

SMALL CUTS THIS HOLIDAY SEASON CAN LEAD TO BIG EXPOSURE FOR EMPLOYERS: TRAPS FOR THE UNWARY AND HOW TO MINIMIZE RISK

By: *Laurel Van Buskirk, Esq.*
Email: lvanbuskirk@devinemillimet.com
Phone: 603.695.8565

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The holiday season is a time of both joy and stress in many workplaces. This year, especially, employers and employees alike have had good reason to be anxious. Employers are trying to be frugal and keep costs down in the last weeks of the year. Employees want time with their families and friends, and holiday presents for their children. Unfortunately for Human Resources personnel, seemingly small actions taken during the last few weeks of the year can have long-term implications if not properly implemented. This year, many well-intentioned cost-cutting measures could result in additional costs in the year to come. Successful navigation of the season, however, doesn't require holiday magic. Instead, with some careful planning and forethought, employers can avoid making mistakes for a happier New Year.

Celebrating the Holidays at Home

This year, many companies have elected to celebrate the holidays at home. Instead of holding the company holiday-bash at a restaurant or function hall, many companies have decided to cut costs by holding the party at the office or in the home of an executive. While these functions can be as festive and fun as those held in public spaces, get-togethers on company premises or at the home of an owner or executive may expose the company to the risk of increased liability. Consequently, employers and human resource professionals must be vigilant to take steps to ensure a safe party for all.

As always, one of the main concerns at any holiday celebration should be those employees and guests who become "over-served."

Labor, Employment & Employee Benefits

Mark Broth, Chair
603.695.8558
mbroth@devinemillimet.com

Newton Kershaw
603.695.8571
nkershaw@devinemillimet.com

Patricia McGrath
603.695.8537
pmcgrath@devinemillimet.com

Anthony Augeri
978.475.9100
aaugeri@devinemillimet.com

Margaret O'Brien
603.695.8631
mobrien@devinemillimet.com

Anne Scheer
603.410.1708
ascheer@devinemillimet.com

Laurel Van Buskirk
603.695.8565
lvanbuskirk@devinemillimet.com

Anne Trevethick
603.695.8725
atrevethick@devinemillimet.com

DEVINEMILLIMET.COM

EMPLOYMENT@DEVINEMILLIMET.COM

Employers must manage (and prepare for) employee safety at holiday functions- especially when the celebration includes alcohol. Alcohol-related accidents may expose an employer to liability for negligence or workers' compensation claims. When companies choose to hold the party on-site or at an executive's house, rather than at a restaurant or bar, the company and/or the party-host have less legal protection in the event a guest or employee overindulges.

To manage these risks, some employers choose not to serve alcohol at on-premises 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. Employers who do serve or choose to allow alcoholic drinks at holiday parties should 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.
- Consider placing restrictions on the type of beverages served, 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 require ID from guests who may not be 21 years of age.
- Select a few supervisors (who are not drinking) 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.
- Stop serving alcohol before the party officially ends.

Employers should recognize that any company get-together can create situations for unwelcome sexual advances, or other unlawful harassment that may lead to complaints under anti-discrimination laws, including sexual harassment. 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.

Even employers who still plan to hold the party at an off-site location, like a restaurant or bar, should exercise caution. While this may provide some protection against liability for over-serving,

Office Locations:

111 Amherst Street
Manchester, NH 03101
T 603.669.1000
F 603.669.8547

300 Brickstone Square
Andover, MA 01810
T 978.475.9100
F 978.470.0618

43 North Main Street
Concord, NH 03301
T 603.226.1000
F 603.226.1001



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. In addition, the employer should consider arranging for transportation from the party back to the workplace. Employers can be held responsible for sexual harassment (or other unlawful harassment) that occurs off site if it affects the work environment.

Holiday Gifts

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 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.



The Grinch Who Stole Christmas

This year, the reality is that discretionary bonuses may be cut, or holiday parties or other holiday extras may be cancelled. Employers should be sensitive to the fact that employees often have expectations based on previous years and should manage those expectations accordingly. Human Resources personnel or management should give employees clear, advanced notice of changes to holiday traditions (including bonuses.) In the event employers have not already done so- at the very least- do not wait until the day before the holiday to tell employees that they will not be receiving bonuses. While this is not necessarily illegal, it is simply unfair and is guaranteed to ruin the festive mood.

Similarly, some employers are still struggling to make ends meet and may be looking to lay off employees. As with any time of year, this is a difficult decision for the employer and will be emotional for the employee. Employers, however, should be particularly vigilant with any employment decisions to make sure they are defensible and justified and that they have documented any selection criteria used to determine who to lay off. If an employee has been a poor performer, make sure 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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