

**EMPLOYEE HIRING PROCESS
FOR A BUSINESS
(Notes)**

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INTRODUCTION

As a business grows, there comes a time when it is necessary to hire personnel to perform certain tasks to improve operational efficiency. The selection process for the required personnel usually involves an interview to evaluate the person under consideration.

During the interview, and even during the employment period, several steps must be taken to avoid discriminatory practices. The *Civil code of Quebec, An Act respecting the protection of personal information in the private sector* and especially the *Quebec Charter of human rights and freedoms* formally prohibit specific forms of discrimination; however, some other forms of discrimination are permitted in specific and limited circumstances.

The purpose of this document is to give employers clear and concise instructions on the legal requirements created by the various laws regarding the equality of persons, so that they may avoid discriminatory acts, both during interviews and afterward.

1.00 LEGAL FRAMEWORK

First and foremost, it is important to identify the legislative texts governing the hiring process.

1.01 Charters of Rights

The federal and government and the Quebec government have adopted laws regarding the equality of persons. However, the *Canadian Charter of Rights* does not apply to employment relationships between private persons. In such situation, the *Quebec Charter of human rights and freedoms* applies. Section 16 of the *Quebec Charter* expressly provides for the right to equal access to employment by forbidding any discrimination in the hiring process.

1.02 The *Civil code of Quebec*

[...]

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As the *Civil code of Quebec* was written “in harmony with the *Charter of human rights and freedoms*,” it implicitly refers to the latter. The most important provisions of the *Civil code of Quebec* regarding discrimination are sections 35 to 41, which govern the keeping of a file about a person.

1.03 *An Act respecting the protection of personal information in the private sector*

An Act respecting the protection of personal information in the private sector aims to establish specific rules governing the protection of personal information of other persons collected, held, used or communicated to third parties by a business in the exercise of the rights granted in section 35 to 41 of the *Civil code of Quebec*.

These three legislative sources limit and control the employer’s right to collect information. However, only the *Charter of human rights and freedoms* applies to the interview process, whereas the *Civil code of Quebec* and *An Act respecting the protection of personal information in the private sector* govern the protection of the personal information once it is collected.

2.00 PROHIBITED TYPES OF DISCRIMINATION

In sections 16 to 18 the Charter lists the prohibited types of discrimination. For example, all types of discrimination in the hiring process are strictly prohibited, especially in the selection process. Moreover, employment agencies/offices are forbidden from discriminating, in any way whatsoever in “the reception, classification or processing of a job application.”

The term “discrimination” is defined in section 10 of the *Charter*, which list several grounds of discrimination, which grounds will now be analyzed below.

2.01 Race, Colour, Ethnicity or National Origin

The most obvious forms of discrimination, based on race, skin colour, ethnic origin or national origin, do not justify the rejection of a candidate.

2.02 Sex

In addition, the sex of the applicant, whether male or female, must not be considered in the decision regarding the ability of the candidate.

2.03 Pregnancy

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An employer may consider rejecting the candidacy of a pregnant woman because she will be entitled to maternity leave. However, discrimination on grounds of pregnancy is prohibited under the *Charter* (amended in 1982).

2.04 Sexual Orientation

The sexual orientation or sexual preferences of a candidate must not be considered during the hiring process. Homosexuality, heterosexuality and bisexuality are part of the sexual orientation of a person. The sexual orientation and sexual preferences of a candidate are strictly private and are not relevant to the person's employment. Consequently, any questions in this respect are prohibited.

2.05 Civil Status

Civil status includes the familial or marital status of the candidate. The maiden name or the fact that the candidate is married, divorced, or single has no bearing on the person's employment and no questions in this respect may be asked.

2.06 Age

In general terms, the candidate's age may not be considered by the employer in the evaluation of the candidacy. While age may indicate a certain amount of experience, it is not a direct indication.

2.07 Religion and Political Opinion

No question regarding the candidate's religion or political opinion may be asked.

2.08 Language

Except if required due to the requirements of the position, discrimination based on the candidate's preferred language is not allowed by the *Charter*.

2.09 Handicap

An Act to secure handicapped persons in the exercise of their rights with a view to achieving social, school and workplace integration specifies that a person is a handicapped person if he or she is "a person with a deficiency causing a significant and persistent disability, who is liable to encounter barriers in performing everyday activities". The courts do not consider obesity to be a handicap.

3.00 RIGHT TO PRIVACY AND AN ACT RESPECTING THE PROTECTION OF PERSONAL INFORMATION IN THE PRIVATE SECTOR

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An Act respecting the protection of personal information in the private sector punishes employers who, among others, collect and record personal information in an abusive manner. The Act specifies strict limits on the creation, holding and use of files and provides for significant penalties for non-compliance.

3.01 Creation of Files

The definition of “personal information” is located in section 2 of the Act. Specifically, “personal information is any information that relates to a natural person and allows that person to be identified.”

The Act applies to all information collected by a business over a period of variable length, stored in any form whatsoever, and obtained from any source whatsoever.

To create a file on a person, the information must be collected from the person subject of the file. However, the creator of the file may contact third parties to confirm the accuracy of such information.

A serious and legitimate reason is required to create a file and the basis of such reason must be specified in the file. As the Act does not specify what constitutes a serious and legitimate reason, great care is required, in case the courts must decide whether or not such reason is serious and legitimate.

The Act is also silent with regard to the “purpose” of the file. However, section 13 prohibits the use of information for purposes that are “not relevant” to the purpose of the file and if that person’s consent was not obtained. In other words, the creator of the file should limit the scope of its contents to avoid any claim of abusive use of the collected information. Moreover, section 7 of the Act requires the employer to specify in the file, the source of all collected information.

3.02 Holding and Use of the File

The file is confidential and must be stored in a secure location. And, only persons specifically authorized for this purpose may have access to the file.

Because the file is considered confidential, no information contained therein may be disclosed without the subject’s consent, except if authorized by the Act (sections 18 *et seq*).

Section 14 of the Act governs the subject’s consent and specifies the terms for such consent to be valid. The consent must be “manifest, free, enlightened and must be given for specific purposes.” In addition, such consent is only valid for a specific period of time. Finally, the individual will, upon submitting a written request, be entitled to access to his or her own file to make any necessary changes or corrections.

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PERMITTED TYPES OF DISCRIMINATION

Section 20 of the *Charter* allows discrimination under certain circumstances, such as requiring certain abilities or skills for a particular position. For example, pregnancy may be used to reject a candidacy if it is possible to prove that the position requires full availability during the months following birth, or if the position entails risk for the future mother or unborn child.

CONCLUSION

As set out above, the hiring process must take place with the greatest possible respect toward the applicant. And the infringement of any law may entail penalties for the business. Accordingly, the business must ensure that they are aware of the latest developments in this area of law.

If you have any doubts regarding the validity of your hiring process, please do not hesitate to contact Edilex (info@edilex.com) to consult with one of our lawyers.



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