

Boo! Don't Let the Upcoming Holidays Scare You

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Common Issues Around the Holidays

- Religious Discrimination
- Sexual Harassment Claims
- Liability for Alcohol-Related Incidents
- Workers' Compensation Injuries
- Leave Requests & Claims for Unpaid Wages



Our Intrepid HR Director, Pat Scrooge

MEMO

FROM: Pat Scrooge, HR Director

TO: Everyone



I am happy to inform you that the company Christmas party will take place on December 23, starting at noon in the banquet room at Luigi's Open Pit Barbecue.

Full bar and plenty of eggnog! We'll have a small band playing traditional carols ... feel free to sing along. And don't be surprised if our CEO shows up dressed as Santa Claus



More from Mr. Scrooge

MEMO

FROM: Pat Scrooge, HR Director

RE: Holiday Party



In no way was yesterday's memo intended to exclude our Jewish employees. We recognize that Hanukkah is an important holiday which often coincides with Christmas, though unfortunately not this year.

However, from now on we're calling it our "Holiday Party." The same policy applies to employees who are celebrating Kwanzaa at this time.

Still More from Mr. Scrooge

MEMO

FROM: Pat Scrooge, HR Director

RE: Holiday Party

Regarding the note I received from a member of Alcoholics Anonymous requesting a non-drinking table ... you didn't sign your name. I'm happy to accommodate this request, but if I put a sign on a table that reads, "AA only"; you wouldn't be anonymous anymore. How am I supposed to handle this? Somebody?



And Still More from Mr. Scrooge

MEMO

FROM: Pat Scrooge, HR Director

RE: Holiday Party

What a diverse company we are! I had no idea that December 20 begins the Muslim holy month of Ramadan, which forbids eating and drinking during daylight hours. There goes the party!

Seriously, we can appreciate how a luncheon this time of year does not accommodate our Muslim employees' beliefs. Perhaps Luigi's can hold off on serving your meal until the end of the party – the days are so short this time of year – or else package everything for take-home in little foil swans. Will that work?



Mr. Scrooge Goes on the Offensive

MEMO

FROM: Pat Scrooge , HR Director

RE: Holiday Party

People, people, nothing sinister was intended by having our CEO dress up like Santa Claus. Even if the anagram of “Santa” does happen to be “Satan,” there is no evil connotation to our own “little man in a red suit.” It’s a tradition, folks, like sugar shock at Halloween or family feuds over the Thanksgiving turkey, or broken hearts on Valentine’s Day. Could we lighten up?

No More Mr. Scrooge

MEMO

FROM: Teri Bishops, Acting HR Director

RE: Pat Scrooge and Holiday Party

I'm sure I speak for all of us in wishing Pat Scrooge a speedy recovery from his stress-related illness and I'll continue to forward your cards to him at the treatment center.

In the meantime, management has decided to cancel our Holiday Party and give everyone the afternoon of the 23rd off with full pay.

Lessons Learned

What more can we learn from
Mr. Scrooge?

What other issues have you
seen or dealt with?

(Potential) Gifts from SCOTUS

- *Integrity Staffing Solutions, Inc. v. Bank*, Dkt. No. 12-1281 (FLSA)
- *Young v. United Parcel Service*, Dkt. No. 12-1226 (PDA)
- *Mach Mining v. EEOC*, Dkt. No. 13-1019 (Pre-Suit Conciliation)

Questions?



Religious Discrimination

American Civil Liberties Union v. City of St. Charles, (7th Cir. 1986)
("There is nothing distinctively Christian about reindeer, Santa Claus, gift-giving, eggnog, tinsels, toys, retail sales, roast goose, or the music (as distinct from the words) of Christmas carols.")

BUT: Employees should never be **required** to attend any function that has religious overtones (for example, a "Christmas" party or caroling). Make sure all employees know such functions are purely voluntary.

EQUAL TREATMENT: Treat everyone the same. If Rudolph is allowed to put up a nativity at his desk, Dasher can put up a menorah on his. Similarly, if Prancer is given Christian holidays off, then Comet and Cupid must be allowed time off for Jewish holidays.

