

Employers' Advisor

WORKPLACE NEWS COAST TO COAST

December 2019

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Fashion Crimes and Misdemeanours: Pitfalls to Avoid in Introducing Workplace Dress Codes

Workplace dress codes can be a fraught topic for many employers, whether the expectation is to dress conservatively in an office environment or to wear outfits that align with customers' expectations in other industries. Several recent high profile cases have brought this issue to the fore in discussions among employers and employees alike, ranging from the outcry over the BC legislature's prohibition on sleeveless tops for women (which has since been reversed) to restaurants requiring staff to wear bathing suits. While employers do have the right to prescribe certain reasonable guidelines for what constitutes appropriate work attire, such policies should only be drafted or implemented with a clear understanding of what the law permits and requires.

As a starting point, workplace dress codes must always take into account the safety of employees. Employers can (and should) require that employees wear personal protective equipment in certain environments and also ban certain articles of clothing, such as loose scarves, in workplaces where that clothing might present hazards. Employers must also avoid implementing requirements that may lead to safety concerns. Requirements for women to wear high heels, for example, have recently gained attention as a health and safety issue. Such

requirements are now prohibited in BC under occupational health and safety legislation.

Another key consideration is whether the dress code is discriminatory on the basis of sex, religion, or another ground protected under human rights law. Employees in both Ontario and BC have successfully filed human rights complaints against employers in relation to workplace dress codes. In *McKenna v Local Heroes Stittsville*, 2013 HRTO 1117, the Ontario Human Rights Tribunal concluded that the employer, a sports bar, had discriminated against a waitress on the basis of sex when she requested accommodation for a new uniform policy that required staff to wear a "tight, form fitting" shirt made to look like a sports referee's jersey. The waitress was approximately five months' pregnant at the time the new uniform was implemented, and she felt the tight shirt would make it more difficult for her to hide the pregnancy. Instead of accommodating, the employer cut her hours and sent her an ROE. The Tribunal found the manager viewed the pregnancy as an "inconvenience", inconsistent with his efforts to re-brand the bar and emphasize sexual attractiveness of staff as a means to attract younger clientele. His actions toward the employee constituted discrimination.

A similar conclusion was reached in *Mottu v Barfly Night Club*, 2004 BCHRT 76, where the servers of a BC nightclub had themselves chosen the outfits to wear at a special beach-themed event – specifically, bikini tops with sarongs or shorts. One employee, Ms. Mottu, was not present at the meeting and was uncomfortable with the choice. She asked the employer if

she could wear a dress over the bikini top and was told no. She could wear the bikini top, or not work the shift and not be paid. Ms. Mottu decided to work the shift, and arrived wearing a bikini underneath a shirt and sweater. The employer quickly moved her to a different area of the bar to sell less popular drinks (and thus earn fewer tips), and required her to remain there for subsequent shifts. The Tribunal found the employer's actions were intended to force her to resign. Though the bikini tops had been the employees' choice (minus Ms. Mottu), the employer approved the "uniform" and condoned it. Its actions toward Ms. Mottu following her refusal to wear the bikini top alone constituted discrimination on the basis of sex.

Employers have the right to establish reasonable standards of dress they believe are necessary for the safe or effective conduct of business. However, certain best practices are advisable to ensure that workplace dress codes are lawful and stand up to scrutiny. In particular, employers should take care to avoid sexualized and/or gender-specific dress codes that impose different requirements for women and men, even where the style of dress may seem conservative or modest. Employers should also be prepared to accommodate for conflicts that may arise between dress code requirements and an employee's religious beliefs or other grounds protected under human rights legislation. Allowing employees to select from a range of clothing options, hairstyles, and uniform sizes is advisable. Employers should consider input from employees when drafting dress code policies, as this may help reduce the likelihood of dispute or disruption down the road. Finally, employers should be aware of specific requirements regarding clothing and uniforms that may apply under applicable collective agreements and employment standards or occupational health and safety legislation.

Attention Federally Regulated Employers: Significant Amendments to the *Canada Labour Code* Now in Effect

On September 1, 2019, a number of amendments to the *Canada Labour Code* (the "Code") came into force. These changes have a substantial impact on all federally regulated employers in Canada.

