration awards) as of June 5, 2019:

Status of Collective Agreement on June 5, 2019	Moderation Period Start Date
In force on June 5, 2019	→ Day after Collective Agreement expires
Collective Agreement expired, no current Agreement	→ Day after expiration of the previous Collective Agreement
No Collective Agreement due to parties negotiating 1 <sup>st</sup> Collective Agreement	→ Commencement date of the 1 <sup>st</sup> Collective Agreement

# “Moderation Periods”

## Non-Unionized Workplaces or Employee Groups

- Moderation Period begins on a date on or before January 1, 2022 at the discretion of the employer
- Exception: A non-unionized employee’s compensation increases in step with increases provided to other workers under a collective agreement. In that case, the moderation period for the non-unionized worker is required to line up with the moderation period applicable to the collective agreement.

# Restrictions Imposed During Moderation Period

- **Salary:** 1% increase during 12-month period
- **Total Compensation:**
  - Includes salary + all other payments provided to or for the benefit of workers, including benefits, perquisites and all other forms of discretionary or non-discretionary payments
  - 1% of total average comp for all employees covered by CBA, or employees not covered.
- **Exemptions:**
  - Salary increase based on compensation plan or CBA due to:
    - Length of employment;
    - Assessment of performance; or
    - Completion of a professional or technical program or course.
  - Increases in benefit costs required for maintaining existing benefits
  - Pre-existing grids may NOT be altered outside of the 1% limit set during the moderation periods.



# Periods Between Moderation Periods

## Can lost increases to salary or compensation during a moderation periods be made up later?

- Before expiry of CBA?
- Before Moderation Period for non-union group?
- Depends on purpose, past practice, terms of CBA (if applicable)

## How will the government enforce compliance with Bill 124?

- Broad and sweeping powers to review, investigate and make orders
- CBA non-compliant – rendered void and former agreement revert.
- Exemptions may be permitted.

# Protection of Certain Statutory Rights

- Bill 124 claims to preserve the right to collective bargaining and to engage in lawful strikes or lockouts
  - However, due to the 1% increase limits, this restricts the salary and compensation increases that can be negotiated or awarded.
- The Act specifically states that nothing in the Act or regulations is to be interpreted or applied so as to reduce a right or entitlement :
  - Under *the Human Rights Code*;
  - Under *the Employment Standards Act* prohibiting discrimination in pay or benefits on the basis of sex, age, or family status;
  - To the applicable minimum wage; or
  - Under *the Pay Equity Act*.

# PART 2: CHANGES TO THE OAP

# OAP - Changes to Direct Funding

- **Base Funding:**
  - Transition away from base funded services
  - Movement towards direct funding and fee-for-service model
- **Annual Budgets:**
  - Annual budget (currently up to \$20,000 for children under age 6 and up to \$5,000 for children over age 6)
  - Increased number of recipients.
- **Eligible Expenses:**
  - ABA, Speech Therapy, OT, Physio, caregiver training, respite services, tutors, technological aids, and travel.

# OAP – Impact on Service Providers

## **New realities for service providers:**

- Increased demand for fee-for-service offerings
- Market driven services:
  - Increasing need for responsiveness to “customer” choice
  - Flexibility, choice of worker, schedules, work locations
  - Service model conflicts with most CBAs
  - Service fees subject to market competition from non-union for-profit competitors operating lean and using independent contractors
- Increased competition:
  - Private providers
  - For-profit providers
- New Risks for Service Providers:
  - New workplaces (community and homes)
  - New risks in service provider workplaces (liability to third parties or caused by third parties)

# PART 3: PAY EQUITY UPDATE

# Pay Equity- 101

- **Purpose:** End gender-based differences in pay by gender by requiring employers to pay equal wages for work of equal value, regardless of the gender of the employee.
- **Methods:** There are three allowable methods of comparing job classes for the purpose of wage adjustments:
  - Job-to-job method
  - Proportional value method
  - Proxy method.
- **Proxy:** The proxy method requires public sector employers (includes DS sector) with predominantly female workforces to compare their employees to other public sector employers where this is more appropriate than internal comparisons.

# Pay Equity – Maintenance

## Prior to 2016

- Maintenance obligations for Proxy employers were widely understood to merely be the requirement to not let new wage gaps emerge
- Avoiding % based wage increases in favour of cent-based increases

**2016** - ONA v. Participating Nursing Homes – PEHT affirms

## April 2019

- ONCA Case - Division Court overrules PEHT and finds that Act should be interpreted to required ongoing comparisons to original proxy employer for maintenance
- Orders Tribunal to establish how this will work

## May 2019

- Nursing homes seek leave to appeal to ONCA

## September 2019

- PEHT affirms maintenance does not require negotiation with union – criticizes May decision
- ONCA grants leave to appeal ONA Decision



# Pay Equity – In the Meantime...

- **Recommendations:**

- Determine whether achieved pay equity or not.
- Maintain up-to-date records of pay equity obligations and actions.
- Consider changes to circumstances that would render old pay equity plans inappropriate, and require new pay equity plans.
- Consider whether new wage gaps have emerged.
- Continue to refer to original or amended pay equity plans and associated Gender Neutral Comparison System when determining wages for new job classifications.
- Be cautious in responding to employee/union requests for information or to enter new pay equity agreements until at least the appeals process is exhausted.
- Remember, FOR NOW, no obligation to negotiate maintenance.

