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## HELPING MANAGEMENT MANAGE

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## **Avoiding Post-Holiday Season HR Liability Hangover**

With New Years Eve celebrations approaching and the Holiday Season wrapping up, businesses should take some common sense steps to minimize the risk of waking up in 2011 with a liability hangover. Participation of employees and clients in company sponsored and other social celebrations and activities can promote big rewards in relationship development and morale if properly managed. However, the music, food, game playing, toasting with alcohol and other aspects of the celebratory atmosphere at New Years Eve and other parties and social activities heighten the risk that certain employees or other business associates will engage in, or be subject to, risky or other inappropriate behavior that can create liability exposures or other business concerns for your business whether or not company sponsored.

### **Discrimination & Sexual Harassment**

Whether or not company-sponsored, holiday parties and other celebrations where employees celebrate with other employees or clients tend to fuel bad behavior by inviting fraternization, lowering inhibitions and obscuring the line between appropriate and inappropriate social and business behavior.

The relaxation of the environment heightens the risk that certain employees or clients will make unwelcome sexual advances, make sexually suggestive or other inappropriate statements, or engage in other actions that expose the business to sexual harassment or other employment discrimination liability. To minimize these exposures, businesses should take steps to communicate and reinforce company policies and expectations about sexual harassment, discrimination, fraternization and other conduct viewed as inappropriate by the company. To promote compliance, businesses also should consider communicating reminders about these policies to employees and business associates during the Holiday Season. Even a simple e-mail reminder to employees that the company expects them to be familiar with and comply with these policies can help promote compliance and provide helpful evidence in the event that an employee engages in an unauthorized violation of these rules.

A good starting point would be to remind employees that the company expects employees and business partners and other guests to adhere to company rules against sexual harassment and other inappropriate discrimination at company sponsored and other gatherings involving other employees or business associates. To enhance the effectiveness of these reminders, a company also might consider providing specific guidance about specific holiday-associated activities that create heightened risks. For instance, a business that anticipates its employees will participate in white elephant or other gift exchanges involving other employees or business associates may wish to specifically include a reminder to exercise care to avoid selecting a gift that may be sexually suggestive or otherwise offensive. Businesses also may want to remind employees that the company does not expect or require that employees submit to unwelcome sexual or other inappropriate harassment when participating in parties or other social engagements with customers or other business partners.

Businesses also should use care to manage other discrimination exposures in the planning of holiday festivities, gift exchanges, and other activities. Businesses also should be vigilant in watching for signs of inappropriate patterns of discrimination in the selection of employees invited to participate in company-connected social events as well as off-duty holiday gatherings sponsored by managers and supervisors. In addition, businesses also should critically review their own plans for possible insensitivity. Business connected holiday parties, communications, gifts and other December festivities should be designed to reflect appropriate sensitivity to religious and other cultural diversity.

### **Alcohol Consumption**

The prevalence of alcohol consumption during the Holiday Season also can create a range of business concerns. Most businesses recognize that accidents caused by alcohol or other intoxication at work or work-related functions create substantial liability exposures both to workers and any third parties injured by a drunken employee.

Businesses also may face “dram shop” or other claims if employees, family members or other guests attending company sponsored functions injure others after being allowed to over-imbibe.

Businesses concerned with these liability exposures should take steps to manage the potential risks that commonly arise when employees, clients or other guests consume alcohol at company sponsored events or while attending other business associated festivities. To minimize these risks at company-sponsored events, many companies elect not to serve or limit the alcohol served to guests at company sponsored events. To support the effectiveness of these efforts, many businesses also choose to prohibit or restrict the consumption of guest provided alcohol at company events.

Businesses that elect to serve alcohol at company functions or anticipate that employees will attend other business functions where alcohol will be served need to consider the potential liability risks that may result if the alcohol impaired judgment of an employee or other guest causes him to injure himself or someone else. Any company that expects that an employee might consume alcohol at a company sponsored or other business associated event should communicate clearly its expectation that employees not over-imbibe and abstain from driving under the influence. Many businesses also find it beneficial to redistribute information about employee assistance programs (EAPs) along with this information. You can find other tips for planning workplace parties to minimize alcohol related risks on the U.S. Department of Labor’s website [here](#).

When addressing business related alcohol consumption, many businesses will want to consider not only alcohol consumption at business related events as well as potential costs that may arise from off-duty excess alcohol consumption. Whether resulting from on or off duty consumption, businesses are likely to incur significant health and disability related benefit costs if an employee is injured in an alcohol-related accident. Furthermore, even when no injury results, productivity losses attributable to excess alcohol consumption, whether on or off duty, can prove expensive to business. Accordingly, virtually all businesses can benefit from encouraging employees to be responsible when consuming alcohol in both business and non-business functions.

