
Current Trends in Unionization and Collective Bargaining

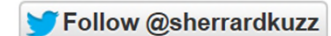
The webinar will begin at 9:00 a.m. EST – December 7, 2022



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Agenda

- Bargaining and Unionization Trends
- Wage Restraint Legislation and Caselaw Update
- Practical Tips for the Bargaining Table

Bargaining and Unionization- Trends



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Bargaining Trends

Factors- Inflation

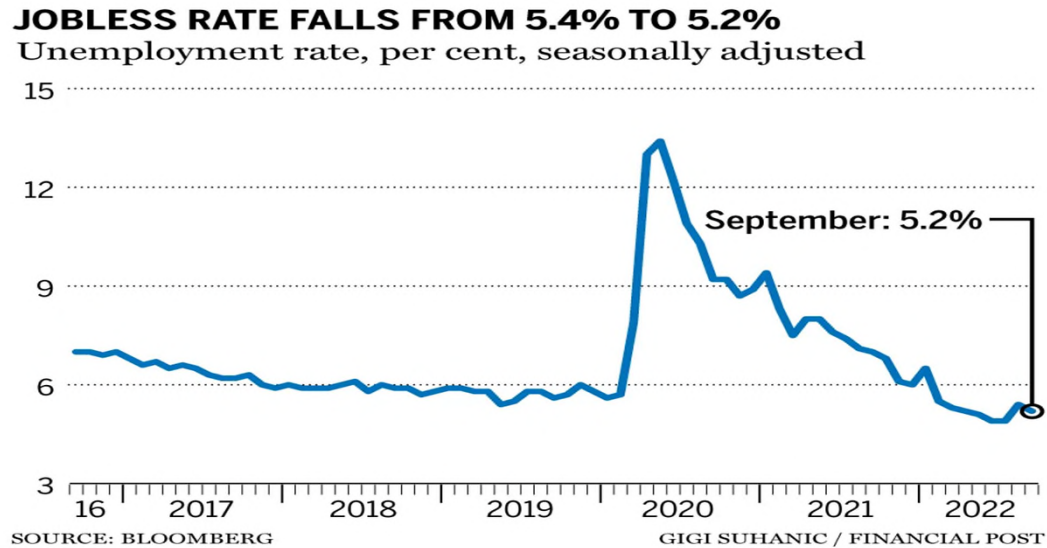


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Bargaining Trends- Low Unemployment



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Bargaining Trends

Wage Increases- National

- Historical Increases (union and non-union):
 - From 2017 to 2019, average wage increased by **2.6%**.
 - In 2020, increased to **5.5%**
 - In 2021, increased by **2.7%** (\$0.80)
- Current Climate:
 - The average hourly wage rose **5.6%** (+\$1.68 to \$31.94) on a year-over-year basis as of October 2022

Bargaining Trends

Wage Increases- Ontario (Unionized)

Year	Number of Collective Agreements Sampled	Average Annual Wage Increases
2020	77 private sector agreements	1.7%
2021	66 private sector agreements	1.9% (including 2.3% in Q4)
2022	72 private sector agreements	3.9%

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Bargaining Trends

Wage Increases

- Other factors influence wage increases:
 - Recruitment
 - Retention
 - Industry-specific increases
 - Desire to remain competitive

Bargaining Trends

Wage Increases

- Other factors influence wage increases:
 - Recruitment
 - Retention
 - Sector-specific increases
 - Desire to remain competitive

Bargaining Trends

Wage Increases- COLA

- If parties decide to add COLA clause, consider
 - Formula where wage adjustment is less than change in CPI
 - Cap potential wage adjustment
 - Only large increase in CPI will trigger COLA
 - CPI as a “float” arrangement

Bargaining Trends

Wage Increases- Alternatives

- Alternatives to standard wage increase
 - Lump sum payments
 - Periodic increases (*e.g.* six months vs. one year)
 - Separate “types” of increases (exceptional increase vs. standard wage increase)
 - “Me too” clauses
 - Wage reopeners

Bargaining Trends ***COVID-19***

- No marked increase in bargaining around vaccine mandates, increased sick time or remote work (as may have been anticipated)
- However, have seen some attempts to have temporary COVID-19 measures adopted as a permanent change to the collective agreement