# PART 4: Regionalization of Services – Lessons from Health

# Regionalization and Other Options for Efficiencies

## Ontario Health Teams Model – Regionalization of Service

- Service providers continue to be independent but accountable to and funded by Team
- MOH provided “OPEN INVITATION” to providers to come together on a regional basis to be **clinically and fiscally** accountable
- Goal is for ALL health providers to join a team.
- Funded through an “integrated funding envelope” based on
  - Care needs of attributed patient population.
  - Funding will follow the patient
  - Budgets set according to risk-adjusted population based funding and activity based funding for specific episodic conditions.
  - Low volume, high cost procedures continue to be provincially funded
  - Budgets tied to quality and outcome objectives
  - Shared savings incentive structure

# Takeaways for the DS Sector

- Ministry Request for Services for Consultation on DS
- Focus on performance and fiscal accountability
  - Expect performance measures
  - Expect increased oversight (serious occurrence reporting process)
- No express push for mergers – for now
- Focus on eliminating overhead = sharing of back-office services
  - Layoffs or by-attrition
  - Restructuring
  - Sharing services
    - Union & non-union sharing of services
    - Confidentiality
- Certain services being re-structured and removed from budgets to be delivered at the regional level or via direct fee for service
  - This has resulted in layoffs and restructuring
  - See impact of direct-funding based supports discussed in OAP discussion

# If considering corporate restructuring...

## Amalgamations and Mergers

- Keep in mind ONCA
- Amalgamation permitted where corp. has the same or similar objects (very different purposes can be barrier to amalgamation under this statute).
- Requires amalgamation agreement (with necessary details of amalgamation) by special resolution of 2/3rds of all members.
- For charities, approval from PGT required.
- Submit amalgamation documents to Lieutenant Governor to issue Letters Patent of Amalgamation (completing the process).

# If considering corporate restructuring...

## Dissolutions

- Requires simple majority of members passing a resolution at a general meeting called for that purpose (s. 230).
- Appoint a liquidator to wind up affairs, and notice is given to the Government and the public.
- Corporate property used to satisfy liabilities, then (for non-share corporations) distribute property to members *or* (if a by-law is passed) to Crown or charitable organizations.
- Present an account to a general meeting of members.
- Liquidator will then notify the Minister.
- Three months after that date, the corporation is dissolved.

# If considering corporate restructuring...

## Labour Law

- Amalgamation:
  - Union – non-union amalgamation
  - Union- union amalgamation
  - Dove tailing/end-tailing seniority
  - Notice entitlements for redundant employees
- Dissolution:
  - Sale of business
  - Layoff and Severance entitlements
- Shared Services
  - Intermingling and location sharing
  - Direction and Control

# Restructuring

- **Legal Considerations:**
  - Temporary layoffs
  - Notice and Group Notice
  - Limitations on the right to temporary layoffs;
  - CBA consultation or discussion obligations;
  - CBA “bumping rights” for employees (with the possibility of “chain bumping”)
  - CBA recall rights for laid off employees.
  - Special benefits or notice entitlements payable in the event of layoff.
  - Employment agreements
  - Human rights considerations



# PART 5: WORKPLACE SAFETY & INSURANCE BOARD UPDATE

# WSIB Rates and Unfunded Liability

## 1. Unfunded Liability Eliminated

- In 2015, was in excess of \$13 billion.
- In September 2018, WSIB announced that it was eliminated.
- Led to two major changes.

## 2. Premiums Reduced as of January 1, 2019

- Subsequently, WSIB slashed WSIB premiums by 30%.
- WSIB still very expensive compared to alternative insurers.
- Cost of WSIB can be 12 times higher than alternative insurers.

## 3. Fee hike frozen for 5 years for not-for-profits September 2019

# Opting Out

- **By Application Employers:** WSIB is optional for “by-application employers” – generally DS Sector employers in this category
- **De-electing:** By-application employers can “de-elect” from WSIB and use less expensive alternatives.
- **Departure Premiums:**
  - Based on employer’s proportionate share of the WSIB unfunded liability.
  - In 2015, the departure premium was in the range of 2-3 times an employer’s annual WSIB premium and had to be paid *before* leaving coverage.
  - The departure premium was removed when the unfunded liability was eliminated. This sparked renewed interest in WSIB alternatives.
- **Continuing Fees:**
  - May still be required to pay fees to WSIB up to a year after ending WSIB. This is determined by an employer’s “experience rating”, a program that rewards or punishes employers for having less or more accidents than their industry average. Based on premium rebates or penalties *at end of year*.

