



DON'T LET THE GRINCH RUIN YOUR COMPANY HOLIDAY PARTY



J. Eric Harrison

"[T]he ubiquitous use of social media by employees exacerbates the risks associated with conducting a company holiday party."

'Tis the season for company holiday parties. And while company holiday parties can create goodwill with employees, as well as fostering camaraderie and improving employee morale, unfortunately, particularly when alcohol is involved, company holiday parties can also create a festive environment that also fosters the risk of inappropriate behavior. And, this inappropriate behavior can be much more than merely embarrassing. It can also lead to lawsuits or claims/charges of harassment or employment law violations which can expose the employer who sponsored the party to liability. By following the suggestions below, you can greatly reduce the chances that the "Liability Grinch" ruins your holiday party.

Alcohol consumption is one of the most common sources of employer liability at an employer-sponsored holiday party. Liability can be predicated on theories of negligence or *respondeat superior*, which extends liability for employee misconduct or negligence to the employer. Finally, most states have "dram shop" laws which hold the provider of alcoholic beverages liable for injuries caused by individuals to whom the provider negligently served alcohol. And in many states, that liability extends not just to sellers of alcohol but to social hosts who provide alcohol to guests.

The most obvious preventative measure for an employer would be to not serve alcohol at a holiday party. However, if the employer makes the decision to serve alcohol, or to make alcohol available to the guests, the following precautions should be considered. First, hold the event at a restaurant or other off-site location that has a liquor/beer permit and professional bartenders who are trained to deal

with intoxicated guests. Or, consider hiring a professional bartender or caterer to handle the dispensing of alcohol. The employer should also limit the amount of alcohol to be served by allocating a limited number of drink tickets, having a cash bar where attendees pay for their own alcohol and/or limiting the time period during which alcohol is served. Also, definitely provide alternative beverages such as soft drinks, coffee and tea to attendees. Finally, strongly consider serving dinner or hors d'oeuvres during the party.

If alcohol is being served, consider providing alternate transportation and/or lodging, at company expense, for any guests. The employer should stress the importance of appropriate and responsible behavior in conjunction with any alcohol consumption and encourage the use of designated drivers. All of these options should be advertised to all guests before, during and after the party. The employer should also encourage all employees to be on the lookout for other employees and guests who appear to be intoxicated or acting inappropriately due to alcohol consumption. Finally, the employer may want to consider the use of "spotters" at the party who are not consuming alcohol and are on the lookout for potential alcohol-related problems. However, be sure not to use spotters who are possibly "nonexempt" wage-earners under the Fair Labor Standards Act to avoid any claims by those employees that they were required to work off the clock.

In the era of the #MeToo movement, many people are very sensitive to the issue of sexual harassment. Company holiday celebrations present an environment rife with opportunities for sexual harassment. To reduce the risk of sexual harassment claims arising from a holiday party or event, employers should ensure that their policies clearly outline that all company anti-harassment and conduct policies extend to employer-sponsored social events. The policy should clearly state that such holiday parties are still intended to be professional environments. An employer may wish to outline specific conduct that is not acceptable. Additionally, the employer should make sure to avoid any risqué, adult-themed venues, such as nightclubs or adult entertainment establishments, and should avoid

Continued on page 4 ►►

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Ann E. Sartwell

"This decision has potential impact well beyond the public sector."

UNANIMOUS SUPREME COURT: ADEA COVERAGE EXTENDS TO SMALL PUBLIC EMPLOYERS

The U.S. Supreme Court's first decision this term was unanimous. In *Mount Lemmon Fire Dist. v. Guido*, 201 L. Ed 262 (Nov. 6, 2018) - authored by Ruth Bader Ginsburg and announced just one day before she was injured in a fall - the Supreme Court held that the Age Discrimination in Employment Act (ADEA) applies to all state and local public sector employers. The Sixth Circuit, under *EEOC v. Monclova*, 920 F.2d 360 (6th Cir. 1990), had

previously held that only public employers with twenty or more employees were subject to ADEA liability. Not all U.S. Courts of Appeal reached the same conclusion, however, and the *Mount Lemmon Fire District* case provided the opportunity to resolve the conflict.

At first blush, this decision might appear to be of limited interest, especially since many states (Tennessee included) already have state laws banning age discrimination by public employers of any size.¹ Appearances can be deceiving. This decision has potential impact well beyond the public sector.