Religious Discrimination (continued)

Where do employers get into trouble?

- **Favoring one religion over the other in terms and conditions of employment.** *Siddiqi v. New York City Health & Hospitals Corp.*, 572 F. Supp. 2d 353, 363 (S.D.N.Y. 2008)(denying requests for leave to observe religious holidays, but granting others).
- **Requiring an employee to participate in a holiday activity which violates his or her beliefs.** *Velez-Sotomayor v. Progreso Cash & Carry, Inc.*, 279 F. Supp. 2d 65 (D.P.R. 2003)(requiring employee to wear Santa hat in violation of religious beliefs); *Kentucky Comm'n on Human Rights v. Lesco Manuf.*, 736 S.W.2d 361 (Ky. App. 1987) (Secretary, a Jehovah's Witness, who refused to answer phone with "Merry Christmas" based upon religious beliefs was discriminated against based upon her religion)

Religious Discrimination (continued)

- **The Law:** employers are required to reasonably accommodate religious beliefs and practices, unless such accommodation would create an undue hardship
 - What is an “**undue hardship**”?
 - An accommodation that would entail “more than a *de minimis* cost and have an effect on the conduct of the business”

Religious Discrimination (continued)

Best Practices to Avoid Religious Discrimination Claims

- Do not require employees to participate in holiday festivities or practices.
- Consider others' beliefs when planning a holiday party.
- Be careful when selecting employee gifts.
- Treat employees of all religions equally in requests for days off and in other terms and conditions of employment (such as office decorations).
- Remind employees to respect their co-workers' beliefs.

Sexual Harassment

As noted by the Seventh Circuit Court of Appeals:

“At the risk of playing the Grinch, however, we note that office Christmas parties also seem to be **fertile ground** for unwanted sexual overtures that lead to Title VII complaints.” *Place v. Abbott Labs.*, 215 F.3d 803, 805 n.1 (7th Cir. 2000)(citing **21** different cases in which company Christmas party led to sexual harassment claim).

The Numbers Aren't Pretty

- 2010 Adecco survey, “**Workplace Holiday Parties Breed Bad Behavior,**” found the following:
 - 40% of people at work-sponsored holiday events saw or suffered a major indiscretion
 - 14% knew someone who was fired for bad behavior at a company holiday party
 - 20% reported drinking too much at a work holiday party

Sexual Harassment (continued)

- Follow the steps outlined in general anti-harassment policy
- Take every complaint seriously
- Conduct an investigation
- Take disciplinary measures where appropriate

Don't do this:

EEOC v. Rose Casual Dining: At office holiday party, manager grabbed a female employee's rear end and told her she looked good. He then removed her name tag and dropped it down her cleavage. After complaining about the incident the next day, the woman was fired because she "did not fit in."

Sexual Harassment (continued)

- Don't forget about harassment by **third parties**
 - Acts of clients, vendors, or other non-employee guests can lead to employer liability if employer does not take reasonable action
 - *Stathatos v. Gala Resources, LLC*: client at a holiday party aggressively grabbed and chased a female employee throughout the night. When the plaintiff asked a supervisor for help, the supervisor teased her instead, suggesting the client liked her and wanted to date her. Plaintiff had also been the victim of sexually charged comments and jokes at other points in her employment; employer's failure to respond appropriately to her complaint weighed heavily in plaintiff's favor before Court.

Sexual Harassment (continued)

Best Practices to Avoid Sexual Harassment Claims

- Make sure harassment policy addresses employer-sponsored social functions
- Think about time of day and venue when scheduling party.
- Consider making the party a family-friendly event, or include significant others.
- Carefully select party activities (games (i.e., no Twister!), gift exchanges, dancing).
- Notify employees of appropriate dress.
- Send employees a friendly reminder about expectations.
- Forget the mistletoe!
- Carefully consider whether or not to serve alcohol.

