

EQUAL PAY LEGISLATION IN CANADA

Equal pay legislation prohibits an employer from paying employees of one sex at a lower rate of pay or wages than that paid to employees of the other sex who perform the *same or substantially the same work*.¹ Equal pay legislation is currently in force in every jurisdiction in Canada, with the exception of Nunavut.² In general, this legislation applies to employers in both the private and public sectors.³ In most jurisdictions, equal pay provisions are included in human rights legislation, with the exception of Manitoba, New Brunswick, Nova Scotia, Saskatchewan and the Yukon Territory (private sector) where such provisions are included in employment standards legislation. Equal pay provisions can be enforced through the complaints process established in the applicable human rights or employment standards legislation.

1. *Measuring Equality of Pay*

In Alberta, British Columbia, New Brunswick, the Northwest Territories, Ontario, Prince Edward Island, Saskatchewan and the Yukon Territory (private sector), an employer is prohibited from paying an employee at a “rate of pay” that is in contravention of the equal pay provisions. In Manitoba and Nova Scotia, equality of pay is measured by the “scale of wages” and the “rate of wages”, respectively; in the federal jurisdiction and the Yukon Territory (public sector), it is measured by “wages”; and in Quebec, it is measured by “salary or wages”. “Pay” or “wages” can include, depending on the legislation, not only wages, payments or salary due to an employee for work performed, but also commissions, bonuses, vacation pay, benefits, employer contributions to health or disability plans, pay in lieu of notice of termination, and/or the value of any board, rent or housing provided by an employer. Moreover, in Newfoundland and Labrador, the *Human Rights Code* requires equality not only with respect to wages, pension rights and insurance benefits, but also opportunities for training and advancement.

2. *Substantially the same work*

The determination of whether work is “substantially the same” or “substantially similar” must often be made by assessing

- the skill, effort and responsibility required in the performance of the work; and
- the conditions under which work is performed.

Furthermore, in Prince Edward Island, the *Human Rights Act* stipulates that the work must also require equal education and experience in order to be considered substantially the same.

In the federal jurisdiction, the *Equal Wages Guidelines, 1986 (Guidelines)* under the *Canadian Human Rights Act* specify that certain factors must be considered in assessing the skill, effort and responsibility required in work and the conditions

under which work is performed. For instance, in assessing the skill required for the performance of work, the *Guidelines* stipulate that intellectual and physical qualifications acquired by experience, training, education or natural ability must be considered. Moreover, under British Columbia's *Human Rights Code*, the concepts of skill, effort and responsibility are subject to factors in respect of pay rates, such as seniority systems, merit systems and systems that measure earnings by the quantity or quality of production.

Except in British Columbia, Manitoba, Prince Edward Island and the Yukon Territory (public sector), an employee's right to equal pay only applies in relation to other employees of the same employer who work in the *same establishment or place*.

3. *Factors that Justify a Difference in Pay*

In most jurisdictions, the legislation specifies factors that justify a difference in pay between male and female employees performing the same or substantially the same work. Such factors can include:

- a seniority system;
- a merit system;
- a system that measures earnings by quantity or quality of production;
- a temporary training position;
- a demotion procedure;
- a skills shortage in the field of work;
- a compensation practice based on regional differences; or
- another factor or system that is not based on sex.

However, the legislation in Manitoba and the Yukon Territory (public sector) does not specify any such factors.

In all jurisdictions, with the exception of Manitoba and Quebec, an employer is expressly prohibited from reducing the wages or rate of pay of an employee in order to comply with the equal pay provisions. Furthermore, Saskatchewan's *Labour Standards Act* provides that an employer who has contravened the equal pay provisions cannot reduce the rate of pay to which an employee is entitled on the grounds that the work is subsequently performed by employees of the same sex.

4. *Complaints under Equal Pay Legislation*

A complaint that an employer has violated equal pay legislation must normally be filed within a specified time limit with the employment standards or human rights body responsible for enforcing the legislation – which can then usually attempt to settle and/or proceed to investigate and resolve the complaint in accordance with the legislative framework (e.g. by an order requiring an employer to pay wages

due and owing to an employee). Also note that there may be additional provisions in the legislation addressing the right to appeal and/or enforce a decision or order made under the complaints procedure.

In several jurisdictions, the amount of money that an employee can recover in a complaint under the equal pay provisions is subject to an upper limit. Under Alberta's *Human Rights, Citizenship and Multiculturalism Act*, an employee can only recover wages, income lost and/or expenses incurred in the two years preceding the complaint. The *Employment Standards Act* of Manitoba provides that recovery is limited to wages due and payable in the six months before the complaint was filed or, if the employee's employment was terminated, in the last six months of employment. Finally, under Ontario's *Employment Standards Act, 2000*, an order against an employer to pay unpaid wages to an employee cannot be made in respect of wages that became due and payable more than six months before the complaint was filed. An order to pay unpaid wages is also subject to a ceiling of \$10,000 per employee.

