

How To Throw A Holiday Party — Without The Legal Hangover

By Vin Gurrieri

Law360 (December 13, 2018, 12:36 PM EST) -- While holiday parties may be a time-honored tradition for many companies, they present unique challenges that can land careless employers in legal hot water, especially in a year when the #MeToo movement has pushed concerns about workplace sexual harassment to the forefront of public consciousness, attorneys say.

Holiday parties give colleagues a rare chance to socialize, and boost camaraderie and morale — and they give businesses a chance to say “thank you” for jobs well done. But they can also create legal liability for employers over a host of issues, including religious bias, injuries stemming from alcohol consumption and sexual harassment.

The harassment issue in particular, even though it has long been a problem associated with company social events, has made employers more skittish this year as they plan holiday parties for the first time since #MeToo went viral.

Michael Schmidt, vice chair of Cozen O’Connor PC’s labor and employment practice, said employers are at a minimum more conscious about what is being served and what behavior is being promoted, while adding that some companies have eschewed holiday parties all together.

“I think it’s fair to say that companies are definitely questioning both the need for holiday parties this year and how they go about doing [them] this year because of the #MeToo movement and everything that’s gone on the past year in the sexual harassment area,” Schmidt said. “Certainly, I know companies [that] have either not gone ahead with holiday parties at all this year or if they have they’ve dialed them back a little bit.”

Here, Law360 looks at four things employers should keep in mind to make sure that holiday parties don’t become fodder for lawsuits.

Tread Carefully With Booze

Year after year, attorneys who advise businesses on the legal risks associated with holiday parties warn that most legal problems can be traced back to employees having a few drinks too many, which relaxes their inhibitions.

For example, a drunk supervisor may touch a subordinate without consent, or a conversation between inebriated colleagues at the bar could lead to offensive comments or an improper sexual proposition.

“Employers who do allow alcohol at their company events should realize that alcohol affects individuals differently,” said Jennifer Fowler-Hermes, chair of Williams Parker Harrison Dietz & Getzen’s labor and employment practice. “They should also recognize that employees who would not normally engage in improper conduct may do so after several drinks.”

So how do employers strike a balance between letting workers enjoy themselves and keeping their revelry in check?

Fowler-Hermes suggests that employers make it known in advance of the party that the company’s standards of conduct and harassment rules remain in effect. She also suggested that the duration of the party be limited, particularly if alcohol is served, and that employers make sure that the drink menu itself is limited, that food is available and that workers aren’t serving themselves drinks.

Craig Bonnist of McCarter & English LLP similarly said there are some common-sense ways employers can limit alcohol consumption, including limiting the drink menu to just beer and wine — which eliminates hard liquor that can get people drunk faster — and cutting off drink service about an hour before the party wraps up.

“If you have employees that are younger and drank too much, which often happens, then your liability is not just for [sexual harassment] but somebody may be injured,” Bonnist said, while adding that it may also behoove employers to consider offering transportation options to workers who were drinking to keep them from driving home.

“If that person leaves and was viewed as intoxicated or incapable of getting himself or herself home, management needs to be the parent in the room ... and ensure that person gets home safely because liability can be tied to the company for knowingly endangering an employee” who drank too much, Bonnist said.

The #MeToo Effect

Although the potential for sexual harassment at holiday parties is always a concern for employers, those fears have been heightened this year, about 14 months after the #MeToo movement went viral amid reports of rampant sexual misconduct by onetime Hollywood mogul Harvey Weinstein.

The cultural movement has resulted in numerous public figures being felled. It also has spurred many employers to take a fresh look at how they handle incidents of alleged harassment and at the policies they have in place both for addressing complaints and how they dole out discipline.

While Fowler-Hermes said that many businesses were already updating their practices before #MeToo, she cautioned that not all employers have done so.

“Numerous employers started making changes to how they handle holiday parties and other company-sponsored social events both before and after the advent of [the] #MeToo movement,” Fowler-Hermes said. “On the other hand, other employers have not made changes and regard such events [as] represent[ing] a time to let employees ‘cut loose.’ Employers should be proactive about setting rules [and] standards in advance.”

As ways of scaling back the festivities and limiting issues related to sexual harassment, Schmidt said some companies have considered holding them at their work site instead of at offsite bars or restaurants “where people are changing [clothes] and feeling as if they are no longer in the workplace,” and that some companies that still hold them at offsite locations have considered opening them up to spouses and significant others “to try to quash any inappropriate behavior by just having employees there alone.”

Bonnist also pointed out that tougher sexual harassment laws have been enacted in some jurisdictions, like New York City, since the onset of the #MeToo movement and that victims are much more willing to come forward with allegations, which should make employers even more careful when it comes to making sure their holiday events are harassment-free.

“Because of the recent changes in law and because of the attention that’s been drawn to sexual harassment, employees are much more aware of their rights and companies have in place much more robust anti-harassment policies and complaint procedures,” Bonnist said. “I would think that employers would be on their best behavior and there will be no question that if an employee believes that somebody has crossed the line, that employee is more likely ... to avail himself or herself to the complaint procedure that’s been put in place.”

Beware the After-Party

While employers can try their hardest to make sure their holiday event is conducted by the book, Bonnist noted that many legal problems actually arise from things that happen after the party was supposed to have ended.

That means employers must set a clear end to the party and managers should avoid even attending any after-parties, let alone picking up a bar tab, he said.

“A lot of what comes across my desk is what happens after the party. An employer needs to make it clear that a party ends at a certain time,” Bonnist said.

If managers do show up at an after-party, Bonnist said it could be construed as a continuation of the company-sponsored event — which could open a company up to legal liability if something bad happens.

“If the situation is such that there are no managerial employees [at the after-party], the company is not encouraging attendance, it is not paying for food and drink, it has absolutely nothing to do with that arrangement, and co-workers — after a firm ending to the company-sponsored event — decide on their own to go out, then the company has gone a long way to absolving itself of any potential liability because it can no longer be connected to the workplace,” Bonnist said.

Religion and Pot

Although harassment and legal problems that stem from overdrinking are at the top of employers' lists of concerns for holiday parties, there are other issues they should keep in mind if they want to avoid lawsuits. Among them, employers should avoid using religious symbolism at company-sponsored events to avoid potential claims of religious discrimination and opt instead for seasonal themes, attorneys say.

“I would set the expectation or let employees know ahead of time that this is an event to celebrate the end of the year and is not to celebrate any particular religious holiday,” Bonnist said.

Meanwhile, a new issue that is increasingly working its way into employers’ minds is what they should do if they operate in states that allow for some form of marijuana use and an employee at a company-sponsored event decides to partake.

Schmidt noted that even in states that have legalized marijuana for recreational use, it is still an unlawful drug under federal law and users are “arguably committing a federal crime.”

Separately, he said that employers could run the risk of violating statutes related to disability discrimination if they discipline or prevent workers who use it for medicinal purposes.

“It very much is a new wrinkle in this area and one that doesn’t have a whole lot of answers or definitive answers just yet,” Schmidt said.

--Editing by Kelly Duncan and Rebecca Flanagan.