



NON-UNIONIZED EMPLOYEES

Interpretations, Policies and Guidelines

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1. Purpose

This Interpretation, Policy and Guideline (IPG) provides guidance on:

- the definition of non-unionized employees provided in the Pay Equity Act (the Act); and,
- different requirements for non-unionized employees in relation to pay equity committees, matters in dispute and complaints.

This document is not a legal document and is not a binding interpretation of the Act. This document is technical in nature and should not be used as a plain language resource. Plain language resources are available at www.payequitychrc.ca.

The term “employer” in this document can also refer to a “group of employers” that has been recognized by the Pay Equity Commissioner.¹

2. Definition of non-unionized employee

Section 3(1) of the Pay Equity Act (the Act) defines **non-unionized employee** as:

an employee who is not a member of a bargaining unit, other than an employee who occupies a position declared to be a managerial or confidential position as defined in subsection 2(1) of the Federal Public Sector Labour Relations Act or an employee who performs management functions or is employed in a confidential capacity in matters relating to industrial relations.

The **following classes of employees** are expressly **excluded** from **this definition**:

- employees who occupy a position **declared** to be a **managerial or confidential** position as defined in subsection 2(1) of the **Federal Public Sector Labour Relations Act (FPSLRA)**;
- employees who **perform management functions**; and,
- employees who are **employed in a confidential capacity in matters relating to industrial relations**.

These excluded classes of employees may not, for example, vote for and would not be represented by the non-unionized employee representative on a pay equity committee.

2.1. Federal Public Sector Labour Relations Act exclusion

The FPSLRA exclusion **applies** to **federal public sector workplaces** where the **Treasury Board** is identified as the **employer** for those departments named in **Schedule I** of the **Financial Administration Act** or another portion of the federal public administration named in **Schedule IV**. This exclusion is also applicable to those separate agencies listed in **Schedule V**.

This **first category of excluded employees** is those in **positions that the** Federal Public Sector Labour Relations and Employment Board (the **Board**) has **declared to be excluded**.

Under the **FPSLRA**, “managerial or confidential position” means “a **position declared to be a managerial or confidential position by an order made by the Board**” under certain enumerated sections.ⁱⁱ

However, if a Board declaration has not been made, a Federal Public Sector employee may be considered to perform management functions or be employed in a confidential capacity in matters relating to industrial relations when their position falls within one of the following categories:ⁱⁱⁱ

- a. the position is confidential to the Governor General, a minister of the Crown, a judge of the Supreme Court of Canada, the Federal Court of Appeal, the Federal Court or the Tax Court of Canada or a deputy head;
- b. the position is classified by the employer as being in the executive group, by whatever name called;
- c. the occupant of the position provides advice on labour relations, staffing or classification;
- d. the occupant of the position has substantial duties and responsibilities in the formulation and determination of any policy or program of the Government of Canada;
- e. the occupant of the position has substantial management duties, responsibilities and authority over employees or has duties and responsibilities dealing formally on behalf of the employer with grievances presented in accordance with the grievance process provided for under Part 2 or Division 2 of Part 2.1;
- f. the occupant of the position is directly involved in the process of collective bargaining on behalf of the employer;
- g. the occupant of the position has duties and responsibilities not otherwise described in this subsection and should not be included in a bargaining unit for reasons of conflict of interest or by reason of the person’s duties and responsibilities to the employer; or,
- h. the occupant of the position has, in relation to labour relations matters, duties and responsibilities confidential to the occupant of a position described in paragraph (b), (c), (d) or (f).

2.2. Performing management functions

The **second exclusion criterion** identified in the Act’s definition of non-unionized employee is **performing management functions**.

When considering whether a position performs management functions, it may be helpful for **federal private sector organizations and those federal public sector organizations not identified as employers under the FPSLRA** to consider the case law that has been established by the Canadian Industrial Relations Board (CIRB) and federal courts. The CIRB and federal courts have an established body of case law examining such exclusions as a **question of fact on a case-by-case basis**.^{iv}

The CIRB **looks beyond job titles and examines the duties and functions of the position** to assess whether the incumbent actually **exercises independent decision-making authority** in key management functions.^v

The following factors are some examples to reflect on when considering whether a **position has actual independent decision-making authority over the employment conditions of other employees**:

- Authority to hire, fire, promote and discipline;
- Assignment and planning of work;
- Scope of responsibilities over financial matters;
- Size of the bargaining unit;
- Number of subordinate employees;
- Type of supervisory functions;
- Decision-making authority; and,
- Nature of the work.^{vi}

Not all factors must be met, nor is any one determinative. Rather, each situation is a question of fact that is considered on a case-by-case basis.

