

Pay Transparency: BC Requirements And Potential Changes For Ontario Employers (Video)



Recently, the Government of British Columbia has introduced new pay transparency laws that impose obligations on employers relating to the disclosure of information about employee compensation. The Government of Ontario has also recently introduced legislation that, if passed, will require more transparency in job postings, including regarding employee compensation.

Join our panel of experienced employment lawyers for an in-depth discussion about these new legal requirements in this on-demand webinar. The panel discussion will answer the following key questions:

- Can employers ask job applicants about their compensation history?
- What information must be included in a job posting?
- What information are employers not allowed to include in a job posting?
- What is a pay transparency report and what are the requirements to submit one?
- Are employers allowed to enforce confidentiality regarding employee compensation, and can they impose disciplinary measures if employees disclose such information?

Transcript

[AUDIO LOGO] ELISA SCALI: Good afternoon. I think we'll get started a few more people will be joining but hopefully they will be able to join us soon. Before we begin our program today, I would like to take a moment to recognize that because we are all based in different cities and provinces across Canada, we are located in different traditional Indigenous territories, some of which are covered by treaties. I encourage all of us to take a moment to reflect upon and acknowledge the land upon which we are living. If there are Indigenous people attending this webinar, please feel welcome.

My name is Elisa Scali. I am a partner with Gowling WLG. I'm practicing in the Employment, Labor, and Equalities Group which we like to call ELE. Our ELE team, I'd like to welcome you here today on behalf of our ELE team to the first webinar of our 2024 webinar series. Today's webinar will focus on new legislation in BC and Ontario that imposes obligations on employers relating to pay transparency and other matters

relating to job postings.

To provide us with an overview of the new requirements under this new legislation, we have here with us today Alycia Riley and Sam Tecle. Alycia comes to us from our Toronto office and Sam is out in our Vancouver, BC office. Both Alycia and Sam practice exclusively in the area of employment law and we're very happy to have them here with us today to help us break down these requirements for employers. So I'd like to start by handing it over to Sam to provide us an overview with the new requirements under the pay transparency legislation in British Columbia.

SAM TECLE: Thank you, Elisa and welcome to everybody. So today, I'll be providing a primer regarding BC's paid Transparency Act. So just as a brief overview, the BC act was assented to on May 11, 2023. But the actual legislation itself with respect to job postings came into effect on November 1, 2023. Of note is this act applies only to provincially regulated employers. So if you're an employer that's governed by say the Canada Labor Code, then the BC act doesn't apply to you.

Now the objective of the act is to address systemic discrimination by improving transparency regarding workforce pay disparities. Now as you'll see on the slide, the act makes reference to consultation with Indigenous governing bodies. But as we'll get into shortly, there's a really important requirement with respect to employers that are governed by the act publishing annual reports.

Of note, however, the act doesn't actually go as far as to require employers to take action based on their report. So the publication of the report is required but the act doesn't go so far as requiring employers to actually take steps based on the report. The mechanism for encouraging employers to actually take steps is in the form of public disclosure of the report which is intended to hold employers accountable and encourage them to give thought to pay equity and workforce.

Now moving to the next slide, there's a series of positive obligations or requirements that are placed on employers that are governed by the act to do something as opposed to negative obligations. So the first and really key positive obligation is employers must specify certain pay information and publicly advertise job opportunities.

So one might ask, what does specifying certain pay information look like? Well, in the DC Act, Section two, it sets out that either the expected salary or wage for the job must be posted. Alternatively, the expected salary or wage range is set up. So for instance, if there is a posting about \$20 and up per hour, that likely wouldn't qualify or wouldn't follow the terms of the act. So there needs to be a specific amount. So \$20 per hour or a range of \$20 to \$30 per hour using that example.

Now the second bullet makes reference to certain employers having to publish- and we can move back. Certain players having to publish a pay transparency report on or before November one of each year. So I briefly made reference to that earlier. Now, the Pay Transparency Act also has a set of regulations or provisions pursuant to the regulation that sets out the information that's required to be included in this report.

Now, with respect to the employers that are covered by the act, the way that the legislation has been prepared is that there's going to be increasing number of employers that are going to be subject to the act. And as of now, as of January 1, 2024, the BC government and certain crown corporations are required to comply with the provisions of the act. As of November 1, 2024, all employers with 1,000 employees or more will be required to begin posting annual pay transparency reports.

And then by November 1, 2025, this requirement will apply to all employers with 300 or more employees. And then by November 1, 2026, this requirement will apply to all employers with 50 employees or more. So the legislation itself is being brought out on a rolling basis depending on the number of employees at a place of employment.

