



Ontario Confederation of University Faculty Associations
Union des associations des professeurs des universités de l'Ontario

FAQ's on Bill 124 – *Protecting a Sustainable Public Sector for Future Generations Act, 2019*

This document is a very high-level look at the draft wage cap legislation, as it was introduced for first reading. There are many other legal, strategic, and tactical questions arising from this legislation that faculty associations will need to address in order to develop a bargaining mandate and strategy.

If you have any questions about how this legislation will apply to your situation, please contact us.

Is Bill 124 in effect now?

No.

Although the government introduced the bill in the Legislative Assembly on June 5, 2019, it then adjourned the Legislature until October 28, 2019. In effect, the government made a choice not to pass this legislation for many months.

The government has also set up a website where the public can provide feedback on the legislation over the summer and is continuing to accept submissions from public sector bargaining agents and employers. The Treasury Board website contains the following statement: “The government will continue to consider any feedback received when deciding a path forward.”

It is not uncommon for changes to be made to draft bills through the legislative process. We cannot know what the final legislation will look like or when it will pass until that process is complete.

While we will look at the details of the draft legislation in the questions and answers that follow, it is important to remember that, until the legislation passes, the status quo legal environment for bargaining remains intact.

Although the current language of the bill states that it will be retroactive to June 5, the day it was introduced, we expect that university bargaining teams will be under direct pressure to ensure their mandate is compliant with the legislation even before the proposed bill becomes law.

Our collective agreement expired prior to the bill being introduced, and we are currently in bargaining. Does the legislation apply to the renewal agreement from this round of bargaining?

The draft legislation applies to all collective agreements and arbitration awards in Ontario, but the period of time during which it constrains compensation varies depending on when your collective agreement expires. If your agreement expired before June 5, 2019 when the bill was introduced, and there is no collective agreement in force, the application of the act begins on the day following the expiry date of the last collective agreement. The constraint period ends on the day that is three years later.

Some faculty association agreements contain continuance clauses which state that the agreement continues in force until a renewal is ratified or a strike or lock-out begins. If your agreement contains such a clause, it may affect the timing of the application of the constraint period.

Our collective agreement expires this year, but after June 5. When will this draft legislation apply to us?

The draft legislation states that where a collective agreement is in effect on June 5, 2019, the period of compensation constraint (referred to in the bill as the “moderation period”) starts on the day after the agreement expires, and continues for three years.

However, faculty association agreements that will expire this summer have either June 30th or August 31 expiry dates. Unless the legislature returns for an emergency summer session, these agreements will expire before the draft legislation is considered again by the legislature or passed into law. Depending on the timing of your negotiations, a new agreement may be in place and implemented prior to any legislation coming into effect.

Our collective agreement expires in a future year. How does this legislation affect us?

The draft legislation states that where a collective agreement is in place, the moderation period starts on the day after the agreement expires, and continues for three years.

Any multi-year agreement that expires after 2021 will have a term that carries past the next election. The draft legislation prohibits increases to compensation before or after the moderation period to “catch-up” for compensation lost as a result of this legislation, yet it is unclear how the Minister will determine or monitor this.

Both the timing of negotiations and the term of the next agreement will be important considerations if your collective agreement expires after 2019.

The enforcement and effect of this provision of the bill are difficult to predict, especially in the event that the current government is not re-elected. OCUFA will be seeking commitments from both the NDP and the Liberals to scrap the bill in its entirety if they form the next government in Ontario.

We are not a certified faculty association. Does this legislation capture us?

Section 8 of the draft legislation states that it applies to an organization that collectively bargains or negotiates, or has a framework for collectively bargaining or negotiating terms and conditions of employment relating to compensation with an employer.

Unlike previous wage cap bills, this legislation does not expressly provide for a process to determine whether a non-certified faculty association is a bargaining agent. The Management Board of Cabinet is empowered to collect and disclose information to ensure compliance, and the Minister has broad powers to determine if a collective agreement or arbitration award is consistent with the act.

With the legislature adjourned until late October, there is no clear route to a definitive answer to this question until mid-fall.

What clauses of our collective agreement does the draft legislation consider to be compensation?

The draft legislation defines compensation as “anything paid or provided, directly or indirectly, to or for the benefit of an employee, and includes salary, benefits, perquisites and all forms of non-discretionary and discretionary payments.”

Because of the nature of faculty work, our collective agreements contain many clauses that deal with the allocation of funds that are not compensation. There are also articles in our agreements that deal with money from sources other than the employer. The specifics of these funds, their purpose and source, will vary across agreements.

More analysis and consideration of the specific clauses will be required.

Until the legislation is passed and implementation is underway, no definitive answer to the question is possible. However, it is fairly clear that any enhancements to benefits would have to be drawn down against the 1 per cent cap on incremental increases to compensation.

