大成 DENTONS

Grow | Protect | Operate | Finance

What you missed on your summer vacation (and what you need to know for the Fall)

September 23, 2022

WEBINAR SERIES
LEGAL UPDATES
FOR CANADIAN EMPLOYERS

大成 DENTONS

Moderator

Andy Pushalik
Partner
D +1 416 862 3468
andy.pushalik@dentons.com

Presenters

Marie-Noël Massicotte
Counsel, Montréal
D +1 514 878 8821
m-n.massicotte@dentons.com

Taylor Holland
Associate, Edmonton
D +1 780 423 7160
taylor.holland@dentons.com

Janice C. Pereira
Associate, Toronto
D +1 416 862 3459
janice.pereira@dentons.com

The latest on Québec's French language Charter and its implications for employers

Marie-Noël Massicotte

Introduction

- June 1, 2022, the *Act Respecting French, the Official and Common Language of Québec* (hereinafter the “**Bill 96**") received the royal assent.

- Bill 96 introduces several amendments to the *Charter of the French language* (the “**Charter**”), some of which impose new obligations on employers and strengthen the right of Quebec workers to carry out their activities in French.

- Most of the amendments pertaining to the language of work came into force on June 1, 2022 and therefore already apply.

Job postings

- Prior to Bill 96, employers were already required to draft and publish offers of employment and promotion in French.

- This obligation now expressly extends to transfers.

- As before, job postings may be published in a language other than French. However, all employers must now ensure :
  1) that it is being published in French simultaneously;
  2) using the same means of transmission and reaching a target audience of comparable size.

- If the knowledge of a language other than French is required by the nature of the duties related to a position, the reasons justifying such requirement must be indicated in the job posting.

Individual employment contracts

- The general principle is that individual employment contracts are drafted in French.

- The parties may however express their wish to have such contract drafted in a language other than French.
  1) Adhesion individual employment contracts: the parties may express their wish to be bound exclusively by a version in a language other than French but only after having examined the French version.
  2) Negotiated individual employment contracts: the parties may express their wish to have the contract drafted exclusively in a language other than French.

- The employer will have to translate an individual employment contract drafted in a language other than French and entered into before June 1, 2022, if the concerned employee requests it by June 1, 2023.
  - No obligation to translate fixed-term employment contracts ending no later than June 1, 2024.

Other employment related documents

- Application forms, documents related to working conditions and training documents made available to employees must be drafted in French. If available in another language, the French version must be available on terms that are at least as favorable to the other version.
  - For such documents that were available only in another language prior to June 1, 2022, employers have until June 1, 2023 to make a French version available.

- Insurers are required to issue a copy of a group insurance policy in French to the client and to distribute insurance certificates in French to the employees. Same applies with respect to group annuity contracts.
  - Insurers have until June 1, 2023 to translate into French a group insurance policy drafted in another language and entered into before June 1, 2022.
  - No obligation to translate policies expiring no later than June 1, 2024. Same applies to group annuity contracts.

Written communications with employees

- Prior to Bill 96, written communications addressed by the employer to its staff were required to be in French.

- Now, written communications addressed to only part of its staff, to a particular employee or to an association of workers representing its employees must also be in French.
  - Also applies to written communications sent after the termination of employment.

- An employer may communicate in writing exclusively in a language other than French with an employee who requests it.

Requirement of the knowledge of a language other than French

- Prior to Bill 96, the knowledge of a language other than French could be required to obtain an employment or a position but only if required by the nature of the duties.

- Now, employers must, in addition, take all reasonable means to avoid imposing such a requirement.

- These restrictions on language requirements now apply to keeping a position as well as obtaining a position whether through recruitment, hiring, transfer or promotion.

Requirement of the knowledge of a language other than French

- To be considered having taken all such reasonable means, an employer must, before concluding that the knowledge of a language other than French is required :
    1) assess the actual language needs associated with the tasks to be performed;
    2) ensure that the language skills already required of other members of staff are insufficient for the performance of these tasks; and
    3) restrict as much as possible the number of positions to which are attached tasks whose accomplishment requires the knowledge of a language other than French.

- The employer who fails to meet all of those three conditions is deemed not to have taken all reasonable means to avoid such requirement.

- Requiring the knowledge of another language when the employer has failed to demonstrate the need for such requirement or has not shown that it has taken all reasonable means to avoid it, is considered a prohibited practice and may give rise to a complaint to the CNESST.

Protection against prohibited practices

- The protection against prohibited practices is now more extensive: employees may not be dismissed, laid off, demoted, transferred nor be the subject of retaliation or penalties:
  - for being exclusively French-speaking or lacking sufficient knowledge of a language other than French (if not required by the nature of the duties of the position);
  - for demanding that a right with respect to the language of work be respected or to deter from exercising such a right;
  - to induce or dissuade from endorsing a document in relation with the francization committee;
  - for having participated in a francization committee; or
  - for having communicated information to the Quebec Office of French Language (the "**Office**").

- Someone who believes having been the victim of a prohibited practice may file a complaint with the CNESST. If unsettled, the complaint may be referred to the Administrative Labour Tribunal for a decision to be rendered.