One important piece that employers should consider is that while complying with the Easy Pay Transparency Act, it'll be important to comply with the relevant privacy legislation. So for public entities, it's Freedom of Information Protection of Privacy Act, known as FIPPA. And for private entities, the Personal Information Protection Act. Now, helpfully, the province has provided the sample report that employers can refer to when figuring out perhaps what's required when setting out this report.

Also of note is that the collection of employee information by employers is voluntary. So if an employee doesn't want to provide certain information, then that's OK. There's no requirement for the employee to do so. And as I noted, there's a requirement for the employer to actually publish this report on a publicly accessible website. And if that employer doesn't have a publicly accessible website, then to make that report readily accessible at the workplace.

So I mentioned earlier about the list of requirements that are meant to be set out in a report and this slide sets out some of that information. So employer information, so name, mailing address, some of the basics that you would normally include must be included in a report, as well as a number of employees. And then there's a series of information that an employer is required to collect. So gender information from their employees, again, on a voluntary basis. So an employee doesn't have to disclose this information.

Now going to the three bullets, so some of this key information includes mean and median analysis for hourly rate, overtime pay, overtime hours, bonus pay. So that information should be set out. But also the percentage of employees in each gender category who receive overtime pay and bonus pay. And then there's a ranking of employees from lowest to highest rate of hourly pay. So this information would be posted publicly at least either on the job site or on a website, if the employer has one.

Now moving on to the next slide. I mentioned earlier that there's certain positive obligations that an employer has, so things that an employer must do. There's also aspects of the act that prohibits employers from doing certain things. The first of which is an employer can't directly or indirectly ask job applicants about what they've been paid at positions with other employers.

So this is a bit of a different context. So on the front end if an employer is conducting interviews, there's certain things that an employer just cannot ask if you're governed by the act. And one of those as I mentioned, is what they've been earning. And the idea behind that is it can't guide the employer's decision as to what they're going to decide to pay the employee based on what they're earning previously.

Now in addition to that, there's also an important provision in the act in which an employer can't dismiss, suspend, demote, discipline, harass, or otherwise disadvantage an employee who does a series of things. So if the employee asks their employer about their pay, reveals their pay to another employee, or someone applying to work with their employer, ask their employer about pay transparency report, or ask their employer to comply with the Pay Transparency Act, or made a report to the director of transparency about their employer's compliance.

So just briefly, one of those bullet points refers to someone applying to work with their employer. So that's the second bullet. In that context, even if the employee speaks to someone who's not currently an employee about what they're earning that employee cannot be reprimanded for doing so.

So it does put a pretty high standard on employers that are governed by the act to not take any sort of disciplinary action arising from any of the conduct described on this slide. Now moving on to the next slide. My colleague Alycia will take you through the Ontario Bill 149 piece that is, in essence, the parallel to the BC Pay Transparency Act that I've described for you.

ALYCIA RILEY: Thanks so much, Sam. And sorry, before we move on, we did get a couple of questions in the chat. A lot of people are asking about whether or not the number of employees, the threshold number is going to be based on the number of employees in British Columbia, nationwide globally. It's actually not apparent to me from the act. Sam, I don't know if you've seen any guidance from the Pay Transparency Office.

I did note on their website that they required—well, the language that they used on the government website was, "pay transparency reports in respect of their BC employees," which would suggest then that we're only focused on the province of British Columbia. But having said that, I didn't see anything specifically in the act talking about that.

SAM TECLE: It's a good point and a really good question. I think from what I've reviewed at least with respect to both the legislation, the regulation, and as Alycia noted on the province's website, it doesn't clearly indicate that the employees are only those included in BC versus those that are also outside of BC. But if I was to anticipate how it would be decided, I mean I would think that it would be employees within the province. Otherwise, it'd be pretty easy to get over any minimum threshold. But again, it's not clear and I think only time will tell as to how those provisions are interpreted.

ALYCIA RILEY: Thanks so much, Sam. So moving on to Ontario we have the Working for Workers Four Act, 2023. And you'll have seen in your invites, we talked about forthcoming changes that may apply. And since that invite originally went out, this act has in fact received royal assent. So it did receive royal assent last week.

That does not mean that all of this act has come into force and I'll explain a little bit more of that in the slides that follow. But what I want to lay out for you here is that this particular statute is another form of omnibus legislation and it amends several existing statutes as well. So today's focus is pay transparency but just to put on your radar that there are some other changes that were made.

So with respect to the Digital Platform Workers Rights Act, 2022, some of you may remember this one. It was passed under a previous Working for Workers Act. That one was in 2022. And that particular act was actually supposed to be proclaimed into force. And as of 11:50 AM this morning when I double checked, it still has not been proclaimed into force.