# Should You Leave WSIB?

- **Factors Relevant to Leaving the WSIB**

- WSIB offers comprehensive case management and protection from lawsuits and civil litigation for workplace injuries.
- Not all alternative insurance covers mental stress-related injuries (which WSIB does cover), creating an uninsured liability. Be sure to review what a relevant policy covers.
- A drastic change to coverage might motivate a union drive (if non-unionized). Ensure clear communication and an open feedback process.
- If unionized, consider the following:
  - Does your CBA require (implicitly or explicitly) WSIB coverage? Is there a “maintenance of existing benefits” clause that would preclude less expansive alternative insurance?
  - Could an estoppel restrict your organization from leaving WSIB?
  - Is a statutory freeze in effect?

# WSIB And Chronic Mental Stress

## Chronic Mental Stress = WSIB Stress

- As of January 2018, WSIB covers chronic mental stress injuries where three conditions are met:
  1. An appropriately regulated health professional (e.g. family physician) provides a diagnosis Diagnostic and Statistical Manual of Mental Disorders or DSM.
  2. The person experienced an identifiable substantial work-related stressor (e.g. workplace bullying or harassment), and
  3. That stressor is the predominant cause of the injury.
- Generally excludes stress from employer's normal employment decisions (e.g. operational changes, discipline, termination) and interpersonal conflict (unless egregious or abusive).
- Consistent exposure to high levels of routine stress that is excessive in intensity and/or duration may be a substantial work-related stressor.

**PART 6:  
ONTARIO NOT-FOR-PROFIT  
CORPORATIONS ACT (“ONCA”)  
UPDATE**

# Imminent Changes with ONCA

- **Coming into force:** ONCA is currently expected to come into force in early 2020.
- **Impact:**
  - Replaces *Corporations Act* in providing a framework for not-for-profit corporations based in Ontario law.
  - More power to a corporation's members, especially where there are multiple classes of shares.
  - Will entrench current membership structures (membership will be determined in the Articles of the corporation, not the bylaws).
  - New conflict of interest disclosure rules for directors and officers.
  - New financial reporting requirements for different types of not-for-profit corporations in the Act.
  - Once ONCA comes into force, not-for-profits incorporated under the *Corporations Act* will have 3 years to transfer over.
- **Key takeaway:** make changes before coming into effect.

**PART 7:**  
***WETTLAUFER REPORT – LESSONS  
FOR THE DS SECTOR***



# Wettlaufer Report

1. Train managers on how to select, screen, hire, manage and discipline employees
2. More training on reporting procedures and medication administration
3. Implement robust hiring and screening processes.
4. Increase spot checks, including on evenings and weekends.
5. Create and maintain employee records with robust records related to coaching, supervision, unusual incidents and discipline.
6. Create clear procedures for reporting unusual incidents
7. Avoid or restrict subcontractors and temporary staffing agency use and ensure agency compliance procedures
8. Audits for compliance with procedures outlined above.
9. Train staff on risks of staff member intentionally causing harm
10. Implement “Just Culture” by dealing with human error openly, not punitively.

# PART 8:

## *Bargaining Update*

# Notes from the Bargaining Table

- Pre-Bill 124 negotiations agreements hovered around 1%/year
- Post-Bill 124 negotiations stalling or settling around 1% based on Bill 124
- Unions seeking:
  - Pre-bargaining disclosure related to passport numbers
  - Increases - no stipends
  - Wage re-openers if sustainability funding renewed
  - Wage re-openers effective if Bill 124 cancelled
  - Layoff prohibitions (reaction to health and OAP)
  - Merger protections (reaction to Health)
  - Restrictions on contracting out
  - Strict scheduling guarantees (reaction to fee-for-service)
  - Ongoing reporting around Passport and Direct Funding
  - Commitments for campaigning and lobbying

# Resources: PooranLaw

## Free Resources Service Providers in the DS Sector from PooranLaw

- **PooranLaw Newsletter**
  - sign up at [www.pooranlaw.com](http://www.pooranlaw.com) to get newsletters and webinar registration
- **PooranLaw Webinars**
  - October 9, 2019 12:00 p.m. to 1:00 p.m. - [Bill 124, the Protecting a Sustainable Public Sector for Future Generations Act, 2019](#)
  - October 25, 2019 12:00 p.m. to 1:00 p.m. - [Abuse and Harm Prevention – Lessons for Employers from the Wetlaufer Report](#)
- **Whole Life Planning Centre**
  - <https://pooranlaw.com/planning-centre/>
- **Inspiring Possibilities Planning Guide**
  - Free E-book by PooranLaw in collaboration with CLO
  - <http://planinspiringpossibilities.com/>

# Questions



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