WILLIAMS HR LAW
LEGAL EXPERTISE AT WORK

Issue No. 6 – *December 2012*

Social Host Liability: The Grinch of the Workplace Holiday Party

'Tis the season once again for employers who have begun planning holiday workplace parties so co-workers can share in the spirit of the holidays together.

And while it's certainly no reason not to deck the halls, it's important that employers stay mindful of the potential exposures that can arise when alcohol is served and employees get a little carried away with having a holly jolly holiday. Alcohol served at a company party can expose an employer to liability arising from sexual harassment, bullying, aggressive behaviour, physical assault, racial slurs and driving under the influence.

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The risks are real, but that doesn't mean there can't be any jingle in the bells at an employer hosted event. With some careful planning ahead of time, a workplace holiday party can still be high on festive cheer and low on legal liability fear. Here is a list of helpful suggestions (be sure to check it twice):

1. Monitor your employees:

While it is probably unrealistic to ban alcohol entirely from a company holiday party, it is necessary for employers to carefully monitor employees who may be drinking excessively. Consider assigning sober monitors to keep a watchful eye out and don't allow employees who have consumed too much alcohol to continue drinking.

2. Consider a cash bar:

Instituting a cash bar with proceeds going to a worthy charity or providing employees with a fixed number of drink tickets are both effective ways to contain the number of alcoholic beverages an employee will have.

3. Provide lots of food:

Remember that plentiful food and snacks will help balance out the effects of alcohol so it makes sense to keep the food coming all night long. Making frequent snacks available throughout the night - even after dinner - is a good idea.

4. Liven up the non-alcoholic beverages:

Provide fun non-alcoholic selections at the bar. Soft drinks and virgin cocktails are more discreet and appealing alternatives than water for employees who don't want to end the night with cheeks as rosy as Santa.

5. Arrange for transportation:

Make it easy for employees to get home safely. Proactive contemplation of transportation is critical to avoid falling into the trap of trying to co-ordinate transportation at the end of the night or attempting to make an assessment as to who is "okay" to drive. Designated drivers, taxi chits and/or shared cabs are good ideas.

6. Keep the party engaged:

Scheduled activities at the party will help entertain employees and ensure that they don't view alcohol consumption as a main theme of the party. Games, prizes, raffles, and gift exchanges are good ways of keeping spirits high and drink consumption low.

7. Choose the right location:

While the North Pole may be an unreasonable venue, hosting the event at a location that is not in the vicinity of bars or clubs makes it more likely that employees will head straight home. Alternatively, holding the party in-house can greatly increase company control over what is served and to whom.

Employers Take Note: Even Departing Employees may be Entitled to a Hefty Bonus

Taking a proactive approach to HR law by designing iron-clad employment contracts and policies is a sensible approach for any employer.

But that tried-and-true strategy is especially useful when it comes to managing often costly discretionary or profit-sharing bonuses for employees who have been given notice and are on the way out the door.

Why? A terminated employee's entitlement to bonuses during a notice period is a common issue of contention in wrongful dismissal litigation. Employers often provide language in company policies stating that any bonuses are at "the sole discretion of the employer" or that entitlement to a bonus requires "active employment." Generally speaking, it's the facts of each case that determine the enforceability of such language. Even with that sort of language, however, employers may still find themselves in a position of liability.

That's a point that was made very clear in the case of *Sandhu v. Solutions 2 Go Inc.* [2012] O.J. No. 1524 *("Sandhu")*.

Sandhu was an employee who had her employment terminated on a without-cause basis on May 25, 2010. Shortly thereafter, on June 18, 2010 – and within the four-week *Employment Standards Act ("ESA")* notice period to which Sandhu was entitled – her employer announced and paid out its profit-sharing bonus for the recently-ended fiscal year. Despite having worked the entire fiscal year, Sandhu did not receive payment of the bonus. Solutions 2 Go argued that it had communicated to employees in a 2009 memo that receiving the bonus required "active" employment at the time the profit-share bonus was to be paid out. The employer further stated in the memo that the profit share is "a discretionary bonus."

The Court disagreed, stating that Sandhu was entitled to her full bonus.

The reasoning behind the decision was that under S.61(1)(a) of the *ESA*, the employer could only terminate Sandhu without notice if she were to receive what she otherwise would have been entitled to receive from the employer under the terms and conditions of her employment during the statutory notice period. According to the Court's decision, denying her the bonus was a clear violation of one of the terms and conditions of her employment, stating that "it would convert her from an "active" employee with potential benefits if the profit sharing bonus was announced, to an "inactive" employee with no potential benefits if the profit sharing bonus was announced."

To properly understand the court's rationale, it's important to remember that the *ESA* serves as a minimum floor of rights to which every employee to whom the *Act* applies is entitled. Therefore, in this case the employer couldn't enter into contracts with its employees outside of this obligation.

What employers should take away is the importance of investing time to build effective and highly-specific HR policies with the help of an employment lawyer.

