

Draft 3

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CONSULTATION DRAFT
PAY TRANSPARENCY ACT

BILL NO.

2021

BE IT ENACTED by the Lieutenant Governor and the Legislative Assembly of the Province of Prince Edward Island as follows:

1. Definitions

In this Act

- (a) **“applicant”** means an individual who applies for employment with an employer, other than an individual who is an employee of the employer at the time of applying;
- (b) **“Board”** means the Employment Standards Board established under the *Employment Standards Act R.S.P.E.I. 1988, Cap. E-6.2*;
- (c) **“compensation”** means all payments and benefits paid or provided to or for the benefit of a person who performs functions that entitle the person to be paid a fixed or ascertainable amount;
- (d) **“Department”** means the department of the Minister;
- (e) **“employee”** has the same meaning as in the *Employment Standards Act*;
- (f) **“employer”** has the same meaning as in the *Employment Standards Act*;
- (g) **“inspector”** means an inspector appointed under this Act, except where noted otherwise;
- (h) **“Minister”** means the member of the Executive Council charged by order of the Lieutenant Governor in Council with the administration of this Act;
- (i) **“publicly advertised job posting”** means an external job posting for a specific job that an employer advertises to the general public in any manner, but for greater certainty does not include recruitment campaigns, general help wanted signs or positions that are only advertised to existing employees of the employer.

2. Minister responsible

- (1) The Minister is responsible for the administration of this Act.

Policies

- (2) The Minister may establish policies respecting the interpretation, administration and enforcement of this Act.

Delegation of Powers

- (3) Where, under this Act or the regulations, any power or duty is granted to or vested in the Minister or the Deputy Minister of the Department, the Minister or Deputy Minister may, in writing, delegate that power or duty from time to time to any employee in the Department, subject to such limitations, restrictions, conditions and requirements as the Minister or Deputy Minister may set out in the delegation.

3. Purposes of Act

The purposes of this Act are

- (a) to promote equality and equal opportunity in employment and in the workplace, including equality of compensation among
- (i) women and men,
 - (ii) Indigenous persons,
 - (iii) members of visible minorities, and
 - (iv) persons with disabilities,
- through increased transparency of pay and workforce composition;
- (b) to increase disclosure of inequities related to employment and compensation that the categories of persons set out in clause (a) may experience in the workplace, and to encourage the removal of such inequities to promote the full and equal participation of those categories of persons in the workplace;
- (c) to promote, amongst employers, the elimination of gender and other biases in hiring, promotion, employment status and pay practices;
- (d) to support open dialogue and workplace consultation between employers and employees on issues concerning employment, compensation and equal opportunity; and
- (e) to support economic growth through the advancement of equity in employment and in the workplace for the categories of persons set out in clause (a).

4. Compensation history

- (1) No employer shall seek compensation history information about an applicant by any means, whether personally or through an agent.

Unprompted disclosure

- (2) Nothing in this section prohibits an applicant from voluntarily and without prompting disclosing compensation history information to an employer or an employer's agent.

Comparable compensation

- (3) Nothing in this section prohibits an employer from seeking information about the ranges of compensation or aggregate compensation provided for positions comparable to the position for which the applicant is applying.

Use of information

- (4) Where an applicant has made a disclosure of compensation history information described in subsection (2) or the employer has obtained information described in subsection (3), nothing

in this section prohibits the employer from considering or relying on such information in determining compensation for the applicant.

Exception, public information

- (5) This section does not apply to compensation history information that is publicly available.

5. Compensation range information

Every employer who publicly advertises a job posting shall include in the posting information about the expected compensation for the position or the range of expected compensation for the position.

6. Pay transparency reports

- (1) Every employer with 100 or more employees, and every prescribed employer, shall collect the prescribed information for the purposes of preparing, no later than May 15 each year, a pay transparency report that complies with the requirements in the regulations and that contains
- (a) the prescribed information relating to the employer;
 - (b) the employer's workforce composition, calculated in accordance with the regulations; and
 - (c) information on differences in compensation in the employer's workforce with respect to gender and other prescribed characteristics.