5. "Anti-Discrimination" Equal Pay Laws

In general, equal pay provisions mandate equality of pay between male and female employees of the same employer who are performing the same or substantially similar work. However, the application of the equal pay provisions is broader in the Northwest Territories, Prince Edward Island and Quebec.

The *Human Rights Act* of the Northwest Territories prohibits an employer from paying an employee, *on the basis of a prohibited ground of discrimination*, at a rate of pay less than that paid to other employees employed in the same establishment who are performing the same or substantially similar work. Prohibited grounds of discrimination include race, colour, ancestry, nationality, ethnic origin, place of origin, creed, religion, age, disability, sex, sexual orientation, gender identity, marital or family status, family affiliation, political belief or association, social condition and a conviction for which a pardon has been granted. The *Human Rights Act* of Prince Edward Island similarly prohibits discrimination in pay ("discrimination" is defined as discrimination in relation to age, colour, creed, ethnic or national origin, family status, marital status, physical or mental handicap, political belief, race, religion, sex, sexual orientation or source of income of any individual or class of individuals). Moreover, in Quebec, the *Charter of human rights and freedoms* requires an employer to grant, without discrimination, equal salary or wages to the members of his/her personnel who are performing equivalent work at the same place. Under the *Charter*, discrimination exists where a distinction, exclusion or preference (based on race, colour, sex, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap) has the effect of nullifying or impairing a person's right to full and equal recognition and exercise of his/her rights or freedoms.

6. Related Anti-Discrimination Laws

Finally, it should be noted that human rights legislation in every province and territory disallows discrimination, however defined, against a person with respect to *employment and/or a term, condition or aspect of employment*. Discrimination on this basis may be permitted under certain circumstances (e.g. where based on a *bona fide* occupational qualification), depending on the legislation. For example, in Manitoba, the *Human Rights Code*⁴ prohibits discrimination⁵ with respect to “any aspect” of an employment or occupation. Under the *Code*, “any aspect” of an employment or occupation includes, among other things, any form of remuneration or other compensation received directly or indirectly in respect of the employment relationship and any other benefit, term or condition of the employment or occupation. Discrimination is, however, permitted, where the limitation, specification or preference in question is based on *bona fide* and reasonable requirements or qualifications for the employment or occupation. Moreover, in the Federal jurisdiction, the *Canadian Human Rights Act* prohibits an employer from differentiating adversely, directly or indirectly, in relation to an employee during the course of his/her employment on the basis of a prohibited ground of discrimination.⁶ However, it is not a discriminatory practice if (among other grounds) an employer establishes that a refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is based on a *bona fide* occupational requirement. Although such provisions do not explicitly deal with equal pay, they should certainly be considered relevant in establishing rates of pay or wages for employees that are performing the same or substantially the same work.

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¹ In Quebec, the *Charter of human rights and freedoms* requires an employer to grant equal salary or wages without discrimination to his/her employees who perform “equivalent work at the same place”. Moreover, in the Yukon (public sector) and the federal jurisdiction, the legislation refers to “work of equal value”.

² However, the *Human Rights Act* of Nunavut does prohibit an employer from discriminating against an individual or a class of individuals with respect to a term or condition of employment, regardless of whether that term or condition exists prior or subsequent to employment. Prohibited grounds of discrimination are race, colour, ancestry, ethnic origin, citizenship, place of origin, creed, religion, age, disability, sex, sexual orientation, marital status, family status, pregnancy, lawful source of income and a conviction for which a pardon has been granted. The anti-discrimination provision does not apply where a practice is based on a justified occupational requirement.

³ However, the *Canadian Human Rights Act* and the *Equal Wages Guidelines, 1986* of the federal jurisdiction (which contain equal pay legislation) apply to the federal public service and federally-regulated undertakings. In addition, the equal pay provisions of the *Employment Standards Act* of the Yukon Territory apply to the private sector only; however, the equal pay provisions in the *Human Rights Act* of that territory apply to the public sector.

⁴ The *Code* applies to both the private and public sectors.

⁵ Under the Code, “discrimination” is defined to include differential treatment of an individual or group on the basis of one of the following characteristics: ancestry, including colour and perceived race; nationality or national origin; ethnic background or origin; religion or creed or religious belief, association or activity; age; sex, including pregnancy, the possibility of pregnancy and circumstances related to pregnancy; other gender-determined characteristics or circumstances; sexual orientation; marital or family status; source of income; political association or political activity; and physical or mental disability or related characteristics or circumstances, including reliance on a dog guide or other animal assistant, a wheelchair or any other remedial appliance or device.

⁶ Prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted.

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