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Company Holiday Party Catastrophes: Practical Guidance for Planning Parties That Won't Get You Sued

by Brandon Sylvia, Partner, Rutan & Tucker

For many employees, the company holiday party is one of the most eagerly-anticipated events of the year. From an employer's perspective, these events combine a year's worth of simmering workplace tensions with the liberating effects of alcohol, to unpredictable and occasionally disastrous results.

For every reason to host a holiday party there are numerous stories of the company's well-meaning efforts going awry, sometimes catastrophically. While the *idea* of a holiday party is appealing, in reality, some employees interpret the annual invitation to "let their guard down" in stunningly inappropriate ways that can seriously impact the company. Case in point: the vice-president who confused "letting his guard down" with letting his *pants* down on the dance floor at the company holiday party, leading to a lawsuit and public ignominy for himself and his soon-to-be-former employer.[1]

This article identifies the potential downsides to throwing holiday-themed parties. The Scrooge-like cynicism you may detect is not without foundation; it is informed by years of defending harassment and discrimination lawsuits, and is buttressed by examples of hard-lessons learned by others. For companies wishing to host a holiday party in spite of the cautionary tales that follow (hopefully, all of you), we recommend measures designed to minimize potential liability.

The Catastrophe: Alcohol Overconsumption

It should be of little surprise that the primary catalyst for company party mayhem is the consumption of alcohol. Even a well-meaning, mild-mannered employee might indulge in an inappropriate joke or comment after a few drinks. As courts have made clear, employers are not protected by "social host" immunity laws. Thus, even if the party ends without incident, employers can *still* be liable for harm caused afterwards.

Years ago, a Southern California employer learned firsthand the consequences of sponsoring unbridled drinking. In that instance, a San Diego Hooters restaurant decided to throw a holiday party at a local hotel.[2] In the words of the court, "[t]he behavior of some of the Hooters employees and their guests was not exemplary...There was heavy alcohol consumption, underage drinking and drug use." Although Hooters had provided a bar where invitees could purchase drinks, many employees supplied their own drinks by mixing them in their hotel rooms and bringing them into the party. The hotel staff noticed, and informed a Hooters manager. The manager's sage advice to the employees was to better conceal their contraband.

In a turn of events, anyone could have predicted, the party got out of hand. Specifically, there was a confrontation with a party guest and a number of Hooters employees. The fracas soon escalated into a no-holds-barred street fight, complete with head butts and knees to the groin – 'tis the season, indeed. A hotel security guard sustained serious injuries in the altercation, sued Hooters, and was eventually awarded more than $800,000 in damages.

In another case, an employer learned that the consequences of allowing its employees to become intoxicated were far-reaching.[3] The company's annual party was meant as a

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"thank you" for all employees, and the employer graciously served alcohol to those in attendance. One employee drank heavily during the party – including repeatedly draining a flask he brought for himself – then safely caught a ride home with a few coworkers. About 20 minutes later, however, the employee decided to leave his house and attempt to drive one of his co-workers to their home. En route, he caused a fatal car crash. The employer was sued, and sought to dismiss the case; but, this request was denied. As the court explained, by allowing the employee to get drunk at a company-sponsored event, the employer could properly be viewed as the cause of the harm flowing from his intoxicated state – even harm occurring *after* the employee safely made it home.

Recommendations

Alcohol consumption is not foremost on our list of "humbugs" by accident; it is probably the most sensitive issue an employer must consider in planning a holiday party. Of course, employers can always opt to have a Prohibition-style, nonalcoholic gathering (without the bathtub gin). Short of a completely dry party, there are a number of steps that employers can take to minimize liability, including:

▶ **Limit Consumption**

Limiting the amount of alcohol consumed is key. Having an all-cash bar staffed with a professional bartender will promote moderation, and cutting off the flow of alcohol well before the party ends can help prevent impaired driving. Providing guests with a limited number of redeemable "drink tickets" can also limit consumption, although these will almost certainly be bartered between employees like prison cigarettes. Employers should also consider limiting the type of alcohol available – *i.e.*, beer and wine only – and should make plenty of nonalcoholic available. And, providing plenty of food can help mitigate the effect of the drinks.

