

Bodman PLC

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### **The Holiday Present Employers Don't Want – Mitigating Risk During the Holiday Season**

By: Mackenzie Clark, Associate, Workplace Law Group

The holiday season is generally a time for celebration. However, employers should be particularly vigilant at year end in their efforts to mitigate risk for employment claims. Below are some issues to keep in mind.

#### **Reducing Risk at Holiday Parties**

Holiday parties offer a great opportunity to connect with co-workers and colleagues. However, employers should consider the risks of providing or permitting consumption of alcohol. Event coordinators and vendors should ensure that intoxicated individuals are not served. If an employee is intoxicated, they should not be permitted to drive. An employer could potentially be subject to liability if it permits the overserving of an employee and there is an automobile accident.

Also, holiday parties may increase the risk of harassment complaints as the celebration and alcohol consumption could lower inhibitions. Be vigilant in investigating any claim of inappropriate harassment arising out of a holiday party. Additionally, managers should be reminded that if they see inappropriate behavior at a celebration, they have the same obligation to report and correct the issue.

#### **Holiday/End of Year Bonuses**

Make sure to review your pay practices regarding bonuses to ensure that they are compliant with the Fair Labor Standards Act. Non-exempt employees may be entitled to have their overtime recalculated to include bonuses in their regular rate of pay for overtime premium calculation. Discretionary bonuses, where the payment and amount are paid at the sole discretion of the employer, do not count towards the regular rate of pay and do not need to be factored into any overtime calculations.

However, non-discretionary bonuses, which are based on fulfillment of a pre-determined formula or metric, must be counted towards the regular rate of pay for determining the

overtime rate. For example, a gratuitous \$500 holiday bonus, that the company decides to pay at or near the time of payment, would not be included in the regular rate calculation. However, if the employer promised a \$2,000 bonus if the company met its revenue goal for the period of January 1 to December 31, and the bonus becomes payable, that bonus would need to be calculated into the regular rate of pay. An additional overtime premium would also be due to non-exempt employees who worked overtime over the previous year.

## **Student Employment**

If your company employs minor students during the holiday season, make sure to comply with Michigan's rules governing youth employment. First, minors must be issued a work permit from the issuing officer of their school. Second, there are restrictions on the number of hours and times of day that minors can work. Those aged 16 and 17 have fewer restrictions than those aged 14 and 15. Minors also must be given a half-hour break for each five hours worked in a day. There are also other restrictions on the type of work that minors can perform, e.g., no work defined as "hazardous."

## **Employee Handbook Review**

The end of the year is a great time to review your employee handbook and consider implementing any policy or procedure changes early in the new year. It is recommended that handbooks be reviewed at least every few years due to both potential changes in company policies and changes in legal requirements. The beginning of the year is a good time to implement changes.

## **Terminations**

Consider whether it makes sense to delay non-critical terminations until the new year in light of the holiday season. If an employee has engaged in serious misconduct or there is a severe downturn in work, delay in taking action is likely not an option. However, if less serious performance/conduct issues have arisen, consider building your documentation of the issues, and addressing the issues at the beginning of the new year. The optics of terminating employees with long-standing issues in the middle of the holiday season could raise the potential for legal action.

Please contact any member of [Bodman's Workplace Law Group](#) if you have any additional questions regarding any of the information above. Bodman cannot respond to your questions or receive information from you without establishing an attorney-client relationship and clearing potential conflicts with other clients. Thank you for your patience and understanding.

<b>WORKPLACE LAW GROUP</b>	<b>AARON D. GRAVES</b>   <i>Chair</i> 313.392.1075 <a href="mailto:agraves@bodmanlaw.com">agraves@bodmanlaw.com</a>	<b>JOHN T. BELOW</b> 248-743-6035 <a href="mailto:jbelow@bodmanlaw.com">jbelow@bodmanlaw.com</a>	<b>JOHN C. CASHEN</b>   <i>Of Counsel</i> 248.743.6077 <a href="mailto:jcashen@bodmanlaw.com">jcashen@bodmanlaw.com</a>
	<b>MACKENZIE E. CLARK</b> 248.925.1926 <a href="mailto:mclark@bodmanlaw.com">mclark@bodmanlaw.com</a>	<b>AMANDA MCSWEEN EMPEY</b> 313-392-1056 <a href="mailto:aempey@bodmanlaw.com">aempey@bodmanlaw.com</a>	<b>GARY S. FEALK</b> 248-743-6060 <a href="mailto:gfealk@bodmanlaw.com">gfealk@bodmanlaw.com</a>
	<b>JOHN DAVID GARDINER</b> 616.205.3123 <a href="mailto:jgardiner@bodmanlaw.com">jgardiner@bodmanlaw.com</a>	<b>MICHELLE L. KOLKMEYER</b> 248.743.6031 <a href="mailto:mkolkmeier@bodmanlaw.com">mkolkmeier@bodmanlaw.com</a>	<b>KAREN L. PIPER</b>   <i>Of Counsel</i> 248.743.6025 <a href="mailto:kpiper@bodmanlaw.com">kpiper@bodmanlaw.com</a>
	<b>REBECCA C. SEGUIN-SKRABUCHA</b> 248.925.1936 <a href="mailto:rsequinskrabuacha@bodmanlaw.com">rsequinskrabuacha@bodmanlaw.com</a>	<b>MELISSA M. TETREAU</b> 248.743.6078 <a href="mailto:mtetreau@bodmanlaw.com">mtetreau@bodmanlaw.com</a>	<b>DAVID B. WALTERS</b> 248.743.6052 <a href="mailto:dwalters@bodmanlaw.com">dwalters@bodmanlaw.com</a>