EMPLOYMENT LAWSCENE ALERT: HAPPY HOLIDAYS! HERE'S A LAWSUIT!

The holiday celebration season is in full swing and everyone is ready to celebrate! And while that hopefully means reflecting on successes of the past year and bonding with coworkers, employers need to be aware of their exposure to potential liability arising from holiday celebrations and what they need to do to reduce or avoid such potential liability. While not to drive the joy out of the holidays, here are some common concerns employers should be aware of during the holiday season and tips on how to reduce employers' risk:

1. **Is That Mistletoe?:** Prevent Sexual Harassment. In light of the continued focus on the #MeToo movement, employers should stay focused on preventing sexual harassment during the holiday season, which includes any holiday party where coworkers congregate or socialize together. Ensure that your employees are aware of your anti-harassment policy and that they understand that harassment involving any employee at any time, including at a holiday party, will not be tolerated. Remind your employees that, while they are encouraged to have a good time at the holiday party, it is a company-sponsored event where all of your employment policies and rules apply. If you become aware of inappropriate conduct that occurs at the holiday party, you must deal with it appropriately in the same manner as you would address such an incident had it occurred in the workplace. Additionally, if you receive complaints post-party about activities that may have occurred at the holiday party, you must document the incident, do a proper investigation to deal with those issues, and take prompt corrective action, if necessary.
2. **Hey, What's in This Drink?:** Reduce the Risk of Alcohol-Related Incidents. Employers may be subject to liability for injuries caused by employees who consume alcohol at employer-sponsored events. To avoid potential liability, employers should promote responsible drinking and monitor alcohol consumption appropriately. Employers may want to consider either not serving alcohol or hosting their holiday parties 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. Employers may also consider providing information regarding or paying for a ride-sharing service such as Uber or Lyft to promote responsible behavior.
3. **It's Icy Outside!:** Minimize the Risk of Workers' Compensation Liability. Workers' compensation benefits may be available to employees who suffer a work-related injury or illness arising from an employer-sponsored holiday party. To avoid this liability employers should make it clear that there is no business purpose to the event, that attendance is completely voluntary, and that they are not being compensated for their attendance at the event. Illnesses caused by contaminants found in food or beverages may create legal exposure if the providers are not properly licensed, so employers should use licensed third-party vendors who have their own insurance coverage to provide food and beverages.
4. **Am I Required to Be Here?:** Prevent Wage and Hour Claims. Non-exempt employees must be paid for all work-related events that they are required to attend. Therefore, to

ensure that the time spent at a holiday party is not considered compensable under state or federal wage and hour law, employers should make it clear that attendance is completely voluntary, hold the party outside of normal working hours, ensure that no work is performed during the party, and make sure that employees are not under the impression that they are performing work.

5. **Happy Non-Denominational Holiday Celebration!:** Avoiding Religious Discrimination Claims. An employer's holiday party or year-end celebration should be about the people who work there and the accomplishments of the organization, not a particular set of religious beliefs unless, of course, you are a religious organization. Employees of all religious and ethnic backgrounds need to feel invited and welcome to attend. Additionally, if employees do not want to attend based on their particular beliefs or practices, an employer may not discriminate or retaliate against the employee for that choice.

So, for this 2019 holiday season, we hope that you spread the joy of the season, have fun, be safe, appreciate the hard work of your employees, and avoid the employment law pitfalls that can come with the holidays!

The Labor and Employment Law Practice Group, O'Neil Cannon

EMPLOYMENT LAWSCENE ALERT: COMPANY HOLIDAY PARTIES AND TIPS FOR AVOIDING LIABILITY

The holidays are upon us, and that means holiday parties. While holiday parties are a good time to reflect on the year and gather employees to boost morale and camaraderie, they also have potential employment law pitfalls that employers should plan to avoid. If throwing a company-sponsored holiday party, employers should keep the following in mind:

1. Prevent Sexual Harassment. Although the #MeToo movement has not changed the legal requirements related to sexual harassment, it has certainly brought such issues to the top of employer's minds, and it should stay there during the holiday season and any holiday parties. Ensure that your employees are aware of your anti-harassment policy and that they understand that harassment involving any employee at any time, including at a holiday party, will not be tolerated. Remind your employees that, while they are encouraged to have a good time at the holiday party, it is a company-sponsored event where all of the policies and rules of the company apply. If you become aware of inappropriate conduct that occurs at the holiday party, you should deal with it appropriately. Additionally, if you receive complaints about activities related to the holiday party, you must document the incident and do a proper investigation to

deal with those issues.

2. Reduce the Risk of Alcohol-Related Incidents. Employers may be subject to liability for injuries caused by employees who consume alcohol at employer-sponsored events. To avoid potential liability, employers should promote responsible drinking and monitor alcohol consumption appropriately. Employers may want to consider hosting their holiday parties 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 Workers' Compensation Liability. Workers' compensation benefits may be available to employees who suffer a work-related injury or illness. To avoid this liability at a company-sponsored holiday party, the employer should make it clear that there is no business purpose to the event, that attendance is completely voluntary, and that they are not being compensated for their attendance at the event. Illnesses caused by contaminants found in food or beverages may create legal exposure if the providers are not properly licensed, so companies should use licensed third-parties who have their own insurance coverage to provide food and beverages.
4. Prevent Wage and Hour Claims. Non-exempt employees must be paid for all work-related events that they are required to attend. Therefore, to ensure that the time spent at a holiday party is not considered compensable under state or federal wage and hour law, employers should make it clear that attendance is completely voluntary, hold the party outside of normal working hours, and ensure that no work is performed during the party and that employees are not under the impression that they are performing work.

