# ‘TIS THE SEASON: TIPS FOR AVOIDING LIABILITY RELATED TO EMPLOYER-SPONSORED HOLIDAY PARTIES

It is that time of the year again – the holidays are upon us! Along with the holidays comes holiday parties, which can bring your employees closer together and boost morale. While a fair amount of planning goes into venue, food, and festivities, employers should also plan ahead to avoid potential legal liability that can be associated with a company-sponsored party. The festive atmosphere combined with alcohol consumption can cause the potential for inappropriate behavior or claims relating to injuries suffered during or after the event.

In preparing for a company-sponsored holiday party, employers should take steps to:

1. Prevent Sexual Harassment. The best way to prevent sexual harassment is to educate your employees about your company’s anti-harassment policy and ensure that employees understand that harassment involving any employee, whether within or outside the office, will not be tolerated. To set the tone of the party in advance, you may consider reminding employees that, while they are encouraged to have fun at the holiday party, it is still a company-sponsored event and, accordingly, all company policies and rules apply.

2. Reduce the Risk of Alcohol-Related Accidents.  Employers may be subject to potential liability for injuries caused by employees who consume alcohol at employer-sponsored events. Negligence and Respondeat Superior, which holds employers liable for acts of employees undertaken in the course of their employment, are two examples. Some states, like Illinois, also have “dram shop” or “social host” liability laws, which hold the provider of alcoholic beverages to intoxicated individuals liable for injuries those individuals may cause while intoxicated. To avoid potential liability under these types of theories, employers should promote responsible drinking and monitor alcohol consumption appropriately. Employers may also want to consider holding their holiday party at a restaurant or other off-site location where alcohol is served by professional bartenders who know how to recognize and respond to guests who are visibly intoxicated.

3. Minimize the Risk of Worker’s Compensation Liability. Generally speaking, worker’s compensation benefits may be available to employees who suffer a work-related injury or illness. In order to minimize the risk of liability for an employee injury or illness that occurs during an employer-sponsored event, employers should make it clear to employees that there is no business purpose for the event, that attendance at the holiday party is completely voluntary, and that they are not being compensated for their attendance at the event. Employers should also consider that injuries or illness associated with contaminants found in food or drinks may create legal exposure if their food and beverage providers are not

properly licensed – using a third-party provider who is licensed may reduce your risk of liability because these licensed providers are typically subject to inspections and protected by their own insurance coverage.

4. Prevent Wage and Hour Claims by Non-Exempt Employees. To avoid any confusion as to whether time spent at a company-sponsored holiday party is compensable time under federal and state wage and hour laws, employers should be sure that participation in the holiday party is completely voluntary, that the party is held outside working hours, and that employees are not performing any work during the party or are not under the impression that they are performing work functions at the party that could be considered compensable under applicable law.

If you have any questions about any of the information provided in this article or would like further advice on how to avoid liability at your company-sponsored holiday party, please do not hesitate to contact us.

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## NEW WISCONSIN CONSUMER PROTECTION LEGISLATION WILL AFFECT HOME IMPROVEMENT AND REPAIR CONTRACTORS

On July 5, 2013, a new piece of consumer protection legislation was enacted in Wisconsin. The new law, 2013 Wisconsin Act 24, takes effect on January 1, 2014. It creates Wisconsin Statute section 100.65, which is similar to a provision of the Illinois Home Repair and Remodeling Act. It will apply to consumer contracts for residential roofing, and for any other exterior repair, replacement and construction respecting one and two family dwellings. The new law's purpose is to protect consumers, whose homes have been damaged, from being taken advantage of by home repair contractors.

The new law gives the consumer the right to cancel a contract for exterior repairs within three days after being notified by his or her insurer that the consumer's property insurance claim for the damage to the home has been denied, in whole or in part. The contractor must give the consumer a specific written cancellation notice form in duplicate, attached to the consumer's copy of the contract. If the consumer cancels the contract, the contractor must refund any payments received within ten days. However, the contractor is not required to refund the reasonable value of any emergency services, acknowledged in writing by the consumer to be necessary to prevent damage to the property that the contractor had performed prior to the cancellation of the contract.

The law will prohibit contractors from offering to pay or to rebate to the consumer all or any part of their insurance deductible as an incentive to enter into a contract.  It will also prohibit the contractor from offering to negotiate on the consumer's behalf with the consumer's insurance carrier.

