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IN THIS ISSUE

The Employers' Edge

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Employer Host Liability: What you Need to Know When Planning the Holiday Party

Holiday festivities are around the corner and, for many businesses, so is the annual office party. Along with ensuring that the function is a successful social gathering, employers should put their mind to ensuring the safety of employees who have consumed alcohol during the function. In Ontario, an employer who does not take all reasonable steps to prevent an employee who has consumed alcohol at the office party from driving home, could face liability if that employee is injured or causes injury to others.

The Ontario Superior Court of Justice decision in *Hunt v. Sutton Group Realty Inc.* is illustrative of an employer's risk of liability. Ms. Hunt, an employee of Sutton Group, consumed significant amounts of alcohol during the company's Christmas party, while on shift and being paid to perform her duties. She then left her employer's premises with co-workers, consumed more drinks at a local bar, and attempted to drive home. She was seriously injured in a car accident. In the action against her employer for negligence, she was awarded $281,229 against the employer. It was found that the employer's obligation to provide a safe work environment required it to take positive steps to prevent Ms. Hunt from driving home in an intoxicated state.

The Ontario Court of Appeal later overturned the trial judge's decision. However, that decision was based upon procedural errors the trial judge had made. The Court of Appeal did not determine that the trial judge was wrong on the issue of liability so the trial decision still stands as a caution to all employers who serve alcohol during company functions.

A 2004 decision of the Ontario Court of Appeal usefully highlights the heightened degree of liability employers face when allowing their employees to leave the office party in an intoxicated state. While in *Child v. Desormeaux,* the Court found that a homeowner hosting a party did not owe guests a duty of care, this decision suggests that there is a significantly higher degree of risk of liability for employers who serve alcohol at company-sponsored events. To the extent that employers serve alcohol, require attendance of employees at the party and do not monitor employees' consumption of alcohol, courts are more likely to find employers liable for the injuries sustained by employees who are intoxicated or who have caused injuries to third parties as a result of their intoxication. Under these circumstances, it is more foreseeable that intoxicated employees would injure themselves or others if permitted to drive home, making it more likely that a court would find the employer responsible and negligent.

When planning office parties, there are a number of options that employers can consider to provide a safe environment with respect to alcohol consumption by employees. Such options include the following:

- Provide an alcohol free event. This is certainly the lowest risk alternative.
- Advise employees in advance of the office function that they are not to drink or drive either to or from the event.
- Do not provide free and open access to alcohol. This prevents an employer from effectively monitoring alcohol consumption.

continued on page 2

Employer Host Liability *continued from page 1*

- Keep track of how much alcohol employees are consuming. Issue a set number of tickets to limit the consumption of alcohol.

- Establish in advance which employees are to monitor alcohol consumption throughout the party. Advise all employees which persons will be serving as monitors. This will allow employers to monitor potential problems, facilitate proactive action when necessary and will encourage compliance by employees.

- Provide alternative transportation for employees either through car pools or taxi chits. Clear communication of these alternatives to the employees is crucial.

- Consider having the office party at or near a hotel and arrange for employees to reserve a room for the night.

The risk of liability for employers who permit employees to drive home intoxicated is too significant to ignore. Proactive planning and communication with employees will go a long way to ensuring that the office holiday party is enjoyable and safe for all, or at least that your risk of incurring liability is greatly minimized.

A Tax by Any Other Name …

In our Summer 2004 edition of *The Employers' Edge*, we advised employers that on June 21, 2004 the Ontario government introduced Bill 106, new legislation that implements the "Ontario Health Premium" ("OHP"). Effective July 1, 2004, employers were required to deduct OHP premiums from their employees' taxable income and pension payments. Certain collective agreements require employers to pay OHIP premiums on behalf of their bargaining unit employees. We suggested that unions may argue that such provisions require employers to pay OHP premiums as well.

There have been four arbitration proceedings since our last edition in which unions have argued for employer liability in this regard. The awards seem to suggest that the question of whether or not the employer is liable to pay OHP premiums revolves around whether or not the OHP is properly seen as a "premium" (which employers would pay) or a "tax" (which employees would pay). Unfortunately, the arbitrators differed in their answers and statements from the Premier's office do not provide much clarity to the issue.