Positions that **exercise only supervisory duties** (e.g., directing and evaluating the work of other employees) are **not considered managerial**.^{vii} The CIRB considers that “true management functions **go beyond mere supervision** of subordinates or coordination of their work; **they influence** either the **decision-making process** that is undertaken or its results.”^{viii}

For a position to be managerial, it must involve significant independent decision-making responsibilities. For a position to be managerial, the employee has **authority to make final decisions** in matters of consequence, **rather than only recommendations** to those with greater authority.^{ix} A supervisor’s authority to make recommendations to hire, promote, discipline or terminate will not necessarily be considered managerial.^x

These criteria and factors are important to note, for the Commissioner may consider them in the event of a dispute about whether a person is a “non-unionized” employee within the meaning of the Act.

2.3. Confidential capacity in matters relating to industrial relations

The **third category of excluded employees** is those that work in a **confidential capacity in matters relating to industrial relations**.

When considering whether a position works in a confidential capacity in matters relating to industrial relations, it may be helpful for **federal private sector organizations** and **those federal public sector organizations not identified as employers under the FPSLRA** to consider the case law that has been established by the CIRB and federal courts.

The CIRB considers this exclusion criterion in a **fact-specific manner**, and **decisions** have been **based** on a “**conflict of interests**” rationale. As the CIRB explains:

The inclusion of that person in a unit represented by a union might give the union access to matters the employer wishes to hold close in its dealings with the union. These **include**

bargaining, grievance and arbitration strategy. To avoid that conflict and to assure the employer the undivided confidence of certain employees these persons are denied the right to be represented by a union even if they wish to be represented. However, this exclusion is narrowly interpreted to avoid circumstances where the employer designates a disproportionate number of persons as confidential and to ensure that the maximum number of persons enjoy the freedoms and rights conferred by Part V.^{xi}

In trying to determine whether a position holds confidential capacities in matters relating to industrial relations, employers **may wish to consider the following three-fold test** that has been developed for this exclusion:

1. The **confidential matters must** be in **relation to industrial relations, not general industrial secrets** such as product formulae. This does not include matters the union or its members know, such as salaries or performance assessments discussed with them or which they must sign or initial. **Examples of confidential matters in relation to industrial relations may include bargaining, grievance and arbitration strategies.**^{xii}
2. The **disclosure** of that **information** would **adversely affect the employer.**
3. The person must be **involved** with this information as a **regular part** of their **duties.**^{xiii}

This three-fold test is important to note, for the Commissioner may consider it in the event of a dispute about whether a person is a “non-unionized employee” within the meaning of the Act.

3. Distinctions concerning non-unionized employees

The Pay Equity Act (the Act) makes distinctions between unionized and non-unionized employees in relation to pay equity committees, multiple plans, matters in dispute and complaints. These distinctions are identified in the following sections.

3.1. Non-unionized employees and pay equity committees

Distinctions pertaining to non-unionized employees in relation to pay equity committees concern:

- Establishing a pay equity committee;
- Representation on the pay equity committee;
- Process for selecting a pay equity committee representative; and,
- Voting requirements.

More details on these different requirements are provided in Table A.

Table A

Section	Summary
16(2)	Establishing a pay equity committee Employers who have between 10 and 99 non-unionized employees on the date on which the employer became subject to the Act may, at their discretion or at the request of an employee, opt to establish a pay equity committee. Non-unionized employees may make a request to their employer that a pay equity committee be established for their workplace.
19(1)(e)	Representation on the pay equity committee If a pay equity committee is established and there are non-unionized employees to whom the pay equity plan applies, at least one member of the committee must be selected by those employees.
19(2)	Process for selecting a pay equity committee representative Non-unionized employees must select pay equity committee members to represent them using a majority-vote process.
20(2)(c)	Voting requirements In order for a pay equity committee to hold a vote, at least one non-unionized employee representative, if any, must be present.

