



## It's a Wrap: Avoiding the Year-End Employment Pitfalls

by Liz Tascio  
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In December, it seems everyone is happy. Offices glitter with holiday decorations, the company party gives employees a chance to unwind and socialize, and everyone's looking forward to a long-awaited bonus check.

But the end of the year also has its own pitfalls. Diverse religious commitments may result in conflicting vacation days or workplace tension. A poor evaluation and or a thin bonus check can leave some employees feeling they didn't get what they deserved. And what looked like a simple flirtation at the company party could develop into a sexual harassment complaint.

It takes foresight, attention to legal requirements, and a sense of fairness, but Human Resource professionals can get the company through the season with ease, and even use the time to prepare for a fresh start in the new year. Howard Schragin, a labor and employment attorney with Epstein Becker & Green P.C., shared a few tips on how to navigate the holiday season and freshen up the department with a quick and helpful audit.

### **Be Festive and Fair**

Probably around Thanksgiving, the office started showing signs of the holidays. Cubicles and hallways were adorned with Christmas wreaths, Hanukkah lights, and other decorations. That's all well and good as long as no one feels left out, Schragin said.

"While you have the right to decorate however you want, be sensitive," Schragin said. Otherwise, an employee may claim that you're not accommodating certain religious beliefs.

If you're planning a party for employees, call it a "holiday" party, without giving it a specific religious affiliation. Hold it during the week, not on a Friday or a weekend, so it doesn't conflict with religious observances. Make attendance voluntary.

Remind employees to be on good behavior and to dress as they would at the office. Before the event, e-mail employees the company's sexual harassment policy, or slip a printed copy into employees' paychecks.

If you want to serve alcohol – a major culprit when it comes to inappropriate behavior at company parties, Schragin said – consider limiting it to two drinks per person, or closing the bar an hour or two before the party ends. Provide transportation or designated drivers. Better yet, invite employees' spouses, clients, and customers.

Something may happen anyway – a drunk driving incident, a sexual assault – and the company needs to be able to show it did everything it could to prevent it, Schragin said. Even

though a holiday party may happen outside the office and after hours, an employer can still be held liable for what happens there.

For example, a Montana court found an employer liable for damages and discrimination after a male supervisor left a holiday party to drive home an intoxicated employee, then sexually molested and assaulted her on the way.

While that example is egregious, employees tend to be more forward with each other at holiday parties. The Seventh Circuit Court of Appeals has called company holiday parties “fertile ground for unwarranted sexual overtures that lead to Title VII complaints.” A recent study found that 29 percent of adults said they’d experienced or witnessed co-workers making sexual advances at holiday parties, more than at any other company event, Schragin said.

“You think you’re outside of the office and the rules don’t apply,” Schragin said. “You’re dancing, the music’s playing, and the way you would act in someone’s office or in the conference room down the hallway, you suddenly are not acting.”

Of course, consensual flirting happens at office parties, and sometimes undercover office romances come to light; nonetheless, look into complaints of harassment immediately, Schragin said. Don’t wait until after the party to address it; by then, he or she may already have harassed other co-workers.

Even if the party goes off without a hitch, stay tuned in to complaints and rumors, without feeding the rumor mill yourself, Schragin said. An incident at the party could merit a harassment claim later; plus, New York’s statute of limitations gives employees’ three years to report it.

### **Who Gets What: Bonuses, Days Off, and Evaluations**

At this time of year, you’ll end up with quite a few people wanting or needing a day off, sometimes for religious observances. If you receive conflicting requests, or requests that would empty out a department, what can you do?

The law requires employers to accommodate “sincerely held” religious beliefs unless it causes undue hardship for the company, Schragin said. If an employee says he or she needs the day off to attend church or temple, it’s okay to ask for some kind of proof that the employee has attended before, such as a church bulletin.

“You don’t want to be oppressive,” Schragin said. “(But) if somebody’s going to be out of work, you have a right to know it’s legitimate.”

In the case of conflicting time-off requests, some companies have a policy of first come, first serve, or simply deny all requests. Saying “yes” to the person who asks first could put you in the position of accommodating some religious beliefs but not others. It’s better to try to form a compromise that treats both equally; maybe one only needs the morning off but could come to work afterward, letting the other attend to his obligations later.

Saying “no” to everyone isn’t the best choice, but at least it keeps your policy consistent, Schragin said.

“I should just have a big Power Point that says, ‘consistently,’” Schragin said. “If you’re consistent, you’ll avoid 75 percent of your problems.”

That's also true in the case of end-of-year bonuses and evaluations, he said. It's best that companies consistently apply a set of clear, work-related criteria to determine both.