In three of the four awards, the arbitrators held that the OHP was in substance a "tax" and, therefore, was not payable by employers. The arbitrators based their decisions on a number of reasons, including the following:

- The amount of OHP payable fluctuates with a person's income. Employers would be required to calculate and remit OHP with respect to the income an employee earned in all employment, not just employment with that particular employer.

- Bill 106 repeatedly refers to the OHP as a "tax".

- The OHP provisions are included within and enforceable under the *Income Tax Act*.

- The OHP does not replace the amount currently paid by the employer for employees pursuant to the Employer Health Tax.

- A "premium" is usually calculated, in part, based on consideration of the risk posed by the insured group. The amount payable for OHP is not related to risk.

- A "premium" usually correlates to the cost of providing the insured service. The OHP amounts bear no specific correlation to health care services provided, but instead are intended to supplement the existing health care system.

- If an employee's OHP is not paid, the employee is still entitled to OHIP benefits.

- Bill 106 does not include a requirement that OHP funds be directed towards health care.

- Parties to a collective agreement should have the opportunity to bargain such an extraordinary change as that imposed by Bill 106.

Standing opposed to these three awards is a decision of Arbitrator Anne Barrett. Arbitrator Barrett found that a collective agreement clause that required an employer to pay 100% of OHIP premiums for their employees included a requirement for the employer to pay OHP as well. In Arbitrator Barrett's view, the OHP is simply another form of premium to fund the OHIP insurance plan. The fact that it was collected through the tax system did not "rob" its essential character as a premium. Moreover, Arbitrator Barrett was of the view that the employer's difficulty in calculating the OHP payable on employees' global incomes could not be determinative of whether or not the employer was obliged to pay such amounts in the first place.

As a result, the question of whether OHP is a "premium" payable by employers pursuant to collective agreement obligations to pay OHIP premiums, or is a tax that is not payable by employers in this fashion, will continue to be debated. Indeed, the Ontario government also appears unsure how to characterize the OHP premium in that during a recent interview on Canada AM Premier McGuinty referred to the OHP as both a "premium" and a "tax."

It is hoped that an anticipated judicial review of these arbitration decisions will provide some clarity to this important issue. In the meantime, employers are advised to ensure that they fully understand their obligations that result from this new tax, which should continue to be paid by employees. Any of our lawyers would be happy to assist with any questions employers may have in this regard.

Privacy Rights Not Violated Where Video Surveillance Conducted With Good Reason

Recent legislative developments in the realm of privacy have important, albeit often ambiguous, implications for all Ontario employers. A recent Ontario arbitration decision usefully highlights the circumstances under which employers can conduct videotape surveillance of their employees, outside of the workplace, without violating their rights to privacy.

In *Teamsters Local 419 v. Securicor Cash Services,* the grievor's duties included the servicing of automatic banking machines (ABM's) and the handling of large amounts of cash. The company suspected that the grievor was stealing cash and advised him of its intention to investigate, prompting the grievor to call in sick for work. Concerned that the grievor would flee or dispose of big-ticket items, the investigator for the company drove past the grievor's residence and witnessed him outside of his residence as well as various people entering and exiting his house. The investigator videotaped his observations. On viewing the videotaped evidence, the grievor was fired for fraudulently claiming sick leave. The dismissal was grieved and the Union raised a preliminary objection regarding the admissibility of the surveillance evidence.

The Union argued that although the evidence was relevant and probative it should be excluded because it did not meet the standard of reasonableness in subsection 5(3) of the *Personal Information Protection and Electronic Documents Act (PIPEDA).* Subsection 5(3) states: "An organization may collect, use or disclose personal information only for purposes that a reasonable person would consider are appropriate in the circumstances." Pursuant to subsection 5(3), the Union argued that it would be unreasonable to allow the employer to rely on evidence obtained in violation of the grievor's right to privacy.

The arbitrator was careful to draw a distinction between an expectation of privacy and a right to privacy. A right to privacy must be grounded in the law, either through the Charter of Rights statute, common law or the collective agreement. Significantly, the arbitrator found that the grievor did have a right to privacy, which flowed from the common law, PIPEDA and the collective agreement. With respect to the common law, the arbitrator noted that there has been recognition by the courts of a common law right to privacy.

