

## ISSUES IN CANADIAN EMPLOYMENT & LABOUR LAW

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PageTurner is an occasional publication from Turner, A Human Resources Law Firm™ that provides a general overview on topics of interest to our clients. The information contained in PageTurner usually addresses workplace issues or strategies that arise as a result of new legislation, legal developments or case law. At Turner, A Human Resources Law Firm™ we provide employment and labour law advice and representation to employers. Our goal is to help our clients excel.

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### THE OFFICE PARTY

#### THE ISSUE:

As the holiday season draws near, we are often asked what proactive steps employers can take to ensure their employees are safe and acting responsibly at the office party. The concern is not just with respect to too much holiday cheer in the form of alcohol, but also employee conduct and the potential impact of the legalization of recreational marijuana.

Employers have a duty under Ontario's *Occupational Health and Safety Act* ("the Act") and specifically under section 25(2)(h) to take every precaution reasonable in the circumstances for the protection of a worker. The Act defines both "worker" and "workplace" broadly to apply to essentially any person who performs work or supplies services for monetary compensation and even those who do *not* receive compensation (in certain circumstances), and applies to any land, premises, location or thing at, upon, in or near which a worker works. This means that an employer cannot simply escape liability simply because an office party is held after-hours and off-site.

#### THE MESSAGE TO EMPLOYERS:

There are a number of strategies prudent employers should consider both before, during, and after their office parties to help minimize potential liabilities – here are our "top 10":

1. **Set out expectations in advance** – employees should receive a reminder of the standards of behaviour expected from them in advance of a workplace event. For instance, employers will want to ensure employees are asked to: drink responsibly; act in a manner that allows for and respects the safety of themselves and others; conduct themselves appropriately as representatives of the employer's Company; maintain appropriate social interactions; monitor their use of impairing substances; not to consume impairing substances and operate a motor vehicle; and report any suspicion of another employee that is planning to operate a motor vehicle while impaired by drugs or alcohol. Employers who will compensate employees for alternate transportation should also remember to provide details well in advance, such as from whom employees can obtain taxi chits, how they may be reimbursed for taking public transportation instead of driving, or where individuals can leave their vehicles overnight in the event they become impaired.

2. **Establish limitations** – providing unlimited, self-serve or BYOB alcohol is a sure-fire way to attract liability at a holiday party. Instead, ensure the event location is equipped with properly licensed and SMART-serve certified bartenders and wait staff who are able to monitor service of alcohol, gauge whether an individual is exhibiting signs of impairment, and where necessary, stop providing service to them. It is also prudent to ensure all employees are properly identified as being of legal age to consume impairing substances; employers may wish to further consider having security measures in place to ensure no external alcohol or drugs are allowed at the event location, and that any individuals who may pose a threat to the safety of themselves or others are dealt with appropriately.
3. **Maintain boundaries** – limit the alcoholic beverages available to each employee by providing drink tickets rather than an open bar, and ensure employees understand they will only be provided with a maximum number (e.g. 2 tickets) and that they are not permitted to give unused tickets to other employees. Also make sure employees know well in advance that they are not permitted to bring in any outside alcohol or drugs. Ensuring that alcohol service stops well in advance of the end of the event (e.g. closing the bar down at 11:00pm or midnight instead of 2:00a.m.) can help to avoid excess consumption and allow employers to better monitor employees towards the end of the evening. However, employers should also be cautious when doing so as employees who may wish to continue the party may seek venues which are open later, and should an incident occur in such circumstances, employers may not be off the hook.
4. **Don't force a "good time"** – mandatory attendance at holiday events can create discomfort for certain employees such as those with substance abuse or dependency issues or individuals who choose not to consume alcohol. Similarly, certain entertainment options can be insensitive, inappropriate, or create an uncomfortable situation for employees who do not want to participate but may feel obligated to do so. Considerations should also be given to non-denominational themes, as well as costs to employees (i.e. gift exchanges).
5. **Be mindful of the venue** – certain venues such as those attached to hotels, ones with many dark corners, and those close by to other bars may pose additional risks by enabling certain circumstances to arise such as unsolicited advances, unmonitored conduct, and the ongoing consumption of alcohol after the main event. Alternatively, other venue choices such as those near to sources of public transportation, well-lit open spaces, and venues offering more entertainment than mere drinking and socializing can help steer a holiday event in a completely different direction. Be aware of the tone being set by the choice of venue, as, for example, bars may have different connotations for anticipated behaviour than restaurants or certain private venues.

