

# MANAGEMENT COUNSEL

Employment and Labour Law Update



## Religious Celebration In The Workplace - What's An Employer To Do?

The end of the year is a celebratory time for many religions. Christmas, Hannukah, Diwali and Kwanzaa and are just a few examples of the holidays observed during this time. What impact do these culturally diverse practices have on the workplace and to what extent must an employer accommodate such celebrations? Is an employer required to promote spirituality, tolerate it or squelch it in the face of our increasingly multicultural workforce?

### HUMAN RIGHTS LEGISLATION AND THE DUTY TO ACCOMMODATE

The Ontario *Human Rights Code* prohibits discrimination on the basis of "creed". Creed has been interpreted to mean "religious creed" or "religion". Generally speaking, creed does not include secular, moral or ethical beliefs or political convictions. However, it does include non-deistic bodies of faith such as the spiritual faiths of aboriginal cultures and newer religions which are *bona fide*. The protection of religion or creed may also extend to sincerely held personal religious beliefs, practices or observances, even if they are not essential elements of the religion.

Human rights legislation prohibits discrimination in the workplace on the basis of religion or creed in a number of areas including: hiring, employment advertising, application forms, interviewing, promoting, dress code, scheduling, working conditions and termination. Employers have a legal duty to take reasonable steps to accommodate individual needs based on religion or creed to the point of undue hardship. This may include changing rules, standards, policies, workplace culture and the physical environment.

### WHAT, THEN, OF THE HOLIDAY SEASON?

#### 1. Can An Employer Require an Employee to Participate in Festive Activities?

Providing your employees with the opportunity to mix and mingle during the holiday season is a wonderful way to enhance workplace camaraderie. When handled with sensitivity and respect, workplace festivities provide an opportunity to celebrate and recognize the accomplishments and hard work of your employees, offer team building opportunities, promote cultural understanding and cultivate an increased sense of loyalty.

Subject to human rights considerations, the manner in which you express your holiday cheer is up to you - the employer. However, it is important to remember that not every employee feels comfortable celebrating, and some may not be able to join in due to their religious beliefs. Therefore, participation in all festive activities should be voluntary.

#### 2. Can an Employer Require an Employee to Decorate for the Holiday Season?

The short answer is "no". In the case of *Jones v. Eisler*, Mr. Jones worked as a merchandiser for a retail pharmacy in British Columbia.

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*Religious Celebrations continued from p.1*

He was dismissed from his job because he refused to decorate the store with Christmas decorations. Mr. Jones told his manager that he was willing to stock Christmas merchandise but was unable to decorate because this was against the tenets of his faith as a Jehovah's Witness. As Christmas neared Mr. Jones was instructed by the owner to decorate the store. When he refused he was fired. The British Columbia Human Rights Tribunal held that Mr. Jones had been forced to choose between his job and his faith contrary to the province's human rights legislation. Mr. Jones was awarded \$21,243.56 compensation for lost wages, \$4,710.40 for loss of vacation pay and \$3,500 for injury to his dignity, feelings and self-respect.

### 3. Can an Employer Forbid an Employee From Decorating His/Her Own Workspace if Doing So May Offend Other Employees?

Every employee is entitled to work in an environment that is free from religious discrimination. Should an employee honestly and sincerely complain about the festive activities of another employee, an employer has a duty to positively address the situation. Doing nothing is not a good strategy, particularly when compared to the cost - financial and otherwise - of a complaint to the appropriate human rights authority.

The practical, more realistic approach is to find a way to allow every employee to celebrate, or not, in a manner that does not offend others. Start by creating a workplace decorating guideline well ahead of time. Invite employee feedback to increase the likelihood of 'buy in' by your entire staff.

Many workplaces have adopted a policy of not allowing festive decorations in common areas, but allowing employees to include limited and tasteful decorations (including those with a religious theme) in their personal space.

The bottom line is to use good judgement. You may recall last year a Toronto judge banished a Christmas tree from the lobby of a provincial courthouse ostensibly because the tree, a "Christian symbol", might alienate people of other faiths. True as it may have been that some members of the public may have taken offence to the tree, the public reaction was overwhelmingly opposed to the judge's ruling. Ontario Premier Dalton McGuinty, together with several non-Christian religious groups, criticized the judge's decision. They reminded Ontarians that in a country and province as multi-cultural as ours, the emphasis should be on building a strong pluralistic society that celebrates all traditions - not asking certain groups to abandon theirs.