So these particular changes are again, going to be contingent upon whether or not that main statute ever gets proclaimed. But for what those changes are they specify that there are going to be recurring pay periods that cannot exceed the prescribed number of days in the regulation and regulation is also to be released.

And there are going to be rules for determining compliance with minimum wage requirements as prescribed by regulation. So these are essentially providing opportunities for regulation in the future so that we can have a better understanding

of what those requirements will be. But as of this time, it provides very little insight as to how that is all going to unfold.

Under the second statute we have listed there, so the Fair Access to Regulated Professions and Compulsory Trades Act. So there are prescribed requirements that are going to have to be met to determine whether a regulated profession as defined within the act, so that includes professions such as accounting, I believe architecture, the Law Society is also listed there.

But the point of the changes in this particular statute is to be transparent, and objective, and impartial in communicating how a regulated profession is assessing the qualifications of its applicants. And to make sure that if any third party is going to be making those assessments, that they have taken reasonable measures to ensure that the assessment is being made in a transparent, objective, and fair manner.

And as part of that it is also an existing requirement under the legislation to make public what documentation of qualifications must accompany an application or if you are looking at alternatives, the regulated profession also then has to disclose which alternatives may be acceptable.

Looking at the Workplace Safety and Insurance Act. Now the changes listed here are going to be in force upon proclamation. It creates a presumption that will apply to certain firefighters and fire investigators. And the presumption is going to be with respect to primary site cancer in the esophagus. There are also going to be amendments enabling increases to benefits above the annual rate of inflation.

And then most importantly for today, we have the further changes to the Employment Standards Act, 2000. Now again, not all of these are enforced right away. But one of the changes that's coming into force immediately is that work performed during a trial period within the meaning of training also fits within the definition of an employee. So in other words, an employer cannot say that somebody is not subject to the Employment Standards Act because they happen to be performing a trial period.

There are also going to be additional requirements now force related to the employee's account in which a direct deposit can be made. They're also going to be new deductions for dines and dashes. So an employer, if you have an employee who unfortunately is subject to a dine and dash at a restaurant or a gas station, the employer will not be able to make deductions from the employee's pay to account for that.

Again, complimentarily, there are going to be new sections regarding the payment of employee tips and other gratuities, as well as a policy about how the employer handles the sharing of tips and gratuities. And specifically, whether or not shareholders or directors of an employer can also participate in the sharing of gratuities. And then lastly, there is going to be methods of paying vacation pay that may only be used if the employee has made an employment— or sorry, an agreement with their employer. If you could go to next slide, please. Thank you.

And so what we're here to talk about today, touching on pay transparency, the new part of the ESA that's going to come into force, again, upon proclamation, so this is not enforced yet, is this new part 3.1 entitled job postings. And so the new requirement is that subject to regulations, a public job posting must include the expected compensation or the range of expected compensation.

And that does not apply— again, it doesn't apply to postings that do not fall within the definition of a public job posting. So that strongly suggests that this is not going to apply to anything internally that an employer may post, like for example, on

its intranet site. And we still don't have a lot of clear ideas on what this is really going to mean because the term publicly advertised job posting is going to have the meaning set out in the regulations, which is not released as of yet. It's also uncertain at this time whether that definition would apply to a recruiter or a headhunter. So I would just encourage you all to just keep an eye on that and make sure that you're checking the regulations for any updates.

Now the term range is subject to conditions, limitations, or requirements as may be prescribed. So again, we're left with a big question mark. It's not entirely clear what that really means. It's uncertain at this time also whether that is intended to capture all elements of compensation or perhaps elements of non-monetary compensation. It's still not clear to us.

And it's also uncertain at this point in time which ranges of compensation are acceptable. For example, can I put \$50,000 to \$100,000? Could I put \$50,000 to \$500,000? It's not clear at this point in time. What we do know is that at least based on this definition, we know that expected compensation or range will suggest that if an employer were to put, as Sam mentioned, under the Pay Transparency Act in BC, if you put something in your posting like \$30 an hour or up or starting at \$60,000 a year, that's very unlikely to meet the requirement.

Also when we look at the term expected, we don't have a great deal of clarity on what that means at this point in time either because many employers, they get a great candidate, they're ready to make the offer, and the candidate's salary expectations are perhaps higher than originally posted. So it's not clear at this time whether offering that greater salary to a successful candidate would necessarily be a breach of the Employment Standards Act.

But what you can understand from that pay transparency part generally with respect to job postings is clearly it's not going as far as British Columbia does with respect to requirements for pay transparency. There's no specific prohibition about asking for salary expectations or former compensation. And there's no pay transparency reporting under this change either.

