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Employer Guidelines for a Happy Holiday Season

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'Tis the season to be jolly, right? The holidays are a time to worship, visit with family, and "eat, drink and be merry." In the employment arena, however, the holiday season presents a sleigh full of legal dilemmas that can expose an employer to significant liability (menorah fires, aside). With the holidays upon us, employers and HR managers should observe the following rules to enjoy the season while minimizing exposure to liability in the workplace.

Remember Religious Tolerance. At risk of sounding like the Grinch, in today's increasingly diverse workforce, the prudent employer should be as inclusive as possible during the holiday season. Employers should not "deck the halls with boughs of holly" or adorn their office with a festively ornamented Christmas tree, well, not unless a Hanukkah menorah (preferably unlit, as cautioned above) or other holiday oriented decorations also are on display. While holiday decorations are entirely appropriate (and improve workplace culture and moral), employers should not favor any particular holiday. Similarly, employers should not make the year-end office party holiday specific. A "holiday" neutral party gives full deference to all (or no) religious beliefs. Importantly, it avoids any conflict or offensiveness that could arise from a holiday specific party.

Another lump of coal lies at the intersection of the holidays and the work schedule. Even old Ebenezer Scrooge understood the issues he faced if he refused Bob Cratchit the day off for Christmas. Under federal and state law, an employer generally must allow its employees time off from work to practice their faith and celebrate the holidays. Unless an employer will suffer undue hardship, its failure to reasonably accommodate employees' sincerely held religious practices could result in a lawsuit, an EEOC claim, and/or stiff penalties. Common accommodations include flexible scheduling, letting workers swap vacation days, giving paid or unpaid time off, and not scheduling an employee to work on holidays, as needed.

Avoid Wage Payment Issues. Private employers are not required to close for the holidays and an employer is generally not required to pay its employees for using a vacation day in observation of a holiday. Likewise, an employer is typically not required to pay an employee overtime for working a holiday. Holiday pay and time off is not mandated because the Fair Labor Standards Act (FLSA) does not require payment for time not worked. That said, employers often have policies that provide for holiday pay or paid time off. These benefits are normally arranged between an employer and its employees as part of company policy or, if union, through collective bargaining. Accordingly, employers should conform with any existing policies, procedures, or collective bargaining agreements relative to paid time off over the holidays. Even the most accommodating employer can run afoul of wage laws if payroll is not properly processed in conformance with any such workplace policies.

Returning to the holiday party, employers are cautioned against mandating employee attendance unless the party is held during regular business hours. Employers run the risk that if attendance at the party is obligatory, the employees may have a reasonable expectation of compensation for their time at the event. This, of course, exposes a business to a host of FLSA and state labor claims, and the last thing any employer needs is the Department of Labor auditing its affairs over the holidays.

(No) More Egg Nog, Please. Employers can do several things to successfully reduce risk at the office holiday party. While I'm not suggesting the following ground rules will guarantee your holiday party isn't hijacked by a group of terrorists (a la "Die Hard," an underrated holiday movie), they should help employers mitigate risk. Employers should monitor and control the amount of alcohol consumed by its employees — and any other guests — at the party. Non-alcoholic beverages and plenty of food should be provided. Pre-arranged transportation from the party and, alternatively, lodging, should be made available to employees who have hit the egg nog a little too hard.

Holiday parties, where alcohol is served, are breeding grounds for offensive and inappropriate behavior. Employees should be reminded that the company's EEO and harassment policies apply with equal force and effect at the holiday party, even outside of regular business hours. Offering designated drivers or lodging, meanwhile, may relieve an employer of substantial tort liability arising from an employee's drunken mishaps later that night... and, more importantly, could save lives.

Employee Bonuses: Give the Gift that Keeps on Giving. For example, a membership to the Jelly of the Month Club. As Frank Shirley learned, an employer can't necessarily suspend year-end bonuses, even if they are "discretionary." The label attached to a bonus is not determinative, and the non-payment of a bonus can lead to litigation.

While employers generally retain absolute discretion to pay a bonus, courts can look to written employment agreements, employee handbooks, bonus plans, verbal promises, and the course of dealing between the parties to determine whether a contractual obligation to pay a bonus exists and will be enforced. In short, a bonus which is, or has become, a contractual entitlement must be paid in accordance with its terms, and the failure to do so will expose an employer to liability. On the other hand, where a bonus is genuinely discretionary under a well-drafted, written contract or bonus plan, an employer may, if it has exercised its discretion properly, decide not to pay without exposing itself to liability.

However, in the spirit of the season, employers are cautioned against suspending bonuses at risk of being abducted by their disgruntled employees.

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