As for whether the bonus was discretionary in this case—and remembering that the decision whether to award profit-sharing at all may have been discretionary—once the bonus had been declared, the employer had no right to exclude a particular employee from entitlement. Furthermore, Solutions 2 Go failed to produce any evidence of criteria that it could, would or did use to differentiate between qualifying employees.

So, what does this case mean for employers?

It's important to put the *Sandhu* decision into context and understand that it's only within an employee's statutory notice period under the ESA that he/she would be entitled to a bonus on the facts of this case.

For example, in *Sandhu* the employee was offered an additional two weeks' notice in excess of her four-week entitlement under the *ESA* if she agreed to sign a release. She refused. However, had she decided to sign, and assuming for a moment that the bonus payout was beyond the *ESA* notice period but within the additional two-week period provided by her employer, then Solutions 2 Go could have potentially succeeded in asserting that she was disqualified from the bonus on the basis that she was not actively employed.

Further, if the employer had been able to prove that criteria existed for which qualifying employees would be assessed as to whether they qualified for the bonus, it's possible that Sandhu might have been disqualified based on those criteria.

What employers should take away is the importance of investing time to build effective and highly-specific HR policies with the help of an employment lawyer.

In *Sandhu*, the employer appeared to have the elements necessary to free itself of the obligation to pay the profit share bonus, but a failure to understand the nuances of the law (e.g. the s.61 *ESA* requirements) and the absence of a robust policy and established practices (e.g., no evidence of discretion in differentiating between employees) meant that Solutions 2 Go was exposed to costly litigation and an unfavourable result.

In the News and Upcoming Events:

Making a clean break: Williams HR Law discusses how employers can minimize the risks associated with terminations of employment in a video feature appearing in the Globe & Mail's Report on Business – October 1, 2012. ***Click here.***

Be sure to say "hello!": Williams HR Law will be presenting on all that is new in Workplace Safety and Insurance law at the 2013 Human Resources Professional Association Annual Conference and Trade Show – January 25, 2013. ***Click here.***

It's all about engagement: Williams HR Law's Laura Williams provides five effective strategies for boosting employee engagement and reducing absenteeism in her latest column for PROFIT Magazine – November 29, 2012. ***Click here.***

'Out with the Old and in with the New' Puts Employer on the Defensive

It's no secret that Canada's workforce is aging rapidly.

More than 15 per cent of Canadian workers are 55 or older and, for the first time, there are just as many workers over the age of 40 as under. With the end of mandatory retirement, it's likely that employers will find themselves with an increasing number of senior employees.

That demographic shift is causing some less progressive employers unanticipated headaches on the HR law front.

Take a recent Ontario case, in which seven women between the ages of 62 and 78 filed human rights complaints against grocery store chain Metro, along with Canada's largest product demonstration company, InStore Focus, in one of the largest claims of alleged age discrimination in Ontario history.

Being inflexible when it comes to the expectations placed on senior workers not only carries the risk of legal exposures such as the human rights complaints lodged in the Metro case, but is often a lost opportunity to harness the unique skill-sets of an experienced workforce.

The complainants held part-time jobs as brand ambassadors for InStore, handing out product samples to customers in various retail stores including Metro, before being terminated. Their complaints allege they were let go for not fitting the "profile" that Metro was seeking to portray – namely, the "soccer mom" look, referring to younger women with kids. In all, 12 women were terminated with seven coming forward to file an application with the Ontario Human Rights Tribunal.

This group of women alleges that while their usual hours were cut to zero as the result of what the company had told them was a downturn in business, InStore was actively advertising for 12 new brand ambassadors. The complainants are seeking $25,000 each in damages for "insult to dignity" and a combined $38,000 in lost wages.

It's true that employers have the right to choose who they want to employ, and to set the quotas and performance standards their employees are expected to meet. They should be mindful however, that being inflexible when it comes to the expectations placed on senior workers not only carries the risk of legal exposures such as the human rights complaints lodged in the Metro case, but is often a lost opportunity to harness the unique skill-sets of an experienced workforce.

Put simply, employers shouldn't assume that workers won't be able to perform a job simply because of their age.

While physical abilities often decline as people age, employers would do well to tap into senior workers' practical experience. They're often ideal candidates for training new employees, for example—a task that can be critical to preserving efficiencies in some workplaces. Additionally, long-standing mature employees often harbour the kind of organizational knowledge that make them ideally suited for management positions.

The changing demographics of an aging workforce is a reality, but it shouldn't be viewed as a barrier to organizational success by employers. In fact, progressive companies able to adapt and embrace the opportunities inherent in the greying of our workforce may even be able to carve out a distinct advantage over their competitors.

Employment Standards Act Shows its Teeth: Director Gets 90 Days in Jail

On November 1, 2012, the Ontario Court of Justice sentenced Steven Blondin, the director of six different companies located throughout southern Ontario to a 90-day jail term for failing to pay wages owed to employees and violating the *Employment Standards Act, 2000*.

