

Questions—And Answers

Keeping the Company Holiday Party Holly and Jolly for All

Kevin J. Smith and Rachel J. Tischler

The “most wonderful time of the year” is often one of employers’—and employers’ lawyers’—least favorite, chiefly due to the stress and worry that the annual holiday party brings. Managing employee personalities and office interactions can be a challenge during the rest of the year, but adding alcohol and good cheer can easily compound those concerns. Before employees can deck the halls with boughs of discrimination lawsuits, employers should review some of the basics. The employer’s duty to provide a working environment free from harassment or hostility does not end just because the party takes place after working hours and/or outside the office setting; it extends to company-sponsored parties in *or* out of the office. This Q&A addresses questions and provides answers to help keep employer-sponsored holiday parties fun for all—even HR.

CAN EMPLOYEES BE REQUIRED TO ATTEND THE HOLIDAY PARTY?

Yes, but employers may then need to pay for their attendance. If a nonexempt employee—that is, an employee otherwise entitled to overtime premium pay—is required to attend, then the person must be paid for the time he or she spends at the holiday party. Moreover, if that same employee is nonexempt, and the amount of time he or she spends at the holiday party increases his or her total hours worked for the week over 40, then the employee becomes entitled to an overtime premium payment—generally one and one-half times that employee’s regular rate of pay. Accordingly, to the extent attendance is required, employers should publish the hours of the party and enforce them as they would any other shift. It may also be wise to consider scheduling

the party during the regular workday when employees are already being compensated. Note that the obligation to pay employees for attendance at a holiday party applies only to nonexempt employees who are not otherwise scheduled to work. Exempt employees do not need to be paid additionally if they attend the holiday party.

If holiday party attendance is completely voluntary, then employers do not have to compensate employees for attending. With that said, under the Fair Labor Standards Act (FLSA), employees of for-profit businesses may not volunteer their services to their employers.¹ This means that nonexempt, hourly employees who are asked to plan a holiday party or to work during the event must be paid, even if the request to do the work indicated it would be voluntary. It is important to keep this in mind before asking employees to chaperone, manage the sign-in desk, or clean up after the holiday party.

A gray area exists when party attendance is neither mandatory nor entirely voluntary. Generally, if the employee is led to believe that his or her present working conditions or the continuation of employment would be adversely affected by nonattendance, then attendance may constitute compensable "work."² To avoid ambiguity, it is best to make the holiday party attendance entirely voluntary and to communicate that message to employees. Leaving the invitation open to interpretation may cause employees to feel compelled to attend or volunteer even if they would not want to otherwise.

SHOULD EMPLOYERS REIMBURSE TRAVEL EXPENSES TO OR FROM AN OUT-OF-OFFICE HOLIDAY PARTY?

In the interest of maintaining employee safety, employers may want to consider arranging for or covering the cost of transportation to and from off-site holiday parties. Particularly with respect to travel home after the festivities wind down, employers should offer to cover the cost of taxis or other transportation to eliminate employees' need to drive themselves home. (This concern is addressed in more detail below.) And keeping in mind that, generally, travel time is not compensable as work time, if the travel intervenes with the employee's regular workday, it may be considered compensable even if it is travel to a holiday party, especially if the party is taking place during an hourly, nonexempt employee's regularly scheduled work shift.³

CAN AN EMPLOYER BE LIABLE FOR AN EMPLOYEE'S CONDUCT DURING A HOLIDAY PARTY?

Employers' chief concern at holiday parties tends to be sexual discrimination and harassment. Employee inhibitions are lowered and sound judgment

is compromised, due primarily to the availability of alcohol. It should be no surprise that allegations of sexual harassment tend to surface during work holiday parties. Employees might use the opportunity to pursue their coworkers, leading to unwanted advances or offensive conduct, or employees may simply have *too much* fun on the dance floor and regret it in the morning. What may seem at first to be consensual behavior during the holiday party may change when viewed in the light of day. Because most of the party attendees are adults and employers are not in the habit of playing schoolmarm, some preparty planning and communication can go a long way toward encouraging good behavior.

For instance, take steps to limit the consumption of alcohol. This can assume the form of distributing drink tickets or using trained, certified bartenders who are alert to overconsumption and can limit those who are going too far; hosting the event with an off-site caterer or bartender is one way to do this. Along the same line, it is never a good idea to hire one's own employees as bartenders because they will find it difficult to refuse serving coworkers that fifth or sixth cocktail. Also, provide plenty of food and nonalcoholic beverages at the party (the starchier, the better!). Additionally, reminding employees of the sexual harassment policies and dress code well in advance of the party will reinforce the employer's expectations for appropriate behavior. Employees should remember that the holiday party is a work function, and the same rules prohibiting harassment apply.⁴ Such recommendations may seem overly cautious, but both employers and employees will benefit in the long run.

CAN AN EMPLOYER BE RESPONSIBLE FOR INJURIES CAUSED BY AN EMPLOYEE AT OR AFTER THE HOLIDAY PARTY?

