



Memo

To: Chief Executive Officers and VPs Human Resources
Ontario's Public Hospitals

From: Dykeman Dewhirst O'Brien LLP

Date: 31 March 2010

Re: **Ontario's 2010 Budget and the Two Year Salary Freeze for Non-Bargaining Unit Hospital Employees**

As part of Ontario's 2010 budgetary measures, on March 25, 2010 the Ontario Government introduced the *Public Sector Compensation Restraint to Protect Public Services Act, 2010*, which is Schedule 25 to Bill 16, *Creating the Foundation for Jobs and Growth Act, 2010* ("Bill 16").

Please note that Bill 16 is not yet law. It has received First Reading and must go through Second and Third Readings (and as such further debate in the Legislature) before it becomes law. Bill 16 is generating much discussion and controversy that is being picked up by and reported on by the media. It is quite possible that Bill 16 may be amended prior to becoming law. As such, making any definitive decisions based on Bill 16 at this point may be premature. We urge our clients to contact us prior to taking action in this regard.

The following is a list of the important aspects of Bill 16 as it currently exists. We will provide you with prompt updates on this status of this Bill as they become available.

1. When is Bill 16 effective?

March 24, 2010 to March 31, 2012.

2. Does Bill 16 apply to hospitals?

Bill 16 expressly applies to Ontario's public hospitals and their non-bargaining unit employees.

It also applies to the non-bargaining unit employees of any authority, board, commission, corporation, office or organization of persons (with the exception of Municipal authorities, boards etc) that meets both of the following conditions,

- It received at least \$1,000,000 in funding from the Government of Ontario in 2009, as determined for the purposes of the *Public Sector Salary Disclosure Act, 1996*; and

- It does not carry on its activities for the purpose of gain or profit to its members or shareholders.

3. Which public sector employees are exempt?

Bill 16 exempts bargaining unit employees of public sector employers, such as those represented by a trade union governed by the *Labour Relations Act* or employees who are represented by an organization that collectively bargains with the employer.

For hospitals, this means Bill 16 does not apply to unionized hospital employees (for example, members of ONA, CUPE, OPSEU).

4. What limits are placed on pay increases or step increases within a pay range?

Bill 16 establishes restraint measures with respect to the salaries and salary ranges of a hospital's non-bargaining unit employees. With respect to pay rates or step increases within a pay range, these restraint measures consist of the following;

- Rates of pay (defined as a rate of remuneration; in our view this would cover salaries or hourly rates) that were in effect on March 24, 2010 cannot be increased before April 2012.
- If there is a pay range in effect on March 24, 2010, the maximum amount of that pay range cannot be increased prior to April 2012.

5. Are staff entitled to step increases within a pay range to which they would normally be entitled?

Yes, under the following three conditions:

- The step increase is authorized under a compensation plan that existed on March 24, 2010; and
- The step increase falls within a pay range that was in effect for a particular position on March 24, 2010. In other words, the maximum end of the pay range itself cannot be increased after March 24, 2010 nor can an employee be provided with a step increase that exceeds the maximum end of pay range that existed on March 24, 2010; and
- The step increase (within the range) is in recognition of any of the following matters:
 - The employee's length of time in employment or in office
 - An assessment of performance
 - The employee's successful completion of a program or course of professional or technical education.

6. Are hospitals permitted to increase or add to employee's benefits, bonuses and other perks other than rates of pay/range of pay?

Yes, under certain conditions hospitals can increase or add to an employee's benefits, bonuses and other perquisites (commonly known as "perks") after March 24, 2010. These conditions are as follows:

- The increase or addition of a benefit, bonus, perk, etc. must be permitted by a compensation plan that existed on March 24, 2010 (i.e., hospitals cannot agree to such compensation plans post March 24, 2010, the compensation plan must have existed on March 24, 2010); and
- The increase or addition is in recognition of any of the following matters:
 - The employee's length of time in employment or in office
 - An assessment of performance
 - The employee's successful completion of a program or course of professional or technical education.

7. Does Bill 16 allow pay, benefit, bonus, perks etc. to be increased if the increase was agreed to but not implemented prior to March 24, 2010?

While a definitive answer is not possible at this juncture, it appears that such pay rate increases would **NOT** be permitted but increases/additions to benefits, perquisites or other payments (i.e. bonuses) **MAY BE**.

With respect to pay rate increases, Bill 16 states that a pay rate that "is in effect" on March 24, 2010 cannot be increased prior to April 2012. Accordingly, if a pay rate was agreed to but not "in effect" on March 24, 2010, there is a strong argument, on a plain language interpretation of Bill 16, that an increase in the effective pay rate on March 24, 2010 would not be permitted.

The same applies for step increases within a pay range. An increase within that range is only permitted (subject to the conditions set out above) for a pay range that "is in effect" on March 24, 2010.

