

## THE POLICY CORNER

# Tips on Limiting Employer Liability at Company Parties

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This past summer, we were asked by a client to investigate a horrific incident that occurred after a party hosted by one of its divisional executives. The story is extremely sad, and one can only hope that other employers will use this as an example to tighten up their control at company parties, where alcoholic beverages are provided. A division of a large company invited its staff to a party to celebrate the completion of a banner year. They rented out an entire restaurant, and served food and alcohol. The function began at about 5 p.m., and at approximately 7 or 7:30 p.m. (frankly, none of the employees could remember the exact time), one of the managers at the party observed a woman in her

late 20s (let's call her Sally) acting very flirtatious with a number of her male colleagues. Being concerned for her well-being and reputation, he asked the Office Manager to pull Sally aside and speak with her about her behavior, which the Office Manager did. In fact, when the Office Manager spoke with Sally, she realized that she was intoxicated, so she took her outside to get some fresh air. She then suggested to Sally that perhaps she should leave. At first, Sally resisted, but ultimately realized that the Office Manager was right. The Office Manager hailed her a cab, and told the cab driver to take her home. The Office Manager let Sally give the cab driver her ad-

dress, and believed she was in enough control to get home ok.

Later that evening, one of the Human Resources Managers got a call from a local hospital, advising her that Sally had been brought to the hospital emergency room where she passed away a short while later. It seems that when she was dropped off at her apartment, Sally was walking up the stairs to her apartment and fell, hitting her head on the marble floor at the bottom of the stairs. The noise from her fall was loud enough to cause a woman who lived on the first floor to come out of her apartment to see what had happened. This woman found Sally, with blood coming from her ear, and im-

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mediately called 911. Unfortunately, it was too late to save Sally.

During our investigation, we learned that the drinks were flowing freely at the party. Most employees we spoke with could only remember that they had 5 or 6, and in some cases more. Several of Sally's co-workers reported that she had had at least 5 drinks, while some thought it was more.

The death of this employee was a traumatic experience for this poor woman's family, for the company, for the manager and Office Manager who had observed her, who continue to ask themselves if they should have done more, and for senior management, who asked themselves (and continue to ask themselves) "how could such a thing happen".

### THE LEGAL CONCERNS

Whether you're planning your company's holiday party or a company picnic, there are a number of issues that must be considered from a legal standpoint to minimize your organization's exposure to legal liability. This article explores the more critical issues employers face at such functions, and offers certain practical advice for avoiding legal troubles, and, more importantly, to prevent another incident like the one this

employer faced with Sally from occurring.

The much more relaxed atmosphere at company social events (in comparison to the normal workplace) can certainly add to increasing employee morale. Indeed, such gatherings provide an opportunity for employees to mingle with their colleagues in an atmosphere much less formal and tense than on-the-job, and can also help instill in employees a feeling of appreciation from their employer for their efforts during the year. And let's be honest, who doesn't love a good party!

For employers, such social gatherings provide the perfect opportunity to say "thank you" to employees for their hard work over the past year, build camaraderie, and to instill a sense of worth, recognition, and belonging. In addition, many companies use such events as a forum to make special announcements to employees such as the awarding of bonuses or promotions.

Despite a company's best intentions, there are many negative situations that can result from company parties as well. Employers now more than ever before are under a microscope in this regard due to the advent of various social media platforms such as Facebook, YouTube and Flickr which enable employees to post pictures and

videos of incidents that occur at such events, and share them with the world.

### SEXUAL HARASSMENT

Even your most "buttoned up" employees have a tendency to "let their proverbial hair down" when it comes to celebrating and, in particular, after having a drink or two (or three or more). Throw in some soft lighting and some romantic mood music, and your company party (and potential for liability) is off and running.

Sexual harassment comes in all forms, shapes, and sizes, and the synergy of alcohol, soft lighting, mood music, and a festive party spirit can lead (as many employers have discovered) to (among other things) charges of sexual harassment, assault, battery, negligent supervision, and negligent retention.

Sexual harassment typically manifests itself in a number of ways, including unwelcome advances, touching, sexual innuendos and jokes, and the like, all of which may occur at a company party as easily as it does on the job. Consider the following scenarios.

#### Scenario #1

Scott Anderson, his company's Director of Marketing, has a crush on his co-worker, Jamie Jacobs. While Jamie likes

Scott, she just wants to remain friends.

After downing a few shots at their company's holiday party, Scott, Jamie and several other people from the office end up on the dance floor. After several minutes of dancing a slow song comes on and Scott's hands "inadvertently" slide below her waist and he pulls her in towards him. Jamie gently pushes Scott's hands away. A few seconds later Scott's hands again "inadvertently" end up below Jamie's waist. Jamie proceeds to push Scott away and heads directly to her car and drives home.

