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Holiday Season Parties: An Employer's Guide to Avoiding Legal Hangovers

The festive season is almost upon us, bringing with it the (in)famous office holiday party. This event is a great opportunity for employers to reward hard work, strengthen team culture and blow off steam. Additionally, this year, it provides a chance for colleagues who may have only interacted virtually to get to know one another in person. However, after last holiday season was cancelled and WFH was the main option, some employees may be feeling more jolly than usual.

A combination of high spirits, liquid courage and lowered inhibitions can often result in a headache for HR and ER managers who are tasked with dealing with the aftermath of any untoward incidents. Of course, there are usually one or two (often, mild-mannered) employees who bring a little too much festive cheer to the occasion. Many of us may think of the perfect ending for Tim and Dawn in The Office Christmas Special. However, we have also all heard the uglier tales in which, between the mulled wine and off-key renditions of Mariah Carey, pent up inter-colleague acrimony is released, inappropriate sexual advances are made, and untoward comments are offered up.

Employers can potentially be liable for these drunken actions and this month's alert provides some tips on avoiding the perils of the holiday party by having systems in place to mop up any issues on the night.

MISSES CLAUSE: EMPLOYERS MAY BE VICARIOUSLY LIABLE FOR THEIR STAFF'S ACTIONS

Employers can be held vicariously liable for discriminatory acts or harassment by employees carried out "in the course of employment", even if the event is off-site or outside of normal working hours. There have been numerous cases where the holiday party has been held to be an extension of the office environment and employers have paid the price for unwanted advances or discriminatory comments.

One example is an Employment Appeal Tribunal (EAT) case where a male police officer told a female colleague "f***** hell, you look worth



one" at an after-work leaving party in a local pub. This was found to be sex discrimination occurring within the definition of the "course of employment", for which the employer could be held vicariously liable for.

In another case, a male employee succeeded in a claim for direct discrimination after his female boss said she would perform a sex act on him if he hit his targets. The remark was made at a boozy lunch in the presence of other colleagues who took it as a joke. However, the Tribunal ruled that the "highly sexualised comment" was made because of the employee's gender and therefore amounted to less favourable treatment because of sex.

Vicarious liability can also extend to claims for assault. In a leading Court of Appeal case, an employer was held vicariously liable for the assault inflicted by a managing director on one of its employees. A work-related argument culminated in an employee being punched twice, such that he fell back and hit his head on the ground, and suffered severe brain injuries. The incident occurred after the holiday party and the colleagues had moved on to another venue where they had continued drinking.

Even though the assault was not committed during an organised work event, there was a "sufficient connection" between the wrong committed by the employee and his employment, such that it was held fair to hold the employer vicariously liable. The managing director had his "managerial hat" on and had misused his position when his managerial decisions were challenged.

Have an experienced, sober manager supervise the event so that any disagreements or inappropriate behaviour can be swiftly de-escalated. Make sure that all employees have been given anti-harassment and discrimination training.

WINNERS OR BOOZERS: PROVIDE CLEAR GUIDANCE ON THE STANDARDS OF BEHAVIOURS EXPECTED

One way to ensure employees do not take the "silly season" too literally is to provide guidance on the acceptable standards of behaviour. Consider issuing a statement to remind staff that the party is an extension of the workplace and make it clear that inappropriate behaviour such as over consumption of alcohol, drug use or unwanted conduct (such as sexist or otherwise discriminatory remarks) may lead to disciplinary action.

It does not have to be a lengthy, detailed policy. It could be a gentle email reminder which sets out other logistic arrangements for the night. Such a reminder would be seen as a "reasonable step" in preventing discriminatory conduct and assist in defending any claim of vicarious liability.

NEVER TOO EARLY: TAKE PRE-PARTY PRECAUTIONS – UNDERTAKE A RISK ASSESSMENT, INCLUDING FOR COVID-19

Employers have a duty of care regarding the health and safety of staff at any employer-organised event. Having a risk assessment in place for the event is key for avoiding negligence claims. The risk assessment should consider the hazards posed by any decorations (particularly potential fire hazards) and have plans in place for any foreseeable injuries. Ensure a sufficient number of first aiders are in attendance.

Employers should include a risk assessment of COVID-19 and identify the controls needed to reduce the risk. The government guidance leaves it to employers to consider the risk within their workplaces and decide which mitigations are needed.

The government has issued new advice to take a (voluntary) lateral flow test before heading to "crowded and enclosed spaces". Employees should be asked to adhere to this guidance. The government also encourages use of the NHS COVID-pass at large indoor events. Employers could consider visual checks of the NHS COVID-pass as a condition of entry.

The UK Information Commissioner's Office (**ICO**) has issued guidance relating to the visual check of the NHS COVID pass, which states that if there is no collection of data relating to vaccination status, then there is no 'processing', and



so the activity of simply conducting a visual check of a COVID pass is outside of the ambit of GDPR (provided no personal data is retained). A visual door check of the NHS COVID pass would therefore not amount to processing of data and avoid the issues around consent to process such data.

GIVING, NOT TAKING: AVOID MAKING PROMISES

Alcohol can loosen tongues. Managers should steer clear of any conversations about promotions, pay rises or performance. In one case an employee claimed he had been constructively dismissed by his employer after it failed to honour a “contractual promise” to increase his salary made during a conversation at the holiday party. The Court of Appeal found in the employer’s favour on the basis that that a promise to award a pay increase “eventually” or “in due course” was too vague to amount to a binding contractual promise. However, had the employer committed to a more definitive timeframe, it may well have gone the other way.