### 4. Can an Employer Forbid an Employee From Giving Religious Holiday Gifts to Co-Workers?

Yes, if this offends the co-worker on the basis of his/her religious beliefs.

In *Ontario (Ministry of Community and Social Services) and O.P.S.E.U. (Barillari)*, Ms. Barillari, a Christian, sought to hand out to her co-workers Christmas gifts with scripture readings attached. When some of her co-workers indicated that this was offensive to them, Ms. Barillari was given the option of handing out the gifts without the scripture. She refused. Ms. Barillari was disciplined.

The union argued that the employer had directly discriminated against Ms. Barillari by denying her the right to hand out Christmas gifts at work. The employer responded that Ms. Barillari was preaching, contrary to a policy of neutrality jointly endorsed by the union and the employer. The employer also argued that it did not expressly forbid Ms. Barillari from handing out Christmas gifts to her co-workers. Rather it directed Ms. Barillari to refrain from handing out gifts with scripture attached.

The arbitrator agreed with the employer, finding that the prohibition against handing out gifts of a religious nature did not constitute discrimination on the basis of religion or creed. Specifically, the arbitrator held that while all parties acknowledged that the opportunity to hand out religious gifts was important to Ms. Barillari, there was no evidence that gift giving formed part of her religion. In other words, the right to hand out religious gifts to co-workers was not rooted in any religious belief or practice.

### BEST PRACTICES FOR RELIGIOUS CELEBRATIONS IN THE WORKPLACE

While it is tempting to encourage and participate in holiday celebrations during this festive time of year, employers must not forget their duty to provide a workplace that is free from religious discrimination. To that end, we suggest the following practices:

- Ensure that all holiday activities are voluntary. This includes parties, luncheons and gift exchanges, etc. Not every employee feels comfortable celebrating, nor may the employee be able to join in due to religious beliefs.
- If you choose to decorate your workplace participation should be voluntary. Even if the purpose is to enhance marketing and would normally form part of an employee's duties, be sensitive to your employees' religious beliefs and practices and accommodate them to the point of undue hardship. This may include assigning the task of decoration to another employee.
- Festive decorating guidelines for individual workspaces should be established well ahead of time. You may consider keeping common areas free from holiday decor and allow employees to decorate only their own personal workspaces (within reasonable limits).
- Should you choose to host an end of year party you may consider making it non-specific and focus on celebration in general. Remember as well to be sensitive to fasting or dietary restrictions, or scheduling conflicts due to religious observances.
- Workplace gift giving guidelines should be established ahead of time. The spirit of gift giving is prevalent during this time of year. However, some employees do not wish to or cannot participate. The best policy may be to avoid any gift-giving that is workplace sanctioned or organized.
- If time off is given to participate in employer-sponsored celebrations, those who opt not to participate due to the tenets of their religion should be given the same time off to avoid a claim of discrimination.
- Non-participation in any "holiday" event or practice should not be viewed or treated negatively.

## "Family Day" Is Here To Stay

Upon re-election, the Liberal Government's first order of business was to fulfill a popular campaign promise. Ontarians will celebrate a new public holiday, "Family Day", on Monday February 18th, 2008, and thereafter on every third Monday in February.

With the addition of Family Day employees in Ontario workplaces are entitled to nine statutory holidays per year under the *Employment Standards Act, 2000* ("ESA"): New Year's Day, Family Day, Good Friday, Victoria Day, Canada Day, Labour Day, Thanksgiving Day, Christmas Day and Boxing Day.

In addition, many Ontario municipalities observe a Civic Holiday on the first Monday in August. Some employers also give a day off on Easter Sunday, Easter Monday and Remembrance Day. However, none of these are "holidays" under the *ESA*.

### DO THE PUBLIC HOLIDAY RULES UNDER THE ESA APPLY TO MY EMPLOYEES?

Certain employees including teachers, pharmacists, accountants and employees in the federal sector are wholly exempt from the *ESA*.