The scope of the new law is very broad.  It will affect all contractors that do any type of exterior repair, replacement or construction work on one and two family dwellings.  This would, for example, include painters, roofers, remodelers, siding contractors, glazing contractors, patio and driveway contractors, and emergency repair contractors.  The law imposes a fine of between $500 and $1,000 for each violation.  Contractors will need to either revise or to completely redraft their contract forms in order to comply with the law.

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## ATTORNEY JASON SCOBY REAPPOINTED TO FOURTH CONSECUTIVE TERM AS CHAIR OF MBA'S CORPORATE, BANKING AND BUSINESS SECTION

Attorney Jason Scoby of O'Neil Cannon was recently reappointed to serve as Chair of the Corporate, Banking and Business Section of the Milwaukee Bar Association ("MBA") for the fourth consecutive year. In this role, Attorney Scoby focuses on providing continuing legal education presentations and resources, as well as networking opportunities for attorneys and other professionals in the corporate, banking, and business field.

Some of the topics previously addressed and to be addressed in upcoming presentations include:

- Mergers and Acquisitions and Important Considerations when Buying or Selling a Business
- Issues in Commercial Loan Transactions
- Patient Protection and Affordable Care Act (commonly referred to as "Obamacare")
- Choice of Business Entity and the Associated Business and Tax Implications
- Drafting Enforceable Non-Compete Agreements
- Antitrust Impact on Businesses
- Contract Drafting

If you would like further information regarding an upcoming MBA event, or if you are interested in making a presentation for the MBA's Corporate, Banking and Business Section, please contact Jason at jason.scoby@wilaw.com.  He can also be reached directly at

414-291-4714.

Attorney Scoby assists clients on corporate and business-related issues.  He focuses primarily on mergers and acquisitions, commercial loan transactions, and general corporate law (e.g. contract review, preparation and negotiation, and general business and legal advice to closely held businesses).

O'Neil Cannon, founded in Milwaukee in 1973, is a full-service legal practice that primarily focuses on providing business law and civil litigation services to closely-held businesses and their owners. The firm represents corporations, institutions and partnerships at all stages of the business life cycle, helping them start, grow and transition from one generation to the next. We also assist business owners with their personal legal needs including tax and estate planning, family law, and litigation-including personal injury litigation.

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## ENDA PASSES SENATE

On November 7, 2013, the U.S. Senate passed the Employment Non-discrimination Act ("ENDA") with a 64-32 vote. The bill would prohibit employers from discriminating against individuals based on the individual's sexual orientation or gender identity, similar to the way Title VII of the Civil Rights Act of 1964 prohibits other types of discrimination.

The bill now moves to the House of Representatives, where its passage is uncertain.

For more information about the Senate Bill (S.815), please **click here** to read our recent blog post regarding ENDA. Visit our blog for updates on ENDA and to find out whether it becomes law.

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## EMPLOYERS MUST PROVIDE TRAINING FOR OSHA'S REVISED HAZARD COMMUNICATION STANDARD BY DECEMBER 1, 2013

By December 1, 2013, OSHA is requiring employers to provide initial training to its employees on OSHA's new Hazard Communication Standard.  OSHA revised its Hazard Communication Standard (HCS) by adopting the United Nations' Globally Harmonized System of Classification

and Labeling of Chemicals. The **final rule** for the new HCS was published in the Federal Register on March 20, 2012. The most significant changes to the HCS requires the use of new labeling elements and a standardized format for Safety Data Sheets (SDSs), formerly known as, Material Safety Data Sheets (MSDSs).

The initial training requirement does not include a requirement to re-train on all hazards. However, the mandated initial training does require employers to ensure that employees understand the new label elements and SDS approach. "Label element" means the specified pictogram(s), hazard statement(s), signal word and precautionary statement(s) for each hazard class and category. Initial training on label elements include:

- Product Identifier: How the hazardous chemical is identified.
- Signal Words: Signal words are used to indicate the relative level of severity of hazard. There are only two signal words, "Danger" and "Warning."
- Pictogram: Eight **pictograms** have been designated under the HCS for application to a hazard category.
- Hazard Statement(s): A hazard statement is a statement assigned to a hazard class and category that describes the nature of the hazard(s) of a chemical, including where appropriate, the degree of hazard. An example of a hazard statement is: "Fatal if swallowed."
- Precautionary Statement(s): A precautionary statement is a phrase that describes recommended measures that should be taken to minimize or prevent adverse effects resulting from exposure to a hazardous chemical, or improper storage or handling. For example, a precautionary statement could read: "Do not eat, drink, or smoke when using this product."