Now just looking at the second main bullet point there. So subject to regulation, there's also going to be a ban on requiring a candidate to have Canadian experience in a job posting or any associated application form. And that again, the act says that particular requirement will not apply to certain publicly-advertised job postings that meet such criteria as may be prescribed. So again, we're left with the question of, OK, well, it's not really clear on whether or not there's going to be any exemptions to this. But TBD.

Now presumably, the intention of that particular bullet point is to guard against discrimination of newcomers who might otherwise not have Canadian work experience, immigrants, foreign students with Visas. In reality, discrimination unfortunately presents itself in ways that are much more subtle than this. So notice that this is limited to a job posting or an application form. It is possible that an employer or manager could raise that in an interview or a separate letter.

So in those circumstances once this is proclaimed into force, such circumstances would not violate the Employment Standards Act. However, whether or not that could represent a breach of the Ontario Human Rights code would be a separate matter.

So there are a couple of holes here that we're hoping is going to be addressed through the regulation. Another example would be that a lot of companies if they are hiring drivers will require very likely a Canadian driver's license. And so that creates a bit of a concern there as well that we're hoping will be addressed over

time.

Now for certain regulated professions, it's worth noting that a lot of regulated bodies are already subject to this type of requirement under Section 10.2 of the Fair Access to Regulated Professions and Compulsory Trades Act which is the act that—another act that was just amended as seen in our previous slide.

On the third bullet point, we have the use of artificial intelligence. So every employer who advertises a publicly-advertised job posting and who uses artificial intelligence to either screen, or assess, or select applicants for the position must include a statement disclosing the use of artificial intelligence. And an artificial intelligence as a term is to be defined by regulation.

So again, this one has not been proclaimed into force yet but certainly something that if you use any third-party websites or assistant tools to help you with your recruiting, may be something to turn your minds to now just to make sure that you have a clear idea of what processes are being used and whether or not you may be required to make a disclosure of AI use in the future.

And then lastly, as an employer, you will be required to retain copies for three years of all publicly-advertised job postings and any associated applications even after the posting has been removed and that is to safeguard against and keep as evidence if you are ever subject to an audit from the Ministry of Labor. We could go to the next slide, please. Thank you.

So under the Pay Transparency Act, we saw Sam's presentation about the new requirements in BC and we now have this supposedly new requirement that's going to come into place in Ontario upon proclamation. But this actually isn't all that new. So back in 2018, the previous liberal government passed a statute called the Pay Transparency Act, 2018. And that particular statute was much more comprehensive and similar to what BC has now enacted under the pay Transparency Act.

So that had prohibitions on employers against asking about compensation history. It had anti-reprisal provisions. It had the requirement for pay transparency reports. However, that particular statute, the coming into force was changed under the present government and one of its statutes that it enacted upon coming into power.

So that pay Transparency Act from 2018, while it is technically still on the books, it's never been proclaimed into force. And so it just sat there inactive for the past few years. But note that section six of that act has substantively the exact same language. So it is possible that under the current government, there may be future legislation that implements more of this 2018 Act. Or it's possible that in the future the [INAUDIBLE] government may reassess and proclaim this 2018 act into force. So I'll pass it back to Elisa now and I believe we're going to be going through some fact patterns together.

ELISA SCALI: Yes, thank you, Alycia and Sam for that overview. Now, to try to apply [CHUCKLES] what has these new requirements clearly because we don't know a lot about the legislation at this point. There's still some uncertainty. But we're going to try to provide some guidance and review a few fact patterns with you.

So we'll start with New Wave Software Inc is a software company. It is based in Vancouver. But it also has offices in Edmonton, Ottawa, and Quebec City. Its business focuses on providing network, performance, and bandwidth monitoring software to the telecommunications industry. After the recent slump in the technology industry, New wave has received a series of new contracts from large tech telecommunications providers. The human resources team of New Wave has been tasked with recruiting new

employees to fill some gaps in New Waves' complement. Next slide, please.

So we have a job posting. As the human resources director, you are requested that each hiring department head provide you with a description of the roles they need to fill. The engineering team comes to you with a job summary of the posting and asks you to post it on LinkedIn. And here is the job posting, entry level software developer. We are a Canadian provider of software to the telecommunications industry in Canada and abroad.

We are looking for a full-time, entry-level software developer to join our team. Possibility for full remote work if desired. Experience working in the telecommunications industry and asset but not a prerequisite. Salary starting at \$85,000 per year with opportunity for advancement, bonuses, benefits, and paid sick leave. So taking a look at this job posting, Alycia, do you see any potential issues in light of this new legislation?