Best Practices for Parties

- 1. DON'T SERVE MINORS.** Depending on the size of your company, and the nature of your planned event, this can involve:
 - Use a licensed, insured venue that already IDs all patrons getting alcohol at a bar. This will allow families to attend without expanding potential liability.
 - Get a guest list with names and ages of attendees from employees beforehand. This will let you tailor activities and fun events for different age groups, but also give your company idea of the number of 15-20 year-olds that may be attempting to get a hold of alcohol at the event.
 - At a house or office event, consider using a professional licensed, insured bartender/catering company. While a plaintiff's attorney would likely still sue the employer as well as the third-party company, damages may be apportioned between you. In all cases when using a third party vendor, use a robust indemnification clause in all contract documents.

Best Practices for Parties (continued)

2. DON'T SERVE DRUNK PEOPLE MORE BOOZE

Simple right? Whether you have a professional bartender or merely a self-service wine and beer table, ensure that someone is responsible for keeping sober and vigilant to ensure that guests are not over-served.

- A potential problem with this approach is a low-level employee telling a principal or partner at the company that he or she has had too much to drink. This is one reason why using a professional company to handle holiday parties and other alcohol-laden corporate events is a smart idea.
- Consider using drink tickets (2 per person) to help limit intake
- Consider offering only wine and beer
- Serve plenty of food rich in starch and protein
- Stop serving alcohol during final hour of event

Best Practices for Parties (continued)

3. IF YOUR COMPANY'S BUDGET ALLOWS IT, SPRING FOR A CAR SERVICE

- Operates as a good defense to establish you acted with reasonable care
- Depending on the location of your party, this may increase attendance and be seen as a great perk by your employees
- Beyond legal liability, this practice is seen as a responsible way to manage employees and only serves to increase regard for your company in the community and by Anti-Drunk Driving groups such as MADD.
- Unique alternatives to a taxi/car service: Lyft, for example, will offer coupons for you to hand out at your event.

Best Practices for Parties (continued)

- 4. ALWAYS USE INDEMNIFICATION CLAUSES IN CONTRACTS WITH SERVICE PROVIDERS, AND ALWAYS USE LICENSED, INSURED CATERERS AND VENUES.**

Tennessee Dram Shop Laws

- Dram shop laws are named after establishments in 18th Century England that sold gin by the spoonful (called a "dram")
- Tenn. Code Ann. §§ 57-10-101 through 57-10-102
- In short, there is potential liability for (1) selling alcohol to minors or (2) selling alcohol to “visibly intoxicated person.”
- Liability is very difficult to establish. By law, the consumption of alcohol is the proximate cause of injuries inflicted by an intoxicated person, not the furnishing of alcohol.
- Alcohol must be “sold” for laws to be applicable, but employers should still be mindful of potential consequences.

Unpaid Wages

Under the Fair Labor Standards Act, an employee must be compensated properly for all “hours worked” for the employer. Generally, all time spent on the employer’s premises or at a designated work place is hours worked when the employee is required or permitted to perform services of benefit to the employer. Also included in hours worked is any work which the employee performs for the employer’s benefit outside of work hours on or off the employer’s premises.

Unpaid Wages (continued)

The DOL clarified that an employer lawfully may treat the employees as unpaid volunteers relative to its after-hours event, as long as the employees (i) volunteered freely, (ii) participated as volunteers after their normal working hours, and (iii) performed services that were not similar to their regular work duties. Conversely, the employer would have to pay minimum wages and overtime to any employees who were required to volunteer, who provided volunteer services during their normal working hours or who provided volunteer services similar to their regular duties.

Unpaid Wages (continued)

TIPS FOR AVOIDING CLAIMS FOR UNPAID WAGES

- Do not make attendance at any after-hours event mandatory
- Do not condition positive performance evaluations or bonuses upon attendance at the event
- Do not hand out bonus checks at the event
- Communicate to employees that their attendance is voluntary and no compensation will be provided for time spent at the event
- Pay employees for all time spent attending events during regular work hours
- Pay employees for time spent organizing and hosting the event
- Do not ask non-exempt employees to act as “spotters” or otherwise assist during the event