▶ **Provide an Alternative to Driving**

Employers should also provide ample opportunity for employees to avoid drunk driving. An employer might opt to provide for company-paid taxis to ensure a safe trip home for any employees who drink at the holiday party, or offer door prizes to employees who volunteer as designated drivers.

▶ **Invite Deterrents**

Consider opening the party invitation up to non-employees. Sometimes, something as simple as the presence of a spouse or significant other can help employees keep their behavior – and their drinking – under control.

▶ **Be Proactive**

Finally, holiday party hosts should be on the prowl for any revelers who have overindulged, and take whatever steps are appropriate, including ensuring that no further alcohol is consumed by such employees and arranging for transportation. Companies can also deploy a high-level management employee at the exit to wish everyone goodnight and monitor for tipsy partygoers.

The Catastrophe: Entertainment Options

The choice of entertainment can also be a fertile area of liability for the unwary employer. For example, one employer learned the seemingly obvious lesson that it is not appropriate to hire a stripper to perform at the office holiday party.[4] The stripper in this case was male, because the company was mostly (though not entirely) comprised of female employees. When the show began, Henry Lahey – the company's only male employee – promptly left the party. However, days later poor Mr. Lahey was still unable to fully escape the gyrating, scantily-clad Santa, since photos of the stripper had been posted throughout the office. This cheery incident formed the basis of a Title VII gender discrimination lawsuit.

Another employer hosted a holiday skit where Santa's helpers were portrayed by white children with their faces painted black. Unsurprisingly, the racial stereotypes inherent in the use of the "blackface" characters were not lost on the plaintiff, who was one of the company's few African-American employees. He promptly brought a discrimination suit against his employer.[5]

Recommendations

Aside from avoiding strip shows and arguably racist skits, employers should use common sense. If a particular act or show would be inappropriate for a breakfast meeting, it should probably be avoided. If in doubt, don't do it.

The Catastrophe: Gift Giving

"Secret Santa" or "White Elephant" gift exchange programs can often be a source of hilarity and banter at a holiday party. They can also form the basis of embarrassing litigation. Oftentimes, an attempt at humor in a gift exchange looks much less funny to a jury.

For example, one plaintiff attempted to construe her boss's gift – red lacy panties – as part of an ongoing pattern of his sexual harassment.[6] Although the court disagreed with that particular plaintiff, other cases have turned out differently. Another court viewed a sexually-charged holiday gift exchange – where gifts included panties, shirts with sexually suggestive slogans, and a box of condoms – as direct evidence of sexual harassment.[7] In yet another case, the court refused to dismiss plaintiff's sexual harassment claim where plaintiff presented evidence that her supervisor organized a sexually-themed holiday gift exchange where gifts included G-strings, cards depicting men and women dressed in their underwear, condoms, whips, and a penis-shaped Eskimo.[8] Plenty of creativity here, but no common sense.

Other issues can arise if the employer provides gifts to its workers. Depending on the value of the gift conferred, the employer might be required by the IRS to count the gift as wages to the employee. In other words, if you give an employee too nice a box of See's Candies, the government will want at least a raspberry truffle. Employers should check with counsel to determine the threshold on gifts.

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Recommendations

Employees should have the *option* of participating in a gift exchange. If enough employees are interested, the employer should implement some simple rules governing the gift exchange – particularly, a restriction on gifts involving inappropriate subject matter. Gag gifts can be great fun, but such presents should steer clear of protected categories – gender, race, religion, etc. Employees ought to be reminded – in a not-too-heavy-handed way, of course – that the Company's policies prohibiting harassment still apply at holiday events.