Bargaining Trends ***COVID-19***

Rexall/Pharma Plus v. UFCW 2021 CanLII 132961

- Union alleged Employer violated the collective agreement when it eliminated a \$2.00/hour pandemic premium
- Employer argued certain pleadings should be struck on *prima facie* basis as no evidence any “agreement” between Union and Employer about pandemic pay

Bargaining Trends

COVID-19

Rexall/Pharma Plus v. UFCW 2021 CanLII 132961

- Arbitrator agreed with Employer, most pleadings struck
- Union’s position that parties “agreed to a pandemic premium” was a conclusion, not a fact
- Documents supported conclusion the bump was a temporary gratuitous payment from employer and union consented

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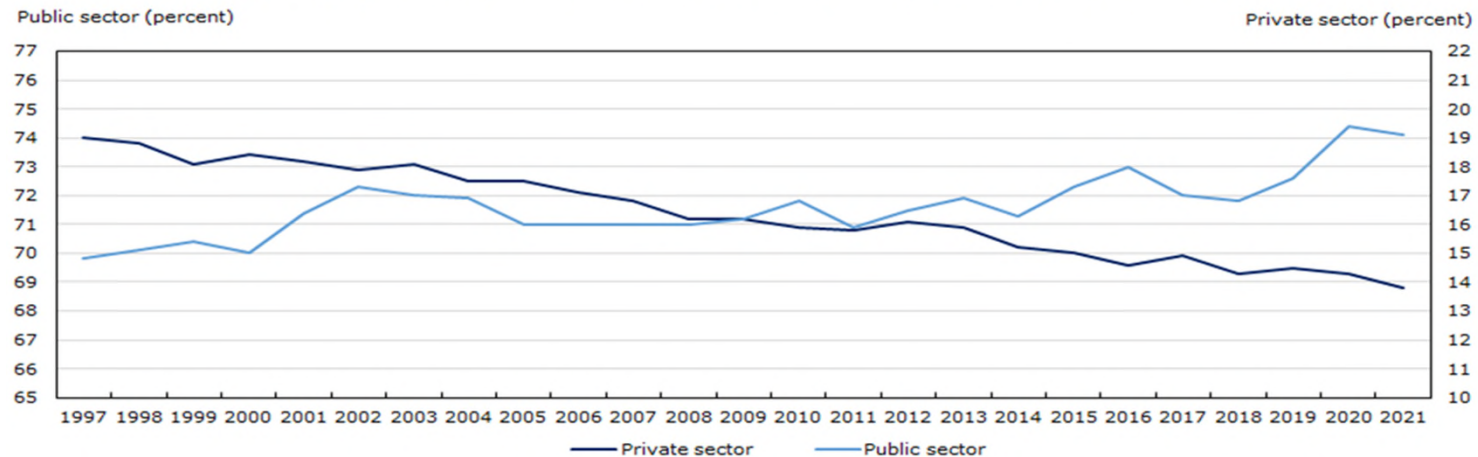
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Unionization Trends

■ In 2021, Canada's overall unionization rate was 30.9%

Chart 1
Unionization rate, employees 15 years and over by private and public sectors, Canada, 1997 to 2021



Note: Due to rounding, estimates and percentages may differ slightly between different Statistics Canada products, such as analytical documents and data tables.
Source: Statistics Canada, Labour Force Survey, custom tabulation.

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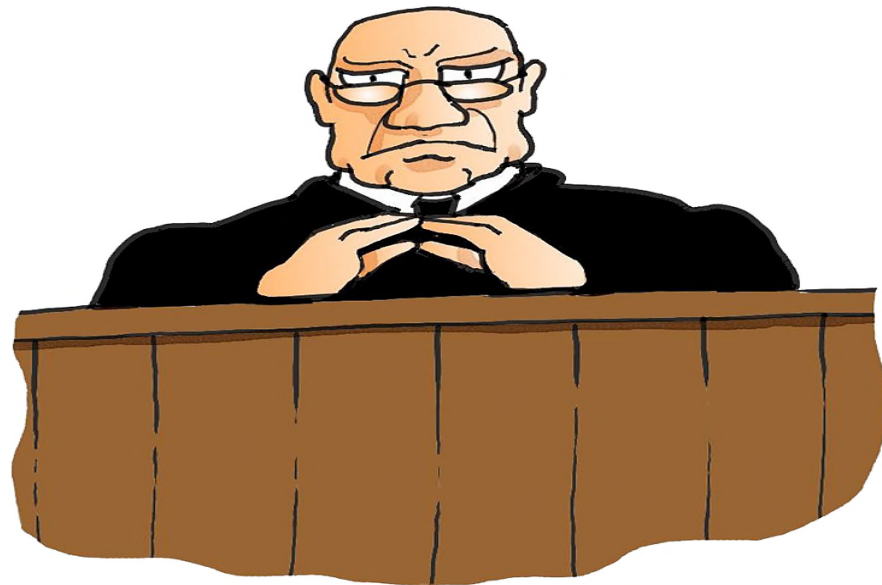
Unionization Trends