ALYCIA RILEY: There are a couple. So first of all, when we're looking at New Wave as a business entity, it's actually not clear whether or not they are, in fact, a provincially-regulated employer. So because they are providing network performance monitoring to telecommunication companies, it's possible that they could fall within federal regulation scope, in which case then we don't need to consider the application of the BC Pay Transparency Act or Ontario's Bill 149.

Looking at this particular job posting, it's also not clear where exactly this candidate could be working from. So possibility for full remote work, if desired, that means that candidate could be working in BC. They could be in Ontario or elsewhere. Even if New Waves' offices are not in a certain province, they could be working from there as well.

So as a matter of applying, I would say, the highest standard for compliance just in case you do end up having a candidate who isn't BC, I would encourage the operations team here— or sorry, is it engineering team, I'd encourage them to put all of those requirements in and comply with the BC legislation even if you end up having a candidate who isn't from BC.

We also have the starting salary at \$85,000 a year. So again, that's not a range. That would be a violation in both BC and Ontario once Ontario enacts or I should say, proclaims the requirement under Bill 149. It's also unclear whether this opportunity for bonuses, benefits, paid sick leave, that poses a bit of concern as well because it's not sure if that's really within the meaning of expected compensation.

And then I noticed also, so it says here, experience working in the telecommunications industry an asset but not a prerequisite. We have New Waves and they're saying that they're a Canadian provider of services and they provide services to the Canadian telecommunications industry. So it's a little bit ambiguous as to whether or not they would in fact be prioritizing Canadian working experience. So it's possible that somebody might make a complaint about that. But that specific language as it is not obviously offside of the legislation.

ELISA SCALI: OK, thank you. So there's quite a few potential issues that maybe one might not have recognized and may not be aware of if they're not aware of that new legislation. Now from a BC perspective, Sam do you see anything else that could cause problems?

SAM TECLE: Thanks, Elisa. So Alycia's covered off a lot of really helpful points that do apply to the BC context. In addition to that, with respect to including language such as bonuses, benefits, paid sick leave, et cetera, for purposes of the act the

employer is not required to include this information. So it is optional. So bonus pay benefits, overtime pay, tips, et cetera, that's all optional.

But I think what employers should consider is if they're going to include this additional information, so in this instance, it's bonuses, benefits, and paid sick leave, that the employer should be careful about how it's worded. I think on its face, the last sentence, at least the last half of the last sentence is fine. But I think an employer wouldn't want to set this out in a way that makes it seem as though that's part of the package.

So starting at \$85,000, that's obviously offside. \$85,000 and up, that's offside. But just making reference to bonuses being a possibility, that seems OK based on the way that this is drafted. So employers will want to consider whether they want to go down that route. And if it's absolutely necessary to post it, then by all means. But to not overdo it, so to speak and draft more than is necessary just to communicate that there are bonuses, for instance, as a possibility.

ELISA SCALI: OK. Thank you, Sam. So on to our next fact situation. Harman has just received a job offer from New Wave as a software engineer. While the job offer was originally made through human resources, Taylor, the Vice President of Software Engineering, gets a bit anxious that Harman may not accept the offer because they haven't heard back after two days.

Taylor decides to call Harman directly and follow up. On their call, Taylor gets the sense that Harman is concerned about the starting salary of New Wave's offer. Taylor asks Harman how much Harman earned at a previous job as a software engineer. Harman advises that the previous salary was \$80,000 but also mentions that he's spoken to Omar, another software engineer currently working at New wave and Omar disclosed that his salary is \$110,000.

Omar is disciplined a few days later for telling Harman about his salary. And Taylor retracts Harman's job offer as a result. So Alycia, based on this fact pattern, what are your preliminary thoughts on this situation? I see a few issues here that you might help us to identify.

ALYCIA RILEY: Yeah. So this is unfortunately one of those situations that make you cringe a little bit as you read it, especially because it appears that human resources was not looped into the picture when Taylor decided to call Harman. So again, we need to also- we still need to assess where Harman as a candidate is based to really determine which law applies.

But again, if we're looking at it broad scope, I'd say, take BC's legislation as the high watermark so that you can be sure that you're not going to be offside in any circumstance. Now obviously, Taylor was not supposed to ask Harman about prior pay and you can't retaliate against Omar as an existing employee if you're in British Columbia.

And so as a best practice, one of the things I would recommend is that as human resources and leadership of the company is advising managers about this, I'd say just try your best to, if at all possible, maybe train everybody consistently, especially with remote working candidates. And so the default would be just don't even ask about it unless you come talk to HR first so that we can walk you through how that's supposed to be done.

