OSLER

Proposed amendments to the Québec Charter of the French Language – impacts on labour relations

SEPTEMBER 9, 2021 8 MIN READ

Related Expertise

- Corporate and Commercial Disputes
- Employment and Labour
- Government and Public Sector

Authors: Alexandre Fallon, Sven Poysa, Julien Ranger

On May 13, 2021, the Government of Québec presented *An Act Respecting French, the Official and Common Language of Québec* [PDF] (the Act), which proposes significant amendments to the *Charter of the French Language* (the Charter).

On May 17, 2021, Osler published an article concerning the new requirements that would arise for those who carry on business in Québec if the amendments were adopted, which can be found here.

This Update focuses in particular on the impacts of the amendments with respect to labour law.

Offers of employment, transfer or promotion

Currently, all job advertisements for Québec positions must be published in French. Application forms in respect of those positions must also be made available in French. Nevertheless, employers have significant latitude on how to do this.

The Act would restrict this latitude somewhat by requiring that where an advertisement for a job is published in English (for example on the employer's website or on a job search site), it must be simultaneously published in French "using transmission means of the same nature and reaching a target public of proportionally comparable size."

This new requirement would require adjustments to job posting publication processes, as consideration would have to be given to ensure the simultaneous publication of French and English versions of postings on comparable mediums. Moreover, employers will have to consider how compliance with this new requirement is documented to avoid potential liability.

Contracts of employment

In principle, contracts of employment must be drawn up in French for all Québec-based employees. However, an employee can currently request that their contract of employment be drawn up in English.

According to the Act, if the employment contract is one of adhesion (i.e., a contract in which the essential stipulations are imposed or drawn up by the employer, and are not negotiable), or if the contract contains or refers to standard clauses, a French version of the contract or the standard clauses, as the case may be, would have to be presented to the employee for

examination before the employee can request to have the employment agreement drawn up in English. Businesses hiring employees in Québec will have to consider what processes can be put in place to ensure that compliance with this requirement could be demonstrated.

Special care will have to be given to the accuracy of translations in this context, as employees will be entitled to invoke either version in the event of a discrepancy.

Existing employees who have English contracts would be entitled to require that French versions be provided to them in the first year following the entry into force of the Act.

Written communications with Québec employees

Section 41 of the Charter already requires written communications with staff to be in French, although case law and administrative guidance have made it clear that this only covers communications that pertain to an employee's conditions of employment.

The Act would modify the wording of this provision in a way that could suggest a broadening of the requirement to all written communications. It seems that communications with Québec employees, be they with groups of staff or with individual employees, would have to be in French, unless an employee requests that such communications be in another language.

The precise confines of this requirement are not defined, and the legislative process will hopefully shed some light on the intent behind this provision. At this time, we presume that this requirement would encompass all "official" communications that emanate from "the employer", namely memorandums or notices provided to employees generally, as well as employer communications with individual employees that relate to their employment (e.g., performance evaluations, improvement notices, pay increase/bonus letters), and not all employee-to-employee communications.

The Act also specifies that documents relating to conditions of employment (policies, benefit terms, etc.) would have to be made available in French. Moreover, it imposes a new requirement that all training documents produced for Québec-based employees, which currently are not always required to be in French (at least for employers with fewer than 50 employees in Québec), would henceforth have to be made available to Québec employees in French.

Existing documents relating to conditions of employment that are not in French would have to be made available in French one year after entry into force of the Act.

Finally, Québec employees would be entitled to receive group insurance contracts and insurance certificates in French. Again, existing documents that are not in French would have to be made available in French one year after entry into force of the Act.

Prohibited practices in respect of French-speaking employees

The Act greatly expands protections in respect of discrimination of unilingual French speakers. Indeed, whereas employers are currently prohibited from dismissing, demoting or transferring unilingual French speakers on this basis, and are prohibited from sanctioning an employee for having requested compliance with the Charter, the prohibition would be extended to any form of reprisal or penalties in respect of unilingual French speakers in respect of:

- deterring employees from exercising rights under the Charter;
- an employee not having sufficient knowledge of a language other than French, where the performance of his or her duties does not require it;
- participating in francization committee meetings;
- attempting to influence the endorsement or not of a francization program;
- communicating with the *Office Québécois de la langue française* (OQLF) in respect of an alleged violation of the Charter, or collaborating with an OQLF investigation; and
- requiring an employee to acquire knowledge of a language other than French to keep a position or obtain a position, unless it can be demonstrated that the performance of the duties requires such knowledge, and that all reasonable means were taken to avoid imposing this requirement.

Moreover, the Act would introduce a new obligation for employers to take means to prevent discrimination or harassment of employees who are unilingual francophones, employees who claim the right to express themselves in French, or employees who demand that their rights under the Charter be respected.

Stricter test for making knowledge of English a condition of employment

The Charter already prohibits making knowledge of English (or any language other than French) a condition of employment "unless the nature of the duties requires such knowledge." In other words, knowledge of English can be required where operationally necessary. The Act would not change this. However, it is more prescriptive in terms of what an employer must be able to demonstrate before making knowledge of English a condition of employment. Under the Act, an employer would be required to demonstrate that:

- an assessment of the actual language needs associated with the duties to be performed was carried out;
- other employees who are already required to be proficient in English could not carry out the duties of the position that require the knowledge of English; and
- the duties requiring English proficiency have been concentrated as much as possible within certain positions, so as to restrict as much as possible the number of positions that require such proficiency.

Businesses will need to consider how to implement this analysis, and how to document such analysis to avoid liability.

Private rights of action and recourse

Currently, private rights of action are limited to employee rights to apply to the Administrative Labour Tribunal for a remedy in respect of a refusal to hire or promote, a demotion, a transfer or a dismissal based on insufficient knowledge by the employee of a language other than French. Otherwise, the sole remedy for a Charter violation was a complaint to the OQLF.

This was a major source of comfort for businesses considering that there are in Québec many language activists who are very active in filing complaints under the Charter. Issues could be addressed directly with the OQLF in a collaborative and practical way, without facing

the risk of private litigation. Contracts entered into in English could be found not to comply with the Charter, but they were nevertheless enforceable.

With the Act, that comfort would disappear. Individuals could seek injunctive relief in respect of a failure by an employer to honour their right to work in French. Similarly, standard form contracts that are not presented to employees in French could be deemed unenforceable by the employer, but could at the same time be enforced by the employee against the employer. English standard form contracts that were not first presented to employees in French would be deemed "incomprehensible" and null as a result.

Enforcement of the provisions of the Charter would be removed from the purview of the OQLF and placed exclusively in the hands of the Commission des normes, de l'équité, de la santé et de la sécurité du travail (CNESST – labour standards board), consistent with the enforcement of all other labour standards. This means that employees would be entitled to file complaints to the CNESST in respect of Charter violations, which complaints could give rise to CNESST mediation and to proceedings before the Administrative Labour Tribunal, where the employee could be entitled to free representation by a CNESST lawyer. Where the complaint alleges discrimination, the CNESST would be entitled to transmit same to the Commission des droits de la personne et des droits de la jeunesse (human rights tribunal).

Lastly, the Act would create a new right under the Québec Charter of Human Rights and Freedoms to "live in French to the extent provided for in the Charter of the French Language". Individuals would then also have a right of action before the Courts in respect of Charter violations, which would include the right to claim punitive damages in instances of "unlawful and intentional interference". Such punitive damages could be awarded in the absence of compensable harm.

Osler is sponsoring two webinars on this topic. Part 1 is on Monday September 13 at 12:30 p.m. and Part 2 is on Thursday September 23 at 12:30 pm. You are invited to register for these.