First report, employer with 100 or more employees

- (2) An employer with 100 or more employees shall submit the first pay transparency report no later than May 15, 2023.

Submission of report

- (3) An employer who is required to prepare a pay transparency report under subsection (1) shall submit it to the Department in accordance with any prescribed requirements.

Posting report

- (4) An employer who is required to prepare a pay transparency report under subsection (1) shall post it online or in at least one conspicuous place in every workplace of the employer where it is likely to come to the attention of employees in that workplace.

Publication

- (5) The Department shall publish, or otherwise make available to the public, the pay transparency reports submitted under subsection (4).

Internet publication

- (6) Authority to publish under subsection (6) includes authority to publish on the Internet.

7. Anti-reprisal

- (1) No employer or person acting on behalf of an employer shall intimidate, dismiss or otherwise penalize an employee or threaten to do so because the employee has
- (a) made inquiries to the employer about the employee's compensation, or made inquiries or requested information relating to the employer's compensation policies;
 - (b) disclosed the employee's compensation to another employee;

- (c) made inquiries about a pay transparency report made under section 6, or about information contained in such a report;
- (d) given information about the employer's compliance or non-compliance with the requirements of this Act or the regulations to the Department; or
- (e) asked the employer to comply with this Act or the regulations.

Arbitration

- (2) Where an employee complains that an employer or person acting on behalf of an employer has contravened subsection (1), the employee may either
 - (a) have the matter dealt with by final and binding settlement by arbitration under a collective agreement, where one is in place; or
 - (b) file a complaint with the Board, in which case any rules governing the practice and procedure of the Board apply, with all necessary modifications, to the complaint.

Board may inquire

- (3) The Board may inquire into any complaint filed under clause (2)(b).

Burden of proof

- (4) On an inquiry by the Board into a complaint filed under clause (2)(b), the burden of proof that an employer or person acting on behalf of an employer did not act contrary to subsection (1) lies upon the employer or the person acting on behalf of the employer.

Board may substitute penalty

- (5) Where, on an inquiry by the Board into a complaint filed under clause (2)(b), the Board determines that an employee has been discharged or otherwise disciplined by an employer for cause and the contract of employment or the collective agreement, as the case may be, does not contain a specific penalty for the infraction, the Board may substitute such other penalty for the discharge or discipline as seems just and reasonable in all the circumstances.

Jurisdiction when complaint by civil servant

- (6) For greater certainty, the Board shall exercise jurisdiction under this section when a complaint filed under clause (2)(b) is in respect of an employee who is an employee within the meaning of the *Civil Service Act* R.S.P.E.I. 1988, Cap. C-8.

8. Inspectors

- (1) The Minister may appoint one or more inspectors for the purposes of this Act who, when acting under this Act, shall have the powers of a commissioner under the *Public Inquiries Act* R.S.P.E.I. 1988, Cap. P-31.

Inspector, *Employment Standards Act*

- (2) An inspector appointed under the *Employment Standards Act* is deemed to be an inspector for the purposes of this Act.

9. Powers and duties of inspectors

- (1) An inspector may exercise the powers conferred upon inspectors under this Act and shall perform the duties imposed upon inspectors under this Act.

Inspectors to follow policies

- (2) An inspector shall follow any policies established by the Minister under subsection 2(2).

Hearing not required

- (3) An inspector is not required to hold a hearing in exercising any power or making any decision under this Act.

10. Inspectors not compellable

- (1) An inspector is not a competent or compellable witness in a civil proceeding respecting any information given or obtained, statements made or received, or records or other things produced or received under this Act except for the purpose of carrying out the inspector's duties under this Act.

Records not compellable

- (2) An inspector shall not be compelled in a civil proceeding to produce any record or other thing the inspector has made or received under this Act except for the purpose of carrying out the inspector's duties under this Act.

11. Compliance audits

- (1) An inspector may, without a warrant, conduct a compliance audit of an employer and, for that purpose, may enter and inspect any place in order to investigate a possible contravention of this Act or to perform an inspection to ensure that this Act is being complied with.

