

An Employer's Guide To Avoiding Holiday Party Liabilities

By [Keith Markel](#) and [Basil Sitaras](#)

First published in *Law360*, December 4, 2019

Many employers and employees look forward to celebrating the holiday season and end of the year with their work colleagues at an annual holiday party, which has become a tradition for many companies. No employer wants to be called a Grinch for not participating in the holiday festivities, but the reality is that company-sponsored social gatherings often create more problems for both employers and employees than they're worth.

For employers, sexual harassment allegations, assault complaints, personal injury claims and other problems stemming from the annual holiday party have become increasingly prevalent over the years.

Now, with the wave of #MeToo claims and heightened New York state and city requirements for conducting interactive sexual harassment prevention training on an annual basis, employers of all sizes need to be more vigilant about creating risks and avoiding liability attributed in many cases, unfortunately, to the annual holiday party. The risks associated with unsavory behavior and accidents associated with alcohol consumption have plagued holiday parties for years, including resulting in terminations or worse: bodily injury, divorce and even fatalities.

New York-based employees (especially managers and supervisors) also must be aware that their actions or inactions can also create personal liability for them under New York state and city human rights laws, subjecting them to potentially costly litigation and career-threatening damage, not to mention potentially unfavorable media coverage. As much as people enjoy a good end-of-year holiday party and toast with their work colleagues, in many instances, encouraging collegiality, bolstering morale and rewarding hard work, the unfortunate reality is that holiday parties create an increased risk of liability and danger for both employers and employees.

Alcohol at the Holiday Party

For those companies who are not discouraged from continuing this tradition, here are some ways to avoid potential pitfalls. The safest way to avoid liability, of course, is to refrain from serving or drinking alcohol altogether at the holiday party.

We recognize, however, as a practical matter that is unlikely to happen. So, if you choose to serve or consume alcohol at this year's festivities, here are some basic tips to consider:

- Drink alcohol in strict moderation, and have service providers handle all alcohol and bartending duties. No employees should be allowed to serve alcohol to themselves or to fellow employees or others. Instruct bartenders to cut off service to employees who appear to be intoxicated or who are acting inappropriately.

- Do not drink on an empty stomach and serve food throughout the time that alcohol is being served. In other words, avoid a cocktails-only gathering.
- Consider serving and/or drinking only beer or wine at the party (i.e., no hard alcohol). If serving or drinking spirits, request that the bartender prepare low-alcohol mixed drinks. It also may be helpful to offer a wide variety of nonalcoholic drinks.
- Consider limiting the number of drinks per person or provide a set number of drink tickets for the evening.
- Ask management, especially those who themselves are not drinking, to monitor excessive alcohol intake and unprofessional behavior.
- Consider limiting the hours that alcoholic beverages are served. For example, stopping alcohol service at least one hour before the holiday party is scheduled to end (this is a practice employed at most sporting events and has proven an excellent deterrent to employees leaving the holiday party in a state of diminished capacity).
- Serve dessert and coffee after you stop serving alcohol and encourage people to stay for coffee and dessert. This may be a good time to schedule any speeches or presentations.

Don't Forget the Laws, Policies and Codes of Conduct

Holiday parties and workplace celebrations sometimes bring with them the notion that reveling and fun take priority over good judgment and common sense. For whatever reason, holiday parties tend to encourage employees to behave in ways that they normally wouldn't while at work.

Despite best intentions and efforts, someone at the holiday party is bound to forget about the laws, policies and general codes of conduct that govern the workplace, all of which apply equally in the holiday party setting and must be strictly adhered to in any company-sponsored event. When in doubt, use your better judgment and act responsibly, like the beer commercial says.

Employers and employees should consider the following steps to reduce the risks of liability and danger arising out of the holiday party:

- Employers should conduct a brief refresher course of the recent New York sexual harassment prevention training that should have been conducted before Oct. 9.
- Employees should reread the company's employee handbook or code of conduct policies the week before the holiday party and employers should consider republishing them or circulating them again to employees around this time of year. Employees should be reminded and understand that these policies apply to company social events both inside and outside of the office. Any gathering of two or more employees can be considered an extension of the workplace. Additionally, employees should be reminded and understand that they will be subject to discipline if they violate these policies during the holiday party, including termination.
- Employees should be reminded and understand that any after-party festivities are not encouraged, nor are they sponsored by the employer. Again, any gathering of two or more employees, even at an employee's home, can be considered an extension of the workplace.
- Employers should remind managers and supervisors of these policies and what to do if they learn of or witness any potential misconduct at the holiday party or afterwards.