Subsection 5(3) states:
"An organization may collect, use or disclose personal information only for purposes that a reasonable person would consider are appropriate in the circumstances."

A statutory right to privacy was also established through PIPEDA because surveillance constitutes "the collection of personal information". Finally, a limited right to privacy could also be grounded in the collective agreement. Recognizing that management decisions to conduct drug and alcohol testing, searches, and medical exams, are subject to a test of reasonableness, the arbitrator reasoned that the collective agreement contained an implicit term that limited management's ability to encroach on the private affairs of employees. From this implicit limitation, a right to employee privacy could be grounded in the collective agreement.

On the facts, the arbitrator ruled that the surveillance evidence was admissible. The evidence was obtained reasonably, according to the arbitrator, because the grievor's expectation of privacy was limited by the fact he was observed in a public space, the employer had a legitimate business justification for observing him, the investigator's observation of the grievor was accidental and there was not a less intrusive way of obtaining the evidence.

It is apparent in the decision that the employer's reason for videotaping the grievor was the most important consideration in determining whether the evidence was reasonably obtained. In the absence of a legitimate business justification, the fact that the videotape evidence was obtained in a public space may not have been sufficient to admit the evidence.

When considering whether to conduct videotape surveillance of employees suspected of wrongdoing, employers should keep the following considerations in mind:

- The reasons the employer is seeking videotaped surveillance. Employee conduct that poses minimal risk to an employer's business interests is not likely to justify intrusions into the employee's sphere of privacy.
- Whether the surveillance will occur in a public or private place. Private surveillance of an employee is much more likely to be considered unreasonable. However, public surveillance in the absence of a legitimate business justification may also be considered unreasonable.
- Whether all reasonable alternatives for acquiring the desired information, including eliciting it directly from the employee, have been exhausted. Videotaped surveillance should ideally be a last resort or the only feasible means of obtaining the required information.

Back to the Future: Proposed Amendments to the Labour Relations Act, 1995

On November 3, 2004, the Ontario government introduced Bill 144 which will make a series of amendments to the Ontario Labour Relations Act, 1995 (the "Act"). The government believes that the Bill will promote greater "workplace stability" by repealing some of the more controversial provisions of the Act introduced by the previous Progressive Conservative government. The following is a brief synopsis of certain provisions of the Bill.

Union Decertification Poster

The Act currently requires all unionized businesses to post in the workplace information outlining the procedures for union decertification. The new legislation would repeal this requirement. The government's view is that the requirement is provocative and one sided as it does not require non-unionized employers to post information respecting the certification of unions.

Union Salary Disclosure

The Bill will also repeal the requirement for unions to disclose the names and remuneration of their directors, officers and employees earning over $100,000 per year. Again, the government's position is that the requirement is one sided because there is no similar requirement for employers to disclose their employees' salaries over $100,000.

Automatic Certification of Unions

The Bill would restore the Ontario Labour Relations Board's former power to automatically certify a union where it finds that an employer has committed a serious breach of the Act, the effect of which prevented employees from expressing their true wishes in a representation vote, or prevented the union from demonstrating that at least 40 per cent of the proposed bargaining unit were members of the union at the time the certification application was filed. Automatic certification would be available when no other remedy for the employer's breach of the Act would be appropriate.

Dismissal of Certification Application

Currently, the Ontario Labour Relations Board ("the Board") may order a second representation vote if it determines that a union's contravention of the Act prevented a true reflection of the employees' wishes in a prior representation vote. Under the Bill, the Board would have the power to dismiss the union's certification application if no other remedy would be sufficient to remedy the union's breach of the Act.

Interim Orders for Violations During Organizing Campaigns

Under the Bill, the Board would be authorized to reinstate workers on an interim basis who were fired during a union organizing campaign because of their efforts to organize.

Bargaining and Dispute Resolution Regime for Residential Construction Sector

The Bill would also make permanent the special bargaining and dispute resolution regime for the residential construction sector in the City of Toronto, the municipalities of Halton, Peel, York, Durham and Simcoe County that have been in place since 2001.