Requirement re conduct of audit

- (2) A compliance audit and any related inspection and investigation shall be conducted in accordance with any requirements set out in the regulations.

Powers of inspector

- (3) An inspector conducting an investigation or inspection as part of a compliance audit may
- (a) examine a record or other thing that the inspector thinks may be relevant to the investigation or inspection;
 - (b) require the production of a record or other thing that the inspector thinks may be relevant to the investigation or inspection;
 - (c) remove for review and copying a record or other thing that the inspector thinks may be relevant to the investigation or inspection;
 - (d) in order to produce a record in readable form, use data storage, information processing or retrieval devices or systems that are normally used in carrying on business in the place; and
 - (e) question any person on matters the inspector thinks may be relevant to the investigation or inspection.

Copy admissible in evidence

- (4) A copy of a record that purports to be certified by an inspector as being a true copy of the original is admissible in evidence to the same extent as the original, and has the same evidentiary value.

Obligation to produce and assist

- (5) If an inspector demands that a record or other thing be produced, the person who has custody of the record or thing shall produce it and, in the case of a record, shall on request provide any assistance that is reasonably necessary to interpret the record or to produce it in a readable form.

Obstruction

- (6) No person shall
- (a) hinder, obstruct or interfere with or attempt to hinder, obstruct or interfere with an inspector conducting an investigation or inspection;
 - (b) refuse to answer questions on matters that an inspector thinks may be relevant to an investigation or inspection; or
 - (c) provide an inspector with information on matters the inspector thinks may be relevant to an investigation or inspection that the person knows to be false or misleading.

Separate inquiries

- (7) No person shall prevent or attempt to prevent an inspector from making inquiries of any person separate and apart from another person under clause (3)(e).

12. Notice of contravention

- (1) If an inspector believes that a person has contravened a provision of this Act or the regulations, the inspector may issue a notice to the person setting out the inspector's belief and specifying the amount of the penalty for the contravention.

Amount of penalty

- (2) The amount of the penalty shall be determined in accordance with the regulations.

Penalty within range

- (3) If a range has been prescribed as the penalty for a contravention, the inspector shall determine the amount of the penalty in accordance with the prescribed criteria, if any.

Information

- (4) The notice issued under this section shall contain or be accompanied by information setting out the nature of the contravention.

Service

- (5) A notice issued under this section shall be served on the person in accordance with the regulations.

Deemed contravention

- (6) The person that is named in a notice issued under this section shall be deemed to have contravened this Act or the regulations in the manner set out in the notice if
- (a) the person fails to apply to the Board for a review of the notice within the period set out in subsection 13(1); or
 - (b) the person applies to the Board for a review of the notice and the Board finds that the person contravened the provision set out in the notice.

Penalty

- (7) A person who is deemed to have contravened a provision of this Act or the regulations shall pay to the Minister of Finance the penalty for the deemed contravention in accordance with the regulations.

Publication re notice of contravention

- (8) If a person, including an individual, is deemed under subsection (6) to have contravened a provision of this Act or the regulations after having been issued a notice of contravention, the

Department may publish or otherwise make available to the general public the name of the person, a description of the deemed contravention, the date of the deemed contravention and the penalty for the deemed contravention.

Internet publication

- (9) Authority to publish under subsection (8) includes authority to publish on the Internet.

Disclosure

- (10) Any disclosure made under subsection (8) is deemed to be in compliance with clause 37(1)(d) of the *Freedom of Information and Protection of Privacy Act* R.S.P.E.I. 1988, Cap. F-15.01.

13. Review of notice of contravention

- (1) A person against whom a notice of contravention has been issued under section 12 may dispute the notice if the person makes a written application to the Board for a review
- (a) within 30 days after the date of service of the notice; or
 - (b) if the Board considers it appropriate in the circumstances to extend the time for applying, within the period specified by the Board.

Hearing

- (2) The Board shall hold a hearing for the purposes of the review.

Parties

- (3) The parties to the review are the person against whom the notice was issued and the Department.

Parties given full opportunity

- (4) The Board shall give the parties full opportunity to present their evidence and make their submissions.