- Employers and employees should avoid posting pictures and information on social media about work colleagues without their permission.
- Employers should confirm that their insurance policies cover the holiday party, regardless of the location of the party.

Regardless of the steps taken, there are occasions when employers or employees may have one too many to drink and believe that their inebriated state somehow excuses them from appropriate behavior. Diminished capacity, however, is never an excuse for violating the law.

Transportation and Safety

Transportation and safety can be an issue for employers and employees regardless of whether alcohol is being served at the holiday party. Making sure employees travel safely to and from the holiday party should be a priority no different than any other day traveling to and from work.

In any event, when it comes to transportation, here are some helpful tips employers and employees can follow:

- Remind employees not to drive if they intend to drink at the party. Consider collecting keys from those employees who do intend to drive and only return keys when someone from management is certain the individual is able to safely drive home.
- Employees should be reminded of the requirement that they be as responsible for themselves on the holiday party night as they would on any other night they are out of the office and responsible for their own safety and well-being.
- Provide transportation options for all employees and, if necessary, at company expense. It's a small price to pay and should be factored into any holiday party budget.
- Consider using a car service or a shuttle service for multiple riders to be dropped off at home or at public transportation destination sites. For example, Grand Central Station, Penn Station or the Port Authority in New York. Such car services should not be used to shuttle employees to bars, nightclubs or any other after-party. Where appropriate, employers can also encourage the use of prearranged designated drivers or public transportation.
- In all instances, an employee who appears to be intoxicated should be provided with a safe ride home. Again, employees should monitor their drinking so they avoid being unable to safely travel home.
- Inform employees, in advance of the party, that they will not be allowed to drive or to take public transportation on their own if they appear intoxicated.
- Invite employees' spouses and partners to attend the holiday party, to encourage the availability of designated drivers. The inclusion of spouses or partners will also help ensure good behavior at the holiday party.

Take Prompt and Appropriate Action If an Issue Arises

Finally, if an issue arises from the holiday party, make sure that a prompt and proper investigation is conducted, that appropriate remedial action is taken, where necessary, and employees are protected from retaliation. In addition to the annual sexual harassment prevention training, all employers in New York now are required to have a specific designee tasked with receiving and investigating internal sexual harassment complaints.

Indeed, New York employers must conduct a prompt, thorough, and confidential investigation that ensures due process for all parties, whenever management receives a complaint about sexual harassment, or otherwise knows of possible sexual harassment occurring. This includes incidents stemming from the annual holiday party.

At the same time, employees are not permitted to file false complaints in bad faith, and an employer's failure to investigate claims and merely accept one employee's version of events also can subject the employer to liability. For example, if the employer might have reason to believe that the accuser's allegations lack credibility, but the employer chooses to terminate the alleged wrongdoer anyway, this rush to judgment could be costly for the company as well.

Just recently, in *Menaker v. Hofstra University*, the [U.S. Court of Appeals for the Second Circuit](#) found that a male employee, who had been accused of sexual harassment and then was terminated, "clearly alleged that he suffered an adverse employment action, and that this action came in response to accusations (if not an actual finding) of sexual harassment." [1]

There, the court found that this male plaintiff plausibly alleged facts that suggested at least some pressure on the employer to react more forcefully to allegations of sexual misconduct by a male, as opposed to if the alleged perpetrator were female. And, "[when] the evidence substantially favors one party's version of a disputed matter, but an evaluator forms a conclusion in favor of the other side (without an apparent reason based in the evidence), it is plausible to infer ... that the evaluator has been influenced by bias."

Moreover, the plaintiff in that case came forward with some evidence to show that his former employer chose "to accept an unsupported accusatory version over [that of the accused], and declined to even explore the testimony of [the accused's] witnesses," which the court stated gave "plausible support to the proposition that [the decision makers] were motivated by bias." In short, that court found that the employer's decision to blindly accept the female's accusations, with no credence given to the male's version of events, gave rise to a possible cause of action for reverse discrimination.

Although there is no surefire way for employers or employees to completely avoid the risks associated with hosting or attending the annual holiday party, adhering to some or all of the suggestions outlined in this article may help employers and employees alike to avoid scandal or liability.

Keith Markel is a partner and co-chair of the labor & employment department at [Morrison Cohen LLP](#).

Basil Sitaras is an associate at the firm.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

*Reprinted with permission from the December 4, 2019 edition of the Law360© 2019
Portfolio Media, Inc. All rights reserved.
Further duplication without permission is prohibited.*

[1] This case is [Menaker v. Hofstra University](#), 935 F.3d 20 (2d Cir. 2019).