

December 6, 2006

As the 2006 Holiday Season moves into full swing, your company should take some common sense precautions to help avoid waking up in 2007 with a post-Holiday Season business liability hangover. The music, food, game playing, toasting with alcohol and other aspects of the celebratory atmosphere at holiday parties and in the workplace during the Holiday Season heightens 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.

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. The company should caution employees that the company continues to expect employees and business partners 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 should 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. Exercise care to ensure that business connected holiday parties, communications, gifts and other December festivities reflect appropriate sensitivity to religious diversity. 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.

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 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" claims from family members or other guests attending company sponsored functions injured or injure others after being allowed to over-imbibe. 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 concerned with these liability exposures should take steps to manage the potential risks that commonly arise when employees or clients consume alcohol at company sponsored events or while attending other business associated festivities. 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 beneficiary 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 at http://www.dol.gov/asp/programs/drugs/workingpartners/sp_iss/send.asp.

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

The exchange of gifts during the Holiday Season 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. Government contractors, health industry organizations, government officials and other entities also frequently may be required to comply with specific statutory, regulatory, contractual or ethical requirements affecting the giving or receiving of gifts or other preferences. In addition to these externally imposed legal mandates, many businesses also voluntarily have established conflict of interest, 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. Businesses concerned about these and other issues may want to review the adequacy of current business policies affecting gifting and adopt and communicate any necessary refinements to these policies. 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.

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.

We hope that this information is useful to you. If you have questions about your businesses' human resources, employee benefit or other operational risks or internal controls practices, or to request publications, information about upcoming programs, or other materials, please contact: Cynthia Marcotte Stamer, P.C., Member, Glast, Phillips & Murray, P.C., 2200 One Galleria Tower, 13355 Noel Road, LB 48, and Dallas, Texas 75240. Telephone (972) 419-7188. E-mail cstamer@gpm-law.com.

For other helpful resources and information about employee benefits and human resources matters, see CynthiaStamer.com or contact Ms. Stamer. If you or someone else you know would like to receive future Alerts or announcements about other developments, publications or programs, please be sure that we have your current contact information – including your preferred

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