Under the Bill, collective agreements in this sector will be deemed to expire on April 30, 2007, and at the end of every third year after that date. Notice to bargain could be given on or after January 1 of the year in which the agreement expires, and the right to strike or lock out would be restricted to the period between April 30 and June 15 of that same year. Either party could apply to have the issues in dispute settled by an arbitrator on the later of the day on which the parties would have been in a legal strike or lock out position if not for the restrictions on strike and lock out activity imposed by this regime, and June 15.

Certification in Construction Industry

The Bill also seeks to re-introduce in the construction industry, a card based certification system that was in effect from 1950 to 1995. Under this system, a union could be certified without a vote if it presented to the Board membership cards signed by more than 55 per cent of employees in the bargaining unit. A representation vote would be held if the union signed up 40 per cent or more of the employees, but less than 55 per cent. The application would be dismissed if the union failed to obtain 40 per cent support.

While the government has indicated that Bill 144 is merely an attempt to restore "workplace stability" in Ontario, it has potentially wide-ranging effects for employers.

The lawyers at Crawford Chondon & Andree LLP would be pleased to discuss any issues raised by the amendments proposed in Bill 144.

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Tips for Creating a Healthy Workplace

The statement that healthy work environments mean healthy employees and healthy employees means organizational effectiveness is proving to be quite true in today's workplace. A national survey by Canadian Policy Research Networks asked employees whether they considered their work environments to be "healthy." Those employees who are in positions that are stressful and hectic with demanding workloads and conflicting demands do not consider their work environments to be healthy.

This survey also found that, from an employee's perspective, the foundation of a "healthy" work environment includes components such as good communication, a positive relationship with supervisors, friendly and helpful peers, and receiving recognition. Individuals who experience the above mentioned components feel greater job satisfaction and commitment, reduced turnover, and less absenteeism.

So, knowing the above, here are some practical guidelines you can adopt to help promote a "healthy" workplace for employees.

Create a supportive culture: It is key to create a supportive workplace culture that truly values employees and is built on a system of trust.

Lead: Commitment from senior management is crucial in achieving a "healthy" workplace. Senior management must be visible and take health issues seriously. If the commitment is achieved at the senior management level, you must also obtain commitment from the line managers.

Promote balance: Health does not only mean looking at the mental and physical health of employees, but also means encouraging employees to live a balanced life.

Allow employees to make a meaningful contribution: When employees make meaningful contributions to the organization they feel trusted and that they have a say in workplace decisions.

Team approach: Organizing a team to implement a healthy workplace strategy is critical. Involving members from management, employees, health and safety, human resources and, if applicable, unions, allows creative strategizing and active involvement, which will lead to a successful program.

Link strategy to goals: Integrating health and wellness-related objectives into the organization's annual/quarterly planning process means that any decisions that management makes will take health into account.

Provide training: Providing training to managers at all levels allows your organization to sustain health-related initiatives and build a corporate culture based on health and trust.

Communicate: Continuous communication on key successes on health-related initiatives that the organization has achieved is essential. Also consider communicating that initiatives that have not proven successful need to be revamped.

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DID YOU KNOW ...

The Ontario Government recently made some changes to the Employment Standards Poster which all employers subject to the Employment Standards Act, 2000 (ESA) are required to post in their workplace.

The key changes are as follows:

- The poster will be available on the Ministry of Labour website, free of charge, whereas in the past, employers had to specially order it at a cost of $6.00.
- It is smaller in size, clearer and more concise, and written in less technical language.
- It includes information about recent amendments to the *ESA*, including family medical leave and minimum wage increases, and it provides up-to-date information on minimum standards related to hours of work and rest periods, overtime, minimum wage, vacation, public holidays, termination pay and unpaid leaves of absence.
- In addition to English and French, the poster is now available in 18 other languages.

Employers should display the poster as soon as practicable. The failure to do so can result in the imposition of fines: $250.00 for the first offence, $500.00 for the second offence in a three year period, and $1000.00 for the third or subsequent offences in a three year period.

The poster is available for download on the Ministry website, accessible through our firm website www.ccaemployerlaw.com

The lawyers and staff at Crawford Chondon & Andree LLP wish you all the best for the holidays and the new year.