The next day Jamie files a complaint with HR regarding Scott's conduct the night before at the holiday party. Jamie says that everyone in the office knows that Scott has a crush on her and for weeks he has been writing inappropriate comments on her Facebook wall such as "Looking GR8 Cutie? . . . I haven't seen you in that outfit at the office . . . LOL" of a picture of Jamie has as her Facebook profile picture of her in a bathing suit from her recent trip to Mexico. Scott, of course, denies (or doesn't remember) the events from the night before, and the dance floor was so crowded that there were no witnesses. Scott also says that he is friends on Facebook with many of his co-workers and

writes comments on all of their pages since that is just what people do. Jamie, however, contends that she can no longer work with Scott and threatens to sue.

### Scenario #2

Maria Davis, a divorced and fairly unattractive sales manager in her 50's, has a thing for young men. Maria also cannot hold her alcohol. After a few martinis at the company's holiday party, Maria starts making advances towards Shawn Bates, a sales rep who reports to her.

Maria and Shawn are talking at the bar and Maria is complaining that all of the young girls in the office are immature and that Shawn should stick with older women like herself who are more "experienced." Maria then makes certain remarks to Shawn that imply that while his job performance is solid and he is "in the running" to land the company's biggest account, if he sleeps with her it will seal the deal. Shawn is extremely embarrassed by Maria's comments and quickly changes the subject and walks away.

Two weeks after this incident Scott finds out through a company e-mail blast that Maria decided to give his co-worker, Ryan Jones, who is the same age as Scott, the company's

biggest account. As a result, Ryan received a pay raise, promotion and corner office. Shawn, who has noticed Maria and Ryan spending a lot of time together over the past few days, including seeing them out to dinner together seeming very "comfortable" complains to HR that the only reason he did not land the account is because he did not sleep with Maria.

### Scenario #3

Jim Mark, the Assistant Warehouse Manager, and a man in his early 60s, is the company jokester. At the party table at which he is sitting he lets loose with about a dozen jokes about "viagra." While most of the employees and their guests at his table find Jim to be hilarious, several of the employees and their guests are highly offended.

### EMPLOYER HEADACHES AND LIABILITY

While the above situations are unlikely to result in a substantial jury verdict they can still create headaches and potential liability for employers. There are countless other cases, however, stemming from mixing company partying and alcohol, that were much more legally problematic for the employers involved.

In one case, a company was sued for sexual harassment, retaliation, and constructive discharge after a company Christ-

mas party where the staff exchanged gifts through a "Secret Santa" format. During this party, a male employee received edible underwear as a gift and proceeded to place the underwear on a female co-worker's head and then put the underwear on over his jeans, stuffed dinner rolls down his pants and two female staff members ate the underwear, while kneeling in front of him. Pictures of the activities at the Christmas party were brought to work and posted all throughout the office, including that of the female employee with the underwear on her head. Despite her complaints, the pictures were not taken down and she resigned due to the embarrassment. The company argued during the lawsuit that any conduct that occurred at the party cannot be considered as part of the harassment or hostile work environment claims because it did not occur in the workplace. Contrary to the company's argument, the court noted that there is no such "bright line" between harassment that occurs in the workplace and harassment that continues outside of the workplace.

In another case, two male employees became so intoxicated at a company party that they went up to the room in the hotel where the party was held, and where one of the them was staying, opened the drapes and

began "mooning" other employees and guests of the hotel as they were leaving. The employees were arrested for indecent exposure and the company received several harassment complaints from employees.

### NEGLIGENCE

In addition to worrying about harassment complaints, employers must be concerned about claims of negligence as well. In many jurisdictions, "social hosts," such as employers, can be sued by third parties who are injured by an employee and who blame the employer for their injuries. In the case of a company party, for example, the injured person could be a guest of an employee, an employee of the establishment where the party is being held, or an innocent third party.

For example, in one case an employer hosted a holiday party for employees at a local bowling alley. An employee who drove to the party smoked marijuana before attending the party and consumed four alcoholic drinks at the party. After leaving the bar, she drove over the center-line and hit another car causing the death of the driver. The company who sponsored the party, as well as the bowling alley, were sued by the administratrix of the decedent's estate who asserted various claims of negligence.

In another case, a company held a party for its employees at a hotel. After the party concluded, some employees moved to the hotel lounge to continue to drink and socialize. One of the managers of the hotel was called to the lounge to break up a fight between some of the employees and the manager's sons, who also worked at the hotel. The hotel manager's sons suffered serious injuries as a result of the fight and he brought a lawsuit against the company alleging, among other claims, negligent hiring and retention as both of the employees who started the fight had a criminal record.

