

# Client Advisory

## Recent developments in workforce rewards and executive compensation – Fall 2019

October 15, 2019

### Summary

Various workforce rewards and executive compensation developments have occurred since the publication of our last Client Advisory. Key items of interest include:

#### Workforce Rewards and Pay Equity:

- Federal consultations on modernizing labour standards
- Federal consultations on changes to the Wage Earner Protection Program
- British Columbia passes *Employment Standards Act* and *Labour Relations Code* reforms
- Minimum wage developments

#### Corporate Governance and Regulatory Compliance:

- Say-on-pay vote results
- Federal budget bill receives Royal Assent: Various reforms in force or pending
- Draft amendments to the federal Employment Equity Regulations
- Federal corporate diversity disclosure amendments, effective January 1, 2020
- Proposed *Income Tax Act* amendments on employee stock options
- CSA review of disclosure regarding women on boards and in executive officer positions
- Board diversity in British Columbia
- Promoting participation of women on boards
- U.K. government report on executive rewards
- Gender wage gap in the U.S.

## Federal consultations on modernizing labour standards

On February 20, 2019, the federal government established an [Expert Panel](#) to recommend amendments to the employment standards provisions (Part III) of the *Canada Labour Code*, which applies to federally regulated private sector employers. The results of the Panel's work will be made public later this year. A [backgrounder document](#) was also released.

One area of possible reform would address access to benefits—both statutory minimum benefits (such as vacation and leaves) and employer-provided benefits (such as medical and dental)—for those who do not have full-time, long-term employment. As outlined in the associated [Issue Paper](#), the Expert Panel will consider whether workers should have access to:

- Statutory minimum paid leaves of absence (and other benefits) through a central portable benefit account funded by employer contributions
- New benefit plans that would be portable between employers and funded through payroll deductions (as a surrogate for benefits currently provided by employers directly)

Other issues to be addressed include:

- Reinstating a freestanding federal minimum wage (see “Minimum wage developments” below)
- Extending certain labour standards protections to non-standard workers
- Setting limits on work-related communications outside of work hours (“right to disconnect”)
- Facilitating a collective voice for non-unionized workers

## Federal consultations on changes to the Wage Earner Protection Program

On May 27, 2019, the federal government [announced](#) consultations on potential changes to the Wage Earner Protection Program. The comment period ended on June 28, 2019. A related [discussion paper](#) includes the following proposals:

- Facilitating earlier payments for workers affected by a corporate restructuring
- Extending eligibility to Canadian employees working for companies outside of Canada
- Changing how trustees and receivers are compensated
- Clarifying when an “excluded manager” is not covered by the Program

The Wage Earner Protection Program provides payments to cover outstanding eligible wages (wages, vacation pay, disbursements of a travelling salesperson, termination pay, and severance pay) to individuals whose employers are bankrupt or subject to receivership under the *Bankruptcy and Insolvency Act*. Last year, the maximum payment under the Program was increased from four weeks maximum insurable earnings under the *Employment Insurance Act* to seven weeks maximum insurable earnings (\$7,148 in 2019).

## **British Columbia passes Employment Standards Act and Labour Relations Code reforms**

Recent amendments to the *Employment Standards Act* contained in [Bill 8](#) and the *Labour Relations Code* in [Bill 30](#) are now in effect, unless otherwise noted.

### *Employment Standards Act amendments*

- Extending the period during which employers must retain certain records, from two to four years
- Extending the period for which workers can recover unpaid wages, from six to 12 months, with the possibility of extending the period to 24 months in some situations
- Requiring, when an employer terminates an employee during the notice period, payment of the lesser of any wages the employee would have earned for the remainder of the notice period and what the employer is liable to pay on termination
- Extending the right of an employee to have his or her employment deemed continuous and uninterrupted on the sale of a business, to situations where the business is continued under a receiver or receiver-manager
- Making collective agreement provisions dealing with statutory holidays and vacation subject to minimum ESA requirements
- Adding new rules regulating tips and tip pooling, and protecting workers' rights with respect to tips and gratuities
- Eliminating the "self-help kit" and introducing new complaint and investigation processes (awaiting proclamation)
- Allowing the Employment Standards Branch to waive or increase penalties (awaiting proclamation)

Bill 8 follows earlier [government consultations](#) and a [Law Reform Commission Report](#).

