

Tips for a litigation-free holiday season

The holiday season is traditionally a time for employers to show their appreciation for employees' hard work, celebrate with employees in the workplace, and demonstrate to employees and customers alike that they grasp the holiday spirit. 'Tis the season to be jolly, but only for those employers who heed these guidelines to successfully avoid legal pitfalls and potential litigation that can frequently arise during the holidays.

Restrict alcohol consumption and take measures to hinder employees from driving under the influence after holiday functions

We have all heard of the CEO who becomes a disco machine after three vodka martinis. Then there's the administrative assistant who drinks a few beers and details some of his supervisor's more personal quirks to everyone within earshot. It seems that most employers who host holiday parties involving alcohol have tales of employees who get a little too engrossed in the holiday spirit (or at least the eggnog).

However, a fun holiday celebration can quickly turn tragic if an intoxicated employee becomes ill from too much alcohol or gets behind the wheel and injures himself or others. While Illinois generally will not hold an employer legally responsible for its intoxicated employees' actions, many courts have held employers liable for accidents and injuries caused by over-served employees after company events. Employers also risk liability for enabling underage employees to consume alcohol at company-sponsored events.

Employers can take various measures to increase the safety of

employees during and after the holiday party. Providing a specific number of "drink tickets" to employees can help control the amount of alcohol each employee consumes. Employers can also manage employee alcohol consumption by instructing bartenders to check employees' identification to ensure they are old enough to drink, limit the number of drinks provided at each trip to the bar, decline to pour shots or exotic multiple-liquor drinks, and refuse to serve employees who appear intoxicated. Employers should provide ample food to go along with the drinks, and should think about terminating alcohol service at a certain time prior to the end of the party.

To prevent employees from feeling like they have no choice but to drive home, regardless of their lack of sobriety, employers should pre-

order a sufficient number of taxis, arrange a car service, and/or encourage sober drivers to step in to help their colleagues get home safely.

Obviously, the safest parties are those that do not involve alcohol. Employers committed to providing alcohol at holiday functions, however, must also commit to taking measures to ensure that their employees do not become a danger to themselves or others.

Reiterate that the company's code of conduct, discrimination, and harassment policies remain in full effect at the holiday party and afterwards

The holiday party is a great opportunity to foster working relationships and improve employee morale by allowing employees and
see HOLIDAYS page 28



James A. Spizzo is a partner in the employment law group at Vedder Price, Chicago. Jim is an experienced advocate representing management in EEO and traditional labor law matters, and is outside General Counsel to IMA. Vedder Price has been an IMA member for over fifty years. He can be reached at 312-609-7705 or by email at jspizzo@vedderprice.com.

Jenny Friedman Koerth is an attorney practicing with Vedder Price in the labor & employment law group. She is well-versed in employment law and litigation issues. She can be reached at 312-609-7786 or by email at jkoerth@vedderprice.com.

HOLIDAYS

Cont. from page 19

managers to unwind and interact outside of the workplace. Problems will arise, however, if an employee or manager engages in inappropriate conduct toward another employee.

Earlier this year, a home security company faced a \$1.7 million jury verdict and significant public ridicule after a female employee was among a group of employees publicly “spanked” by a real estate sign during a work function. The company admitted that the conduct had occurred, but alleged that the employee had been a willing participant. Nevertheless, the jury agreed with the employee that the conduct constituted sexual harassment and sexual battery.

The size of the jury award demonstrates how much judges and jurors are willing to punish companies who allow their employees to engage in inappropriate behavior at work or work-sponsored events, even if the recipient of the behavior seems to welcome it at the time.

Employers can take measures to prevent inappropriate holiday party behavior before it occurs. They can circulate memos to all employees in the days before the party, reminding them that the company’s zero-tolerance for workplace discrimination and harassment extends to work-sponsored events. Employers should specifically refer to or republish its code of conduct, as well as its policies pertaining to discrimination, harassment, and appropriate dress. If your organization lacks a comprehensive harassment policy, now is the time to establish one and ensure the availability of an affirmative defense to the Company in any harassment case arising at any time in the workplace. Managers should be instructed to pay close attention to behavior at the holiday party, and be prepared to take action if a situation appears to be getting out of hand.