What limits to compensation are being imposed on us by this legislation?

The draft legislation limits increases to salary rates to 1 per cent for each twelve-month period of the three-year moderation period. In addition, there is an overall cap of 1 per cent on incremental increases to compensation entitlements, including salary.

There are a number of exceptions, including pay for length of time in employment, assessment of performance, or completion of professional or technical education. In addition, if the employer’s cost of providing an existing benefit increases, this will not be counted towards the 1 per cent cap on incremental increases to compensation entitlements. There are no details in the draft legislation on how changes to benefit plans or the mix of benefits will be costed.

Faculty compensation models are often much more complex than those of other occupations, and vary considerably in how pay for length of employment (progress through the ranks, career development increments and grid steps) and pay for performance (merit)

are calculated and applied. We expect many situation-specific and technical questions arising from this aspect of the draft legislation.

We are currently engaged in or are considering a challenge under the Pay Equity Act. Can we still proceed?

Section 22 of the proposed legislation states that nothing in the bill or regulations shall be interpreted or applied so as to reduce a right or entitlement under the *Human Rights Code*, section 42, 44 or Part IX of the *Employment Standards Act*, or the *Pay Equity Act*.

Your rights and the rights of your members for compensation increases are different under each of these existing pieces of legislation. However, if the proposed legislation passes as introduced for first reading, your existing rights will be unaffected.

Do we have the right to apply for conciliation, and to strike?

Until this legislation passes, the status quo legal environment for bargaining remains intact. You continue to have exactly the same legal rights as you had prior to June 5, 2019.

The draft legislation protects your right to bargain, apply for conciliation, and strike.

Section 4 of the proposed legislation states that nothing in the Act affects the right to engage in a lawful strike or lockout. Section 3 of the proposed legislation states that the right to bargain collectively is continued.

Section 23 limits the jurisdiction of the Labour Relations Board with respect to a determination on whether a provision of the proposed legislation, a regulation or an order are constitutionally valid or in conflict with the *Human Rights Code*.

The draft legislation contains no other provisions limiting the application of the *Ontario Labour Relations Act* or the jurisdiction of the Ontario Labour Relations Board.

How do we know if changes to our collective agreement reached in negotiations or contained in an arbitration award are within the imposed limits? How will a settlement be costed?

Responsibility for the implementation of the act is shared by the Management Board of Cabinet and the Minister (defined as the President of the Treasury Board or other member of the Executive Council).

Management Board can direct employers to provide information on bargaining or compensation needed to ensure compliance. This can include the collective agreement, their mandate, and submissions to arbitrators. Management Board can also direct the employer to provide their costing with respect to collective agreements, proposed or negotiated changes, compensation plans, and proposed changes to compensation plans.

The draft legislation is silent on whether sources of information other than the employer will be part of determining whether a collective agreement or arbitration award is compliant. It is

quite common for the faculty association and the employer to disagree on the cost of changes to the collective agreement.

The Minister is empowered to make an order that a collective agreement or arbitration award is inconsistent with the proposed legislation if it passes in its current form.

The proposed legislation establishes no new person, structure, or institution to verify the cost of settlements or implement the legislation when passed.

Does the legislation affect our right to use interest arbitration to settle disputes?

For the most part, the impact of the legislation on arbitration awards mirrors collectively bargained agreements. The start of the moderation period will be determined by whether an award was issued prior to June 5, 2019. With respect to an arbitration award after June 5, 2019, the moderation period begins at the start of the collective agreement to which the award applies.

It is also important to note that the proposed legislation statutorily constrains the jurisdiction of arbitrators to settle negotiating stalemates within the same limits imposed in collective bargaining. Therefore, interest arbitration will no longer be available as a safety valve to settle monetary disputes. It is unclear, particularly for non-unionized associations, what dispute resolution will look like when the parties cannot agree.

What happens if we don't agree with the government's decision on whether the terms of our settlement or arbitration decision are compliant with the legislation?

The Minister must notify the parties and give them 20 days to provide written submissions before the Minister makes an order of noncompliance.

The Minister may also exempt, by way of a regulation, a collective agreement from the application of the proposed legislation.

As discussed earlier, the Labour Relations Board cannot determine whether the proposed legislation is unconstitutional or violates the *Human Rights Code*. However, court challenges to either the proposed legislation, once passed, and to the Minister's order remain possible.

What penalties does the draft legislation impose if the Minister says our settlement or arbitration award is not compliant with the legislation?

The draft legislation does not contemplate penalties for noncompliance. However, the government has made it clear that timely and detailed reporting of all faculty compensation will be a part of the next round of Strategic Mandate Agreements.

If your collective agreement is declared not consistent with the legislation once passed, the parties return to the same stage of bargaining they were at immediately before they settled the collective agreement. Terms and conditions of employment that existed immediately prior to the order will apply.