Employers should be concerned with injuries that might occur at or after the party—whether a single employee is injured or one employee injures another. Often, these incidents are caused by the consumption of alcohol, so similar caution should be taken with respect to managing how much alcohol employees are permitted to consume. Workers' compensation insurance will cover injuries sustained while in the "course and scope" of employment, provided those injuries are not the result of horseplay or intoxication. Mandatory party attendance will likely bring employee conduct within the course and scope of employment. Examples of covered conduct may include an employee's injuring himself or herself while dancing, or one employee's causing injuries to another employee or spouse during a karaoke performance.

Attending client holiday parties may also trigger an employer's workers' compensation coverage, as employee attendance can benefit an employer's

client relationships, bringing the party within the course and scope of employment. The scope of liability that employers may face differs by state. Several state statutes, for example, hold that the workers' compensation coverage does not apply to holiday parties because the injury would have been "incurred in the pursuit of an activity, the major purpose of which is social or recreational."⁵

Workers' compensation coverage aside, employers can nevertheless be liable for injuries caused by their own negligence. Negligence can include failing to stop illegal activity, such as turning a blind eye to drugs being used at a holiday party, or knowingly allowing intoxicated persons to drive themselves home. As we mentioned, it is no surprise that most liability issues at holiday parties arise as a result of alcohol consumption. Owing to "social-host" or "dram-shop" laws—under which those who serve alcohol to intoxicated individuals can be held liable for injuries those intoxicated individuals may cause—employers can be accountable for the irresponsibility of their employees. These laws vary by state.⁶ Accordingly, as previously discussed, employers should either host parties at establishments with professional bartenders who know how to regulate the amount of alcohol consumed by employees during the event, who can limit the number of drinks consumed by employees, or who will close the bar at least one hour before the party ends. Even creating alternative sources of entertainment at the party, such as karaoke or photo booths, can shift the attention of the event away from alcohol. To avoid potential injuries on the drive home, employers should consider providing transportation for employees leaving the party—or reimbursing the cost of cab or car rides home.

HOW "ACCOMMODATING" DOES A HOLIDAY PARTY NEED TO BE?

Employers should think of the holiday party as an extension of the workplace. In this regard, when choosing a holiday party venue, employers should ensure that the location is accessible and reasonably accommodating to all employees. Because reasonable accommodations help employees with a disability "enjoy the benefits and privileges of employment,"⁷ and the holiday party is a prime example of those benefits, employees with a disability should be able to participate. Examples of such accommodation at a holiday party include making sure the location is wheelchair accessible or providing a reader or interpreter for employees who are blind or hearing impaired, if, for example, the holiday party involves seeing a show or other cultural event.⁸ For this reason, employers are cautioned against planning a "zip-line" outing for a holiday party—such activities may not easily accommodate employees with disabilities. Hosting a holiday party at a venue that offers multiple, alternative forms of entertainment, at least some of which are

accessible, such as a bowling alley, billiards, or arcade facility—would likely be acceptable. Of course, more casual dinner and dancing can also work for many types of employees.

SHOULD THE HOLIDAY PARTY AVOID RELIGIOUS THEMES?

Employees have diverse backgrounds and viewpoints. Similar to requirements under disability laws, employers are required to provide certain reasonable accommodations for an employee's particular religious beliefs or practices.⁹ It is good policy, therefore, to allow employees to decide whether they would like to attend the holiday party in cases when they might have a religious or cultural objection. Employers may try to accommodate and incorporate into their party every religious belief that is represented in the office, but given the vast number of customs, traditions, and faiths that are celebrated, such an undertaking may be burdensome—and, in the end, may create an inadvertent offense to a particular faith.

In addition, office holiday parties have become more secular over time, a shift that ensures employee satisfaction and generates a more inclusive workplace atmosphere. Although the EEOC may find certain symbols of the holidays (e.g., wreaths or Santa Claus) to be neutral, the better course is to avoid any overt religious references. There are many ways that employers can spread the holiday season spirit without the event being inherently religious. Hosting a gift exchange between employees (e.g., Yankee Swap), offering themed trivia or bingo games, and decorating the event space with festive lights or "wintery" decor are just some examples and trends that employers have increasingly adopted.

CAN EMPLOYERS REGULATE SOCIAL-MEDIA ACTIVITY AT A HOLIDAY PARTY?

The short answer is yes, but employers must be cautious not to adopt policies that might violate the sensitive domain of workplace employee privacy. The chief concern is that some harassing or embarrassing material could surface at the party, and as a result of the myriad social-media and photo-sharing avenues that smartphones and other devices provide, that material can be captured and broadcast to a wider audience, and it is being done so more frequently than ever before.