#METOO: SEXUAL HARASSMENT CLAIMS AND MISCONDUCT

Wisconsin attorneys Sara Geenen and Erica Reib discuss the duties and risks for both employers and employees seeking to protect themselves.

EMPLOYMENT LAWSCENE ALERT: IS YOUR BUSINESS EXPOSED TO LIABILITY FOR YOUR COMPANY'S LEASED EMPLOYEES/TEMPORARY WORKERS?

‘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.

SUPREME COURT ADOPTS NARROW DEFINITION OF "SUPERVISOR" IN CONTEXT OF WORKPLACE HARASSMENT CASES

On June 24, 2013 the Supreme Court of the United States issued a decision in *Vance v. Ball State University*, in which it defined narrowly what it means to be a "supervisor" in the context of workplace harassment claims. The Court's decision in *Vance* has been a long time coming and offers long-awaited guidance to employers as to who constitutes a "supervisor" for purposes of imposing strict liability under Title VII for workplace harassment.

Whether an employee is considered a "supervisor" for purposes of Title VII is of critical importance because an employer's exposure to liability is significantly different depending on whether that employee is a "supervisor" or simply a co-worker. An employer is liable for harassment by a co-worker only if the employer was negligent in controlling working conditions. Different rules apply, however, where the alleged harasser is a "supervisor." In those situations, an employer may be strictly or automatically liable for the supervisor's creation of a hostile work environment where the supervisor's alleged harassment results in a tangible employment action such as hiring, firing, or failure to promote. Where the harassing conduct is committed by a "supervisor," an employer can only avoid liability in the absence

of a tangible employment action if: (1) the employer exercised reasonable care to prevent and correct the harassing conduct (*i.e.*, having a written anti-harassment policy, conducting regular supervisory training, *etc.*); and (2) the employee failed to take advantage of the employer's preventive and corrective measures available to the employee. So, whether an alleged harasser is a "supervisor" or merely a co-worker is important.

In *Vance v. Ball State University*, the Supreme Court defined "supervisor" narrowly to mean only those individuals who have authority to take tangible employment actions including a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. In adopting this narrow definition of supervisor, the Court rejected the EEOC's attempt to broaden the definition of "supervisor." The EEOC attempted to argue that individuals who simply direct the work of another employee should be sufficient to caste the title of "supervisor" upon an individual for the purpose of imposing strict vicarious liability upon the employer, which would include anyone who directs another employee's work tasks.

The Supreme Court's adoption of the more narrow definition of "supervisor" means that not every employee with the authority to direct work will be considered a supervisor for the purpose of imposing strict liability upon an employer for workplace harassment. The Court's holding may result in employers facing less strict liability harassment claims in the future and at the same time provide employers a better opportunity to defend themselves against such claims under the less stringent negligence theory of liability.

What Steps Should You Take to Protect Your Business in Light of the* Vance *Decision?

Be sure to review and update your anti-harassment policies and procedures and communicate those policies and procedures to your employees. You should always be sure to act quickly in conducting a thorough investigation of any complaint or allegation of harassment by one of your employees and take appropriate corrective or disciplinary actions as necessary.

Also, clearly establishing the status of each of your employees will continue to be of critical importance. You should create or review and clarify job descriptions for those employees who you intend to have authority to take tangible employment actions.

Please contact Sarah Matt for more information or to provide you advice regarding your anti-harassment policies and procedures and employee job descriptions.

SUPREME COURT ADOPTS HEIGHTENED STANDARD FOR EMPLOYEE RETALIATION CLAIMS

Recently, the Supreme Court of the United States issued its decision in ***University of Texas Southwestern Medical Center v. Nassar***, which raises the bar for employees who file Title VII retaliation claims against their employers.

Title VII protects employees from discrimination based on race, sex or gender, religion, or national origin. Title VII also protects employees against certain forms of retaliation. Specifically, Title VII prohibits an employer from retaliating against an individual who has opposed, complained of, or participated in any complaint of unlawful employment practices by the employer. Retaliation can take many forms, including actions relating to terms and conditions of employment (*i.e.* hiring, firing, promotions, *etc.*), disciplinary actions and even discriminatory acts that occur outside the workplace.

For an employee to prevail under Title VII for a claim of retaliation, the employee must show some causal link between an adverse employment action and the employee's protected activity. Although federal district courts have been divided on just what type of proof an employee must establish in order to succeed on a Title VII retaliation claim, the key inquiry has always been the employer's motivation. Some courts have allowed employees to prove retaliation claims by establishing that the employer's action or decision was motivated by the employee's complaint or other protected activity, even if the employer also had other lawful motives that caused the employer's action or decision. Other courts, however, have applied a more stringent standard that requires employees to prove that the employer would not have taken the challenged employment action "but for" the employee's complaint or engagement in other protected activity.

In *Nassar*, the Supreme Court clarified that in order to prove retaliation under Title VII, an employee must prove "but-for" causation – that the employee's complaint of unlawful employment practices was the "but-for" reason for the challenged employment action rather than just one of many reasons. Proving that a challenged employment action was motivated by discriminatory reasons, even if the employer's action was also motivated by other lawful reasons, is no longer sufficient to succeed with a retaliation claim.

What does the Court's decision mean for employers?

The Court's decision in *Nassar* is of particular significance because the number of retaliation claims filed by employees has significantly increased in recent years and has nearly doubled from 1997 to 2012, according to EEOC statistics. Requiring employees to prove "but-for"

causation in a Title VII retaliation claim should make it easier for employers to succeed at the early stages of litigation and will hopefully curb the filing of frivolous claims that cost employers time and money to defend. That is not to say that employers no longer need to apply or enforce anti-retaliation policies. Documenting performance problems and adhering to consistent disciplinary and termination practices continues to be of critical importance for employers as evidence of legitimate and non-discriminatory reasons for any challenged employment action.