6. **Stay alert to signs of distress** – employers are required to take all reasonable measures to ensure the safety of employees in the circumstances. When employers *create* a set of circumstances through events such as holiday parties, they may be held to a higher standard than where employees are in a traditional workplace setting. For instance, hosting a holiday party where alcohol is served can provide a setting where circumstances of lewd comments, aggressiveness, and other inappropriate forms of behaviour may arise. It is important that employers are mindful of employee interactions during such events, and do not turn a blind eye to any suspicious behaviour. It may also be valuable to address these potential issues before they arise by emphasizing that any behaviour which is contrary to the company's policies will not be tolerated at company events – an extension which should also be built into policies and procedures, and where it is, circulated as a reminder in correspondence before a big event.
7. **Reward good behaviour** – consider incentivising the non-consumption of alcohol and legal drugs by offering alternatives such as free, unlimited mocktails, and providing small tokens of appreciation (e.g. coffee shop gift cards or gas cards) for volunteer designated drivers. Where alcohol is being served, ensure food is also either provided or available.
8. **Be aware of pre- and post- partying** – even though an employee may become intoxicated before or after the actual event, an employer can be held liable in certain circumstances. To help avoid contributing to an employee's consumption of alcohol or other impairing substances, employers should discourage “pre-drinks” and should not invite (or condone) employees to attend post-event venues such as house parties or after-hours clubs. It may also be practical to have certain individuals monitor party-goers as they leave the designated event venue to ensure that anyone who appears to be intoxicated or impaired does not attempt to operate a motor vehicle.
9. **Understand the potential for third party liability** – even where an employer is not responsible for an employee's conduct or actions while impaired, it may be very difficult to provide that it is not legally liable for any damages that employee may cause to themselves, other employees, property, or third parties. Employers should be aware that they may become or share in the liability for incidents such as motor vehicle collisions or other accidents, even where an employer has not supplied alcohol or drugs or has taken proactive steps to ensure the safety of employees. Indeed, this can occur anytime impairment is an issue if an employee is under their control when the alcohol and/or drugs are being consumed.

Both the common law and statutes impose a duty of care owed by employers to employees which arises out of the employer's obligation to provide a safe working environment and to take reasonable care for the safety of its employees. This duty extends to ensuring that an employee is not intoxicated while at or on the premises of the employer or any other “workplace” so as to impair the ability to drive safely home, and places a positive obligation on the part of the employer to

take affirmative steps to prevent the foreseeable risk of injury. This can include monitoring the amount of alcohol consumed and preventing an intoxicated or impaired employee from driving home.

Typically, an employer's risk of liability will increase where:

- An employer is directly involved in the provision of alcohol or drugs;
- An employer knows or ought to know that an employee is intoxicated or impaired;
- There is a foreseeability of risk resulting from the employee's intoxication or impairment; and/or
- The employer has failed to take reasonable steps in the circumstances to prevent the risk

10. **Take action when warranted** – Managers and Supervisors should lead by example, and monitor their own conduct and alcohol consumption so that they can be aware of and alert to any circumstances which arise that require attention or action. If such circumstances do arise, employers must know how to mitigate the risks of unsafe conduct if they arise, such as diffusing tensions between employees or ensuring an intoxicated employee does not pose a risk to themselves or others. Employees should also know how and who to report any improper conduct to during and after the event, and in employers receive any such complaints, these should be properly investigated as with any other health and safety, violence, or harassment complaints and in accordance with the company's established policies and procedures.

### **THE BOTTOM LINE:**

Holiday parties are meant to be enjoyed by all. Employers should be mindful and take steps to assess and address both the naughty and nice aspects of holidays parties well in advance to ensure that all employees, including management, feel comfortable and know what is expected of them.

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At Turner, A Human Resources Law Firm™, we are experienced in providing expert advice tailored to your workplace. For assistance navigating workplace issues such as drafting and revising policies and procedures to meet changing needs, ensure legal compliance, and avoid unnecessary risks, please get in touch with us.

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