Host a Summer Party Without Getting Burned

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From Memorial Day barbeques, Fourth of July fireworks, Labor Day soirees and many pub-crawls and Friday afternoon happy hours in between, the summer season offers employees and employers the opportunity to bond outside of the workplace. While these events can serve to strengthen employment relationships and build morale, they also can be a hotbed for employer liability.

Employer-hosted parties would not create nearly the burden they do if it were not for one item: alcohol. According to Vault.com, 57 % of surveyed employees admit to having been drunk at a company party, and 38 % of the survey respondents say an open bar was *the most important element of a successful holiday party*.

In this newsletter, you will learn how employers can limit their exposure when hosting parties. Although your imagination is the only limit for what can go wrong when employees and alcohol mix, this newsletter focuses on two issues that cause the most problems – and potential liability: drinking and driving, and sexual harassment.

The Case of Too Many Mai Tai's

In *Lev v. Beverly Enterprises*, 457 Mass. 234 (2010), the Supreme Judicial Court once again held that the negligence of an employee cannot be imputed to his employer when the employee acts *outside* the scope of his employment at the time of the accident.

Beverly Enterprises, a nursing home located in Chestnut Hill, employed John Ahern as a cook. One evening after work, Ahern and his supervisor met at a local Chinese restaurant to discuss patient menus and an upcoming Department of Public Health survey. While at the restaurant, Ahern purchased two drinks and consumed at least one drink and one-half of the other. While driving home, Ahern struck the plaintiff, Charles Lev, as he was crossing the street. Ahern was arrested and eventually convicted of operating under the influence.

Lev argued that Ahearn's employer, Beverly, was responsible for his injuries because Ahern was acting within the scope of his employment when he struck Lev. The Court agreed with Lev that Ahern was acting within the scope of his employment when he became intoxicated at the restaurant, that is, the *purpose* of Ahern's meeting with his supervisor was to discuss work-related matters. However, the Court also found that Ahern no longer was acting within the scope

of his employment after he left the meeting. "He simply was driving home from a meeting with his supervisor, conduct that, substantively, was no different than traveling home after the completion of his shift." Put another way, the Court ruled that "Ahern's homeward-bound trip from [the restaurant] was not an essential part of his employer's mission." The court also noted that the restaurant, not the employer, controlled the flow of alcohol.

When "Serving" Your Employer Isn't a Good Idea

In *O'Connor v. Gaspar and Peabody Office Furniture*, 19 Mass. L. Rptr. 302 (Ma. Super. March 8, 2005), a Massachusetts Superior court highlighted the danger of hosting an office party on-site, and during work hours.

Ronald Gaspar was a senior vice-president in charge of sales at Peabody Office Furniture. During Peabody's holiday party in 2001, Gaspar drank several vodka tonics from a bottle of vodka that had been a gift from one of his colleagues. The company provided wine, beer, and non-alcoholic beverages, but did not arrange for the purchase of vodka or other liquor.

Just prior to leaving the party, Gaspar spoke with the company's president, who understood that Gaspar had been drinking vodka and that Gaspar had a drinking problem. Shortly after leaving the party, Gaspar hit another car head on. At the scene, Gaspar's blood alcohol content was nearly 3 times the legal limit.

The injured motorist filed a lawsuit against the company, arguing that Peabody was liable for his injuries. Peabody argued that it could not be held responsible because it had not controlled the flow of alcohol to Gaspar. Said another way, Peabody argued that it had not furnished or paid for the vodka, the only alcohol Gaspar drank at the party.

The court held that if Gaspar was acting within the scope of his employment when he became intoxicated during the office party, the company could be held liable under the doctrine of *respondeat superior*, a Latin term for "let the master answer." This legal doctrine means that an employer can be held liable for the injuries an employee causes when acting within the scope of his employment.