3.2. Non-unionized employees and multiple plans

Section 30(1) of the Act outlines that **any non-unionized employee** of the employer may **apply to the Pay Equity Commissioner directly to approve the establishment of more than one pay equity plan**. Non-unionized employees do not have to go through their pay equity committee representative or employer to do so.

3.3. Non-unionized employees and matters in dispute and complaints

Four provisions in the Act outline distinctions pertaining to non-unionized employees in relation to matters in dispute and complaints.

More details on these four provisions are provided in Table B.

Table B

Section	Summary
147	Notice of matters in dispute A non-unionized representative on a pay equity committee may notify the Pay Equity Commissioner if there is a disagreement at any step leading to the establishment or updating of a pay equity plan.
149(2)	Complaints — employees Any employee to whom a pay equity plan applies can file a complaint with the Pay Equity Commissioner if they have reasonable grounds to believe that the employer has attempted to influence or interfere with the selection by its non-unionized employees of members to represent them on a pay equity committee.
150(3)	Complaints — bargaining agents Any bargaining agent that represents unionized employees to whom a pay equity plan applies can file a complaint with the Pay Equity Commissioner if they have reasonable grounds to believe that the employer has attempted to influence or interfere with the selection by its non-unionized employees of members to represent them on a pay equity committee.
157(1)	Determination of matter in dispute The member that represents non-unionized employees has the opportunity to present evidence and make representations in order to determine a matter in dispute in respect to a notice received by the Pay Equity Commissioner under section 147.

4. Referenced Pay Equity Act provisions

Definitions

3 (1) The following definitions apply in this Act.

non-unionized employee means an employee who is not a member of a bargaining unit, other than an employee who occupies a position declared to be a managerial or confidential position as defined in subsection 2(1) of the Federal Public Sector Labour Relations Act or an employee who performs management functions or is employed in a confidential capacity in matters relating to industrial relations. (non syndiqué)

Group of employers

4 (1) Two or more employers described in any of paragraphs 3(2)(e) to (i) that are subject to this Act may form a group and apply to the Pay Equity Commissioner to have the group of employers recognized as a single employer.

Voluntary establishment of pay equity committee

16 (2) An employer that is considered to have 10 to 99 employees for the purpose of section 6 or 7, as the case may be, may, on its own initiative or at the request of an employee, decide to establish a pay equity committee if all of its employees were non-unionized employees on the date on which the employer became subject to this Act.

Composition of committee

19 (1) A pay equity committee is to be composed of at least three members and must also meet the following requirements:

- (a) at least two-thirds of the members must represent the employees to whom the pay equity plan relates;
- (b) at least 50% of the members must be women;
- (c) at least one member must be a person selected by the employer to represent it;
- (d) if some or all of the employees to whom the pay equity plan relates are unionized employees, there must be at least the same number of members to represent those employees as there are bargaining agents, with each bargaining agent selecting at least one person to be a member and to represent employees who are members of any bargaining unit represented by that bargaining agent; and,
- (e) if some or all of the employees to whom the pay equity plan relates are non-unionized employees, at least one member must be a person selected by those employees to represent them.

Non-unionized employees

19 (2) Non-unionized employees must select members to represent them by a majority of votes.

Minimum composition required for vote

20 (2) The pay equity committee may hold a vote only if there is present for it

- (a) at least one member who represents the employer;
- (b) for each bargaining agent, if any, that selected members, at least one such member; and,
- (c) one member who represents non-unionized employees, if any.

Multiple plans

30 (1) An employer referred to in subsection 16 (1) or (3), a bargaining agent for any unionized employees of the employer or a non-unionized employee of the employer may apply to the Pay Equity Commissioner to approve the establishment of more than one pay equity plan.

Notice of matters in dispute

147 If a pay equity committee is established under this Act in respect of a pay equity plan, and if the members of the committee who represent employees and the members of the committee who represent the employer do not agree in respect of a matter at any step leading to the establishment or updating, as the case may be, of the pay equity plan, the employer, a bargaining agent or a member who represents non-unionized employees may notify the Pay Equity Commissioner of the particulars of the matters in dispute and if they do so, they must, as soon as feasible, notify the members of the committee that they have notified the Pay Equity Commissioner.

