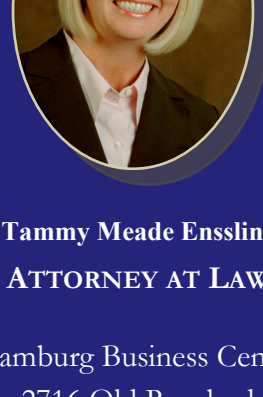


November 29, 2012



**Top Employers
Know When
To Seek Counsel**



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Office Parties: Celebrate the Season Without Getting Sued!

It's that time of year! 'Tis the season for toasts and traditions, presents and parties, secret Santa's and sexual harassment, lawyers and lawsuits. . . Wait, what? Unfortunately, it's true. Santa is not the only one looking to see who's been naughty or nice this year. As much as we all love a good party, they create increased risks of liability for employers. Common issues involve worker's compensation claims, sexual harassment complaints, and social host liability. While employers should take these risks into consideration, don't cancel the party just yet! There are some simple ways for employers to minimize their risks. Without question, planning ahead and limiting alcohol consumption are two key ways to celebrate the season—without getting sued.

As you might expect, the most common liability issues arise from serving alcohol at the office party. While this is the season to be "merry and bright," the overuse of alcohol frequently leads to a host of potential legal headaches for the unprepared employer. According to Tammy Meade Ensslin, a lawyer who advises and represents employers on these issues, "alcohol-related issues make up the majority of the claims that I see from holiday parties. The types of claims generally stem from the misdeeds of intoxicated employees and are pursued under a number of legal avenues such as workers' compensation laws, sexual harassment laws, premise owner liability, and general negligence."

Questions for employers to consider include:

1. Can our company be held responsible for automobile accidents caused by intoxicated employees on their way home?
2. Are injuries to intoxicated employees at the holiday party covered under Kentucky's worker's compensation laws?
3. Can our company be held liable for inappropriate behavior, including claims of sexual harassment, even when the party is held after work hours?

Unfortunately, the correct answers to these questions depend on a number of factors. The liability determination is often fact intensive and may differ from situation to situation. Ms. Ensslin also reports that the laws on these issues vary widely by state. Therefore, for multi-state employers, they should seek legal advice to learn what laws and ordinances apply to their particular business location. By way of example, some states impose liability on social hosts for over serving alcohol to guests who then cause injuries to themselves or others while other states impose no liability at all.

Social host liability is based on the concept that, under certain circumstances, a party host serving alcohol should be responsible for the acts of intoxicated guests. On the bright side, Kentucky is one of 18 states that do not impose social host liability unless alcohol is served or provided to a minor. And, by Kentucky statute, the General Assembly has tied liability to those who consume, sell or serve alcohol instead of the casual social host. Thus, unless your company is in the business of selling alcohol, or serves alcohol to a minor, you might be protected from liability at least under a social host theory. Despite that, Ms. Ensslin is quick to point out that there are other potential theories that could result in liability for the employer so proceed with caution when serving alcohol.

A big area of concern for employers, when alcohol is involved, is the potential liability for injuries to nonemployees. Ms. Ensslin has seen claims against employers made by third parties injured by the organization's intoxicated employee on the theory of "respondeat superior." Under this legal theory, an employer may be liable for its employee's actions if they were committed within the course and scope of employment. Therefore, employers should carefully consider this when deciding where to host the company party, whether attendance is mandatory, whether the party will be held during normal work hours, will company vehicles be used, whether alcohol will be served, and if so, who will be serving the drinks. Ms. Ensslin states that she typically advises clients to make attendance at holiday parties entirely voluntary, host the parties after work hours, choose a venue that is off the organization's property, and have trained servers who are not employees of the company. She also states that "it's generally a good idea to have a cash bar so that employees are purchasing their own drinks. If the employer is offering complimentary drinks, then provide a limited number of drink tickets so that alcohol consumption, paid for by the company, is restricted."

While the "respondeat superior" legal theory deals with liability to third parties, employers should also remember potential claims for injuries to their own employees. Employee claims are generally covered by both state and federal laws. There are some defenses to these claims depending on the factual circumstances. As it relates to intoxicated employees, under Kentucky's worker's compensation laws, injuries caused by voluntary intoxication are not compensable under the worker's compensation statutes. Accordingly, employers may be able to defend such claims if they can prove that the employee was intoxicated and that was the primary cause of the injury. However, the burden is on the employer to establish the evidence of intoxication. Additionally, there is some case law in Kentucky that allows employers to defend worker's compensation claims for injuries occurring at employer-sponsored recreational events on grounds that they were not work related if the event is purely voluntary and held off campus.