The court analyzed whether Gaspar's conduct at the party was "of the kind he was employed to perform" and whether it was motivated "by a purpose to serve the employer." In ruling for the plaintiff, the court found that Gaspar had been acting within the scope of his employment when he got drunk. In so finding, the court relied on the following:

- The party, *held during regular business hours at the office*, was supposed

to promote employee morale;
- As a senior vice-president and *an officer of the company*, Gaspar was tasked with making his sales staff happy and helping them to enjoy the party;
- Gaspar used the vodka to meet this end;
- Peabody Furniture, through Gaspar, *controlled the flow of alcohol*.

Gaspar also instructs that an employer does not have social host liability when (1) an employee's attendance at an employer sponsored social event is *voluntary* (2) the party is held *off the employer's premises* and (3) the party is held *outside of normal working hours*.

A Golf Game Gone Awry

Sexual harassment claims also are a large source of potential claims when employers host parties. In *Morehouse v. Berkshire Gas. Co,* 989 F.Supp. 54 (D.Mass. 1997), the United States federal court from the District of Massachusetts considered whether an employer should be held liable after a supervisor displayed sexually explicit, defaced photos of an employee during a company golf outing.

Sheryl Morehouse was actively involved in the employee union at Berkshire Gas. Morehouse had had several run-ins with management over the rights of union employees in the months leading up to the annual golf outing.

The outing was organized by Berkshire employees, with tangential support from the company (such as permitting the organizers to use the company's photo copiers and telephones). Berkshire did not directly contribute money towards the outing.

Prior to the outing, a manager at Berkshire took a picture of Morehouse, and defaced it to depict Morehouse with male genitals, and the words, "drive it home," "queen of the union," and "Sheryl sucks cock." During the tournament, the manager displayed the photocopies prominently throughout the golf course. The manager later admitted that he had been very intoxicated at the time he hung the photocopies.

When Morehouse discovered what had happened at the outing, she became depressed, and filed a lawsuit against the company alleging that the incident had created a sexually hostile work environment.

The court ruled that the golf outing was a company sponsored event, even though Berkshire had not directly contributed money, because (1) top

management routinely participated; (2) the tournament was covered in the company's newsletter, and (3) the event organizers used company resources.

Under the Massachusetts discrimination statute, c. 151B, employers are held "strictly liable" when a supervisor sexually harasses a subordinate. Therefore, the court considered whether the manager who defaced the picture of Morehouse was acting within the scope of his employment during the golf outing. In ruling for Morehouse, the court noted that

- A supervisor need not be "in the course of exercising his or her authority" in order to hold the employer liable for harassment. Thus, the court found it immaterial that the harassment occurred outside of the working relationship, and;
- It did not matter that the accused manager did not directly supervise Morehouse. The court ruled that a direct supervisory relationship need not exist between the harasser and the victim for an employer to be found liable under c. 151B.

What's an Employer to Do?

Eliminating alcohol is the most obvious way to minimize liability for employer-sponsored parties. However, for a variety of legitimate reasons, most employers will not make this choice. The following tips will help employers host a summer party without getting burned:

- Include an **alcohol and drug use policy in your Employee Handbook**. The policy should state that when alcohol is served at company-sponsored events, employees are expected to drink responsibly, not to drink and drive, and to otherwise abide by all company policies.
- **Communicate** early and often. Using email, memos, and bulletin notices, remind employees about the company's alcohol and sexual harassment policies. Remind employees that company policies remain in effect during employer-sponsored events.
- Make attendance **voluntary**.
- Host the party **outside of normal working hours.**
- Hold the event **off-premises** – ensure that your host has **liability coverage**.
- Hire a **professional bartender**. Empower the bartender to refuse to serve alcohol to intoxicated employees.
- Serve many types of **non-alcoholic beverages**.
- Notify employees about **public or alternative transportation** options. Consider making cab vouchers available.

- **Serve food.**
- **Limit the length of the event** to a few hours and make it clear when the event ends. Stop serving alcohol at least an hour before the end of the event.
- **Investigate all complaints as though the "bad act" happened in the workplace.**