- Unionized employees may file a grievance.

Protection against discrimination and harassment

- Employees are now protected against discrimination and harassment:
  - for having no or little knowledge of a language other than French;
  - for wanting to express themselves in French; or
  - for demanding that a right with respect to the language of work be respected.

- Employers have the corollary obligation to take reasonable steps to prevent such discrimination or harassment and make it cease when they become aware of it.

- Employees who believe they are the victim of harassment or discrimination may file a complaint with the CNESST which will be dealt with in accordance with the provision of an *Act respecting labour standards* related to harassment.

- If unsettled, the complaint may be referred to the Administrative Labour Tribunal for a decision to be rendered.

- Unionized employees may file a grievance.

Sanctions for non-compliance

New civil sanctions and administrative penalties

- Subject to some exceptions, the victim of a violation of the fundamental right of workers to carry out their activities in French may obtain the cessation of such violation.
- The person suffering a damage resulting from the provision of a contract, decision or other act in violation of the Charter may seek the nullity of such provision or the reduction of his or her obligation.
- A company that repeatedly violates the Charter may have its governmental permit or other authorizations suspended or revoked.

Stronger penal provisions

- Potential fines for a violation of the Charter have been increased.
- New offence for the disclosure of false or misleading information or for retaliation in the context of a disclosure to or investigation by the Office.
- Fines are doubled for a second offence and now tripled for subsequent offences. Fines for a natural person are also doubled when the offence is committed by a director or officer of a legal person.
- An offence that continues for longer than one day now constitutes a separate offence for each day it continues.

Trends on increasing damages awards in Alberta human rights decisions

Taylor Holland

Available remedies

- The Alberta Human Rights Tribunal has a broad array of remedies available to it, including:
  - damages for lost income and benefits;
  - general damages for injury to dignity and self-respect;
  - a verbal or written apology;
  - a job reference;
  - an agreement or order that the respondent stop the behaviour and take steps to ensure that the behaviour will not happen again;
  - reinstatement;
  - participation by the respondent in a human rights education activity; and/or
  - development and implementation of an anti-discrimination policy in the workplace

Remedy factors

- The Tribunal has considered various factors in assessing the appropriate remedy for a human rights violation, including:
  - the nature of the contravention;
  - the frequency and intensity of the contravention;
  - the vulnerability of the complainant; and
  - the impact on the complainant.

- With respect to a claim for lost wages damages, the Tribunal will also consider a complainant's mitigation efforts.

No damages cap

- In Alberta, there is no statutory or common law cap for human rights damages.
- The leading authority with respect to the assessment of human rights damages in Alberta remains *Walsh v Mobil Oil Canada*, 2008 ABCA 268.
- The following principles emerged from *Walsh*:
  - Human rights legislation must be accorded a broad and purposive interpretation;
  - The fundamental purpose of the legislation is to recognize all people as equal in dignity and rights, and to protect against and compensate for discrimination;
  - Another purpose of the legislation is to prevent further discrimination by issuing remedies as a deterrent and educational tool;
  - The measure of general damages requires consideration of the effect the discrimination had upon the complainant and whether the discrimination was engaged in willfully or recklessly; and
  - Inadequate damages awards can have the unintended effect of perpetuating discrimination.

Yaschuk v Emerson Electric Canada Limited, 2022 AHRC 62

- The first complaint alleged that the Complainant was subject to sexual harassment by her direct supervisor and later terminated in a discriminatory manner for reporting the harassment to the Respondent's management in violation of Section 7 of the *Alberta Human Rights Act*.
- The second complaint alleged that the Respondent retaliated against her for filing the first complaint in contravention of Section 10 of the *Act*.
- The Respondent submitted that the Complainant was not an employee within the meaning of the *Act* and her contract for services was terminated prior to complaining to management about harassment.
- The Respondent also submitted it conducted a thorough investigation, which found the claims to be unsubstantiated, and there was no retaliation for filing the first complaint.

Yaschuk v Emerson Electric Canada Limited

- The Tribunal held that the Complainant was an employee for the purposes of the *Act* despite the parties entering into an Independent Contractor Agreement.
- The Tribunal accepted that the Complainant was subject to sexual harassment and the harassment was a factor in the timing and manner of her termination.
- The Tribunal did not accept that the Complainant was retaliated against.
- After finding sexual harassment occurred, the Tribunal then considered which remedy was appropriate.

Yaschuk v Emerson Electric Canada Limited

- The Director and Complainant sought general damages, damages for lost and future income, and special damages.
- The Complainant was awarded lost wages in the amount of $42,750 and general damages in the amount of $50,000, plus pre-judgment interest.
- The general damages award was based on the following:
  - The discriminatory conduct had a profound affect on the Complainant causing her significant mental health issues preventing her from gaining meaningful employment;
  - The employer’s investigation was flawed by failing to interview witnesses identified by the Complainant and preserve relevant email records;
  - The sexually harassing conduct was serious;
  - The employer’s attitude and responding to her complaints of harassment were dismissive and cavalier; and
  - The termination was precipitous.