Some of the most significant changes to the *Code* are as follows:

Flexible Work Arrangements

Employees with more than 6 consecutive months of continuous employment may formally request a change to certain aspects of their working arrangements, such as their hours of work,

work schedule or location of work. An employer must respond to the request within 30 days and can refuse a request (in whole or in part) on one or more of the following grounds:

- the additional cost would be a burden on the employer;
- the change would have a detrimental impact on the quality or quantity of work, customer demands, or other aspect of their employment;
- the employer would be unable to reorganize work among existing employees; and
- the change would result in insufficient work for the employee.

Schedules

Employers must provide employees with their work schedule, in writing, at least 96 hours before the start of the first shift, except under certain circumstances.

Employers must also provide their employees with at least 24 hours' notice of any change or extension to the employee's previously scheduled shift, except emergencies or unforeseen events.

Breaks and Rest Periods

Employers are required to provide employees with one unpaid break of at least 30 minutes during every period of 5 consecutive hours of work, with certain exceptions. If the employee is required to be available to work during this break, the break must be paid.

Employers must also provide unpaid breaks to employees for necessary medical reasons, or to nurse or express breast milk. For medical breaks, employers may request certification from a health care practitioner setting out the required length and frequency of the breaks.

Vacations

Starting September 1, 2019, vacation entitlements under the *Code* were increased as follows:

- 2 weeks' vacation (4% vacation pay) after 1 year of employment;
- 3 weeks' vacation (6% vacation pay) after 5 years of employment; and
- 4 weeks' vacation (8% vacation pay) after 10 years of employment.

Overtime

Employees can now take 1.5 hours of time off with pay for each hour of overtime worked, if they enter into a written agreement

with their employer specifying the dates on which the paid time off will be taken by the employee. The time off must be taken within 3 months of the pay period during which the employee worked the overtime hours, and, if not taken, the employer must pay the employee for the overtime hours.

Refusal of Overtime

Employees may refuse to work overtime if it interferes with family responsibilities related to the health or care of any of the employee's family members or the education of any family member who is under 18 years of age.

Leaves of Absence

Service requirements for parental leave, maternity leave, leave related to critical illness, and leave related to death or disappearance were eliminated. The following leaves of absence were also introduced:

- **Personal Leave:** Employees may now take up to 5 days unpaid leave (the first 3 days are paid after 3 months of continuous employment) per calendar year for various reasons such as health care or family responsibilities.
- **Leave for Victims of Family Violence:** An employee is entitled to 10 days unpaid leave (5 paid days after 3 months continuous employment) for each calendar year to seek support or aid if they, or their child, is a victim of family violence.
- **Leave for Traditional Aboriginal Practices:** An Aboriginal employee (defined as Indian, Inuit, or Métis for the purpose of this leave), who has completed 3 months continuous employment, may take up to 5 days unpaid leave per calendar year to engage in traditional Aboriginal practices such as hunting, fishing, and harvesting.
- **Court or Jury Duty Leave:** Employees may take leave to act as a witness, juror or to participate in jury selection.

Changes have also been made to existing leaves of absence under the *Code*:

- **Medical Leave:** The current sick leave provisions will be converted to medical leave, which will cover up to 17 weeks of absence as a result of personal illness or injury, organ or tissue donation, or medical appointments during working hours.

- **Bereavement Leave:** Employees may now take up to 5 days of unpaid leave (3 days paid after 3 months of continuous employment) for an immediate family member's death, to be taken from the day of the death until six weeks after the funeral, burial, or memorial service.

There are a number of additional amendments to the *Code*, but it has not been determined when they will come into force.

These include changes to the minimum age of employment, termination provisions, reimbursement of expenses, equal pay for employees performing similar work, and rules surrounding temporary staffing agencies. Stay tuned for further updates.

