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## 10 Considerations for Planning the 2016 Office Holiday Party

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The end of the year brings many reasons to celebrate, and the vast majority of employers intend to make merry by hosting a holiday party of some sort. This occasion presents an opportunity for employers to foster team spirit and express appreciation for the hard work performed by staff all year. In turn, employees appreciate the chance to interact with their coworkers outside the hectic workday.

Nonetheless, a holiday party can create unintended negative consequences for employers. A quick search of YouTube videos can demonstrate how easily a holiday gathering can go wrong, especially if alcohol is involved. Despite their laudable intentions, employers could face liability for the conduct of employees who behave inappropriately. To help curb that possibility, we offer 10 considerations as employers prepare for their holiday events.

### 1. No pot at the potluck?

On Election Day, several additional states legalized marijuana for adult recreational use.<sup>1</sup> As a result, marijuana is, or shortly will be, legal for adult recreational consumption in Alaska, California, Nevada, Oregon and Washington.<sup>2</sup> In California, for example, adults may possess up to 28.5 grams of marijuana and 8 grams of concentrated marijuana. The Massachusetts and Nevada laws permit possession of up to 1 ounce outside the residence.

Given this trend, employees in affected states may feel it is appropriate to bring marijuana, in one form or another, to a holiday party. This development may make employers, and employees, uncomfortable for

<sup>1</sup> See Nancy Delogu & Eunju Park, [Marijuana Legalization Efforts Enjoy Success, Demonstrating Major Shift in Approach to Drug Regulation and Use](#), Littler Insight (Nov. 9, 2016).

<sup>2</sup> The marijuana ballot initiative in Maine appears to have passed, but an official recount is underway to confirm the very close results.

a variety of reasons. It also poses serious risks, particularly if employees bring marijuana edibles to share with coworkers. Edibles can be dangerous because the marijuana content may not be known to consumers and because its effects are delayed (by an hour or two), which sometimes leads people to ingest unsafe or unintended amounts of the drug. Every jurisdiction that permits the recreational use of marijuana has some law prohibiting the operation of motor vehicles with marijuana in one's system, too, although the standards to prove a criminal motor vehicle violation vary from state to state. Employers want everyone at the celebration to reach home safely.

Despite the legality of possession in some states, employers still have the authority to ban pot from the holiday potluck—and from their premises generally. Marijuana remains a controlled substance under federal law. Employers that maintain drug-free workplaces do not need to alter their policies—although now might be a good time to remind employees in affected jurisdictions that their drug-free policy stands and will be enforced. And even in states where recreational marijuana is legal, those laws recognize that employers can prohibit marijuana consumption in the workplace and, by extension, at work-sponsored events.

## **2. But what about a cup of cheer?**

Alcohol consumption, though legal for those over the age of 21 everywhere, can quickly transform an otherwise innocuous party into a minefield of unintended consequences. Common claims that stem from such parties include sexual harassment and discrimination, as well as complaints due to injuries suffered both by attendees and third parties.<sup>3</sup>

If alcohol will be served at an event, there are several simple ways to reduce the likelihood that attendees overindulge. For example, consider hiring a third-party bartender and/or issuing employees a limited number of drink tickets. A cash bar might also discourage excessive drinking. Perhaps limit the types of alcohol offered to beer and wine, and serve food. Employers should set concrete hours for the event and ensure that non-alcoholic beverages are available. Employers could also coordinate designated drivers or sponsor rides home as needed.

Another option is to host a breakfast or lunch event, where employees would likely consume less alcohol, if alcohol were served at all. And beyond the party-planning phase, employers with existing alcohol and drug use policies should also send a memo prior to the event, reiterating the policy in place.

## **3. Avoid “locker room talk” or similar behavior.**

This election year was like no other, to put it mildly. In light of recent events, including the tenor of the campaign, some employees may mistakenly feel emboldened to push the envelope on acceptable behavior. Such conduct raises the risk of sexual harassment, as well as other forms of unlawful discrimination.<sup>4</sup> Alcohol, as noted above, can exacerbate the situation. With lowered inhibitions, employees (or worse, managers) may make unwanted sexual advances, inappropriate gestures, or offensive remarks.