CHRISTMAS SPIRITS: BE WARY OF THE OPEN BAR

In another cautionary tale, three employees who got drunk and had a fight successfully argued before the Tribunal that their resulting dismissals were unfair on the basis that the company had effectively condoned their behaviour by offering free unlimited alcohol. Although this was overturned by the EAT, employers should take care not to let their staff go too overboard to avoid such claims and also for health and safety reasons.

You may want to consider restricting the amount of free alcohol available or have trained bar staff serving drinks to ensure no intoxicated persons are served. Providing plenty of food and non-alcoholic drinks may also assist.

Under the Misuse of Drugs Act of 1971, it is an offence for an employer to knowingly permit or even to ignore the use or supply of any controlled drugs taking place on their premises. If it is discovered that an employee is taking drugs at the holiday party, it is important that appropriate action is taken.

WRAPPING UP: GETTING HOME AFTER THE EVENT

While employers do not have to provide transport for employees to get home, thought should be given to how employees will get home safely after the party. An employer could potentially be liable in a situation of drink driving where actions of the employee were deemed within the course of their employment, particularly if there was no other way for them to get home. If a staff member has clearly drunk too much and plans to drive home, the employer should intervene.

Could you provide coaches to nearby tube stations or pre-book taxis? Employers should issue clear advice about not drinking and driving, provide information on alternative methods of travel and advise staff to check the time of their last trains home.

COLD TURKEY: THE MORNING AFTER

If your party falls on a weekday, be clear about your expectations regarding the next day. If you are taking a firm line and disciplinary action is to be taken for unauthorised absence or lateness, staff should be informed about this possibility in advance. A history of tolerance at work events or another manager’s more lenient approach could result in such disciplinary action being deemed unfair.

THE NAUGHTY LIST: DEALING WITH THE AFTERMATH

An employee can be disciplined for misconduct occurring at or after a holiday party. In one Tribunal decision, the employer was found to have fairly dismissed an employee for punching a colleague in the face on the walk home from the holiday party. The Tribunal found that had there not been a holiday party, the employees would not have been walking home together, and therefore the assault was sufficiently connected to employment.



Employers should follow their usual disciplinary process and ensure that any complaints are fairly and thoroughly investigated. In one case, a waitress was found to be constructively dismissed after an employer had failed to adequately investigate an allegation of assault at a party. Another employee had placed the waitress in a headlock, seemingly in a friendly drunken gesture. A noticeable squeeze captured on CCTV resulted in the waitress passing out. She suffered facial paralysis caused by a lack of oxygen or nerve damage. In the immediate aftermath, the waitress did not want the employer to formally investigate the matter. However, two months later, after becoming aware of the long-term nature of her injury and after witnessing the colleague be aggressive towards another female, she viewed the incident as more insidious. The employer failed to investigate her allegations with any formality. The Tribunal noted the “inextricable link” between the incident at the party and the workplace, and said it was incumbent on the employer to investigate the matter further as a disciplinary issue.

Office gossip following a party has also resulted in a successful constructive dismissal claim. In one EAT case, an employee brought a claim as a result of gossip about her pregnancy following her conduct at the law firm's party. The claimant was in a relationship with one of the firm's solicitors but was seen kissing the IT manager at the party. The two colleagues left together and when the employee later disclosed her pregnancy, there was speculation about the paternity of the baby, initiated by the HR Manager. The employee asked to be transferred to another office and raised a grievance about the rumours spread by the HR Manager. The employee was not paid for the whole of February after refusing to come into the office and subsequently resigned. The EAT found that the gossip connected to the pregnancy constituted harassment. It held that the employer had breached the implied term of trust and confidence by insisting that the employee return to work before investigating her grievance, and terminating her pay when she did not.

It is important that any incidents involving multiple employees be dealt with equally. At the London Zoo's holiday party one year, a meerkat handler and a monkey specialist got into a physical fight (being the current and former girlfriends of another colleague, the llama keeper). There were factual disputes over who initiated the altercation, but the brawl resulted in one woman needing stitches after being hit in the face with a glass. The more seriously injured zookeeper received a final written warning and the other was dismissed. The Tribunal found that there was insufficient evidence to determine who had initiated the fight and concluded the dismissal was unfair. The two zookeepers should have received the same disciplinary sanction – which the Tribunal noted could have been dismissal or final written warnings.

ALL I WANT FOR CHRISTMAS IS LIEU: HANDLING HOLIDAY REQUESTS AND CARRY OVER

The countdown to the end of year is on. For many employers this aligns with the end of their holiday year. Have you reminded employees to use up their annual leave entitlement? It is best practice to remind employees to use their entitlement and warn of the potential for losing it.

Last year, the carry over rules were relaxed to allow employees to carry over up to four weeks of their annual leave for the next two leave years where they had been unable to take some or all of their leave due to COVID-19. Usually, this entitlement cannot be carried over except in exceptional circumstances. There is little guidance on use of this carry over exemption and employers may face arguments as to what might amount to an inability to take leave due to COVID-19.

An employer can require employees to take annual leave over the festive period, which is helpful for employers that close down over that period. An employer needs to give notice that is at least double the period of leave that the employee is required to take. This should also ideally be stated in a holiday policy.

An employer can also refuse or cancel holiday, but must give the employee at least the same amount of notice as the amount of leave requested. For example, an employee wanting to take one week off should give two weeks' notice. In that scenario, the employer must give one week's notice if they wish to refuse the request.



It is advisable to consider well in advance what cover is required over the holiday season within each team. Have a system in place for dealing with competing requests fairly. For example, a rota, ballot or “first come first served” system. Ensure competing requests are not dealt with in a discriminatory way (for example, favouring employees with children).

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