### *Labour Relations Code amendments*

- Extending successorship protection to re-tendering of service contracts in various sectors and industries
- Extending, from four to 12 months, the period during which an employer must not alter pay or another term or condition of employment if a trade union is certified as bargaining agent and a collective agreement is not in force
- Increasing certain fines, from between \$1,000 and \$10,000 to between \$5,000 and \$50,000

Details on other labour relations amendments are set out in a [backgrounder document](#).

## **Minimum wage developments**

### *Minimum wage increases*

The following hourly minimum wage increases have been implemented or announced:

- British Columbia - \$13.85 on June 1, 2019
- Saskatchewan - \$11.32 on October 1, 2019
- Manitoba - \$11.65 on October 1, 2019
- New Brunswick - \$11.50 on April 1, 2019
- Yukon - \$12.71 on April 1, 2019

However, Alberta lowered its hourly minimum wage for students under age 18, from \$15.00 to \$13.00 on June 26, 2019.

### *Other minimum wage developments*

The federal government has established an [Expert Panel](#) to consult and provide recommendations on possible amendments to Part III of the *Canada Labour Code*, including whether a freestanding federal minimum wage should be reinstated, instead of the current minimum wage which is pegged to the minimum wage rate in the province or territory of employment (and if so, how it should be set, at what level, and who should be entitled to receive it).

British Columbia's Fair Wages Commission has launched [public consultations](#) on how to bridge the gap between the province's minimum wage and the "living wage", defined as the hourly rate at which a household can meet its basic needs based on the actual cost of living in a specific community. The living wage is generally higher than the minimum wage.

Alberta has appointed an [Expert Panel](#) to assess the labour market impact of recent minimum wage changes, and the possibility of re-introducing a lower minimum wage for hospitality industry workers who serve alcohol. A report is expected in early 2020.

[Bill 104](#) has amended Prince Edward Island's *Employment Standards Act* to add a new requirement to solicit submissions from the public and issue a report as part of the annual review of the minimum wage. Also, the Employment Standards Board must now consider "measures of poverty and the ability of an employee to maintain a suitable standard of living" when setting the minimum wage.

The Yukon [Employment Standards Board](#) will consider various issues in relation to minimum wage increases for 2020 and 2021, including changes in the annual Consumer Price Index, developments in other jurisdictions, and the economic impact of additional increases.

## **Say-on-pay vote results**

The 2019 proxy season marked the 10th year of voluntary say-on-pay in Canada. Overall, results were similar to past years, with prevalence of say-on-pay continuing to rise and average shareholder support remaining strong at 91%.

Proxy advisors and shareholders appear to be paying closer attention to the link between executive pay levels and share price performance. Notable examples in 2019 relate to the two companies that received less than 50% shareholder support: Cardinal Energy (49.8%) and Copper Mountain Mining (45.9%). Institutional investors focused on the misalignment of CEO pay and company performance, and on problematic incentive design and pay practices. Aside from these two failed say-on-pay votes, the majority of issuers received support above 80%, generally indicating alignment between disclosed executive compensation levels and overall company performance. Highlights of the 2019 proxy season, according to a Willis Towers Watson analysis as at July 5, 2019, include:

- 211 companies adopted say-on-pay (down from 223 in 2018 due to mergers and acquisitions, or delistings), including 43 constituents of the S&P/TSX 60 Index and 148 constituents of the S&P/TSX Composite Index
- Among the total sample, 196 companies held a vote this year (up from 190 in 2018)