Practice and procedure for review

- (5) The Board shall determine its own practice and procedure with respect to a review under this section.

Rules

- (6) The chair of the Board may make rules with respect to a review under this section
- (a) governing the Board's practice and procedure and the exercise of its powers; and
 - (b) providing for forms and their use.

Quorum

- (7) The chair or a vice-chair of the Board constitutes a quorum for the purposes of this section and is sufficient for the exercise of the jurisdiction and powers of the Board under it.

Decision final

- (8) A decision of the Board is final and binding upon the parties to the review and any other parties as the Board may specify.

Judicial review

- (9) Nothing in subsection (8) prevents a court from reviewing a decision of the Board under this section, but a decision of the Board concerning the interpretation of this Act or the regulations shall not be overturned unless the decision is unreasonable.

Onus

- (10) On a review under this section, the onus is on the Department to establish, on a balance of probabilities, that the person against whom the notice of contravention was issued contravened the provision of this Act or the regulations indicated in the notice.

Decision

- (11) On a review under this section, the Board may find that the person
- (a) did not contravene the provision and rescind the notice;
 - (b) did contravene the provision and affirm the notice; or
 - (c) did contravene the provision but amend the notice by reducing the penalty.

14. When no decision after six months

- (1) This section applies if the Board has commenced a hearing to review a notice of contravention, six months or more have passed since the last day of the hearing and a decision has not been made.

Termination of proceeding

- (2) On the application of a party to the proceeding, the chair of the Board may terminate the proceeding.

Re-institution

- (3) If a proceeding is terminated under subsection (2), the chair of the Board may re-institute the proceeding upon such terms and conditions as the chair considers appropriate.

15. Filing notice with court

- (1) If a notice of contravention has been issued under this Act, a copy of the notice, certified by an inspector to be a true copy, may be filed in the court.

Advising of filing

- (2) An inspector who files a copy of the notice of contravention shall serve a letter in accordance with the regulations upon the person against whom the notice was issued advising the person of the filing.

Notice enforceable

- (4) A notice of contravention filed under subsection (1) may be enforced in the same manner as a judgment or order of the court.

16. Limitation period

No notice of contravention shall be issued under this Act more than one year after the occurrence of the last act or default upon which the contravention is based.

17. Persons from Board not compellable

- (1) Except with the consent of the Board, none of the following persons may be compelled to give evidence in a civil proceeding or in a proceeding before the Board or another board or tribunal with respect to information obtained while exercising their powers or performing their duties under this Act:

- (a) a member of the Board;
- (b) the secretary of the Board;
- (c) an employee of the Board.

Non-disclosure

- (2) An inspector who receives information or material under this Act shall not disclose it to any person or body other than the Board unless the Board authorizes the disclosure.

18. Service of documents

Where service of a document on a person is required or permitted under this Act, it is sufficiently served if it is served in accordance with the regulations.

19. Regulations

The Lieutenant Governor in Council may make regulations for carrying out the purposes of this Act and, without restricting the generality of the foregoing, may make regulations

- (a) respecting any matter that this Act describes as being prescribed by or provided for in the regulations, or that is to be done in accordance with the regulations;
- (b) governing the service of documents;
- (c) defining or clarifying any word or expression used in this Act but not otherwise defined;
- (d) declaring an “Equal Pay Day”;
- (e) governing pay transparency reports, including, without being limited to, their content and form, and the manner in which workforce composition is to be calculated for the purpose of clause 6(1)(b);
- (f) governing the collection, use, disclosure, storage and reporting of information in connection with a requirement to prepare pay transparency reports under subsection 6(1);
- (g) governing compliance audits, including requirements on how inspectors conduct compliance audits and any related inspections and investigations;
- (h) establishing penalties for contraventions for the purposes of section 12, and without restricting the generality of this power,
 - (i) establishing different penalties or ranges of penalties for different types of contraventions or the method of determining those penalties or ranges,
 - (ii) specifying that different penalties, ranges or methods of determining a penalty or range apply to contraveners who are individuals and to contraveners that are corporations, or
 - (iii) prescribing criteria an inspector is required or permitted to consider when imposing a penalty.