Businesses also may want to review their existing health and other benefit programs, liability insurance coverage and employment policies to determine to ensure that they adequately protect and promote the company’s risk management objectives. Many health and disability plans incorporate special provisions affecting injuries arising from inappropriate alcohol use as well as mental health and alcohol and drug treatment programs. Similarly, many businesses increasingly qualify for special discounts on automobile and general liability policies based upon representations that the business has in effect certain alcohol and drug use policies. Businesses can experience unfortunate surprises if they don’t anticipate the implications of these provisions on their health benefit programs or liability insurance coverage. Reviewing these policies now to become familiar with any of these requirements and conditions also can be invaluable in helping a business to respond effectively if an employee or guest is injured in an alcohol-related accident during the Holiday Season.

### **Gift Giving, Gratuities & Social Entertainment**

The exchange of social invitations, gifts and gratuities during the Holiday Season or at other times throughout the year also can raise various concerns. As a starting point, businesses generally need to confirm that any applicable tax implications arising from the giving or receiving of gifts are appropriately characterized and reported in accordance with applicable tax and other laws. Make sure that all expenditures for social entertaining, gifts or other similar expenditures are completely and accurately documented and properly classified and reported for tax purposes.

In addition to ensuring proper tax documentation and reporting, businesses also need to ensure and retain documentation of the propriety of invitations, gifts and other benefits. Social entertainment and gift-giving activities intended to show appreciation or support marketing efforts can create significant legal or relationship risks if not properly tailored to avoid regulatory or contractual prohibitions or appearances of impropriety. Government contractors, government officials, public companies and an amazingly broad range of other entities often must comply with specific statutory, regulatory, contractual or ethical requirements affecting the giving or receiving of invitations, gifts or other preferences. An ill-conceived social invitation, gift, or other benefit that violates these restrictions may expose both givers and recipients to legal prosecution, program disqualification and other serious legal risks.

In addition to these externally imposed legal mandates, many businesses also voluntarily have established conflict of interest, social entertainment, gift giving or other policies to minimize the risk that employee loyalty or judgment will be comprised by gifts offered or received from business partners or other outsiders. Employees, officers and contractors of businesses maintaining these policies generally face termination or other significant discipline for violating these requirements. Accordingly, businesses offering social invitations, gifts and other benefits to valued vendor or customer relationships risk must be sensitive to these organizationally imposed requirements.

Businesses should adopt and communicate clear policies and procedures governing both giving and receiving social invitations, gifts, and other benefits. Businesses should review applicable governmental regulations, contractual requirements, and customer and vendor policies for possible requirements that could impact the offering, receipt,

reporting or other handling of gifts, social invitations or other activities. Businesses also should design policies to ensure that they collect and retain sufficient documentation from employees, officers, consultants, customers, and vendors to monitor compliance and other legal and operational risks associated with social entertainment, gifts, and other similar benefits, to appropriately report tax deductions and income arising from these activities, and to meet other compliance obligations. Businesses concerned about these and other issues should review and update current business policies affecting social entertainment, gifting and other similar activities.

### **Performance, Attendance & Time Off**

Businesses also commonly face a range of attendance and productivity concerns during December. The winter cold and flu season and other post-celebration illnesses, vacations, and winter weather inevitably combine to fuel a rise in absenteeism in December. Managing staffing needs around the legitimate requests for excused time off by employees presents real challenges for many businesses. Further complications can arise when dealing with employees suspected of mischaracterizing the reason for their absence or otherwise gaming the company's time off policies. Meanwhile, performance and productivity concerns also become more prevalent as workers allow holiday shopping, personal holiday preparations, and other personal distractions to distract their performance. Businesses concerned with these challenges ideally will have in place well-designed policies concerning attendance, time off and productivity that comply with the Fair Labor Standards Act and other laws. Businesses should exercise care when addressing productivity and attendance concerns to investigate and document adequately their investigation before imposing discipline. Businesses also should ensure that their policies are appropriately and even-handedly administered. They also should exercise care to follow company policies, to maintain time records for non-exempt workers, to avoid inappropriately docking exempt worker pay, and to provide all required notifications and other legally mandated rights to employees taking medical, military or other legally protected leaves. In the event it becomes necessary to terminate an employee during December, careful documentation can help the business to defend this decision. Furthermore, businesses should be careful to ensure that all required COBRA notifications, certificates of creditable coverage, pension and profit-sharing notice and distribution forms, and other required employment and employee benefit processes are timely fulfilled.