In yet another case, an employer and the caterer it hired were sued by several guests of employees who contracted hepatitis after eating the salad at a dinner party. The carrier of the hepatitis was allegedly a food service worker employed by the caterer. Negligence again was the theory used by the plaintiffs in this case.

### WORKERS' COMPENSATION

The textbooks are replete with cases where employees file workers' compensation claims against their employers for injuries sustained during company parties and other events. Indeed, in many jurisdictions, employer sponsorship of the party and required or implied attendance is all that is

needed to bring an employee's injury sustained at a party within the scope of state workers' compensation laws.

In one case, co-workers organized a retirement dinner for a co-worker. At this event, an employee suffered fatal injuries. The employer argued that this event was not compensable under workers' compensation as the dinner in question was a purely social affair conducted off the employer's premises during nonbusiness hours, was not sponsored by the employer, and did not benefit the employer beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life. The employee's death was found to be covered by workers' compensation because employees of offices hundreds of miles away who attended the dinner were reimbursed for their travel expenses and were given time off from their work to attend, from which it could be inferred that the affair was encouraged by the employer and because the employer subsidized some of the costs of the dinner.

In another case, an employee was stabbed by a co-worker after a party held on the employer's premises at which alcohol was served. The employer argued the injury did not arise out of the employee's

employment because the stabbing was the result of a co-worker's jealousy of the injured employee's dancing with a female co-worker at the party, not due to any employment-related reason. The event was held to be compensable under workers' compensation law since the dancing and the drinking at the party which were provided by the employer initiated the conflict that resulted in the injury.

### RECOMMENDATIONS

As the above examples illustrate, liability can arise in a number of ways at company parties and other events. To help minimize exposure to such liability, employers may wish to consider taking the recommended steps found in the list below.

### RECOMMENDATIONS FOR AVOIDING LIABILITY AT OFFICE PARTIES

Liability can arise in a number of ways at company parties and other events. To help minimize exposure to such liability, employers may wish to consider taking these recommended steps.

1. Prior to the party (e.g., several days before), circulate a memorandum to your employees reiterating your company's policy against sexual and other forms of harassment, as well as your company's social media

policy. If your company does not have such policies, or if they have not been updated in several years, now is the perfect time to do so.

2. Remind your employees in this memorandum that the policy applies to their conduct at company parties and other social events, and that they should govern their conduct accordingly by acting professionally at all times.

3. Remind your employees as well of both your policy against the abuse of alcohol and your zero tolerance policy with respect to the possession, use, or sale of drugs.

4. Modify your dress code to prohibit any form of revealing or provocative attire from being worn at any time on-the-job or at company-sponsored events, and reiterate this to employees as well.

5. If possible, allow employees to invite a spouse or their children to the party. (Many people are much less frisky and daring, and are more well-behaved, in front of their spouses/guests and children than when left alone.)

6. Consider limiting the number of drinks that will be served to each employee (e.g., two) and/or stop serving alcohol well before the party ends (e.g., one hour before).

7. Make sure that there are plenty of non-alcoholic beverages available to employees and that food is served so that employees are not consuming alcohol on an empty stomach.

8. Notify the restaurant/hotel/catering house where the party is held that (1) they are not permitted to serve any employee who appears impaired or intoxicated, and (2) their staff should be advised to inform designated company representatives of any employee/guest who appears impaired/intoxicated.

9. Deputize a number of your managers to be on the lookout for anyone who appears to be impaired or intoxicated.

10. Do not allow employees who have been drinking heavily to drive home. Arrange for "designated drivers" in each group who have not consumed any alcohol or, preferably, provide your employees/guests with transportation home (e.g., car services, cabs, buses). If an employee appears to be heavily intoxicated, have a manager drive him/her home or ride with him/her in a cab to make sure that he/she gets home safely.

11. Attempt to include indemnification/hold harmless clauses in your contract with the restaurant/hotel/catering hall where your party is being held, to the effect that they will indemnify your company and hold it harmless (including paying your reasonable attorneys fees) in the event of any action

against the company by any third party, arising out of or in connection with your holding the party at their establishment.

12. Check your general liability and other insurance policies to ensure that they cover the company adequately, in the event of any accidents/injuries occurring at or arising from company-sponsored parties and other social or recreational activities or events.

13. Promptly investigate and resolve (by taking prompt, remedial action against any offenders) any complaints that may be brought to your attention after the party, in which a violation of company policy or some other form of misconduct is discovered.