

## Avoiding an HR hangover this Christmas: employment law considerations for work Christmas parties

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Christmas parties can undoubtedly be a good mechanism to reward hard work and celebrate achievements at the end of the calendar year, but they can also be a major risk for employers.

A 2018 survey found that one in 10 UK workers have been dismissed or disciplined following a work Christmas party, with reasons including getting involved in a fight, taking drugs, or inappropriate behaviour, including sexual harassment. A further 8% felt like they had to leave their job after a Christmas party as they could no longer face working with their former colleagues.

### | Regulatory considerations

Employers may think that the majority of incidents that take place at a work Christmas party are an internal matter, and overlook wider regulatory considerations.

Each regulator will have its own expectations regarding the standards to be maintained by its membership and not all regulators apply their rules in the same way. The same can be said for reporting - what must be reported, at what juncture, in what format and by what means will be different from regulator to regulator.

Depending upon the infraction in question and any connected finding the regulator might have a range of measures at its disposal. It could issue a reprimand, a suspension (eg of a membership or trading licence or the ability of a natural person to hold a specific office or function) or removal.

### | Discrimination law

Although Guernsey's new discrimination legislation will come into force in a phased approach

from October 2023, employers in Guernsey and Jersey should still carefully consider the potential discrimination matters that a Christmas party can present.

For example, take care not to inadvertently exclude employees from an event by reason of:

- Age – in choice of venue or physical activity
- Sex – in the time chosen to hold the event. Temps for example, may be excluded due to the day/time of the event if it's held during working hours, or even as a matter of policy. Temps are more likely to be female, older, and/or disabled
- Pregnancy and maternity – if someone is on parental leave, don't presume they wouldn't want to be invited. In the tribunal case of *Howie v Hollaways of Ludlow*, a mother who was not invited to an informal work Christmas party because she was on maternity leave was found to have been discriminated against. There should be suitable food and drink options at the party for someone who is pregnant or breastfeeding
- Disability – consider the accessibility of the venue, and transport options to the venue. Different food and drink options should be provided for certain medical conditions
- Religion or belief – while religion/belief is not yet a protected characteristic in Jersey, and legislation has not yet come into force in Guernsey, employers should be considerate of non-Christian beliefs, both in terms of how the event is labelled, and in terms of food and alcohol. Conceivably, although it hasn't been formally tested in the Jersey Tribunal, aspects of religion and belief might potentially fall under race discrimination in some circumstances. Care should also be taken around clashing with important dates/times for those of other religions

## Data protection

Some of the data employers may gather from employees ahead of the Christmas party is special category data under data protection legislation, including certain dietary requirements, home addresses and contact details, and medical information (for example, if people need adjustments from the venue in relation to a disability or long-term illness). Explicit permission must be obtained from the employee to share this data with the venue.

Other data protection issues include openly discussing work matters/other colleagues in front of those who shouldn't be privy to that information, sharing photos without consent, and individuals recording staff performances, presentations, awards and management speeches. Smartphones and social media make it all too easy to share photos that may damage careers as well as the reputation of the company.

Of course when done in the right way, sharing pictures on social media can be a good way to demonstrate company culture. Employers should ensure they publicise their social media policy to ensure nothing inappropriate is shared.

## **COVID, mental health and other reasons why employees might not feel safe attending**

Although all COVID restrictions have been removed in Guernsey and Jersey, there are still many people who are particularly vulnerable to COVID and winter viruses and are therefore fearful of attending large group activities like an office-wide Christmas party.

These employees might be concerned that failure to attend the Christmas party could affect their prospects, exclude them from opportunities, lead them to fall out of favour with managers, or be viewed as not a team player.

Alongside those continuing to shield, the demands of being away from home can be difficult for remote workers and/or people with caring responsibilities. There are those who would prefer not to attend the party due to mental health reasons, such as anxiety or depression, or due to a substance use disorder.

Employers should take into account the individual circumstances of each employee, and ensure that nobody feels they have to attend if doing so would make them feel unsafe or uncomfortable.

Reasonable adjustments in the context of COVID fears or transmissions could include offering virtual events as an additional or alternative to physical festive gatherings.

Other reasonable adjustments might be to have a larger room than is strictly required, ventilation, sanitiser facilities, facemasks available if people prefer, and emailing a circular to all staff the week before the event asking people to test for COVID beforehand.

## **Dealing with misconduct and grievances**

This is the first year of employee and client celebrations in many jurisdictions since before the pandemic. People may drink more than usual as a result, and undesirable behaviour could follow.

If employees are at risk of over-indulging, employers might want to remind staff in advance of the rules/policy around sickness and unauthorised absence the next day.

Fears over the reputational and legal fallout from bad behaviour at staff parties and a growing intolerance for potentially offensive or discriminatory conduct are leading employers to consider initiatives such as:

- sober chaperones
- alcohol-free events

- drinks vouchers (instead of an unlimited free bar)
- pre-arranged transport home
- strict guidelines on conduct.

## **Employers' vicarious liability for employee misconduct at Christmas parties**

In an employment relationship, vicarious liability involves an employer being liable for the wrongs committed by an employee where there is a sufficient connection between those wrongs and the employee's employment. It does not matter that the employer itself has committed no wrong.

Vicarious liability may also arise in respect of a relationship that is 'akin to employment', a view endorsed by the Supreme Court.

In *Chief Constable of the Lincolnshire Police v Stubbs and others* for example, the Employment Appeal Tribunal (EAT) held that an employer was vicariously liable for an act of sexual harassment committed by an employee in a pub outside working hours, stating that social events away from the office involving employees from work either immediately after work, or during an organised party, fell within the remit of 'course of employment'.

Where there is employee misconduct at a work event, the starting point is an employer will be liable. It is a defence for the employer to prove that they took such steps as were reasonably practicable to prevent the misconduct.

It's worth considering the online arena too. It's established that an employer's duty of care extends to an employee's home where their home is also a workplace, so while it's untested, liability that would attach to in-person work events could also attach to online events taking place in employees' homes.

## **Conclusion: getting the balance right**

As noted earlier, Christmas parties are a great way for management teams to thank their staff and acknowledge the hard work that has been put in throughout the year.

It is also a great way to motivate your teams and retain staff (and hopefully improve productivity) going into the new year.

There is a balance to be struck therefore between employees being able to relax at the event and employers taking steps to avoid the risks. This includes:

1. Drawing a distinction between official events (where employers are at risk of vicarious liability) and unofficial ones (which are less likely to be a risk)
2. Briefing managers to set a good example to their teams and to keep an eye out for situations that could lead to problems
3. Providing clear guidance on the expected standards of behaviour - normal workplace rules of conduct and behaviour still apply – and zero tolerance for harassment, discrimination and any other misconduct
4. Moderating the flow of alcohol to limit the risk of excessive consumption
5. Conducting risk assessments to mitigate accidents and incidents
6. Ensuring that employees are aware of the complaints process
7. Taking any complaints seriously and investigating where appropriate.
8. Addressing any incidents or allegations swiftly and fairly according to normal procedures and policies

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