To ward against this possibility, the invitation to an off-site event could include a guest and/or children, to keep the atmosphere family-friendly. Moreover, in advance of the party, employers should review anti-discrimination policies and instruct employees that such policies continue to apply at the event. If necessary, these policies should also be updated to expressly cover work-sponsored functions. Employers might discuss with managers the importance of setting a good example and keeping an eye out for trouble. One way or another, employers should remind all staff that they are expected to behave responsibly and professionally, at all times—even if off-site and wearing “ugly sweaters.”

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<sup>3</sup> Alison Hightower & Gary Bethel, [Avoiding the Hangover: Minimizing Liability for Holiday Parties](#), Littler Insight (Dec. 7, 2010).

<sup>4</sup> Kevin Kraham, [Addressing Post-Election Tensions in the Workplace](#), Littler Insight (Nov. 18, 2016).

#### 4. Choose to be inclusive and welcoming.

It can be tempting to select a religious theme for a holiday party, particularly as several of the world's largest religions (including Christianity, Islam, and Judaism) have feast days at this time of year. But for nearly all employers, the purpose of the holiday gathering is not to celebrate any specific religion—it is to celebrate the employees, the organization, and hopefully the close of a successful business year. The employees themselves are the guests and may be a diverse crowd, with many varied religious and cultural traditions.

As a result, and despite the “anti-PC” rhetoric in some circles, employers should be inclusive with party themes, messages, and decorations. For example, invitations should not refer to a “Christmas party” when the event is more accurately described as a “holiday party” or “end-of-the-year celebration.” Employers should also refrain from decorating with religious imagery, such as nativity scenes or menorahs. And for all the reasons discussed in this article, please skip the mistletoe!

Some employers plan parties occurring in the new year, which further distances the event from underlying religious connotations and offers a diversion during the post-holiday doldrums. This approach also can be much easier on organizations that are busy at the holidays, as well as less expensive.

#### 5. Be mindful of social media.

If Benjamin Franklin were alive today, he would identify three certainties in life: death, taxes, and social media coverage of the office holiday party. Without question, employees will post comments or pictures from the event on social media. This digital attention can be positive, but it can also lead to very public embarrassment for employers and attendees alike, along with other complications.<sup>5</sup>

With that in mind, employers should encourage employees to interact with each other, rather than their screens. Providing an optional, structured activity or entertainment at the party might help keep employees engaged. That being said, employers should not permit drinking games, gag-gift exchanges, or unsupervised skits or speeches, as these activities tend to get out of hand.

Employers should also instruct employees not to photograph, record, or post about party guests without their permission. Posting still or video images without consent is not only rude—it can be illegal in some states and may violate federal wiretap laws. And if an employer wishes to post on its own social media accounts, it should pay one sober, sensible employee to handle that task.

#### 6. Fun isn't mandatory.

There are many reasons an employee might choose not to participate in a holiday gathering, even if it is billed as a secular event. Some employees may not feel comfortable attending a party for religious reasons (i.e., Jehovah's Witnesses) or for other personal reasons (i.e., social anxiety issues, financial concerns, dietary restrictions). Recovering alcoholics might want to skip a party where alcohol is served. And if the party is after-hours, parents without childcare might have to pass, some employees might have a scheduling conflict, and others just might not want to attend.

The bottom line is that, unless an employer intends to pay its employees to participate, attendance must be voluntary. Employers may not penalize any employee who declines the holiday party invitation, no matter the reason. Relatedly, employers may want to avoid using the holiday party as a venue for business-related speeches, distributing gifts or bonuses, or the announcement of awards or promotions—all of which could imply that employee attendance is mandatory.

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<sup>5</sup> Zoe Argento, [Social Gatherings and Social Media this Holiday Season - What's Not to 'Like'?](#), Littler Insight (Dec. 14, 2015).

## 7. Finding that perfect gift . . .

Many employers provide gifts to some or all of their staff at the holidays. While thoughtful, this gesture nonetheless requires some care. Gifts should be uniform, neutral, and of equal value, regardless of the recipient's sex, sexual orientation, or other characteristic.

In addition, employers should be aware of the tax consequences of certain gift options. Gifts such as turkeys, gift baskets, and other tangible goods with a *de minimis* value (typically around \$25 or less) do not implicate any tax issues. But beware of giving cash, or "cash equivalents" (i.e., gift cards), which are always treated as taxable wages by the ultimate Scrooge, the IRS.