20. Appropriation required

The moneys required for the purpose of this Act shall be paid out of moneys appropriated for that purpose by the Legislature.

21. *Employment Standards Act* amended

[cross-reference provisions referring to this new Act to be added]

EXPLANATORY NOTES

SECTION 1 establishes definitions to be used for the purposes of the Act, including definitions of “applicant”, “Board”, “compensation”, “Department”, “employee”, “employer”, “inspector”, “Minister”, and “publicly advertised job posting”.

SECTION 2 provides that the Minister is responsible for the administration of the Act, and may establish policies respecting the interpretation, administration and enforcement of the Act. It also provides that the Minister or Deputy Minister of the Department may delegate powers or duties subject to such limitations, restrictions, conditions and requirements as the Minister or Deputy Minister may set out in the delegation.

SECTION 3 sets out the various purposes of the Act.

SECTION 4 prohibits an employer from seeking compensation history information about an applicant but provides that where an applicant has made a voluntary disclosure of compensation history or the employer has obtained information about salary ranges nothing prohibits the employer from considering or relying on such information in determining compensation for the applicant.

SECTION 5 requires every employer who publicly advertises a job posting to include in the posting information about the expected compensation or the range of expected compensation for the position.

SECTION 6 sets out the requirements for pay transparency reports to be filed with the Department by employers, and requires the Department to publish the reports it receives.

SECTION 7 prohibits employers or persons acting on behalf of an employer from intimidating, dismissing or otherwise penalizing an employee or threatening to do so because the employee has done any of a variety of lawful activities listed in that section.

SECTION 8 provides that the Minister may appoint inspectors for the purposes of the Act who have the powers of commissioners under the *Public Inquiries Act*, and deems an inspector appointed under the *Employment Standards Act* to also be an inspector under the Act.

SECTION 9 establishes the powers and duties of inspectors and provides that an inspector is not required to hold a hearing in exercising any power or making any decision under the Act.

SECTION 10 provides that inspectors and their records are not compellable in a civil proceeding respecting any information given or obtained, statements made or received, or records or other things produced or received under the Act except for the purpose of carrying out their duties under the Act.

SECTION 11 provides inspectors carrying out compliance audits and sets out the various powers that inspectors may exercise in carrying out such audits. It also provides that a copy of a record that purports to be certified by an inspector as being a true copy of the original is admissible in evidence to the same extent as the original, and has the same evidentiary value, and requires a person who has custody of a record demanded by an inspector to produce the record. It also prohibits several things that would constitute obstruction of an inspector.

SECTION 12 provides that if an inspector believes that a person has contravened a provision of the Act or the regulations, the inspector may issue a notice to the person setting out the inspector's belief and specifying the amount of the penalty for the contravention. Penalties, or a range of penalties may be established by regulations. Where a person fails to apply for a review of the matter by the Board, or upon such a review by the Board is found to have contravened the provision set out in the notice, the person is deemed to have contravened the Act or regulations and is liable to pay the penalty. The outcome shall be published.

SECTION 13 sets out the procedure to be followed by the Board in carrying out a review, including the requirement for a hearing, and the rights of the parties to be heard.

SECTION 14 provides for an application to terminate a proceeding where six months or more have passed since the last day of the hearing and a decision has not been made.

SECTION 15 sets out the procedure to have a notice of contravention enforced in the same manner as a judgment or order of the court.

SECTION 17 provides that Board members, the Board's secretary, and employees of the Board are not compellable in a civil proceeding or in a proceeding before the Board or another board or tribunal with respect to information obtained while exercising their powers or performing their duties under the Act.

SECTION 18 provides that where service of a document on a person is required or permitted under the Act, it is sufficiently served if it is served in accordance with the regulations.

SECTION 19 establishes regulation-making powers for the purpose of the Act.

SECTION 20 provides for the moneys needed for the purposes of the Act to be paid out of moneys appropriated for that purpose by the Legislature.

SECTION 21 makes several consequential amendments to the *Employment Standards Act* to reflect the existence of the Act.