ELISA SCALI: And Sam, what are your thoughts about Taylor retracting Harman's job offer?

SAM TECLE: Right. So regarding Taylor's retraction of the offer, technically speaking, it's not in contravention of the act. But it's still an issue. And really, when you're looking at this act, you want to think, OK, what's the purpose of the act and what's the spirit of the act. And it's really to protect employees but the legislation also extends to applicants.

So in this instance, again, even though there's no breach technically of the act, it's something that could cause issues for the employer. Say, in this case, Harman wants to make a complaint to the director. Even though the director may not say that there was technically a breach, it's just not something an employer wants to have to deal with because of the spirit of the legislation.

ELISA SCALI: And with respect to Omar, assuming he's in BC, what could Omar do in these circumstances?

SAM TECLE: Right. So Omar is an employee in this fact pattern. So Omar actually has the ability per the act to make a report to the director of pay transparency and specifically with respect to New Wave's decision to discipline Omar. So under section four of the act, new wave wasn't permitted to take steps to discipline Omar because Omar shared salary information.

Now the interesting point about this fact pattern and specifically this is part of it is that Omar is entitled to make a report to the director of pay transparency. But over and above that, the employer is not permitted to take any further disciplinary steps to reprimand Omar for making the report to the director. So it puts the employer, in essence, in a really difficult spot so Omar takes those steps and makes the report. That's something that the employer just has to live with. And so it really does put a high burden on the employer to not be those things.

ELISA SCALI: And do you have any comments on what other steps Harman could take after having the job offer retracted?

SAM TECLE: Right. So unlike Omar, in this instance, Harman is not an employee so there isn't something prescribed in the act that permits expressly that Harman can go ahead and make a complaint. But there's nothing stopping Harman from going ahead and making a complaint anyway to the director. So that's something that employers should be mindful of. Again, the spirit of the legislation ultimately is to protect employees but extends to applicants in certain instances. So you can safely assume that if Harman made a complaint, even though Harman wasn't expressly permitted to but that's something that Harman could do and the director would look into this.

Now, it's noted that the employer could come into knowledge about Harman's previous salary if Harman's salary is publicly accessible. So there are opportunities for the employer to know this information. It's just how the employer comes into this information is relevant. They can't get this information from a third party or some other means that is something other than it being publicly accessible.

ELISA SCALI: OK, thank you. So based on this scenario, I think what would be a good practice if human resources does not have complete control over this process is to train those individuals that are involved in this hiring process to ensure that they're aware of this new legislation so that they don't run into situations like this where they potentially violate the requirements under that legislation. So making everyone aware of this legislation would probably be beneficial for employers as well. Next slide, please.

So collection of information and this deals with pay transparency reports. New Wave is collecting information to complete its pay transparency report. The new human

resources— sorry. Human resources department works with the operations team to develop an internal employee survey. This survey requests voluntary disclosure of gender category. Once the survey is finalized, HR asks the operations team to send a general email directing employees to the survey on the company's portal. Upon receiving the email, HR notes that the employees have been given a deadline of October 31, 2024 to complete the survey. So Sam, do you see any potential issues with this?

SAM TECLE: So one thing that the post does correctly is it indicates that the survey is— it's basically employees can participate on a voluntary basis. So that's something that's notable. If it stated, for instance, that it was mandatory, then that would be offside. So employees are open to participate in the survey or not. And that shouldn't be dealt with in any negative manner by the employer.

So regarding the date, so the final bullet makes reference to the deadline of October 31, 2024 to complete the survey. Given that the reports are due on November 1, 2024, the requirement to submit the report, at least complete the survey by October 31 is far too late. Presumably an employer is going to need time to compile this data and prepare the report. So the one change that should be made is that the requirement to complete the survey voluntarily happens well before October 31 so that it could be two months before or a month and a half before whatever amount of time that the employer thinks is sufficient to complete the report. Now— sorry.

ELISA SCALI: No, go ahead.

SAM TECLE: The other point is simply the encouragement for employer to set out the rationale. So why the pay transparency report is significant, what its objectives are, et cetera so that employees understand its importance.

ELISA SCALI: Thank you. So again, in this scenario, it would have been important, if the operations team is going to be involved in this process, that they appreciate the requirements and so that they can ensure maybe that deadline would have been a little bit earlier to allow appropriate time in order to complete the report. Next slide, please.

Pay transparency report. So New Wave completes its pay transparency report and it publishes it on its website in November, 2024 so it met its deadline. Morgan who identifies as non-binary reviews the pay transparency report in advance of an interview for a position with New Wave that is based in Ontario.