Complaints — employees

149 (2) Any employee to whom a pay equity plan relates who has reasonable grounds to believe that the employer has attempted to influence or interfere with the selection by its non-unionized employees of members to represent them on a pay equity committee, or that the employer or a bargaining agent has acted in bad faith or in an arbitrary or discriminatory manner while exercising their powers or performing their duties and functions under this Act, and who is affected or is likely to be affected by the alleged behaviour may, within 60 days after the day on which they become aware of the alleged behaviour, file a complaint with the Pay Equity Commissioner that sets out the particulars of the complaint.

Complaints — bargaining agents

150 (3) Any bargaining agent that represents unionized employees to whom a pay equity plan relates that has reasonable grounds to believe that the employer has attempted to influence or interfere with the selection by its non-unionized employees of members to represent them on a pay equity committee, or that the employer or another bargaining agent has acted in bad faith or in an arbitrary or discriminatory manner while exercising its powers or performing its duties and functions under this Act may, within 60 days after the day on which it becomes aware of the alleged behaviour, if the alleged behaviour affects or is likely to affect the employees to whom the pay equity plan relates, file a complaint with the Pay Equity Commissioner that sets out the particulars of the complaint.

Determination of matter in dispute

157 (1) In order to determine a matter in dispute in respect of which the Pay Equity Commissioner has received notice under section 147, the Pay Equity Commissioner must, subject to subsection 155(2), give the employer, the bargaining agent, if the bargaining agent selected a person to be a member of the pay equity committee, and the member that represents non-unionized employee, if any, an opportunity to present evidence and make representations

ⁱ See Pay Equity Act, section 4(1).

ⁱⁱ See FPSLRA, sections 62(1), 63, 74(1) and 75.

ⁱⁱⁱ See FPSLRA, section 59(1).

^{iv} See, for example, the Federal Court of Appeal in *Bank of Nova Scotia v. Canada Labour Relations Board*, [1978] 2 FC 807 (dismissing the application for judicial review of *Bank of Nova Scotia (Port Dover Branch)* (1977)), 21 di 439 at p. 813: “(...) the concept of ‘management functions’ must be interpreted and applied according to the circumstances of each case and, except in very extreme cases, I am inclined to the view that its precise ambit is a question of fact or opinion for the Board rather than a question of law (...)”

^v See, for example, *Re. Garda Security Screening Inc.*, [2017] CIRBD No. 10 (upheld on judicial review 2018 FCA 71) [*Garda*] at para. 33 and cases cited therein.

^{vi} *Re. Garda Security Screening Inc.*, [2017] CIRBD No. 10 (upheld on judicial review 2018 FCA 71) [*Garda*] at para. 33 and cases cited therein.

^{vii} *Re. Vancouver Wharves Ltd.* (1974), 5 di 30, *Garda*; see note v at para. 36.

^{viii} *Garda*; see note v at para. 35, citing *NorthwestTel Mobility Inc.*, 2006 CIRB 346.

^{ix} *Desgagne v. Avalon Aviation Ltd.* (1981), 42 NR 337 the Federal Court of Appeal.

^x *Garda*; see note v at para. 35, citing *NorthwestTel Mobility Inc.*, 2006 CIRB 346.

^{xi} *Bank of Nova Scotia (Port Dover Branch)* (1977), 21 di 439 (upheld *Bank of Nova Scotia v. Canada Labour Relations Board*, [1978] 2 FC 807) [*Bank of Nova Scotia*].

^{xii} *Unifor v. Persona Communications Inc.*, 2015 CIRB 760 (CanLII), <https://canlii.ca/t/ghg26>, retrieved on 2022-07-07, para. 28 from *Bank of Nova Scotia (Port Dover Branch)* (1977), 21 di 439 (upheld *Bank of Nova Scotia v. Canada Labour Relations Board*, [1978] 2 F.C. 807) [*Bank of Nova Scotia*].

^{xiii} *Bank of Nova Scotia*; see note xi.