Between March, 2007 and October, 2009, there were a total of 61 employees who filed claims for unpaid wages under the *ESA* against companies operated by Blondin. Following investigation, the Ministry issued 113 orders to pay amounts totaling more than $125,000. None of the orders were paid and the director and the companies pleaded guilty to failing to comply.

In addition to the jail time, the Court ordered that Blondin and his companies pay fines totaling $280,000. All wages owing to employees were also ordered to be paid along with a 25 percent victim surcharge, as required by the *Provincial Offences Act*.

Sentences of jail time are obviously quite rare but where employers recklessly and repeatedly shirk their duties under the *ESA* they will be held to account by the courts and directors and officers can find themselves personally liable. The *ESA* provides that directors and officers of provincially regulated Ontario corporations can be personally liable for up to six months of unpaid wages and they can be sentenced to up to one year in jail for such a violation.

Employees' Expectation of Privacy Affirmed by the Supreme Court of Canada

Employee privacy is one of a number of issues that has been pushed to the forefront by the increasing use of technology in the workplace.

In March 2011, the Ontario Court of Appeal's decision in *R. v. Cole* served as a caution to employers about an expanding expectation of employee privacy. In a decision released on October 19, 2012, the Supreme Court of Canada ("SCC") weighed in on the Cole case (*R. v. Cole* [2012] S.C.J. No. 53) and affirmed that Canadians may reasonably expect privacy of information contained on workplace computers where personal use is permitted or reasonably expected.

To review, the *Cole* case concerned a school teacher who was found to be in possession of nude and sexually explicit photographs of a female student on the hard drive of his school-issued laptop. The photos were discovered by a computer technician employed by the school board who was responsible for ensuring the integrity of the network system. Upon being notified about the photographs, the school board seized and searched the teacher's laptop and provided it along with copies of the computer's data to the police. According to the SCC, computers that are reasonably used for personal purposes – whether found in the workplace or at home – contain information that is meaningful, intimate, and touching on the user's biographical core. Therefore, Canadians in the workplace do in fact have a reasonable expectation of privacy on workplace computers where such use is permitted or can be reasonably expected. The SCC went on to say that workplace policies and practices may diminish an individual's expectation of privacy, but may not necessarily remove the expectation entirely and that the "totality of the circumstances" will be considered.

Canadians may reasonably expect privacy of information contained on workplace computers where personal use is permitted or reasonably expected.

The SCC's decision sends a message to employers that where they permit or condone the personal use of workplace computers, employees will have an expectation of privacy in regard to the information they may store on the computer. However, it should be noted that the *Cole* case arose in the context of a *Canadian Charter of Rights and Freedoms* challenge and the SCC did not speak directly to the issue of an employer's right to monitor computers or the admissibility of evidence obtained by an employer's search of an employee's computer in civil actions for wrongful dismissal.

Although the SCC stated that workplace policies and practices are not determinative on the issue of privacy expectation, it remains critical that employers implement a clear and unambiguous policy regarding the use of any workplace computer. The policy should provide statements regarding employer ownership; proper and improper uses; employer's right and intention to monitor use; the employer's purpose for monitoring use; the information that will be collected; and that no privacy of information should be expected by employees.

The Williams HR Law WSIB Compliance Audit

The ideal tool for managing workplace safety and insurance-related risks and costs.

The Workplace Safety and Insurance landscape in Ontario is in the midst of significant change. The *Workplace Safety and Insurance Act* is a key piece of legislation that promotes workplace health and safety across the province.

Not understanding or keeping abreast of these changes can result in legal and financial risks to employers. That's because violating WSIB policies can have serious consequences, from large administrative penalties, to fines for companies and individuals, to unnecessary costs from unmanaged claims. Simply remaining compliant with the Act is becoming increasingly difficult for employers, many of whom don't fully understand its complex regulations, or have the means to stay a step ahead of its constant amendments.

That's why we developed the innovative Williams HR Law WSIB Compliance Audit, a diagnostic tool designed to help employers assess their WSIB compliance levels, evaluate exposures and identify areas for improvement. Best of all, the tool helps employers develop cost-saving strategies to minimize liabilities associated with WSIB claims.

The Williams HR Law WSIB Compliance Audit focuses on five key areas:

- Legal compliance with the *Workplace Safety and Insurance Act*, regulations and policies
- Claims management and cost reduction
- Work reintegration and return-to-work practices
- Employer classification
- Prevention strategies

Don't let WSIB non-compliance hurt your company's bottom line. Use the Williams HR Law WSIB Compliance Audit to analyze gaps between your current practices and WSIB obligations, evaluate your ability to manage WSIB claims, manage legal risks associated with accidents in the workplace, and facilitate effective and informed decision making.

To find out more about our WSIB Compliance Audit and other services, please contact us:

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Wishing you every happiness this holiday season and prosperity in the new year from all of us at
WILLIAMS HR LAW