Employees, too, are now planning their gift-giving. If an employer allows employees to conduct a gift exchange, it should ensure that participation is optional. It should also insist that all gifts are appropriate and encourage a reasonable price limit. Employers might also consider how to address employee online shopping at work, which is prevalent and may decrease office productivity.

## 8. Juggling time-off requests.

This time of year, many employers will notice an uptick in requests for time off. Employees may want to use leave time to finish up shopping, to prepare for hosting the family get-together, or to travel. But long lunches, leaving early, arriving late, and other time away can become a real problem. Accordingly, employers should pay extra attention through the end of the year on timekeeping and recordkeeping—particularly for employees who might have been recently re-classified as hourly.<sup>6</sup>

Employers must also make sure that they are granting time off requests fairly. All requests should be handled in a non-discriminatory manner, consistent with any existing policies or procedures governing such requests. For example, if Employee A asks for the day off on December 23, and then Employee B asks for the same day off, and both requests cannot be allowed, it would be impermissible to grant leave to Employee B solely because she is Christian or female, while Employee A is not.

## 9. Keep party crashers at bay.

Holiday events—especially if hosted at the office—should not be an open house. Only employees should be invited, possibly along with a guest if the party is after-hours and off-site. While no one wants to be a Grinch, it can become difficult to monitor the activities of non-employees, who may not be recognized, wandering around the office. Remember that inviting non-employees into the work space may give them proximity to files, computers, and potentially confidential or proprietary material.

Moreover, employers can be subject to premises liability and/or social host liability (aka "dram shop liability") for injuries occurring at, or because of, an office event. Tort liability to third parties may also attach due to an employee's misconduct. Employers may wish to consult their insurance providers to learn if party-related incidents would be covered by existing policies. And to help keep the party under wraps, employers should not share details about the event with vendors or clients, or on social media.

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6 Although implementation of the new overtime rule promulgated by the U.S. Department of Labor has been temporarily enjoined, some employers may choose to continue with realignment in light of the ongoing litigation and/or to honor previously-announced changes. See Sean McCrory et al., [Federal Court Blocks New Overtime Rule](#), Littler ASAP (Nov. 23, 2106); see also Daniel L. Thieme, [The DOL Overtime Salary Regulation Is Temporarily Enjoined – Now What?](#), Littler ASAP (Nov. 28, 2016). Additionally, employers in New York likely must comply with a similar pending state law change affecting exempt employees, which, if adopted, will take effect December 31, 2016. Emma Fursland & Bruce R. Millman, [Proposed Amendment to New York State Wage Orders Set To Substantially Raise Salary Requirements For Exempt Employees](#), Littler Insight (Nov. 1, 2016).

## 10. Workers' compensation issues.

Despite an employer's best efforts, party fouls happen. And as with third parties, employees can get hurt. Given this reality, employers should consider whether such injuries would fall under their workers' compensation coverage.

Workers' compensation laws vary widely by jurisdiction. In general, however, workers' compensation liability frequently turns on whether the employee was injured performing his or her duties or otherwise acting within the scope of employment. Injuries suffered at a company party may be compensable in many states, particularly if the event is formally sanctioned by the employer. Additional factors that might bolster a workers' compensation claim include: (1) the location (i.e., the party took place at the office); (2) the employer's level of encouragement for participation (i.e., attendance was required); and (3) the role of the employee at the function (i.e., whether he or she performed duties at the event, such as handing out drink tickets).

In conclusion, we hope these pointers have demonstrated two things: employers have much to consider when hosting a holiday party, and lawyers really know how to kill joy! Or, in other words, while the holiday party is a worthy and festive tradition, preparation is helpful to ensure employee enjoyment and safety. Employers should contemplate carefully what type of party environment best suits their staff, budget, and goals. They should also consider issuing a memo or email to employees prior to the party, addressing, for example, the voluntary nature of the event, limitations on drug or alcohol use, anti-discrimination policies, social media etiquette, and/or gift-exchange expectations. With a little forethought, this year's holiday events can be memorable—but not infamous. Happy Holidays!