### **Timely Investigation & Notification**

Businesses faced with allegations of discrimination, sexual harassment or other misconduct also should act promptly to investigate any concerns and if necessary, take appropriate corrective action. Delay in investigation or redress of discrimination or other improprieties can increase the liability exposure of a business presented with a valid complaint and complicate the ability to defend charges that may arise against the business. Additionally, delay also increases the likelihood that a complaining party will seek the assistance of governmental officials, plaintiff's lawyers or others outside the corporation in the redress of his concern.

If a report of an accident, act of discrimination or sexual harassment or other liability related event arises, remember to consider as part of your response whether you need to report the event to any insurers or agencies. Injuries occurring at company related functions often qualify as occupational injuries subject to worker's compensation and occupational safety laws. Likewise, automobile, employment practices liability, and general liability policies often require covered parties to notify the carrier promptly upon receipt of notice of an event or claim that may give rise to coverage, even though the carrier at that time may not be obligated to tender a defense or coverage at that time.

### **For Help With Investigations, Policy Updates Or Other Needs**

If your organization needs assistance investigating a reported concern, reviewing and updating its policies or assessing, managing or defending these or other labor and employment, compensation or benefit practices, or needs other assistance auditing, updating or defending its human resources, corporate ethics, and compliance practices, or responding to employment related or other charges or suits, please contact management attorney and consultant Cynthia Marcotte Stamer at [estamer@solutionslawver.net](mailto:estamer@solutionslawver.net), (468) 767-8872.

Board Certified in Labor & Employment Law by the Texas Board of Legal Specialization and Chair of the American Bar Association RPTe Employee Benefits & Other Compensation Group and a nationally recognized author and speaker, Ms. Stamer helps business manage people, operations and risk. She is experienced with advising and assisting employers with these and other labor and employment, employee benefit, compensation, risk management and internal controls matters. Her experience includes helping management both manage performance and manage legal risk and compliance. While helping businesses define and manage the conduct and performance of their employees, contractors and vendors, she also assists employers and others about compliance with federal and state equal employment opportunity, compensation, health and other employee benefit, workplace safety, and other labor and employment laws, advises and defends businesses against labor and employment, employee benefit, compensation, fraud and other regulatory compliance and other related audits, investigations and litigation, charges, audits, claims and investigations by the IRS, Department of Labor, Department of Justice, SEC, Federal Trade Commission, HUD, HHS, DOD, Departments of Insurance, and other federal and state regulators. She has counseled and represented businesses and their management on workforce and other internal controls and risk management matters for more than 23 years. Ms. Stamer also speaks and writes extensively on these and other

related matters. For additional information about Ms. Stamer and her experience or to access other publications by Ms. Stamer see [here](#) or contact Ms. Stamer directly.

### **Other Helpful Resources & Information**

If you found this article of interest, you also may be interested in reviewing other Breaking News, articles and other resources available CynthiaStamer.com or Solutions Law Press articles authored by Ms. Stamer including:

- [Small Employers Should Weigh If Health Premium Tax Credit Justifies Changing Employee Leasing Arrangements](#)
- [2011 Standard Mileage Rates Announced](#)
- [Proposed New Defined Benefit Plan Annual Funding Notice Rule Reminder of Need to Carefully Manage Pension Plan Responsibilities](#)
- [Affordable Care Act Grandfathered Plan Rules Loosened To Allow Insured Plans Making Some Insurance Changes To Qualify](#)
- [Update Employment Practices To Manage Genetic Info Discrimination Risks Under New EEOC Final GINA Regulations](#)
- [DOL Proposes To Expand Investment Related Services Giving Rise to ERISA Fiduciary Status As Investment Fiduciary](#)
- [EEOC Attacks Medical Leave Denials As Prohibited Disability Discrimination](#)
- [Annual Benefit Limitation Waiver Guidance Offers Fast Acting Employers, Insurers Expanded Options To Meet Affordable Care Act Health Plan Rule](#)
- [New Insured Group Health Plan Non-Discrimination Rules Create Significant Liability For Employers & Insurers; Prompt IRS Also To Review Self-Insured Group Health Plan Rules](#)
- [Affordable Care Act's Health Plan External & Internal Review Safe Harbor & Other Regulations Require Health Plan Updates](#)
- [New Rule Requires Federal Government Contractors To Post New "Employee Rights Under The National Labor" Poster](#)

If you or someone else you know would like to receive future updates about developments on these and other concerns, please be sure that we have your current contact information – including your preferred e-mail – by creating or updating your profile [here](#). For important information concerning this communication click [here](#). If you do not wish to receive these updates in the future, unsubscribe by updating your profile [here](#).

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