2018		2019
223 / 190	Number of companies / number of votes held	211 / 196
91%	Average shareholder support	90%
3% (5)	ISS say-on-pay “against” vote recommendation	3% (5)
2% (3)	Failure rate (less than 50% shareholder support)	1% (2)

## Federal Budget bill receives Royal Assent: Various reforms in force or pending

Bill C-97 received Royal Assent on June 21, 2019. It implements some, but not all, measures announced in the [2019 Federal Budget](#), including the following amendments to various statutes:

- *Bankruptcy and Insolvency Act* (BIA), effective November 1, 2019, to allow courts to review certain termination payments, severance payments, and other incentives or benefits provided within a year of a corporation’s initial bankruptcy, and require parties in proceedings to act in good faith
- *Companies’ Creditors Arrangement Act*, which may be used by insolvent corporations instead of the BIA, to allow courts, effective November 1, 2019, to order a party to disclose any economic interest in a debtor company, and require parties in proceedings to act in good faith
- *Canada Business Corporations Act* (awaiting proclamation unless otherwise noted) to:
  - include the interests of employees, retirees and pensioners as factors (among others) that directors and officers may consider when determining the best interests of a corporation, which extends beyond the traditional focus on shareholder interests (effective on June 21, 2019)
  - require corporations designated by regulation to develop an approach with respect to the remuneration of directors and members of senior management, which would be subject to a non-binding shareholder (say-on-pay) vote

- require corporations designated by regulation to provide prescribed information to shareholders on the recovery (“clawback”) of incentive or other benefits, which are included in remuneration paid to directors and members of senior management
- *Employment Equity Act* (awaiting proclamation) to expand the reporting requirements to include wage and bonus gap information by occupational group

## Draft amendments to the federal Employment Equity Regulations

The federal government has appointed a Pay Equity Commissioner, and released draft [supporting Regulations](#) under the *Employment Equity Act* (EEA) to expand the reporting requirements dealing with wage and bonus gaps passed as part of Bill C-97. The EEA applies to federally regulated private sector employers with 100 or more employees. Specifically, the Regulations would:

- Replace the annual salary reporting process (a “known burden for employers”) with a new requirement to submit data elements through their human resources or pay system
- Expand salary reporting to cover all 35 census metropolitan areas, up from the current eight
- Require mandatory use of definitions for designated groups (i.e., women, Aboriginal peoples, persons with disabilities, and members of visible minorities), thus eliminating inconsistencies in self-identification data between employers, and streamlining audits performed by the Canadian Human Rights Commission
- Require reporting above the current \$100,000 salary level
- Impose additional record-keeping requirements

According to the Regulatory Impact Analysis Statement, the federal government expects the reforms to “support a more proactive response from federally regulated private sector employers covered by the Act in identifying wage gaps and implementing initiatives to eliminate the gaps for all four designated employment equity groups”. To promote early understanding and compliance, the Labour Program will provide guidance to employers through the annual submission process and introduce new online engagement tools.

The comment period has now ended. Final Regulations, together with the underlying amendments to the EEA, are expected to take effect in early 2020.

## Federal corporate diversity disclosure amendments, effective January 1, 2020

The federal government has [proclaimed into force](#), effective January 1, 2020, amendments to the *Canada Business Corporations Act* (Act) contained in Bill C-25, introducing a corporate diversity disclosure requirement (new section 172.1 of the Act) together with [supporting regulations](#).