The Catastrophe: Holiday Decorations

As incredible as it sounds, even something as innocuous as holiday decor has formed the basis of lawsuits. For example, one company's holiday party table decorations were used as evidence of a sexually hostile workplace.[9] (The objectionable decorations consisted of bare-breasted mermaid figurines – an interesting take on the holiday season.)

Other employers find trouble with over-zealous attempts to celebrate the season. For example, one overeager employer demonstrated the Christmas spirit by suspending an employee who refused to wear a Santa hat while at work.[10] The employee's refusal was not merely due to workplace fashion concerns; as a practicing Jehovah's Witness, the employee asserted that her religious beliefs precluded her from celebrating Christmas. The court refused to dismiss the employee's case, and held that she stated a valid basis for recovery. In another case, an equally-enthusiastic employer mandated that each of its employees answer the phone with a "Merry Christmas" greeting.[11] When an employee explained that she could not do so without compromising her religious beliefs (again, a Jehovah's Witness), she was fired. She sued, and her employer was found liable for religious discrimination.

Recommendations

Companies must realize that one person's Christmas season is another's Hanukkah, yet another's Kwanzaa, yet another's Festivus, and is simply December to others. As such, employers should attempt to keep the company's celebratory spirit secular. The U.S. Supreme Court has held that wreaths, Christmas trees, lights, Santa Claus, and reindeer are "secular" symbols, which ought to make them fair ground for your workplace.[12] And, if an employer decides to tolerate a Santa hat or manger scene, it must also tolerate displays of menorahs and kinara candles.

Conclusion

Hosting a company holiday party can be a workplace disaster waiting to happen. As the holiday party horror stories above make clear, there is no end to the innovative and unique ways in which employees will ensure that the new year brings with it the promise of litigation. The only way to guarantee that no liability arises from a company holiday party is to not hold one. That, however, may be too Grinch-like for many employers.

For those whose hearts are not two sizes too small, there are ways to at least limit the potential for legal exposure. Employers should be sure to appropriately communicate (and *document* the communication) that the business's standards of conduct – including the policy against harassment – remain in effect, even during the party. Additionally, by careful planning – and spending a few minutes conversing with legal counsel – employers can curtail the possibility that the company could be deemed liable for wrongdoing occurring during or after the event. A successful and enjoyable party can bolster employee morale and stockpile goodwill that lasts long into the new year. But, if someone gets sloshed on eggnog and starts streaking through the office, don't say you weren't warned.

1 *Rogers v. Carmike Cinemas*, 211 Ga. App. 427, 428 (1993).
2 *Johnson v. Hooters of America, Inc.*, 2004 Cal. App. Unpub. LEXIS 6355 (2004).
3 *Purton v. Marriott Int'l., Inc.*, 218 Cal. App. 4th 499, 513 (2013).
4 *Lahey v. JM Mortg. Servs.*, 2000 U.S. Dist. LEXIS 5221 (N.D. Ill. 2000).
5 *Pickens v. Shell Technology Ventures Inc.*, 118 Fed. Appx. 842, 850 (5th Cir. 2004).
6 *Babcock v. Frank*, 783 F. Supp. 800, 806–07 (S.D.N.Y. 1992).
7 *Showalter v. Allison Reed Group, Inc.*, 767 F. Supp 1205, 1208 (D.R.I. 1991).
8 *Rosa Angela Gonzalez-Santos v. Angel G. Torres-Maldonado, et al.*, 839 F. Supp. 2d 488,498 (D.P.R. 2012).
9 *Jones v. Flagship Int'l*, 793 F.2d 714, 716–17 (5th Cir. 1986).
10 *Velez-Sotomayor v. Progreso Cash and Carry, Inc.*, 279 F. Supp. 2d 65 (D.P.R. 2003).
11 *Kentucky Comm'n on Human Rights v. Lesco Manuf.*, 736 S.W. 2d 361 (Ky. App. 1987).
12 *County of Allegheny v. ACLU*, 492 U.S. 573 (1989).