During the interview with the hiring manager, Morgan asks several questions about the report which appeared to be unclear to them in many respects. As the director of human resources, you meet with the hiring manager to discuss the candidates for the position and to discuss how the interviews went. You're surprised to hear the manager say they weren't particularly keen on Morgan. [CHUCKLES] The reason being that she asked— or they asked a lot of annoying questions and don't have Canadian experience in the telecommunications industry. So Alycia, what are your thoughts about the manager's comments relating to Canadian experience?

ALYCIA RILEY: So we know from this that the position is based in Ontario. It's not clear where Morgan is based. So Morgan may be outside of the province. So again, it's one of those situations where you'd want to apply just as an out of an abundance of caution and say, apply the most onerous provincial requirement as your high watermark.

Now, can the manager here lawfully make a distinction that Morgan does not have Canadian work experience? Technically under the ESA, yes because as we saw from the

prior slide, it's not contained in a publicly-advertised job posting and it's not contained in an application form.

But this is one of those situations where you see the limitations of that statute and so because that distinction is not being made in the posting or the application, is it offside of the ESA? Technically no. But then you could, as the employer, still be looking at a potential violation under the Ontario Human Rights code. So just another thing to be mindful of. Even though the ESA has one requirement, always consider the human rights element on top of that.

ELISA SCALI: Yeah and I think it's important to understand that the intention behind all of these pieces of legislation are they're intended to be consistent in order to apply the same principles of fairness and not to discriminate based on grounds protected such as citizenship and gender, et cetera.

ALYCIA RILEY: So I think going back to Sam's comment on the previous slide, the spirit of the legislation is to protect employees. So in a circumstances like— in a circumstance like this where applying that same criteria even if not in writing could still have you running offside of the statute.

ELISA SCALI: OK. Now, Sam what are your thoughts on this comment made by the manager that Morgan's questions were annoying.

SAM TECLE: So on its face, it's a concerning comment from the hiring manager. Now that's not the end of the inquiry. I think what really needs to happen is there needs to be a determination by the director of human resources as to whether these annoying questions related to the pay transparency report or there are some other reasons why the hiring manager's views of Morgan weren't great.

And if it in fact has something to do with the pay transparency report, then that's something that the director of human resources should try to deal with and hopefully mitigate against. So that's an issue that the hiring manager has and the director bringing that to the manager's attention, that's not really a basis that you can rely on to form this view of Morgan. Morgan's entitled to ask questions about the report and that should inform or help formulate the manager's view as to whether Morgan's a suitable candidate for the job.

And really, these steps are to trigger against any potential liability. So especially with legislation so new, there's a lot that will come in the coming months and years as to how the provisions are interpreted. But ideally, the employer is taking a relatively conservative approach before more information comes out about how the provisions of the act are interpreted.

ELISA SCALI: And it is new legislation and we have so many questions, [CHUCKLES] in fact, from our attendees. I think mostly because it is new legislation and no one's really familiar with it at this point. And we have a few minutes so I'd maybe like to tackle a few of these questions recognizing that because it's new legislation, it may be a to be confirmed answer. But let's take a look at some of these questions and see whether there's a response that we can provide based on what we know right now.

There's one question here, regarding violation of requesting for Canadian experience, is it only related to Ontario Bill 149, although it does not come into effect and not BC's Pay Transparency Act? Sam, do you want to just clarify that?

SAM TECLE: Sure. So based on the current act in BC, that requirement doesn't apply. So that's specific to the Ontario Bill.

ELISA SCALI: OK. And I think we've covered this but let's just— it might be a

repeating. With regard to job postings, what if the company you work for has a remote working environment and can hire anyone across Canada. Do you recommend the job posting be compliant with both BC and Ontario legislation in case an applicant from one of these provinces is hired?

ALYCIA RILEY: Out of an abundance of caution, I would definitely take that approach. I think it just— and it's best for me— I mean, think a lot of provinces tend to follow BC and Ontario in terms of what comes next for their legislation. So even though we've only got those requirements in those two provinces at the moment, I'd anticipate more provinces enacting pay transparency legislation in the future too.

ELISA SCALI: And here's another one regarding the collection of information for the pay transparency report. I'm going to direct this to Sam. The question is, if the company already has data relating to gender, do they still need to collect that information specifically for the pay transparency report or can they rely on the information that they already have?

SAM TECLE: Yeah, it's a good question. So assuming the information that the employer already has is current, then I don't see any issue. I think collecting that information is key whether it comes from some other means. But for all intents and purposes, that information should be collected anyways. So I don't think there's any issue with an employer already having that information and applying it. It's more probably for the circumstance where employers weren't previously collecting this information.