- Union organizing has been influenced by COVID-19 and broader social and economic factors
 - Emphasis on causes
 - Health and safety
 - Increased cost of living
 - Job security

Unionization Trends

- Other factors may increase unionization risk:
 - Card-based certification in Federal sector, Ontario (construction sector only), Quebec, New Brunswick, Nova Scotia (construction sector only), and Prince Edward Island and, more recently, British Columbia
 - Electronic signatures on union membership cards

Wage Restraint Legislation and Caselaw Update



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Wage Restraint Legislation

- Public sector wage restraint legislation across Canada:
 - ❑ **Ontario:** cap of 1% on compensatory increases per year for 3-year moderation period
 - ❑ **Alberta:** wage-freeze on all non-unionized public employees, ended December 2021
 - ❑ **Manitoba:** two-year wage freeze, 0.75% cap in year 3, 1% cap in year 4 (never proclaimed into law and repealed in June 2022)
 - ❑ **Nova Scotia:** 2-year wage freeze, 1% cap in year 3, 1.5% cap in year 4 + 0.5% cap on last day of year 4

Wage Restraint Legislation- Court Challenges

- Constitutionality of legislation challenged in three jurisdictions
 - **Ontario:** Constitutional challenge heard in September. Legislation struck down November 29, 2022
 - **Nova Scotia:** Court of Appeal declined to hear reference
 - **Manitoba:** Court of Appeal upheld legislation (although later repealed by the Government)

Wage Restraint Legislation- Court Challenges

Manitoba Federation of Labour et al v. Government of Manitoba, 2021 MBCA 85

- At trial level, court held the Manitoba's wage restraint legislation was unconstitutional
- Court of Appeal disagreed and reversed trial level decision, legislation restored
- Supreme Court of Canada denied leave to appeal

Wage Restraint Legislation- Court Challenges

Manitoba Federation of Labour et al v. Government of Manitoba, 2021 MBCA 85

- Court of Appeal satisfied the interference with collective bargaining was not “substantial”
 - Broad-based and time-limited
 - Did not preclude meaningful collective bargaining on other important workplace matters

Wage Restraint Legislation- Court Challenges

Ontario English Catholic Teachers Assoc. et al v. Government of Ontario

- On November 29, 2022, Bill 124 struck down as unconstitutional
- Court held wage restraint legislation was a “substantial interference” with free collective bargaining and not saved by Section 1 of *Charter*

Wage Restraint Legislation- Court Challenges

Ontario English Catholic Teachers Assoc. et al v. Government of Ontario

- 1% cap both limited the scope of wage increases and prevented “trade offs” between salary demands and non-monetary benefits
- Court also satisfied that the wage restraint interfered in collective bargaining in a number of other ways

Wage Restraint Legislation- Court Challenges

Ontario English Catholic Teachers Assoc. et al v. Government of Ontario

- Distinguished this legislation from earlier cases
 - Financial situation in 2019 was as dire as in earlier circumstances where wage restraint legislation introduced
 - Cap set below what was generally achieved in bargaining (unlike other cases where cap was comparable)

Wage Restraint Legislation- Court Challenges

Ontario English Catholic Teachers Assoc. et al v. Government of Ontario

- Court held Ontario could have held a firm line on wage increases in negotiation without having to resort to legislation
- Ontario Government has expressed an intention to appeal- stay tuned!