Employers may also want to consider allowing employees to bring their significant others, spouses, and children to the holiday party. Employees are significantly more likely to keep their behavior in

check if their significant others and children are within earshot. The cost of the extra guests is far outweighed by the good will generated and litigation avoided.

Ensure that the company has adequate insurance to cover unforeseen events

Even the most perfectly planned parties cannot prevent all potential accidents or slip-and-falls. As a result, employers must make sure they will be sufficiently protected if Susan from accounting breaks her arm after slipping on a dropped piece of shrimp cocktail.

Employers should review their insurance policies for any alcohol-related exclusions, and purchase supplemental or “special event” insurance coverage if necessary. If the holiday

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party will occur off-work premises, employers can help avoid liability for damage to the property and/or injury to persons at the party by ensuring that the restaurant, banquet hall, or building hosting the party is adequately bonded and insured.

Employers can also find themselves liable for employee injuries under state workers’ compensation laws, which generally cover injuries “arising out or in the course of employment.” Indeed, some courts have interpreted these laws to include injuries that occur at employer-sponsored holiday parties, including injuries caused by employee intoxication.

The Illinois Workers’ Compensation Act generally excludes from coverage injuries that arise from employees’ participation in voluntary social events. The exclusion will not apply, however, if employees are required to attend the holiday party or are not clearly relieved of their work duties while attending the event. Indeed, absent clear communications and instructions, it is conceivable that some employees attending a holiday party, including otherwise exempt managers, would remain covered by the workers’ compensation statute during the event and possibly thereafter.

Respect and accommodate employee diversity

Employers must also be cognizant of the fact that their workforce likely encompasses a variety of different religions, beliefs, and cultures. Employers can demonstrate their appreciation for and sensitivity to employee diversity in a number of ways. Instead of focusing on Christmas or a specific December holiday, employers can acknowledge the entire holiday season. Indeed, a measure as small as renaming the annual “Christmas” party the annual “holiday” party can do wonders for making employees who do not observe Christmas still feel like a part of the celebration. Employers who choose to decorate the workplace with Christmas-related decorations can also embrace employees who do not celebrate the holiday by incorporating Hanukkah, Kwanzaa, and other seasonal displays.

Employers also must realize that some employees might not want to engage in holiday-related activities at all, either by choice or because their individual religious beliefs prohibit it. Indeed, given generally pervasive cultural pressures during the holiday season, the Company should be vigilant against harassment directed towards non-Christian employees. Do not leave unanswered that unfunny, intra-office memo which could say, “Christmas party tomorrow, all invited except for Ali and Abraham.” Conversely, some employers have had to learn the hard way that requiring employees to participate in religious or

see **HOLIDAYS** page 29

HOLIDAYS

Cont. from page 28

Christmas-related holidays can subject them to liability for religious discrimination.

In *Velez-Sotomayor v. Progreso Cash and Carry, Inc.*, 279 F. Supp. 2d 65 (D.P.R. 2003), for example, a practicing Jehovah's Witness brought suit after her employer terminated her for refusing to wear a Santa hat during her work shift. The Court determined that the employee had a legitimate basis for declining to wear the hat, and refused to dismiss the case. Likewise, in *Kentucky Comm'n on Human Rights v. Lesco Manuf.*, 736 S.W. 2d 361 (Ky.App.1987), the Kentucky Court of Appeals held that an employer who required its practicing Jehovah's Witness employee to answer phone by saying, "Merry Christmas," engaged in discrimination because her religion specifically prohibited her from acknowledging the holiday.

Employers need not ignore the holidays completely for fear of

offending a few employees. However, employers should be receptive to employees' individual beliefs, and respect any requests not to take part in holiday-related practices or events.

Remember that certain employee holiday gifts count toward employee wages

The IRS does not treat all gifts to employees equally. For instance, an employer who provides a small holiday turkey or ham to its employees does not need to include the de minimis gift in their employees' year end stated income as extra salary or wages. However, the employer who gives its employees a gift certificate or coupon to purchase a pumpkin pie to go along with a sizable turkey or ham, must include the value.

Employers unsure about whether or not their holiday gifts to employees count as taxable income should consult with a tax professional [or call the IRS hotline] to ensure the Company remains in compliance with all applicable guidelines. ■