With respect to an increase or addition to benefits, perquisites or other payments under a compensation plan, Bill 16 states that such increases or additions are permitted after March 24, 2010 (subject to the conditions set out in Section 5 of this memo) if the increase/addition is permitted by the compensation plan "as it existed" on March 24, 2010.

The term "in effect" (used in connection with the pay rate/range increases) is quite distinctive from the term "as it existed" (used in connection with benefits/perquisites/other payment increases or additions). The use of such different terms is usually deemed to be intentional and for the purpose of indicating a different intention or treatment of the matter in question.

Accordingly, it may be possible to implement a benefit/perquisite or pay increase/addition (other than a pay rate/range increase) under a compensation plan that allows for such increases/additions if the compensation plan was in existence on March 24, 2010, even if it was not "in effect" on that date.

Bill 16 gives no guidance on what elements are necessary to establish that a compensation plan was “in existence”. It may be that it will be sufficient to provide evidence that the compensation plan was agreed to between the parties (employer and employee) prior to March 24, 2010. Each case will likely need to be determined on its own facts.

The final determination of this issue is unclear and may be the subject of future judicial determination.

8. How does Bill 16 affect bonuses?

If there is a compensation plan “*in existence*” as of March 24, 2010, which includes a bonus provision, it appears the bonus can be paid provided it is related to:

- seniority,
- performance, or
- successful completion of a program or course of professional or technical education.

In some instances, a compensation plan will provide for a bonus capped at some maximum amount (i.e., an actual dollar amount or a percentage of salary). Bill 16 does not prohibit an employer from paying out that maximum bonus amount (provided it is based on any one of the three factors of seniority, performance or successful completion of an education program). However, the employer cannot increase the maximum amount of the cap until April 2012.

If the bonus amount is discretionary, issues may arise if an employer pays out a bonus that far exceeds previous years’ bonus payments. An argument may be made that such a payment is really an attempt to circumvent the spirit of Bill 16 and to evade the restraint measures imposed by Bill 16 (i.e., disguise a salary increase as a discretionary bonus). However, Bill 16 in its current form does not appear to prevent this practice.

9. Does Bill 16 allow increases in pay for employment contract renewals between March 24, 2010 and April 2012?

No. Employment contract renewals and re-election/renewal of an officer holder’s position cannot change the employee’s or office holder’s pay, benefits or perquisites.

(Note: Bill 16 uses the term *change* as opposed to *increase* – this could be used by a public sector employee or office holder to argue that pay, benefits and perquisites cannot be increased *or decreased* before April 2012, as either would represent a change in the pay, benefits or perquisites).

10. Can parties retroactively agree to and back-date a plan that allows for an increase in pay rate/range or benefits, perquisites or other payments under a compensation plan?

It is not clear, but it is unlikely that a retroactive or back-dated agreement to increase pay rates, benefits or other perquisites will be permitted.

An agreement made post March 24, 2010 was not “in effect” nor could it have “existed” on March 24, 2010 (if there was no agreement to the terms on March 24, 2010). Therefore, any increase under such a plan is unlikely to be permitted.

As with the matter under Question 7 of this memo, this issue may well be the subject of future judicial determination.

11. How does Bill 16 affect:

- a. **non-bargaining unit employees hired by the public sector employers identified above between March 24, 2010 and April 2012, or**
- b. **current non-bargaining unit employees who accept new positions with their employer between March 24, 2010 and April 2012?**

The compensation plan (which includes all payments or benefits that an employee could receive as result of his or her employment) of a newly hired employee or an employee who accepts another position with the employer cannot exceed the compensation plan for that position as it existed on March 24, 2010.

12. Can parties agree to defer any pay rate/benefits etc. increases for the period between March 24, 2010 and April 2012 until after the end of this period?

No, Bill 16 clearly states that a compensation plan cannot provide compensation after March 31, 2012 to an employee for compensation he or she did not receive as a result of the restraint measures of Bill 16.

13. Does Bill 16 impact a hospital’s current or future collective agreements?

With respect to current collective agreements (those in effect prior to March 24, 2010), the provisions of those collective agreements will be honoured and will NOT be effected by Bill 16. As such, any provisions that provide for a pay rate or pay range increase during the period between March 24, 2010 to April 2012 can be implemented in the ordinary course.

Bill 16 is silent with respect to collective agreement renegotiations that occur between March 24, 2010 and April 2012. Many are speculating that Bill 16 is the Government’s way of sending a strong signal to unions whose collective agreements are up for renegotiation during this period that there is not a lot in the coffers – and if the non-bargaining public sector employees are expected to take a hit, then so will the bargaining unit employees.

For more information, please contact any one of the lawyers listed below:

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