

Whitten & Lublin is a team of legal experts who provide practical advice and advocacy for workplace issues.

HE'S A DRUNK - CAN'T I FIRE HIM FOR THAT?

There was a time when “habitual drunkenness” was an accepted reason under the law for firing an employee. Today, however, alcoholism is recognized as a disease, rather than a moral failing. Alcohol (or drug) addiction is recognized as a disability under the Ontario *Human Rights Code* (the “Code”) and similar legislation elsewhere. Employers cannot discriminate against employees with addictions. Instead, the *Code* expects employer to accommodate the disease to the extent possible. A drunken employee can do serious harm though, and employers often want to do everything they can to get rid employees who drink on the job.

Of course, not every employee who drinks on the job is actually addicted to alcohol. The social drinker who got carried away at one lunch meeting is not addicted to alcohol. Social drinkers are not protected under the *Code*. Only those addicted to alcohol are protected. This tempts some employers to try to decide on their own who is an addict and who is not, so that they can fire the social drinker. This is not wise. Determining who is an addict and who is not is complicated. Some alcoholics, for example, may drink in a controlled way for years, but drink heavily when confronted with certain stressors. Certainly, an employer would be foolish to rely on employee’s blithe assurance that they “don’t have a drinking problem” to risk breaching the *Code*. Employers should err on the side of caution, and treat every situation where an employee is drinking at work as a potential addiction scenario.

What can an employer do when someone notices that an employee appears impaired, smells like liquor, or just took a drink? A simple zero tolerance policy is out. For most workplaces, a zero tolerance policy is not a justified response. Instead, the employer needs to do an individual assessment. As a first step, look at the employee’s job. Is this a safety-sensitive role, such as a machinery operator or a driver? If there is a real safety risk, the employee can be suspended from the role until they can demonstrate that their drinking is under control. If this isn’t the first offence, termination is probably acceptable.

For most employees though, safety will not be an issue. Here, employers need a game plan. Identify the harms (and risks) that the impaired employee created. Did the employee botch some paperwork? Miss an important meeting? Make a scene in front of a client? Were there other risks that the employee narrowly avoided? Having established the harms, warn the employee that drinking on the job is not acceptable. Suggest that the employee seek treatment if they have an alcohol problem. Direct the employee to available resources, such as an Employee Assistance Plan. Get the employee to sign that they agree never to drink at work again. Depending on how much damage the employee has done and how long the employee has been with the organization, the employer may need to provide several warnings to build a solid case for termination. If the employee really does have a problem with drinking at work though, the chance to terminate will come, without breaching the *Code*. As an added bonus, the employer also won’t need to pay any severance.

Keep in mind the following:

1. Alcohol addiction is a disability, protected under human rights law.
2. Zero tolerance is rarely acceptable, individual assessment is needed.
3. Build the case, documenting the harms and using written warnings.

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LATEST NEWS

[Daniel Lublin](#) discussed severance and employee rights in relation to the Target closures on his [CTV News](#) interview [here](#) and in [The Star](#)'s article [here](#).

On February 5th, [Daniel](#) appeared on [CTV Canada AM](#) to discuss the timely topic of employment rights with regards to snow days. Watch his interview [here](#).

Daniel continues to inform [Globe & Mail](#) readers as their Careers employment law expert. Review his articles and Q&As [here](#).

[David Whitten](#) discussed the Commons Board of Internal Economy's problematic new parliamentary harassment policy with [The Hill Times](#). Read the full article [here](#).

Read [David](#)'s legal opinion regarding contractor rights when a renovation company goes bankrupt in [The Star](#) [here](#).

The long awaited [Human Resources Professionals Association](#)'s 2015 Annual Conference took place January 21 - January 23 at the Metro Toronto Convention Centre, where [David](#) spoke about Employment Agreements. For more information, please visit [HRPA's website](#).

UPCOMING EVENTS

Coming up on February 26th, [David Whitten](#) will be a roster speaker at [The Commons Institute](#)'s [Advanced Sessions in Labour and Employment Law](#) program. He will be discussing the topic of Accommodating Mental Illness and Addiction in the Workplace. Find out more and register [here](#).

Ozlem Yucel will be presenting a webinar for the [HR Reporter](#) on February 24th, discussing the topic "The Ontario Employment Standards Act and the Ministry of Labour: What Employers Need to Know". Find out more and register [here](#).

Paul Macchione will be leading a presentation for the [HRPA](#) titled "Risky Business: Leading the Termination Process". Keep an eye on the [HRPA's calendar](#) for details to come.

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