



## INFORMATION FOR CLIENTS OF TEXAS ATTORNEYS

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# 'Tis the Season for Holiday Parties

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The holiday season can be festive and celebratory, but it is also rife with potential liability for the unwary employer. Whether claims stem from the company holiday party or heightened observance of religious practices, employers must monitor their employees and review existing policies to minimize their risk of liability. Employers might face the following questions during the holiday season:

### **Am I liable for any sexual harassment during my company's holiday party?**

The rules for liability differ depending on whether the harasser is a supervisor.

An individual qualifies as an employee's supervisor if:

- The individual has the authority to make tangible employment decisions affecting the employee, or
- The individual has the authority to direct the employee's daily work activities.

As a general rule, employers are responsible for the behavior of their supervisors because supervisors are the agents of their employers. Even if an employer did not know about a supervisor's misconduct, it may nonetheless be

liable for it. An employer, however, is not liable for a non-supervisor's harassment — a co-worker — unless it knew or should have known about the conduct and failed to take proper remedial action.

There are several requirements for sexual harassment. An employee must show that: (1) he or she belongs to a protected class; (2) he or she was subject to unwelcome sexual harassment; (3) the harassment was based on his or her sex; (4) the harassment was severe enough to alter the terms of employment in the employee's mind or in the mind of someone in his or her position; and (5) the employer



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knew or should have known of the harassment and failed to take remedial action. Generally, the more severe the harassment, the less pervasive it needs to be. Unless the harassment is quite severe, a single incident of offensive conduct usually does not constitute unlawful harassment.

To prevent sexual harassment, have anti-harassment policies and training programs in place before the party. Send a memo reminding employees to act responsibly at the party, clearly expressing a lack of tolerance for inappropriate behavior. Reemphasize the dress code for the party to avoid inappropriate or suggestive attire. Take complaints seriously and take prompt, effective steps to address them.

**What if my employee becomes intoxicated at the company party and hurts him- or herself or someone else?**

Texas courts have held that if an employer requires an employee to consume alcohol as a part of his or her job and the employee injures him- or herself or someone else, the employer is responsible to prevent foreseeable injury. If the employer does not take steps to prevent the injury, it is liable for the damages.

On the other hand, if the employer does not require its employees to drink and makes it clear that attendance at the holiday party is strictly voluntary and not

work-related, the chances of liability will greatly decrease.

Limit the length of time during which alcohol will be served and the amount of alcohol that will be served to each person to avoid alcohol-related liability. Provide plenty of food rich in starch and protein to slow the entry of alcohol into the bloodstream. To encourage employees to be on their best behavior, invite spouses, children, and/or clients to the party.

**Am I responsible if my employee gets injured at the party?**

If an employer is a workers' compensation subscriber, workers' compensation does not cover an employee for injuries sustained during voluntary participation in off-duty work-related or work-sponsored social, athletic, or recreational events, unless participation is required by the employer.

If the employer is not a workers' compensation subscriber, the employee can bring a common law action for the injury. To prevail in a case against a nonsubscriber, the employee must show he or she was acting in the course and scope of his or her employment at the time of the alleged injury. Generally, to prove the course-and-scope element, the employee must show: (1) the alleged injury occurred while the employee was acting in furtherance of the employer's business or affairs; and (2) a causal connection between the

required work and the resulting injury. Additionally, the employee bears the burden of proving the employer was negligent and that the employer's negligence proximately caused the alleged damages.

Additionally, the Texas Labor Code provides two specific defenses available to nonsubscribers against employee claims: (1) the injury was caused by an act of the employee who intended to bring about the injury; or (2) the injury occurred while the employee was in a state of intoxication. ❖

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