The new Safety Data Sheets will be organized using specified order of information. Employers must train employees on the format of the SDS which now consists of a standardized 16-section format, including the type of information found in the various sections. The 16 sections include:

1. Identification
2. Hazard identification
3. Composition/information on ingredients
4. First-Aid measures
5. Fire-fighting measures
6. Accidental release measures
7. Handling and storage
8. Exposure control/personal protection
9. Physical and chemical properties
10. Stability and reactivity
11. Toxicological information
12. Ecological information
13. Disposal considerations
14. Transport information

15. Regulatory information
16. Other information

Although initial training must be completed by December 1, 2013, full compliance with the preparation of new labels and SDSs is not required until **June 1, 2015** and employers will have until June 1, 2016 to update their hazard communication programs or any other workplace labeling as necessary. *See* OSHA's **fact sheet** for additional information on the revised Hazard Communication Standard.

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## SENATE TO VOTE ON EMPLOYMENT NON-DISCRIMINATION ACT (ENDA)

Senate Majority Leader Harry Reid (D-Nev.) has announced that the U.S. Senate will vote on the Employment Non-Discrimination Act ("ENDA") before the Thanksgiving recess, and perhaps as early as Monday, November 4th.

The Employment Discrimination Act (S. 815) would prohibit employers from discriminating against individuals based on the individual's sexual orientation or gender identity, just as current federal law prohibits discrimination based on race, sex, national origin, religion, age, and disability.

ENDA is sponsored in the Senate by Senators Jeff Merkley (D-Ore.) and Tom Harkin (D-Iowa). The bill would need 60 votes before it goes to a final vote. Employers should stay tuned to find out whether ENDA will become law.

To view a full copy of the Senate Bill, click here.

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## BARUCH, GOUSHA, AND SPIVAK HIGHLIGHT OCHDL'S ETHICS SEMINAR

On October 10, 2013, O'Neil, Cannon, Hollman, DeJong and Laing held its annual Continuing Legal Education seminar in Milwaukee, Wisconsin on a number of legal ethics issues of interest to in-house counsel.

Chad Baruch of Texas, a recognized national speaker on legal issues, presented a lecture

entitled “Back to the Beginning:  *Marberry v. Madison* and the Roots of Judicial Review” and made a presentation on the ethics of legal writing.

Pete Faust, Chair of O’Neil, Cannon, Hollman, DeJong and Laing’s Corporate Practice Group, moderated a panel discussion between professional journalists and attorneys entitled “Legal Ethics Issues Relating to the Media and Dealing with the Media.”  The panel was comprised of two media representatives, Mike Gousha, a television broadcaster and Distinguished Fellow in Law and Public Policy at Marquette University Law School, and Cary Spivak, an investigative reporter with the *Milwaukee Journal-Sentinel*, and O’Neil, Cannon, Hollman, DeJong and Laing attorneys Dean Laing and Steve Slawinski.

Grant Killoran, Chair of O’Neil, Cannon, Hollman, DeJong and Laing’s Litigation Practice Group, presented a lecture entitled “Ethical (and Practical) Considerations for Managing E-Discovery and Electronically Stored Information” focusing on legal ethics issues relating to electronic data.

O’Neil, Cannon, Hollman, DeJong and Laing will hold this seminar again in the Fall of 2014.  If you would like copies of the materials from our recent seminar, or if you would like to attend the 2014 seminar, please contact O’Neil, Cannon, Hollman, DeJong and Laing at 414.276.5000.  This seminar is limited to in-house counsel.

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# TENTH CIRCUIT SAYS EMPLOYEES MUST GIVE EXPRESS NOTICE OF RELIGION-WORK CONFLICT

Earlier this month, the U.S. Court of Appeals for the Tenth Circuit found that the EEOC failed to establish a prima facie case of religious discrimination where the EEOC could not show that a prospective employee expressly informed the employer of a conflict between the applicant’s religious beliefs and the employer’s dress code and of the applicant’s desire for a reasonable accommodation from that dress code.

