

TIPS TO AVOID END OF THE YEAR TROUBLES FOR A HAPPY NEW YEAR

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It's that time of year again - the end of the year holidays are right around the corner. For many employers, however, this time of year creates additional challenges. Scheduling becomes more difficult due to increased vacation requests, motivation may be low as employees would prefer to be spending more time with their families enjoying holiday festivities and the like, and employers must be vigilant about areas of potential liability that come but once a year. A little preparation now will help companies steer clear of end-of-the year pitfalls that, without care, could revisit them in the year to come.

Holiday Cheer

If your Company plans a holiday celebration, it should prepare for those employees and guests who may enjoy the party a little *too* much. Employers must manage (and prepare for) both employee safety and the risk of inappropriate behavior at holiday functions - especially when the celebration includes alcohol.

Obviously, one of the biggest concerns this time of year is that an employee or guest will become "over-served" and drive home while impaired. Alcohol-related accidents may expose an employer to liability for negligence or workers' compensation claims.

Additionally, holiday celebrations may create situations for unwelcome sexual advances, or other unlawful harassment that may lead to complaints under anti-discrimination laws, including sexual harassment.

The safest way to manage these risks is for an employer to choose not to serve alcohol at holiday parties. If the employer has made the decision to host a "dry" party, it should explain to employees that it also will not tolerate guests bringing their own alcoholic beverages to the event.

Many employers, however, do serve alcohol at company parties. Employers who do serve or choose to allow alcoholic drinks at holiday parties should

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consider taking the following steps to minimize exposure to alcohol-related incidents:

- Remind employees of your drug and alcohol policy and that the policy still applies to work-related social events, including the holiday party.
- Remind employees that your sexual harassment policies will also be in effect.
- Provide non-alcoholic beverages and plenty of food.
- To the extent possible, limit consumption of alcohol by placing restrictions on the type of beverages served (consider offering beer and wine only), the times alcoholic beverages are available, or the number of drinks served (by using drink tickets). You may also wish to consider having a cash bar.
- Hire trained professional and independent bartenders, and required ID from guests who may not be 21 years of age. NEVER allow managers or supervisors to act as bartenders.
- Select a few supervisors to keep an eye on the festivities to make sure that things do not get out of control.
- Arrange for alternative transportation, such as designated drivers, buses or cabs. If the party is off-site, arrange for transportation from the party back to the workplace.
- Consider the possibility of overnight accommodations after the party so that employees will not be drinking and driving.
- Stop serving alcohol before the party officially ends.

Many employers try to manage these risks by holding the party at an off-site location, like a restaurant or bar that has its own bartenders. While this provides *some* protection against liability for over-serving, employers will diminish that protection if they provide an open bar. Employers should still consider implementing the steps outlined above to decrease risks of liability.

Similarly, employers can be held responsible for sexual harassment (or other unlawful harassment) that occurs outside of work if it affects the work environment. Holiday festivities do not offer an excuse for violating a sexual harassment policy, either on or off premises, and alcohol-related harassment is not a defense from liability.

Religious Observance

Although the holiday season has become increasingly commercialized, it is still at its core a religious time of year for people of many faiths and employers often face requests for time-off from employees for religious observances. Such requests may be protected under Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. 2000e, et seq., which protects workers from, among other things, discrimination based on their religion. Title VII also requires the reasonable accommodation of employees' sincerely held religious beliefs, observances, and practices when requested, unless accommodation would impose an undue hardship on business operations.

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Although the determination of whether any given request poses an undue hardship is fact-specific, often isolated requests for a day off for religious reasons will not rise to the level of an undue burden and must be accommodated.

Thus, if an employee requests a day off in order to engage in a religious practice, or his/her faith prohibits work on a particular day, the Company likely has an obligation to accommodate the employee. Note, however, that the request must be based on a sincerely held religious belief. Employers must keep in mind that religious accommodation is not limited to “mainstream” religions or religions with which the Employer (or its supervisors) are familiar.

Employers should train supervisors appropriately to respond to such requests and to go to Human Resources with any questions.

Holiday Greetings

This is the season for holiday cards and holiday e-mails. Many companies (and individuals) have switched to sending electronic greeting cards as an environmentally friendly and cost-effective way to send holiday cards to clients, employees and friends. These are well-intentioned and tasteful communications wishing recipients the joys of the holiday season. In addition, at this time of year, e-mail jokes and attachments containing holiday-themed pictures abound. Many of these jokes and pictures are cute, however, many violate corporate sexual harassment and discrimination policies. Unfortunately, employees often confuse the two and unwittingly forward inappropriate or offensive e-mails to co-workers and friends. Employers should make sure employees are aware of company sexual harassment and discrimination policies, complaint reporting procedures and internet use policies.

Stocking Stuffers

In the past year, many companies have been forced to reduce their workforce and take other drastic cost-cutting measures. Consistent with the sacrifices made throughout the year, many employers are reducing, or eliminating, holiday bonuses this year. While, at first blush, this may seem to be a simple and effective method to reduce costs, employers must be cautious to trim only those bonuses to which employees are not already legally entitled.

For example, if the bonus is expected or required pursuant to a pay arrangement, contract or promise, then this is not a place where the employer may be at liberty to save. Bonuses which have already been earned or are otherwise contractually due to an employee have already “vested” to the employee and will be considered wages. Similarly, if the “holiday bonus” is really part of an incentive program that had been offered to employees for increased production, efficiency or hours, and the employees have met those goals, they likely have already earned the bonus and employers are not entitled to withhold it. Doing so may result in a wage claim at the Department of Labor, or in court.

Holiday Good Will

Good causes abound during the holiday season. Programs are set up to help underprivileged children have better holidays, and to help schools, the homeless, and food banks during this tough time of year. Often, solicitation for support of these programs are brought to the work place by well-meaning employees.

If your company has a blanket “non-solicitation” policy, and you look the other way during the holiday season, you may have a hard time later when you try to enforce your non-solicitation rule in other contexts (e.g. union organizing). If you have a non-solicitation policy, apply it uniformly, at all times of the year.

The Grinch Who Stole Christmas

Employees do not perform better simply because it’s December. As with any time of year, there may be compelling reasons to discipline or even discharge an employee during the holidays. Employers, however, should be particularly vigilant with any employment decisions to make sure they are defensible and justified and that any progressive discipline policies have been followed. If an employment decision is challenged, the plaintiff is guaranteed to garner sympathy if s/he was terminated right before Christmas.

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