The key to understanding the potential broader impact of the *Mount Lemmon Fire District* decision lies in the ADEA's history. The ADEA generally bans discrimination against employees over the age of 40 by an "employer." At the time the ADEA was enacted - three years after Title VII banned discrimination based on race, sex, color, religion and national origin - the term "employer" under both statutes only included private employers. That separate history explains why employers (and sometimes practitioners) are caught by surprise by distinctions between ADEA and Title VII administrative processes, damages, and the like. Title VII bans discrimination by any "employer," which is defined as a "person engaged in commerce who has fifteen or more employees." In 1972, Title VII's definition of "person" was expanded to include "governments, government agencies,

[and] political subdivisions." Meeting the "numerosity" requirement is thus a basic element of any Title VII plaintiff's case. *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006)

The ADEA was also amended to include public employers, but two years later and via different statutory language. 29 U.S.C.S. § 630(b) now defines an "employer" as:

"a person engaged in an industry affecting commerce who has *twenty or more employees* The term *also means* (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency"

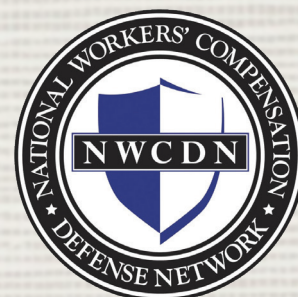
(emphasis added). This amendment occurred at the same time Congress expanded FLSA coverage to include all government employers.

The Court's analysis in *Mount Lemmon Fire District* turned on what the term, "also means" means for ADEA purposes. Ordinarily, "also" is "additive" rather than "clarifying," and when "also means" appears in other federal legislation it "typically" has been given an additive meaning. The Court rejected the employer's argument that the ADEA should be read consistently with Title VII, in part because the ADEA appears in the same title of the U.S. Code as the FLSA, which makes no distinction based on employer size.

The Court's decision does not end answer a much more challenging question: namely, what the words that follow "also means" in the definition of *employer* mean. Does "any agent of such a person" mean that Congress meant to impose individual liability for an ADEA violation? By way of footnote, the Court declined to address the issue because it was not part of the underlying dispute in that case. The Sixth Circuit has previously considered and rejected individual liability under the ADEA in *Stults v. Conoco Inc.*, 76 F.3d 651 (1996). Rest assured, in light of *Mount Lemmon Fire District*, there will be plaintiff's attorneys who will assert otherwise.

¹The Tennessee Human Rights Act, at Tenn. Code § 4-21-102 (5), defines an employer to include the state and any political or civil subdivision thereof.

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RIOT GAMES – LESSONS FROM A CORPORATE CULTURE OF HARASSMENT



Mary C. Moffatt

“[This case] provides a good example of how unacceptable behavior, left unchecked, can grow into a systemic problem ... so deep that it becomes a company culture.”

gender-discrimination including claims of equal pay discrimination, various forms of sexual harassment, and related misconduct, as well as retaliation.

Three months prior to the November lawsuit, the online gaming blog, Kotaku, released the results of an investigation into the Company’s culture which included interviewing 28 current and former employees. The report contained serious allegations such as male co-workers openly denigrating females in Company meetings, exhibiting aggressive hostility towards female colleagues, upper level management sexually evaluating female employees, and male employees sending unsolicited pictures of their genitalia to female co-workers. Shortly after the Kotaku publication, Riot Games issued a statement which included an apology and a promise to address these issues including taking steps to “weave...change into our cultural DNA and leave no room for sexism or misogyny. Inclusivity, diversity, respect and equality are all non-negotiable.”

The lawsuit alleges the Company had a practice of paying women less than similarly-situated men, assigning women to less desirable jobs, promoting men more frequently and over similarly-situated and qualified women, as well as maintaining and encouraging a sexually discriminatory work environment. The allegations include claims that an officer bragged about visiting strip clubs on work trips, another male employee commented about drugging and raping a female employee, and male employees allegedly circulated emails with jokes intended to demean women’s intellect or that were sexually explicit. The lawsuit is in its early stages and Riot Games will no doubt resist the claims.

The scenario provides a good example of how unacceptable behavior, left unchecked, can grow into a systemic problem

within an organization so deep that it becomes a company culture. So, what can other employers learn from Riot Games’ difficulties?

First and foremost, organizational culture matters and it starts with the upper levels of management. Harassment and discrimination prevention is a multi-pronged process, which includes creating a culture of mutual respect in the workplace. That culture of respect, in turn, may be an employer’s best hope at preventing complaints of harassment and discrimination from occurring in the first place.

While a written policy alone will not work as a vaccine against harassment issues, a strong, comprehensive policy is a necessary component and should include provisions designed to make it easy to report alleged misconduct such as:

- A clear statement that harassment based on any legally-protected characteristic will not be tolerated;
- An easy-to-understand description of prohibited conduct, including examples;
- A description of a reporting system, available to employees who experience or observe harassment and that provides multiple, easily accessible avenues to report; employers should consider a system to enable anonymous reporting of complaints such as a hotline;
- A statement that the reporting system will provide a prompt, thorough, and impartial investigation; and
- An assurance that the employer will take immediate and proportionate corrective action if it determines that harassment has occurred.