ELISA SCALI: And along the same lines, there's another question regarding collection of the gender information. Because you're collecting it and disclosure is voluntary, the question is, if someone declines to respond, which means you're not going to have 100% responses, how do you deal with that in the report? Is there any guidance on that?

SAM TECLE: Bear with me for one moment. It's a good question. I don't recall there being anything explicit with respect to how that's dealt with. So I'll have to double check that because that is a very good question. But A, that's more than OK. But B, there would have to be some mechanism for the report actually setting out that perhaps not everybody participated. Otherwise, you could have the minimum number with 20% not participating. So I don't know the answer to that question specifically.

But I would imagine there's some mechanism for setting that out. I mentioned earlier in the webinar that the province of BC provides a really helpful template or sample versions of what these reports look like. So that may also provide guidance as to how that might play out.

ELISA SCALI: All right. So that's to be confirmed. A question for Alycia. When it comes to the retention of the records for the three years, the question is, we don't use application forms but we do request resumes. Does that obligation require that we retain resumes for three years?

ALYCIA RILEY: So unfortunately, there's no clear answer to that because the act just says any publicly-advertised job posting and any associated application form. So my understanding from that then is it's documents that are being drafted by the employer. That's how I think it's supposed to read. I can't say 100% because it's so new and we don't have any further guidance on this, be it from the Ministry of Labor or elsewhere.

But if the idea is, for example, that your application package includes, please upload your resume, please input all of your job experience, I would say that's a

circumstance where you should then consider retaining it because it's something that you as the company have drafted for applicants to review. So sorry, I know it's a tricky distinction. But I'd say if it's something that your company is drafting, I would definitely hang on to it just in case of an audit.

ELISA SCALI: All right. Thank you. We have time for maybe one more question. This relates to the BC legislation where an employer may not discipline an employee for discussing or disclosing their compensation. And the question is in terms of managing this, would it be a good practice to encourage employees not to? Or can you just encourage them not to discuss wages? And would that somehow be a breach of the requirements under the legislation?

SAM TECLE: Again, a good question. Given how recently this came out, I would say that that's probably not the best approach. I think you don't want to change behavior by making those suggestions. Because even though it's not directly reprimanding employees, it's kind of signaling that the employer wouldn't appreciate the discussion of wages. I think the idea is that if employees want to be able to discuss it, it's open to them. So I would say in short, I wouldn't recommend that approach just given what we know about the act.

ELISA SCALI: All right, thank you. One more question for Alycia, in Ontario, does the legislation- we have a question here. Does the legislation apply to not-for-profit organizations? Is there any type of private organization that would be excluded from these requirements?

ALYCIA RILEY: So it's not clear at this time. And the reason I say that is the Employment Standards Act in Ontario generally applies to all employers in the province, unless they're exempt. And so we have a series of exemptions both under the act and under regulation. I've not seen anything at this point in time that suggests to me that not-for-profit corporations would have any special treatment. But again, so much of this is as prescribed by regulation so it's entirely possible that they will be exempt in the future. We just don't know right now.

ELISA SCALI: All right, thank you. So I think we've done our best to review most of the questions. But we will review what we have in the chat. And if there's anything that we've missed, we will provide responses to those that we can in writing following today's webinar. A lot of them were similar questions so I think we've covered most of them.

And so I'd like to really thank Alycia and Sam for that overview. That was very informative. And I appreciate you looking into the legislation and trying to assess [CHUCKLES] what it means and where we're going given the information that we have at this time. So thank you.

A few things that I didn't mention at the beginning of the presentation but I will do that now. This PowerPoint will be shared with all of the attendees. So you will be receiving a copy. And this presentation has also been recorded and you will also be receiving a link to the presentation. So if you want to go back, refresh your memory, and view it again, you can do that.

Now as I mentioned, this is the first webinar of a series of webinars that we will be presenting in 2024. Our next webinar is coming up in April, please stay tuned. You will be receiving more details on that webinar very shortly. And again, as we do every year, we have a survey. And if we could just go back to the slide with the QR code. If you hold your camera up to that QR code, it will link you to a survey.

And we really appreciate your feedback on these webinars because always, we want to

improve them wherever we can and whenever we can. So if you could take a few minutes to complete that survey, we would greatly appreciate it. And again, I want to thank Alycia and Sam. And thank you for attending. And we hope to see you at our next webinar coming up in April.

[AUDIO LOGO]

Read the original article on GowlingWLG.com

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

[Alycia Riley](#) , [Sam Tecle](#) and [Elisa Scali](#)

Gowling WLG