

Tips for a Liability-Free Holiday Party

By former Associate Jack Blum

It's that time of year again, so your office administrative staff is likely planning your company's 2016 holiday party. While holiday parties are a great way to build morale and show appreciation for your employees, they can also present risks for employers. As any fan of Dunder-Mifflin's Party Planning Committee from *The Office* or the new movie *Office Christmas Party* knows, a holiday party can quickly go downhill for an employer that is not careful. With these tips, employers can avoid receiving a post-holiday party lump of coal in the form of legal liability.

Alcohol

The biggest concern for employers hosting holiday parties is employee alcohol consumption. While a strong batch of eggnog can make for a party to remember (or not...), employee overconsumption can lead to a bigger headache than even the strongest of post-holiday party hangovers. No employer wants its holiday season to be marred by potential legal liability if a drunk driving employee injures another person while driving home from the company party. An injury lawsuit arising out of such an incident would require a fact-intensive analysis of whether the employee was acting within the scope of employment while attending and returning home from the party, which would carry an uncertain outcome for the employer. Even if the employer won, it would likely also face a public relations nightmare and expensive legal fees.

The best way to avoid alcohol-related problems at a holiday party is to follow some or all of these commonsense suggestions:

1. Use drink tickets rather than an open bar to limit employee alcohol consumption.
2. Offer taxi or Uber credits, or a designated driver service, to dissuade employees from drinking and driving.
3. Ensure that bartenders are instructed not to overserve.
4. Close the bar well before the party ends.
5. Monitor employees who may have had one too many and encourage them to use alternative means of transportation.
6. Remind employees in writing before the party that, while alcohol will be served, they are still expected to behave professionally and that anyone who cannot safely drive home must secure alternative means of transportation.

If there is going to be an after-party at a bar or other establishment serving alcohol, employers would also be well-served to make clear that the event is not company-sponsored and avoid charging drinks at that after-party to company credit cards.

Sexual Harassment

As many might gather, this risk goes hand in hand with alcohol overconsumption. While the holiday party may seem like an informal setting, liaisons between employees that stem from holiday parties can be just as damaging as those occurring in the office. Aside from taking the above-listed steps to limit alcohol consumption, employers should also make sure to circulate and remind employees of their anti-harassment and reporting policies before the party. This will not only ensure that the issue is at the forefront of employees' minds, but will also support the employer's "*Faragher-Ellerth*" defense based on, among other things, an employer's use of reasonable care to prevent harassing behavior, if an incident does occur.

Wage and Hour Issues

One issue that is likely not in the forefront of most employers' party planning lists is whether employees must be paid for attending the holiday party. At first glance, many employers may see a holiday party as a non-work event, since employees are not performing their usual job duties. Under many state wage and

hour statutes, however, that may not be the case. If attendance at the holiday party is mandatory, then it is likely that employees have to be paid for the time they spend there. The same could be true if attendance is not mandatory but is strongly encouraged, either explicitly or implicitly. Other relevant factors could be whether the party takes place during working hours and on or off of the employer's premises. If an employer is planning not to pay non-exempt employees for holiday party attendance, the employer should make clear that attendance is optional and the party should ideally take place outside of working hours and the employer's office. Exempt employees cannot have their salaries docked for workday holiday party attendance, as doing so would threaten the employee's exempt status.

Discrimination

A careful reader may have noted that this blog uses the term "holiday" party, without including references to Christmas, Hanukkah, or any other seasonal religious holiday. Employers would be wise to follow that example. Title VII of the Civil Rights Act prohibits employers from discriminating against employees on the basis of religion. A holiday party with overt religious references provides an employee who believes that he or she has been the subject of religious discrimination with one more piece of evidence in support of such a claim. Even if the employee ultimately loses his or her discrimination case, this type of circumstantial evidence can cause an employee's claim to survive summary judgment or other early dismissal, potentially imposing higher litigation and settlement costs on the employer. Holiday parties present a risk of other types of discrimination as well. Employers should ensure that the party does not take place at a private establishment with discriminatory membership policies and should also be wary of facilities that are inaccessible to persons with disabilities.

While the description of these risks may have sounded like something one would hear from the Grinch or Ebenezer Scrooge, employers need not despair. If you follow the recommendations in this blog, holiday parties can still be a fun, morale-boosting event rather than a source of liability. Happy Holidays!