Fisher (Marshall) v Devolbren Property Services Inc., 2022 AHRC 67

- Alberta Human Rights Tribunal hearing of a complaint of discrimination on the grounds of family status, marital status, and mental disability.
- The Complainant was employed in an administrative role from 2014 to 2017. She was married to the Director of Operations of the Respondent who resigned his position in April 2017.
- The Complainant was subsequently advised that she could no longer continue her administrative role due to a conflict of interest. However, if she wanted to remain employed, she was required to work in the field.
- The Complainant requested two business days to consider her options and, instead, was placed on a two-week medical leave due to anxiety and stress.
- The Respondent subsequently terminated the Complainant with just cause shortly thereafter.

Fisher (Marshall) v Devolbren Property Services Inc.

- The Tribunal found that, to the extent that the Complainant's relationship was a factor in her termination, the protected grounds of family and marital status were engaged.
- The Tribunal also accepted that the Complainant had a mental disability based upon her doctor's diagnosis of anxiety and stress.
- The Tribunal found that the Complainant's relationship was a factor in her termination as the Respondent determined since it could no longer trust her husband, it could also no longer trust her.
- The Tribunal also found the Respondent submitted "extremely underwhelming" evidence to support its just cause position, which suggested the Respondent's non-discriminatory rationale was dishonest, pretextual and in bad faith.

Fisher (Marshall) v Devolbren Property Services Inc.

- The Tribunal awarded the plaintiff lost wages in the amount of $2,444 and general damages in the amount of $30,000.
- The general damages award was based on the following:
  - It is not uncommon for the Tribunal to award general damages in the range of $20,000 to $25,000, but these amounts should not be considered a ceiling;
  - The Respondent engaged in multiple acts of discrimination;
  - The Respondent alleging the Complainant was lying about her need for accommodation because she “did not appear sick” required denunciation and a deterring effect;
  - The Respondent’s conclusion that the Complainant’s marital status made her guilty of her spouse’s actions was dehumanizing; and
  - The adverse impact was termination.
- $5,000 in costs were also awarded against the Respondent for submitting personal and intimate photos of the Complainant to the Tribunal that served no purpose in the hearing.

Ontario’s new requirement for an electronic monitoring policy

Janice C. Pereira

Disclosure of electronic monitoring of employees

Amendments to the *Employment Standards Act, 2000*

- Requirement for written policy on electronic monitoring.

- Employers with 25+ employees in Ontario as of January 1 of each year
  - Policy in place by March 1 of that same year
  - This year, October 11, 2022

- "**Electronic monitoring**" includes all forms of employee monitoring that is done electronically, *e.g.,* GPS tracking of delivery vehicles, tracking of websites visited during work hours on company-issued computers, keycard/fob data to track office entry/exit times, electronic sensors to track how quickly items are scanned at a grocery store check-out.

Written electronic monitoring polices

Substantive requirements

Substance

- Information regarding whether the employer electronically monitors its employees;
- If so, a description of how such monitoring is performed, and under what circumstances; and
- The purpose of collecting information through such electronic monitoring.

Must also be…

- Dated, with any dates of amendment tracked
- Provided to all employees

Electronic monitoring is NOT limited to….

What is required to be captured in the employer's policy is not limited to:

- devices or other electronic equipment issued by the employer
- electronic monitoring that happens while employees are at the workplace

Transparency

- Ontario government's stated objective
- Limits on complaints to the Ministry of Labour

Tips for implementation

- Employers may not be aware of the types of electronic monitoring that they can perform
- Collection of electronic usage data via automated software solutions
- Passive collection of electronic data and usage vs. active and targeted monitoring
- Liaise with your IT Department: when in doubt, reach out!

大成 DENTONS

Moderator

Andy Pushalik
Partner
D +1 416 863 416 862 3468
andy.pushalik@dentons.com

Presenters

Marie-Noël Massicotte
Counsel, Montréal
D +1 514 878 8821
m-n.massicotte@dentons.com

Taylor Holland
Associate, Edmonton
D +1 780 423 7160
taylor.holland@dentons.com

Janice C. Pereira
Associate, Toronto
D +1 416 862 3459
janice.pereira@dentons.com

大成 DENTONS

Did you know Dentons produces podcasts on a variety of topics?

Agribusiness
Arbitration
Business Insights
Employment and Labour Law
Entertainment and Media Law
Intellectual Property
Life Sciences and Health Care
Mining
Smart Cities
Tax
Transformative Technologies and Data
Women in Leadership and Entrepreneurship

Visit our Podcast page and subscribe: https://www.dentons.com/en/insights/podcasts

Grow | Protect | Operate | Finance

大成 DENTONS

We also have blogs in various areas.

Commercial Litigation

Commercial Real Estate

Drone Regulation

Employment and Labour

Entertainment and Media

Insurance

Mining

Occupational Health and Safety

Privacy and Cybersecurity

Regulatory

Tax Litigation

Technology, New Media and IP Litigation

Transformative Technologies and Data

Venture Technology

Visit our Blogs and Resources page: https://www.dentons.com/en/insights/blogs-and-resources

Grow | Protect | Operate | Finance