Unequivocal, frequent communication about the organization’s commitment to a culture of mutual respect is critical. Beautiful policy statements alone are insufficient, however - those policies must be reinforced with:

- Allocating money and staff time appropriately;
- Delegating authority to investigate and take prompt, consistent, proportionate action;
- Assessing organizational-specific risks and taking steps to minimize them;
- Using workplace climate surveys to assess the effectiveness of its programs and policies; and
- Training and evaluating supervisors and mid-level managers on prevention, recognition and response to problematic behaviors (including applying performance metrics to supervisors and managers).
- Train everybody, but train supervisors and managers differently, and do not rely solely on passive learning, such videos and pre-recorded lectures.

In this age of increased transparency and accountability,

Continued on page 4 ►►

“DON’T LET THE GRINCH RUIN YOUR PARTY”

continued from page 1

sexually-themed games or activities (such as hanging mistletoe or exchanging “adult” gag gifts). Further, while it can increase the expense of the party, consider allowing guests of employees to attend. Employees tend to act in a more professional, reserved manner if their significant others or unfamiliar faces are in attendance. And finally, if any allegations surface of inappropriate conduct during the holiday party, the employer should treat it just like any other harassment claim and conduct a thorough and prompt investigation, which should result in appropriate discipline if the allegations are proven to be true.

The employer should also be aware that workers’ compensation liability can arise from a company holiday party. That is, an employee who is injured in connection with a holiday party may be able to pursue a workers’ compensation claim unless the following steps are taken to minimize the risk of such liability. First, keep the holiday party separate from employee job duties. That is, make it clear that the holiday party is voluntary and attendance is not a condition of employment. Also, avoid engaging in any business activities during the event such as speeches about business matters or giving out business or performance awards. One advantage of having an off-site party is that it strengthens the employer’s claim that the party is not a work-related activity under workers’ compensation laws. This has the added benefit of avoiding possible wage and hour law violations. Additionally, be sure that off-site vendors and establishments connected with the holiday party are independently licensed and insured.

To avoid any issues with possible discrimination claims, the employer should make sure that the event is nondenominational and is billed as a “holiday” party instead of a “Christmas” party. Also, the employer should avoid any displays of religious symbols so as to allow employees of all religious backgrounds to feel welcome. Also, if using an outside venue, be sure to ensure that the venue has a nondiscrimination policy, particularly if it is

some sort of private club, and also make sure the venue is ADA accessible.

In addition, the ubiquitous use of social media by employees exacerbates the risks associated with conducting a company holiday party. Inappropriate and/or embarrassing behavior could quickly become public knowledge through a social media post. However, employees enjoy certain free-speech rights in connection social media usage, so the employer must tread carefully when trying to limit or constrain an employee’s use of social media. Initially, if your company has a well-drafted social media policy, consider extending it to the holiday party. Also, the employer can consider prohibiting employees from taking and posting photos or videos of their fellow employees and guests without their consent under the auspices of protecting employees’ privacy rights. The employer can also request employees remove any offensive or inappropriate social media content related to the holiday party (so long as it does not depict or relate to concerted activity regarding the terms or conditions of employment under the National Labor Relations Act). Finally, the employer should not publish any photographs or videos of the holiday party without the consent of the photographed employees.

And lastly, prior to the holiday party, the employer should make sure it has adequate insurance coverage for the event. The employer may wish to confirm that its employment practices liability insurance extends to the holiday party and further, the employer may want to ensure that its general liability policy covers the event and includes dram shop coverage. In fact, the employer may wish to explore the possibility of taking out a short-term custom insurance policy to cover just the holiday party.

Hopefully, if you follow these guidelines, you will have a festive and enjoyable holiday party that does not result in legal entanglements that extend well into the new year. Happy holidays!

“LESSONS FROM A CORPORATE CULTURE OF HARASSMENT”

continued from page 3

inaction regarding the prevention of harassment and discrimination is simply not an option. Organizations should frequently evaluate policies and procedures, and consider multiple ways to communicate the message of mutual respect, accountability and responsibility in clear and simple terms. Train everyone and document it. Train managers and supervisors about their specific roles and responsibilities, and consequences for failing to act.

Survey your employees – inquire about their perceptions regarding the organization’s commitment to harassment prevention and ask them for suggestions about

improvements they would like to see to its systems. Keep paying attention to the data that will begin to emerge about the most effective approaches to harassment prevention, and, in the meantime, continue to conduct training at regular intervals.

Not every organization faces the same internal turmoil or external pressures that Riot Games is facing, but the messages leaders convey to the individuals who work with or for them have consequences.

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