

The Most Wonderful Time of the Year? Not For Employers.

The holidays are here again and they represent a minefield for employers. It seems that every year the period of time from mid-November through the end of the year is guaranteed to generate employment litigation. I like the holidays as much as the next person, although I must admit that my favorite holiday story of all time is A Christmas Carol by Charles Dickens. With the help of Ebenezer Scrooge, I list below in no particular order, some common problem areas associated with the holiday season.

1. Scheduling, Absenteeism and Tardiness

Everyone is busy and no one wants to be at work. Whether it is parties, Christmas shopping or family commitments, issues with scheduling, absenteeism and tardiness are plentiful during the holidays. As to scheduling, the critical point is to maintain a fair and objective approach to avoid claims of discrimination. As for absenteeism and tardiness, the key is to continue to enforce the rules – it is a mistake to depart from normal employment practices just because the holidays are here (* note that I do have an exception to this rule below).

Scrooge says, "A poor excuse for picking a man's pocket every twenty-fifth of December . . . But I suppose you must have the whole day [off]. Be here all the earlier next morning."

2. Holiday Parties and Gift Exchanges

I am not sure why some employers continue to have company sponsored parties when I consider the volume of litigation that I have seen generated by these events. If you intend to hold a holiday party, you need to plan it very carefully and be prepared to closely manage the party and any issues that arise from it. The same goes for gift exchanges, which often involve inappropriate, gag gifts that the recipient may not find funny.

Scrooge says, "I don't make merry myself at Christmas and I can't afford to make idle people merry."

3. Holiday Displays

Of course, the "holidays" can refer to events other than Christmas; you may have employees who celebrate Hanukkah or Kwanzaa. You may also have employees whose religion has no major holidays in December and some employees who do not observe any religious holidays and find them offensive. All of this can lead to conflict among employees who may want to decorate their work areas and others who don't like the decorations or the underlying messages. To the extent the displays are based on religious convictions, the employer may have a limited obligation to provide accommodations. It is a complex area and it is a good idea to consider the issue in advance rather than waiting for a conflict.

Scrooge says, "Every idiot who goes about with Merry Christmas on his lips should be boiled with his own pudding and buried with a stake of holly through his heart."

4. The Holidays Bonus

Unfortunately, this one is probably not a big concern for most employers this year. Nevertheless, it is worth remembering that unless a bonus is completely discretionary on the employer's part, it needs to be retroactively included in employees' base pay for the purposes of overtime calculations. Bonuses that are guaranteed or based on some production goal or attendance need to be included in base pay and may result in retroactive overtime pay. As a result, employees should be made aware that any bonuses at the holidays are completely discretionary.

Scrooge says, "What reason have you to be merry? You're poor enough."

5. Termination and Adverse Action

Although I do not advocate bending the normal workplace rules during the holidays, I do suggest avoiding termination and other adverse action between Thanksgiving and the end of the year if it is possible. Obviously, some situations call for immediate action. However, if you have a situation that is only headed toward termination or discipline, it is usually best to put it off until after the holidays. The reason is not legal but practical. Every case I have ever had in which there was discipline or a termination near the holidays has included a tear jerking account of the injustice – “. . . terminated him ___ days before Christmas . . . ;” or “. . . couldn't even buy presents for the kids . . . ;” etc. The reason these cards are always played is because they work. Being terminated from a job is bad enough but at Christmas it appears cruel. Better to avoid the situation if it is possible.

Scrooge says, “If [the poor] would rather die, they had better do it, and decrease the surplus population.”

Despite the dire warnings above, there is some good news for employers. In my experience, January is the best month for favorable settlements. It seems that everyone is more receptive to offers in the month after Christmas. I wonder why.

Scrooge says, “What's Christmas time... but a time for paying bills without money.”