Snell & Wilmer L.L.P.

THE WORKPLACE WORD

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Back by popular demand, here is our annual Holiday Liability issue of the Workplace Word.

Avoiding Holiday Liability

The holidays should be a cheerful, festive and happy time of year. However, the holidays can provide fertile ground for potential legal liability against employers. Seemingly simple scenarios, such as employees taking time off of work for religious observance, and employers giving end-of-year bonuses and hosting holiday parties, all can have legal consequences. While employers do not need to avoid celebration altogether, preventive planning can go a long way toward avoiding holiday problems.

Holiday Religious Accommodation

Title VII of the Civil Rights Act requires an employer to "reasonably accommodate" an employee's religious observances, practices and beliefs, as long as it can do so without "undue hardship" on the employers' legitimate business interests. An employer can show undue hardship if accommodating an employee's religious practices requires more than ordinary administrative costs, diminishes efficiency in other jobs, infringes on other employees' job rights or benefits, impairs workplace safety, causes co-workers to carry the accommodated employee's share of potentially hazardous or burdensome work, or if the proposed accommodation conflicts with other laws or regulations.

Thus, a request by a Jewish employee for a single day off on Hanukkah because his religious beliefs forbid working that day, or a request by a Christian employee for the last shift off on Christmas Eve because his religious beliefs require attendance at a Christmas Eve service are usually reasonable, and the employer should attempt to accommodate these types of requests.

It is important to note that an employee's religious beliefs do not have to be part of a widely recognized faith in order to qualify for legal protection. If you are in doubt as to whether your employee's professed religious beliefs are subject to protection, it may be wise to consult an attorney.

Holiday Bonuses

While end-of-year holiday bonuses are popular, they can also present opportunities for violations of the federal Fair Labor Standards Act (FLSA). Generally, the FLSA requires employers to pay "non-exempt" employees (typically, though not always, employees paid on an hourly basis) at least the minimum wage and "time and a half" for overtime work.

Holiday bonuses given to "non-exempt" employees can be tricky, as they may need to be included in overtime calculations, depending on the nature of the bonus. If the bonus is purely discretionary (both in terms of whether it will be paid and how much will be paid), it typically does not need to be included in an employee's regular rate for purposes of overtime calculations. However, where the bonus is expected by the employee due to a prior contract, agreement, or promise, it may need to be included in overtime calculations. Employers should take note that even an advanced announcement that bonuses will be provided may cause such amounts to be included in the overtime calculations, as those amounts may now be "expected" by the employees. Employers also should be careful where the bonuses provided are calculated, even in part, based upon hours worked, production, or efficiency, as those amounts likely need to be included in overtime calculations.

Any employer considering giving a bonus to its "non-exempt" employees should first consult the advice of counsel to determine the potential impact on overtime calculations. In this instance, an ounce of advice certainly is worth a pound of holiday cheer!

Holiday Parties

Holiday parties often present situations for unwanted sexual overtures that could also lead to Title VII complaints. Employers have a legal duty to prevent harassment at holiday parties, just like they have a legal duty to prevent harassment in the office. Thus, employers should consider the following:

- Publish or re-publish the company's sexual harassment policy before holiday parties take place. Remind employees that holiday festivities do not offer an excuse for violating a sexual harassment policy. If a company does not have a written policy, this would be a good time to implement one.

- If alcohol is served, keep consumption in check. Limiting access to alcohol by placing restrictions on the type served, the time available, or the number of drinks served (such as through drink tickets) may reduce the possibility that employees will imbibe to excess. Providing food is also a good idea, as it typically slows the absorption of alcohol into the bloodstream. Providing plenty of non alcoholic beverages is also a wise choice.

- Hire professional bartenders, and require ID from guests who do not appear to be 21 years of age.

- Arrange designated drivers or cabs to ensure that all persons have a safe way to get home.

- Invite spouses, significant others, families and important clients. Inviting workers' families and the company's important clients and others with whom the company does business can change the atmosphere of a company party and discourage inappropriate behavior.

Most importantly, if there is a problem — deal with it promptly! Every act of sexual harassment — whether by a co-worker, client, or supervisor should be taken seriously. Prompt action designed to stop any further harassment not only demonstrates that the employer does not condone such behavior, but may prevent certain behavior from being imputed to the employer. Also, a record of consistent and effective response to incidents is important because the employer's entire record of dealing with such matters is considered when evaluating liability.

Conclusion

When getting ready for the holidays, don't forget the potential for liability, as compliance with the law takes no holiday. Have a safe, enjoyable and problem-free holiday season!