Document specific reasons an employee is or is not getting a bonus, Schragin said. Be aware that announcing bonuses ahead of time could be construed as a promise to pay. Review bonuses for patterns and trends; a simple spreadsheet can reveal discriminatory tendencies, even unintentional ones.

"Is it okay, and the employer may have reasons for why, in the discretionary bonuses, (if) the entire workforce, obviously, does not get it? For example, just professional staff (receives bonuses)," asked Celayne Hill, deputy general counsel for Local Initiatives Support Corporation.

That's probably all right, Schragin said, but even a neutral policy, such as bonuses for management but none for employees, may create a legal problem if, for example, most employees are black and most managers are white. The U.S. Equal Employment Opportunity Commission may find that policy has an "adverse effect," Schragin said.

Make sure bonuses are in line with federal law regarding salary. Under the Fair Labor Standards Act, certain bonuses, such as substantial or performance-based ones, may be considered part of an employee's regular rate of pay and affect overtime, Schragin said. Withholding a bonus that makes up a large portion of the employee's expected compensation may be considered a breach of contract.

A company can pro-rate a bonus for an employee who's out on leave for a significant portion of the year if the bonus is based on performance, but not if it's based on safety record or attendance, criteria that requires the employee to be there, Schragin said.

End-of-year evaluations require the same care and even-handedness, Schragin said. A big reason for that is the potential for an employee to sue over what he or she perceives is an unfair assessment that damages a career. Even with that danger, it's beneficial to do evaluations.

"You have an opportunity to evaluate your workforce and find out areas of need. It helps you make decisions for strategy and for staffing," Schragin said. "And it helps the employees ... to develop and progress."

Honest and thorough evaluations can also be a valuable tool to defend against discrimination lawsuits, Schragin said. But if you hold back on evaluations to avoid hurting an employee, you could get stuck later in court trying to convince a jury that the employee deserved to be fired.

Use comments to bolster a simple ratings system, and make note of training needs. Leave out anything unrelated to performance, such as comments on age, race, or medical leave. Make it a tool the employee can use to progress.

"You don't want to say things like 'Sally is lazy and careless,'" Schragin said. "Explain how that carelessness translates to negative performance."

When delivering the review, choose a secure and private location, put the employee at ease, have a witness if you feel you'll need one, and say the good stuff first. Don't gloss over criticism; explain it in a constructive way, using specific examples.

"If ... the employee actually does provide details, enough to justify that maybe the supervisor provided a bad evaluation," should you change the rating or does that set a bad precedent? asked Hill of Local Initiatives Support Corporation.

It's okay to note their comments, but don't go too far, Schragin said. "If you started to allow them to dictate changes ... you're going to have little mini-litigations over every performance evaluation."

Ana Harris, director of Human Resources for Signature Bank, says her company uses self-appraisals to help write evaluations.

"Some of my managers are very good; every time a customer makes a good comment about an employee, they stick it in a file," Harris said. But some don't, and it's helpful to hear the positives from employees, she said.

### **Spring Cleaning in December**

Amid all the festivities and year-end evaluations, take a moment to give your policies, practices, and paperwork a quick audit.

"The end of the year is a good time to do it, sort of a housecleaning just to make sure your HR shop is in order," Schragin said.

Check that employment applications, standard interview questions, job descriptions, offer letters, and contracts are up to date and conform with your company policies and with state and federal law. If you offer at-will employment, make sure that's clear in all your paperwork and manuals.

"I had a case recently where their offer letter said, 'at-will employment, at-will employment,' but then said, 'Your at-will employment will last until Dec. 23, 2005, and during this two-year period, you're going to get 'X' salary,'" Schragin said. "That's what the employee sued on when the person got fired before Dec. 23, 2005."

Update handbooks and employee manuals to align with employment law and your company's policies. Make sure all materials are available in the languages your employees speak and read. Check that legally required postings, such as no smoking signs and anti-discrimination policies, are up to date and in a visible spot, not behind the microwave in the breakroom.

Assess past sexual harassment training sessions and schedule more for the upcoming year. Decide whether you need a new trainer or an updated presentation.

Review which employees are exempt from overtime and make sure their duties still justify that. Separate medical records from personnel files and keep them private. Make sure you're keeping records such as I-9 forms and payroll records for the length of time the law requires.

"Three years is sort of the magic number for a lot of these things," Schragin said, but some records need to be kept longer, or for the duration of a lawsuit. Keep personnel files for the duration of employment.

“This is not brain surgery,” Schragin said. “It’s just that year’s end is a good time to take the pulse of what’s going on.”

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