With respect to social-media postings by employees, employers can regulate such activity, but only if a social-media policy exists and employees consent to it. Employers have begun creating policies that discourage employees from posting dishonorable content about their fellow employees, including comments about employees' protected characteristics on social

media. Employer policies may also prohibit posting content pertaining to sensitive or confidential company information. Implementing a social-media policy in the employee handbook can help prevent potentially humiliating or damaging content from being published on the Internet—particularly content that reflects the carefree atmosphere of the company holiday party.

Attention from the employment community has been growing concerning “bring your own device” or BYOD policies, and how much access an employer can have over the content on an employee’s personal phone.¹⁰ The merging of personal and professional realms makes it difficult for employers to set and enforce policy regarding use of the “company” phone. Provided an employer’s BYOD policy is clear about how much and how often an employer can access the content saved on the device, an employee’s privacy on that device will be limited¹¹—and that includes photos or messages sent from the holiday party of employees in potentially compromising positions! Consistent application of the BYOD policies is important so as to insulate employers from potential retaliation or discrimination claims by employees. In other words, do not wait until the holiday party to start reviewing the content of employees’ devices (if that is permitted as part of your company policy)—apply the policy the same way all year.

Giving incentives to employees to avoid the use of cell phones to capture holiday-party moments would be ideal (although probably not easily enforceable) for all involved, because it would enable employees to feel more relaxed and able to enjoy the festive atmosphere that holiday parties are supposed to engender. Employers should kindly advise employees to be respectful and appropriate when taking pictures or posting on social media, and remind them that they are responsible for the content they possess or post online. At the same time, employees want to be assured that the rules and restrictions are not overly intrusive of their privacy. Employers would be best served by clearly communicating *and consistently applying* the policies that grant them access to employees’ personal electronic devices and social-media activity.

NOTES

1. See Office of the Assistant Secretary for Policy, Volunteers, Department of Labor. Retrieved July 13, 2015, from <http://www.dol.gov/elaws/esa/flsa/docs/volunteers.asp>
2. See 29 C.F.R. § 785.28.
3. See 29 C.F.R. § 785.39-.40.
4. In the case of *Shiner v. State University of New York*, a clerk for the Buffalo Dental School successfully sued her employer for sexual harassment under Title VII of the Civil Rights Act of 1964 following a 2010 holiday party where she experienced multiple acts of assault. No. 1:11-cv-01024 (N.D.N.Y. Nov. 2, 2012). She had previously notified her employer that similar conduct had occurred

- at previous parties, and the employer took no remedial action. *Id.* The parties ultimately settled for over \$250,000. Lakamp, P. (2013, August 31). University of Buffalo to pay Amherst woman in sex harassment settlement. Buffalo News. Retrieved from <http://www.buffalonews.com/city-region/federal-court/university-at-buffalo-to-pay-amherst-woman-in-sex-harassment-settlement-20130831>
5. See, e.g., Michigan Worker's Disability Compensation Act of 1969, Act 317, MCL § 418.301, available at <http://legislature.mi.gov/doc.aspx?mcl-418-301>
 6. In Florida, an employer who furnishes alcoholic beverages to an employee of lawful drinking age is not liable for injury or damage caused by or resulting from the intoxication of such employee. See Fla. Stat. § 768.125. In Indiana, however, employers may be liable if they had actual knowledge that they were serving an intoxicated employee, and if that employee was later the proximate cause of an injury to another. See Ind. Code § 7.1-5-10-15.5.
 7. See Disability Discrimination, Equal Employment Opportunity Commission. Retrieved from <http://www.eeoc.gov/laws/types/disability.cfm>
 8. See *Id.*
 9. See Religious Discrimination, Equal Employment Opportunity Commission. Retrieved July 13, 2015, from <http://www.eeoc.gov/laws/types/religion.cfm>
 10. Smith, K., Forman, S. (2014). Bring your own device: Challenges and solutions for the mobile workplace. *Questions—And Answers. Employment Relations Today*, 40(4), 67–73.
 11. A 2012 Fifth Circuit decision ruled that cell phones are not protected under the Stored Communications Act (SCA), and therefore anything stored on an employee's electronic device (e.g., e-mails, text messaging, pictures) can be accessible by employers. See *Garcia v. City of Laredo*, 702 F.3d 788, 790 (5th Cir. 2012).

Kevin J. Smith is special counsel at Sheppard, Mullin, Richter & Hampton LLP, in the firm's Labor and Employment group. He has extensive experience in employment litigation, including trials and appeals in federal and state courts, and conducting arbitrations and administrative hearings. His employment law practice also includes counseling Fortune 500 companies in all types of employment and labor-law matters. He may be contacted at kjsmith@sheppardmullin.com. Rachel J. Tischler is a labor and employment attorney at Sheppard, Mullin, Richter & Hampton LLP. She has a broad range of experience in labor and employment matters, including wage-and-hour class-action lawsuits, wrongful-termination and discrimination lawsuits, and counseling. Her practice also includes experience in international employment concerns, wage-and-hour compliance, and personnel handbooks, with particular experience in I-9 and E-Verify compliance. She may be contacted at rtischler@sheppardmullin.com.