According to the Regulatory Impact Analysis Statement, this in-force date was selected to “minimize the disruption to [annual shareholders] meetings in 2020 while providing the diversity information to shareholders before they vote on directors”. Corporations will have to disclose:

- Number and percentage of directors and senior managers from each “designated group”

- Term limits or other mechanisms of board renewal (including either a description of those mechanisms or, if none exist, an explanation why)
  - Written policy relating to identification and nomination of directors from designated groups, including a description of:
    - objectives and key provisions
    - measures taken to ensure effective implementation
    - annual and cumulative progress in achieving objectives
    - how effectiveness is measured, if applicable
- Or, if no such policy exists, an explanation why
- How representation of designated groups is considered when nominating directors or appointing senior members, or an explanation why such factors are not considered
  - Annual and cumulative progress in achieving board and senior management targets, for each designated group, or if there are no targets an explanation why

The supporting regulations provide that the new disclosure obligations apply to all federally incorporated issuers, including venture issuers. They define “designated groups” to mean women, Aboriginal peoples, persons with disabilities, and members of visible minorities (which is the same definition as in the *Employment Equity Act*). The definition of “members of senior management” is aligned with the definition of “executive officer” in the Canadian Securities Administrators’ rules to mean:

- Chair and vice-chair of the board of directors
- President, Chief Executive Officer, and Chief Financial Officer
- Vice-president in charge of a principal business unit, division or function including sales, finance or production
- Any individual performing a policy-making function for the corporation

For further details on other reforms (not yet proclaimed into force) in Bill C-25, the draft version of supporting regulations, and related initiatives, see our [Client Advisory](#) dated December 4, 2017.

## **Proposed Income Tax Act amendments on employee stock options**

The federal government has tabled a [notice of ways and means motion on stock options](#), which the government asserts are used inappropriately to “provide tax-preferred compensation for executives of large, mature companies”. The proposed *Income Tax Act* amendments are also designed to align Canada’s system of taxation for stock options more closely with the U.S. The changes would apply to employee stock options granted after January 1, 2020, and include:

- Imposing an annual limit on tax-preferred treatment of employee stock option grants. Under the current rules, all options granted receive preferential tax treatment (i.e., the employee receives a

tax credit and pays tax on only half of the gain). The proposed rules would limit the preferential tax treatment to the first \$200,000 of option grants that vest each year (based on the fair market value of the underlying shares at the time the options are granted)

- Fully taxing all grants above the \$200,000 limit at the employee's marginal tax rate
- Providing a separate \$200,000 preferential tax limit per employer, if an individual has more than one employer and provided the parties deal at arm's length with each other
- Providing an exemption for options granted by Canadian-controlled private corporations or, if certain requirements are met, other companies that qualify as start-up, emerging or scale-up companies (i.e., all option gains would continue to receive preferential tax treatment)
- Allowing employers to receive a new tax deduction equal to the gain received by the employee for options that do not enjoy preferential tax treatment, and designate options as ineligible for preferential tax treatment (and instead as eligible for the new tax deduction)
- Requiring employers to notify employees in writing when options are granted subject to the new rules, and CRA if they issue securities subject to the new rules

The Department of Finance also released a [backgrounder document](#) providing further details on the proposed changes, including examples of how the \$200,000 limit would operate and implications for employers and employees.

Finally, the government sought stakeholder input on the appropriate definitions for exempt start-up, emerging, or scale-up companies, and related administrative and compliance implications. The comment period ended on September 16, 2019.

## **CSA review of disclosure regarding women on boards and in executive officer positions**

The Canadian Securities Administrators have released [CSA Multilateral Staff Notice 58-311 – Report on Fifth Staff Review of Disclosure Regarding Women on Boards and in Executive Officer Positions](#).