Other categories of employees are exempt from the public holiday provisions even though they are otherwise covered by the *ESA*. This includes any individual who is employed:

- as a fishing or hunting guide
- as a landscape gardener or to install and maintain swimming pools
- as a student to instruct or supervise children
- as a student at a camp for children
- as a superintendent, janitor or caretaker of a residential building and resides in the building
- as a taxi cab driver
- as a seasonal employee in a hotel, motel, tourist resort, restaurant or tavern and is provided with room or board
- directly related to: growing of flowers for the retail and wholesale trade, the growing, transporting and laying of sod, the growing of trees and shrubs for the retail and wholesale trade
- under an arrangement whereby he or she may elect to work or not when requested to do so
- in the construction industry and receiving 7.3% or more of his or her hourly rate or wages for vacation pay or holiday pay

Still other employees are exempt from certain sections of the public holiday provisions of the *ESA* if the holiday falls on a day on which the employee would normally work and is not on vacation. This includes an employee in the following industries:

- hotels, motels and tourist resorts
- restaurants and taverns
- hospitals and nursing homes
- "continuous operations" (operations or parts of operations that normally continue 24 hours a day without cessation in each seven day period, such as oil refineries and alarm monitoring companies)

### CAN I OPEN MY STORE ON A PUBLIC HOLIDAY?

The question of whether a retail store may open on a public holiday is addressed in the *Retail Business Holiday Act* ("RBHA").<sup>1</sup> Under the *RBHA*, most retail establishments are prohibited from selling or offering to sell goods or services or admitting members of the public during a holiday, Boxing Day excepted. However a number of businesses are exempt from these provisions, such as:

- small stores less than 2,400 square feet with no more than three employees whose principal business is the selling of foodstuffs, tobacco, antiques or handcrafts
- certain pharmacies under 7,500 square feet
- special service retailers such as gas stations, flower shops/nurseries and book or magazine stores
- art galleries
- establishments licensed to sell liquor
- establishments open to the public for educational, recreational or amusement purposes
- necessary services such as, prepared meals, living accommodations, laundromats, car or boat rentals

### IF MY BUSINESS IS OPEN ON A PUBLIC HOLIDAY CAN MY EMPLOYEES REFUSE TO WORK?

Under the *ESA* most retail employees have an explicit right to refuse to work on a public holiday.<sup>2</sup> Even an employee who has agreed to work on a public holiday can renege by giving at least 48 hours' notice to the employer. The exception is an employee who works for a retail employer whose primary business is selling prepared meals, renting living accommodations or is open to the public for educational, recreational or amusement purposes.

### IS IT NECESSARY TO HAVE A WRITTEN AGREEMENT TO WORK ON A PUBLIC HOLIDAY?

In a word "yes". The *ESA* requires an employer and an employee to "agree" that the employee will work on a public holiday. Section 1(3) states that any reference to the term "agreement shall mean an "agreement in writing". A written agreement should be signed for each public holiday. A one-time general agreement which seeks to cover all of the public holidays will not comply with the *ESA*.

On a practical note, a written agreement signed well in advance of the public holiday allows an employer time to sufficiently staff for the public holiday; it also increases the chances that an employee will receive their shift of choice and therefore show up as scheduled. Beware, though, even an employee who has signed a written agreement may refuse to work provided 48 hours' notice is given.

*If you would like more information on public holiday entitlements, including the appropriate pay scales, retail business obligations, or would like us to prepare a written agreement for upcoming public holidays, please contact a member of our team.*

1. In addition to the *RBHA*, certain municipal by-laws allow select stores to remain open on holidays, generally for the development or maintenance of tourism.
2. Including Boxing Day.

**DID  
YOU  
KNOW?**

*A fine levied by a union under its governing constitution may not be enforceable. Recently, a union sought to fine a group of members who had crossed a picket line during a lawful strike. A court found the fines to be contrary to public policy and not recognized by law. For more information contact a member of our team.*

**Next in our series of employment and labour law updates:**

**TOPIC:** *Managing Employees On Leave - Without Taking Leave Of Your Senses!*

- Authorized Leaves and Unauthorized Leaves
- Statutory Leaves
- Rights of Employees During Leave
- Rights of Employers During Leave
- Performance of Work During Leave
- Permissible Communications with Employees on Leave
- Automatic Termination Provisions Under a Collective Agreement

**HReview**  
Seminar Series

**DATE:** Wednesday, January 23, 2008: 7:30 – 9:00am. Program at 8:00am, breakfast provided.

**VENUE:** The Country Club (formerly The Toronto Board of Trade), 20 Lloyd St., Woodbridge, ON 905.856.4317

**COST:** Please be our guest.

**RSVP:** **By Friday, January 11, 2008 to 416.603.0700 or [info@sherrardkuzz.com](mailto:info@sherrardkuzz.com)**

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