

TATTOOS: NOT JUST FOR SAILORS AND STEVEDORES ANYMORE

Reconciling corporate image with employee personal expression is not a tension new to the workplace. In the 1970s, policies that restricted men from wearing their hair long and growing sideburns were the subject of legal challenge. Today, tattoos are at the forefront of this longstanding conflict.

For an employer two questions emerge: (1) Is it legally permissible to prohibit the display of tattoos in the workplace; and (2) If it is, should an employer do so?

Can an employer prohibit the display of tattoos in the workplace?

The scope of an employer's ability to implement a policy prohibiting the display of tattoos depends on whether the workplace is unionized.

In a **non-unionized workplace**, an employer has absolute discretion to implement a dress code of its choosing provided its terms do not violate human rights legislation. In Canada, freedom from discrimination on the basis of having a tattoo is not a protected ground under human rights legislation. That said, human rights could be implicated if the display of a tattoo is a legitimate expression of a protected characteristic. For example, in the Hindu religion marking the forehead is believed to enhance spiritual well-being and some Hindu women may tattoo dots around their chin or eyes to ward off evil. Even where a restriction on the display of tattoos is permitted, employers are well-advised to ensure the restriction is reasonable, clear and consistently applied. This is because when deciding a case of termination for cause, a court will almost always consider the following two factors: (1) Did the employer clearly communicate the standard of conduct employees were expected to meet; and (2) Was the employee treated fairly and consistently with all other employees in the workplace?

In a **unionized workplace** employer policy-making power is more scrutinized than it is in a non-union environment. However, similar to the non-unionized context, a policy restricting the display of tattoos must meet certain criteria, including that it be: (1) reasonable; (2) clear and unequivocal; and (3) consistently enforced.

The application of these criteria to a policy which prohibited the display of "large tattoos" was recently considered in *Ottawa Hospital v CUPE, Local 4000*, a case in which the arbitrator found the policy void and unenforceable. The hospital's argument was three-fold: First, the prohibition of "large tattoos" was *reasonable* because the display of tattoos would undermine patient care. The hospital served an older demographic who tended to attribute negative characteristics to people with tattoos. For these older patients receiving service from an employee with a tattoo could undermine the patient's confidence in the hospital at a time when the patient was already experiencing stress. Second, while the prohibition of "large tattoos" was not necessarily clear, this lack of clarity ought to be accepted because strict guidelines would necessitate the imposition of an arbitrary limit on the size of a tattoo. Third, while there may have been some *inconsistent enforcement* of the policy in the past, this ought to be forgiven in a workplace of thousands of employees and hundreds of supervisors.

The arbitrator found the policy void and unenforceable for two principal reasons: First, while he accepted the hospital's argument regarding the negative stereotype to which some patients may attribute a tattooed employee, he refused to conclude this had any impact on patient care. Second, although he acknowledged achieving clarity and consistency may be challenging, he refused to relax these requirements because otherwise employees might not know the standard they were required to meet, might be vulnerable to the subjective interpretations of individual supervisors, and could be at risk of being unfairly targeted for reasons other than their lack of adherence to the policy.

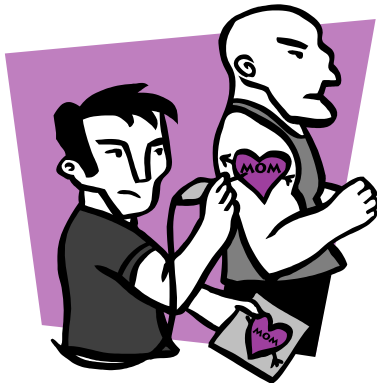
Is prohibiting the display of tattoos good corporate policy?

There is no single answer to this question. A “conservative” and “professional” image may be an asset to one business but a detriment to another. However, at a time when tattoos have become more mainstream, and there is less of a presumption that a tattoo reveals something negative about a person’s work ethic or character, many businesses are revisiting whether a policy prohibiting their display serves a necessary objective.

A recent example is Starbucks which, after receiving an employee-initiated online petition that collected 25,000 signatures, amended its policy to permit the display of tattoos provided they are not located on the face or throat and do not depict hateful messages or swear words. Starbucks explained the company’s decision by citing the importance of permitting “*our partners (employees) to be able to express their individuality more freely and show their tattoos*”. While laudable, it is also possible Starbucks understood that a policy viewed by employees as arbitrary or unnecessary is likely to negatively impact employee morale and retention.

Tips and best practices

In light of the foregoing, an employer considering implementing or revising a tattoo policy is encouraged to consider the following tips and best practices:



- **Be Critical:** Understand and critically evaluate the objective of the policy, and whether it outweighs the direct and indirect costs to the business.
- **Be Clear and Consistent:** Ensure the conduct prohibited is clearly identified, train supervisors and managers how to apply the policy, and conduct periodic audits to ensure the policy is enforced consistently.
- **Allow for Human Rights Accommodation:** Build in flexibility for the rare circumstance where the display of a tattoo is connected to a characteristic protected under human rights legislation.

To learn more and for assistance, contact any member of the Sherrard Kuzz team.

Leah Simon, Lawyer, Sherrard Kuzz LLP

Leah Simon is a lawyer with Sherrard Kuzz LLP, one of Canada’s leading employment and labour law firms, representing employers. Leah can be reached at 416.603.0700 (Main), 416.420.0738 (24 Hour) or by visiting www.sherrardkuzz.com.

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