In *EEOC v. Abercrombie and Fitch Stores, Inc.*, the Tenth Circuit reversed the lower court’s grant of summary judgment in favor of the EEOC on the EEOC’s claim that the employer failed to provide a reasonable religious accommodation for a prospective employee who wore a “hijab” (headscarf) for religious reasons. The employer, a national retail clothing company, maintains a “Look Policy” or dress code that is intended to promote and showcase the company’s clothing brand. The policy requires employees to dress in clothing that is consistent with the kinds of clothing that the company sells in its stores and prohibits employees from wearing black clothing and caps.

The employer rejected the prospective employee for employment after she wore a hijab to her job interview. The EEOC filed suit against the company, alleging that the company failed to provide the prospective employee a reasonable religious accommodation in violation of Title VII of the Civil Rights Act of 1964.

The Tenth Circuit recognized employers' obligation under Title VII to reasonably accommodate religious practices of an employee or prospective employee unless the employer demonstrates that the accommodation would pose an undue hardship on its business. The court found that, in this case, the EEOC had failed to establish one of the key elements of a Title VII religious accommodation claim – notice. The Tenth Circuit held that in order to succeed on such a claim, the employee or prospective employee must inform the employer that he or she engages in a religious practice that conflicts with the employer's policy and that the employee would, therefore, require an accommodation for that religious practice.

Because the prospective employee, in this case, did not inform the employer, prior to its hiring decision that she engaged in the conflicting practice of wearing a hijab for religious reasons and that she needed an accommodation for it, the court found that the EEOC could not meet the requirements for a religious accommodation claim under Title VII.

As an employer, you should be aware of the general obligation under Title VII to reasonably accommodate religious practices of employees or prospective employees who inform you of a conflicting religious belief or practice and the need for such an accommodation. Understand, however, that the reasonable accommodation obligation is implicated *only* when there is a conflict between an employee's religious practice and your neutral policy. If you are made aware of an employee's religious conflict, you should take steps to obtain additional information that would allow you to determine whether an accommodation can be made available to that employee to eliminate the religious conflict without posing an undue hardship on your business. If you have questions about religious accommodation under Title VII, please contact one of our Employment Law attorneys.

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## U.S. SUPREME COURT WILL DECIDE WHETHER TIME SPENT CHANGING CLOTHES IS COMPENSABLE WORK TIME

Generally, if an employee is required to change into work clothing as part of that employee's job, the Fair Labor Standards Act ("FLSA") requires an employer to pay the employee for the

time it takes to do so. Section 203(o) of the FLSA, however, contains an exception to this general rule. The exception provides that any time spent "changing clothes or washing" at the beginning or end of each workday that is excluded from compensable time either by the express terms of or by a custom or practice under a collective bargaining agreement, is not compensable time under the FLSA.

On November 4, 2013, the U.S. Supreme Court will hear oral arguments in *Sandifer v. U.S. Steel*, a case arising out of the Seventh Circuit, to resolve disagreement among circuit courts as to what constitutes "changing clothes" within the meaning of Section 203(o). It is not clear whether the term "clothes" includes personal protective equipment or gear. In *U.S. Steel*, the employer and employees are parties to a collective bargaining agreement, which exempts changing clothing from compensable working time. The employees in *U.S. Steel* argue that they should be compensated for the time it takes to change into and out of their required work clothes because their work clothing is not actually clothing, but is more akin to personal protective gear and, therefore, does not constitute "clothes" within the meaning of Section 203(o).

Most circuit courts that have addressed this issue, including the Seventh Circuit, disagree with the employees' position and have upheld the collective bargaining exemption under Section 203(o), finding that it would be impossible to exclude all work clothing with a protective function from the Section 203(o) exemption.

The U.S. Supreme Court will be hearing the *U.S. Steel* case in the coming weeks. This is an important case to watch, not only for all employers who may be exempt from compensating employees for donning and doffing activities by virtue of their collective bargaining agreement, but for any employer whose employees change clothes as part of their jobs. Any change to the definitions of "clothing" or "changing clothing" under the current donning and doffing rules could affect all employers' current compensation policies and practices.

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## O'NEIL, CANNON, HOLLMAN, DEJONG AND LAING S.C. PUBLISHES EMPLOYMENT LAW BLOG

The Employment Law Practice Group at O'Neil Cannon recently published an employment law blog in an effort to provide employers with the latest developments and meaningful insight into the ever-changing employment law landscape.

Employment law is one of the most rapidly changing and developing areas of the law, which

can make it difficult for employers to navigate through even the most seemingly simple and everyday personnel matters. It is our hope that you will find the articles and resources on the Employment LawScene™ to be an asset in your day-to-day human resources management.