

Human Resources BRIEF



'Twas the Lawsuit After Christmas



• November 2021 •

As employers begin to slowly creep back to some sense of normalcy in the workplace, company gatherings, both virtual and in-person, are increasingly being explored as a way to bring employees together again and create a more connected workforce. Historically, the holidays were always a time for parties and celebration for employers, even if there were clear compliance best practices that needed to be assessed. Today, with the combination of both in-person and virtual events, preparing for holiday revelry at work has never been more complicated.

This compliance brief is intended to provide employers with a clearer understanding of the compliance concerns that holiday parties can create in today's environment and ways to minimize those risks, whether they be virtual or in-person. For some organizations the risks of hosting an event are simply too great and they are spending the holiday event budget by providing employees with holiday bonuses or gift cards instead. For some organizations this may be the right choice, but for most organizations good communication and following best practices will make for a return to a memorable and compliant holiday event.

In-Person Events

We all remember the good 'ol days of end of year holiday parties where everyone gathered in the office or at an event venue to exchange gifts and have a few glasses of spiked egg nog to celebrate the holiday season. Now that some employers are starting to reinstitute in-person events again, its time for a refresher on the obvious compliance and safety pitfalls of in-person gatherings as well as the best practices to avoid a disaster.

Sexual Harassment

Anytime employees and alcohol are mixed, there is a chance for unintended negative consequences. Sexual harassment is the most common compliance concern that arises during holiday events. Employers should already be conducting sexual harassment training annually and there is no better time to do it then right before the holidays. It allows annual training

obligations to be met as well as incorporating a clear reminder to employees about how to conduct themselves at holiday gatherings in the coming weeks. Training should be for the entire workforce, both supervisors and non-supervisors, to make sure everyone understands company policies and expectations but also allows the employer to target specific expectations at holiday events. Company training necessarily includes targeting employees but employers cannot forget that employee guests are often invited to these types of events, and they can also create liability through inappropriate conduct. Consequently, employers should make sure to include reference to employee guests in any training that occurs with employees.

As part of the training, set clear expectations for what rules need to be followed to avoid compromising situations at the event. Make sure that employees understand the dress code for the event and what level of professional dress is expected. Organizational leadership needs to lead by example both in the areas of dress as well as general decorum. There is no quicker way for a gathering to devolve into chaos than if the organizational leadership breaks the rules, thereby inadvertently communicating to all other employees that non-compliant inappropriate behavior is acceptable. The legal standard for supervisory harassment is much more dangerous for employers and leaves many employers with little to no defense for sexual harassment claims involving supervisory employees.

Although timely training is certainly a best practice, employers also need to use common sense to avoid compromising situations, especially when alcohol is involved. Let's not hang mistletoe around the room. Let's not put a dance floor out there for intoxicated employees to be in close contact with each other. Let's not have any adults sitting on Santa's lap at the event. These precautions seem innocuous, but they create dangerous compliance situations for employers that are not necessary to have a good time.

Be Inclusive of All Employees

There are several holidays in November and December that are celebrated by employees of all races and religions. To try and avoid claims of racial and religious discrimination during this time, employers should not include true religious symbolism or practices for any specific religion during holiday events. If an employer wants to create a greater holiday feel for the event while avoiding clear religious overtones, secular symbols such as Santa Claus, menorahs and Christmas trees are generally recommended. Utilizing those secular symbols doesn't guarantee compliance, but courts have generally been kind to inclusive holiday gatherings that include a diverse assortment of secular decorations.

Creating an inclusive environment should make attendance at a holiday gathering more welcoming to a greater number of employees in the organization, but mandatory attendance is a clear compliance risk. Employees required to attend any event generally should be paid for their attendance, thus creating wage and hour concerns. Voluntary holiday events in which

no work is performed are not considered compensable time thereby eliminating the wage and hour concerns for employers.

Safety First

The greatest culprit to disastrous holiday events is alcohol. The first question an employer needs to ask when planning a holiday event is whether to serve alcohol or not. If the decision is to serve alcohol, there are numerous ways to minimize the potential for liability associated with having alcohol at an organizational event.

When: Holding the event on a weekday and/or during the day rather than on a weekend and/or at night carries less risk. Many employers have holiday lunch events during the workday which minimizes the desire to drink alcohol and engage in raucous partying that can lead to compliance problems.

Where: Other than insurance concerns, having an event at the office rather than at a third-party venue generally carries slightly less risk. Employees tend to maintain greater decorum in the office for events than if they are at a third-party venue offsite. It is also important to assess whether an in-person event should be held indoors or outdoors as a result of the local rules and circumstances surrounding COVID.

Drink Service: Hiring a bartender to monitor alcohol consumption provides some risk mitigation against employees overindulging in a self-service environment. Another risk mitigation strategy is to provide employees with a limited amount of drink tickets that must be presented to the bartender in order to receive a drink. Although some may feel it is draconian, the employer can also tab certain employees to monitor overall alcohol consumption during the event to determine if any employees are getting intoxicated.

Drink Types: Many employers remove hard liquor from the bar completely and only serve beer and wine. It is also recommended to offer non-alcoholic mocktails for those employees that either do not want alcohol or want a non-alcoholic drink during the night between alcoholic drinks to slow down their consumption of alcohol. Food and snacks should be plentiful throughout the night so that employees are not drinking on an empty stomach.

COVID: Employers should assess mask mandates, vaccine requirements and social distancing rules that might either be required in certain jurisdictions or that might be a best practice.

Transportation: With the rise of ride-share services such as Uber and Lyft, some employers have made the decision to budget for free rides to and from the event for employees to avoid potential situations where employees are driving under the influence. Even if the employer is not paying for the service, employees should be

encouraged to utilize these services or a designated driver for transportation to and from the event.

Virtual Events



Most HR professionals are adept at assessing risk at in-person events due to years of experience and training. Even the most seasoned HR professional, however, doesn't have a long history of risk assessment for virtual events. Although many of the issues are similar, there are some differences that must be explored.

Inappropriate religious symbols and/or sexual images can find their way onto employee's screens either through artificial backgrounds or in the actual background of the person's home office. In one example, an employee had pictures of scantily clad women in Santa costumes behind his desk in his home office that were readily visible to anyone on the video conference.

Chat rooms during a virtual event can be used for sidebar conversations that can lead to claims of sexual harassment, especially if employees become intoxicated. In one example, a side chat was utilized to rate the attractiveness of other employees on the video conference during the event.

As always, alcohol can play a negative role in the enjoyment of the event for employees and lead to liability for employers. Virtual events are notorious for employees engaging in pre-party festivities so that they log on to the event already intoxicated. This can lead to inappropriate comments and careless camera shots like taking the camera to the bathroom or broadcasting inappropriate visuals to the group. To minimize risk, someone at the event should have the ability to mute and/or disable specific features of individual employees if poor behavior is exhibited.

Conclusion

Holiday parties have always been a compliance headache for HR professionals. It is a balancing act between allowing employees to unwind and have fun, while doing so in a safe and compliant environment. The addition of virtual and hybrid events has only complicated an already difficult endeavor. If the intent is to move forward with an event, planning and training are necessary to minimize risk. Factoring in the foregoing best practices when conducting risk assessment and mitigation can make all the difference between creating a memorable holiday experience for your employees or receiving an ugly lump of coal in your stocking the morning after the event. **Happy holidays!**