The Report focuses on disclosure requirements set out in National Instrument 58-101 – Disclosure of Corporate Governance Practices, and summarizes results from a review of disclosures (information circulars or annual information forms) by 641 issuers listed on the TSX with year-ends between December 31, 2018 and March 31, 2019, in seven participating jurisdictions (Alberta, Saskatchewan, Manitoba, Ontario, Quebec, New Brunswick, and Nova Scotia). Key trends include:

- 17% of board seats were occupied by women, up from 11% in 2015
- 73% of issuers had at least one woman on their board, up from 49% in 2015
- 33% of board vacancies were filled by women
- 5% of issuers had a female board chair
- 21% of issuers have adopted some form of director term limits (alone or with other mechanisms of board renewal)

- 50% of issuers have adopted a policy on board representation of women, a “significant increase” since 2015
- 4% of issuers had a female Chief Executive Officer
- 15% of issuers had a female Chief Financial Officer
- 64% of issuers had at least one woman in an executive officer position

The Report notes that the larger Canadian banks were not captured in the data sample, but that the six largest banks had an average of 38% of women on their boards, based on 2019 information circulars filed for their years ending October 31, 2018.

The underlying data from the review will be published next year.

## **Board diversity in British Columbia**

Having reported that women now make up over 49% of public sector board members, up from 41% in 2017, the government will engage with industry and civil society on how to [improve gender parity](#) in British Columbia’s private sector.

## **Promoting participation of women on boards**

The federal government has [announced](#) the launch of a new [Statistics Canada Centre for Gender, Diversity and Inclusion Statistics](#). It provides information about education, families, health, immigration, labour and income from a gender, diversity and inclusion perspective. Among various objectives, the Centre is intended to help promote female participation on corporate boards.

## **U.K. government report on executive rewards**

A U.K. House of Commons Committee has released its latest [Report on Executive Rewards](#) covering the period 2017-2019. The Report examines progress on the government’s efforts to address the gap between CEO and employee pay, and its impact on company performance. U.K. CEOs are the second highest paid in Europe (after Switzerland) but receive significantly less total compensation than in the U.S. While average annual FTSE 100 CEO earnings (at 4 million pounds) increased at four times the national average over the past decade, new pay awards were fairly flat over the same period, in part reflecting the influence of say-on-pay reforms. Due to changes in FTSE membership and increasing shareholder returns, executive pay also remains generally linked to company success.

Nevertheless, citing recent examples of excessive payouts by several U.K. corporations, the Report concludes that “the climate for excessive executive pay needs to be made sufficiently hostile and damaging to reputations that no one in the decision-making chain would be prepared to countenance it”. The following reforms are highlighted to help achieve this goal:

- A more empowered and proactive regulator to monitor the reporting of remuneration in support of increased transparency and alignment of pay with objectives, as well as compliance with various codes of conduct

- At least one employee representative on the remuneration committee
- Simpler compensation structures based on salary plus long-vesting deferred shares, combined with less reliance on variable pay such as bonuses, options and profit sharing
- Publishing an absolute cap on total executive remuneration, and explaining how it operates
- Ensuring bonus payments are truly discretionary, through performance measures that reward increased productivity and support the interests of customers, suppliers and workers
- Remuneration reports that analyze the impact of share buy backs on executive remuneration, and “public explanations” of misaligned executive pension contributions
- Proxy advice and policy guidelines that are tailored to individual investors and help avoid “excessive and poorly designed pay policies and awards”
- Requiring that currently exempt legal and professional services partnerships provide gender pay gap reporting and explain how they take pay ratios into account when determining remuneration levels, particularly those that significantly exceed sector norms

## **Gender wage gap in the U.S.**

A U.S. [Census Bureau study](#) indicates that the gender wage gap is wider for workers with a college degree than for those without one. Overall, women workers earn about 80 cents for every dollar men earn. This difference widens with more education to 74 cents among workers with a bachelor's degree, compared with 78 cents for workers without a college degree. However, age and job choice can also impact the extent of the wage gap.

## **Comment**

The governance and regulation of workforce rewards, pay equity, and executive compensation issues in Canada continue to evolve in response to various factors, including regulatory changes from abroad. We urge companies to monitor new developments such as those discussed in this Client Advisory.

## **For more information**

This Advisory is not intended to constitute or serve as a substitute for legal, accounting, actuarial or other professional advice. For information on how this issue may affect your organization, please contact your Willis Towers Watson consultant, or:

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