'Tis the Season for Holiday Parties – Tips and Best Practices for Employers

As the holidays grow near and the holiday party season begins, employers should keep in mind that hosting these events can expose them to serious liabilities if the proper precautions are not taken. Employers that plan on hosting a holiday celebration where alcohol may be served should be aware of the risks associated with the consumption of alcohol and should take the necessary steps to ensure that their employees and guests enjoy themselves in a safe and responsible manner. The recent legalization of recreational cannabis serves to heighten concerns about employers' risks and responsibilities in connection with potential impairment at holiday parties.

In particular, employers should be aware of the risks associated with consumption of alcohol and cannabis, as well as the increased risk for harassment or assault related incidents. Being familiar with the signs of alcohol and cannabis impairment will help employers ensure that their employees are enjoying themselves responsibly. Recognizing the early signs of intoxication will allow those responsible for the celebration to address any concerns about an individual's level of impairment before the situation escalates, allowing employers to take reasonable precautions which can help to shield the organization from potentially significant liability.

The decision in *Hunt (Litigation Guardian of) v Sutton Group Incentive Realty Inc.*, 2001 CanLII 28027, illustrates the potentially significant liability that can arise as a result of a holiday party hosted by an employer, and the importance of ensuring that adequate measures are taken to ensure the safety of your employees.

In *Hunt*, the employer, Sutton Group, hosted an office Christmas party which was attended by its employees. After

attending the party and enjoying the open bar, one employee, Hunt, stopped for some additional drinks at a pub and was later seriously injured in a motor vehicle accident on her way home. The employee alleged that she was drunk because of the open bar and that the Company ought to have known she was intoxicated.

The employer responded by saying that it had taken significant steps to ensure that Hunt would be safe, including offering to pay for her taxi home and offering to phone a family member to pick her up, and that they were therefore not liable for her injuries. However, at Hunt's insistence, the employer did not actually see any of these measures through and allowed Hunt to leave the Christmas party of her own devices.

The Court ultimately determined that Sutton *did* have a duty of care to Hunt that arose from the employment relationship. As a result, the Court held that once the employer realized that the employee was intoxicated, it should have undertaken concrete steps to protect her by actually taking her keys, calling a cab or a family member, or contacting the police. This led to the finding that Sutton, as well as the bar that Hunt had stopped at after leaving the company Christmas party, were jointly liable for 30% of Hunt's \$1.1 million in damages.

During this holiday season, it is especially important for employers to be aware that they may be held responsible for the actions of their employees who may become impaired at a company-sponsored event. The following are some useful steps that employers should take to ensure that all of their attendees are able to enjoy the celebration in a safe and enjoyable environment.

- Do not *require* employees to attend an event where alcohol will be served.
 - *If* alcohol is to be served, a clear and unequivocal communication should be circulated to the employees about appropriate employee behavior. This includes a warning about overconsumption and a clear condemnation of driving while intoxicated.
 - Plan the event so that entertainment or other activities are the primary focuses, and that the consumption of alcohol is only an incidental activity.
 - Ensure that the distribution of alcohol is done by licensed professionals who are trained to spot the signs of intoxication.
 - Management should lead by example and respond to any concerns about impairment at the event.
 - Consider having the bar close an hour or two before the party ends.
- Serve non-alcoholic drinks and food if alcohol is to be served at the event.
 - Ensure that there is a procedure in place for transporting impaired employees home. This may include providing taxi chits, reimbursement for transportation, or arranging for designated drivers. If transportation cannot be arranged, employers should arrange for the employee to stay at a local hotel.
 - If an employee *does* become intoxicated, intervene to ensure that the employee does not jeopardize their safety and the safety of others around them by driving while intoxicated. Whatever is done, you should *not* allow them to drive while intoxicated. If the employee continues to insist on driving and attempts to do so, you should call the police for assistance.

With these tips in mind, we wish you and your employees a safe and happy holiday season!

About Mathews Dinsdale

Mathews Dinsdale is Canada's only national boutique labour and employment law firm. With six offices across Canada, and connections to the Ius Laboris global network of HR law firms, we are uniquely positioned to assist employers with all their local, national or international workplace law needs

If you have questions about any of these topics or any other questions relating to workplace law, please do not hesitate to contact a [Mathews Dinsdale lawyer](#).

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