Wage Restraint Legislation- Arbitration

- Arbitrators have consistently held they are bound to Bill 124 and that it limits their ability to apply factors traditionally considered in interest arbitration (*e.g.* replication of what would occur in collective bargaining)
- In some cases, arbitrators have expressly addressed what happens if Bill 124 is found to be unconstitutional

Wage Restraint Legislation- Arbitration

Participating Nursing Homes v SEIU Local 1, 2022 CanLII 90597

- Central bargaining for long-term care and retirement homes
 - Arbitrator awarded 1% for not-for-profit homes, remained seized if Bill 124 repealed or found constitutionally invalid
 - For-profit homes awarded 3% per year wage increase with many additional monetary perks- Bill 124 settlements not relied on as not “reflective of true collective bargaining”

Wage Restraint Legislation- Arbitration

Participating Hospitals and ONA, 2021 CarswellOnt 13031, aff'd 2022 ONSC 5899

- Union argued Arbitration Board should not apply Bill 124
 - Arbitration Board held proper place to challenge Bill 124 is the court
- Board remained seized in the event Bill 124 was declared unconstitutional
- Affirmed on judicial review

Wage Restraint Legislation- Arbitration

OPSEU and College Employer Council, unreported

- Another wage re-opener
- Arbitrator ordered that if Bill 124 is found to be unconstitutional, the parties shall meet within 60 days to negotiate a remedy

Wage Restraint Legislation- Arbitration

- Arbitrators have also looked to impose settlement terms that exceed 1% cap for the post-moderation period
- While Bill 124 prohibits “top-up” payments after the three-year period, arbitrators have generally justified based on economic or other factors

Wage Restraint Legislation- Arbitration

Mon Sheong Richmond Hill Long-term Care Centre v SEIU, Local 1, 2022 CanLII 77203

- First year (last year of the moderation period)- 1%
- Second year- 3.25%
- Relied on inflation during the three years of statutorily imposed compensation limits to justify the significant bump
- Did not address concern this might be a “catch up” payment

Wage Restraint Legislation- Future Impact

- Current circumstances leave public sector bargaining on compensation issues in flux
- Regardless, many employers will soon come to the end of moderation period
- Be prepared for significant financial “asks” in light of current economic conditions
 - Risk of potential “catch up” claim if Bill 124 restored

Practical Tips for the Bargaining Table



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Practical Tips for the Bargaining Table

- Virtual vs. In-Person Bargaining
 - Seeing a return to the physical bargaining table
 - Many advantages to being “face to face”
 - Virtual may still have some advantages in certain circumstances

Practical Tips for the Bargaining Table

- Managing the Ratification Vote
 - ❑ Final offer vote as a tool in bargaining
 - ❑ Be prepared to use employer communication as a tool to increase odds of ratification
 - ❑ Be prepared- have contingency plans in place if no deal is reached or if deal is not ratified

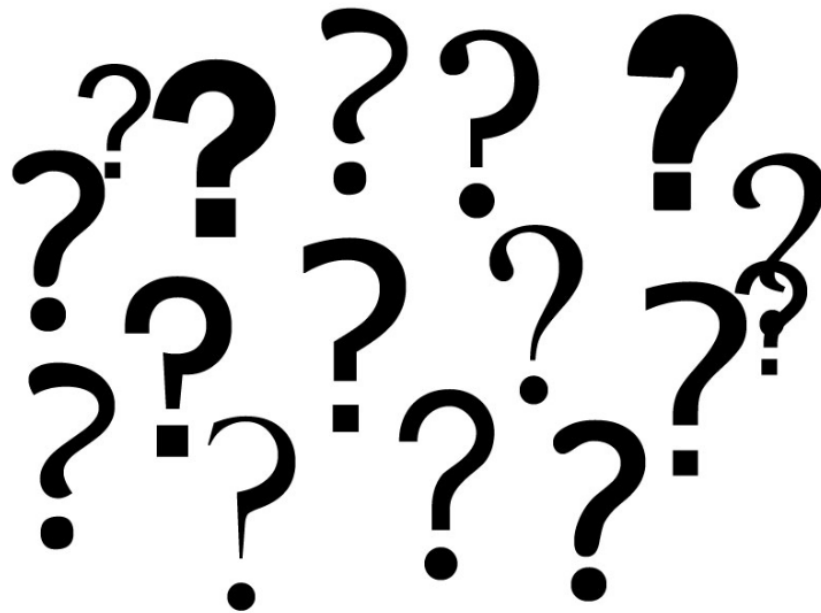
Practical Tips for the Bargaining Table

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Practical Tips for the Bargaining Table

- Forward-Looking Considerations
 - While a deal is always the goal, consider the long-term impact of agreed-upon provisions if the business changes
 - Contracting out restrictions, technological change, *etc.*
 - Don't agree to something today that you may not be able to live with tomorrow

Questions





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