Lastly, no matter how well planned, office parties tend to encourage employees to behave in ways that they normally would not when at work. In fact, the Seventh Circuit Court of Appeals, in Place v. Abbott Laboratories, 215 F.3d 803 (7th Cir. 2001), even noted in their opinion that, "office Christmas parties seem to be fertile ground for unwanted sexual overtures that lead to Title VII complaints." The court went on to cite approximately 20 cases where employees complained of harassment occurring at employer-sponsored parties. These cases highlight the potential problems associated with alcohol consumption at employer-sponsored events. And, this brings me to the issue of the employer's anti-harassment policies and whether liability can rest with the employer for misdeeds occurring at social events. Unfortunately, despite an employer's best efforts to train employees, someone is bound to forget – unless reminded – that the company's anti-harassment policies generally apply equally to office parties and to non-employees. Mixing and mingling, with a little too much of one's favorite holiday "spirit," often leads to employees crossing the line in the name of "holiday fun." Therefore, employers should remind employees of the company's anti-harassment and reporting policies especially at this time of the year. Let employees know that the policies apply to company events outside of the office and to social events in the office. Remind supervisors that conduct at employer sponsored parties can result in claims of sexual harassment against the employer and in some instances, the supervisor.

Importantly, remember that celebrating the season in the workplace doesn't *require* certain holiday traditions, particularly those that could contribute to a harassing environment. For example, hanging mistletoe typically lends itself to someone being "naughty" in the name of holiday cheer. And, having a supervisor dress up as Santa and inviting employees to sit on his or her lap is never a good idea. It's only funny until the summons is served. A sexual harassment lawsuit is probably not found on any employer's wish list this year.

So, while there are defenses to some of these claims and regardless of actual liability, employers should remember that they remain a tempting legal target and are considered the "deep pocket" when damages are sought. Once a lawsuit is filed, the employer will be faced with significant monetary expenses in defending the claims even if they are eventually dismissed for lack of liability. Therefore, if employees can skip or minimize the alcohol at office parties, then they can greatly reduce their risks of liability.

If alcohol will be served, here are the TOP TEN ways that employers can keep their names off the "naughty list" this year:

1. Make attendance at the company holiday party voluntary. If formal invitations are provided to employees, note on the invitation that attendance is optional.
2. Schedule the party after normal working hours and avoid discussing business at the party.
3. Hire bartenders and restrict drinks. If you have an open bar, let only professional bartenders serve (and control) the alcoholic drinks. Never let an owner or supervisor pour or mix drinks. If complimentary drinks are provided, consider drink tickets to limit alcohol consumption. When possible, a cash bar is recommended so that employees are purchasing their own drinks. Make sure no minors are served.
4. Any employee who is intoxicated should be cut off from further alcohol service and provided with a ride home. Inform employees in advance that they will not be allowed to drive if they appear intoxicated.
5. Host the party off the company premises. Suggested locations include a restaurant, bar or other venue open to other patrons during the party. Avoid hosting the party at a private residence.
6. Make alternative transportation available for any employee who needs or wants it. Consider paying for taxis or a shuttle service. Make the offer in advance so that employees can plan ahead. Announce during the party that transportation is available, even for employees who did not make an advance request.
7. Invite employees' spouses/partners and families as well as clients and business partners to the party. Their presence will (hopefully) encourage appropriate behavior.
8. Consider implementing a dress code that maintains a professional environment. There is nothing wrong with a "business casual" holiday party. Santa hats are optional, but the sequined miniskirt and faux leather pants should stay at home. Santa suits where employees are asked to sit on supervisors laps are never a good idea. Avoid mistletoe.
9. Discourage informal "after parties" and alert supervisors to the perils that could result from said parties.
10. Discourage dirty Santa parties or similar gag gift exchanges. They provide fertile ground for inappropriate gifts and potential claims for harassment. [See the Kentucky case of Parker v. Pediatric Acute Care, PSC, 2008 WL 746677, that involved a lawsuit filed by an employee who received a gift card, at the annual Christmas party, to an adult store that sold lingerie, adult sex toys, and sexual movies. In that instance, the Court found that this one-time incident was not so severe and pervasive to amount to a sexually hostile work environment.]

Although there is no way to completely eliminate the risks that come with hosting an office party, implementing some or all the above suggestions should greatly reduce your liability and, more importantly, ensure that you and your employees enjoy a safe and happy party.

For additional information on Employment or Labor Law issues,

please contact TAMMY MEADE ENSSLIN at 859-963-9049.

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