'Tis the Season for Holiday Workplace Issues

Our Top Holiday Headaches Series

porterwright

As much as everyone loves them, the holidays create increased risk of employer liability and can result in a long list of legal problems for an unprepared employer. We've put together our top five holiday headaches for employers, a blog series that ran on the Employer Law Report December 10 - 14.

Here, we have included all five blog and have included a special "stocking stuffer" blog about every employer's favorite thing – the FMLA.

We hope you enjoy our holiday-themed blog series as much as we enjoyed writing it!

Three FMLA Stocking Stuffers: How to Avoid a Big Lump of Coal

We couldn't do a holiday-blog series and NOT include something about every employer's favorite holiday topic. Like fruitcake, it is a gift that nobody really wants or knows what do with... the FMLA.

Here we tackle three prickly FMLA-holiday questions. First, do holidays count against an employee's FLMA leave entitlement? Second, how does FMLA work in the case of a week-long plant, office or school shutdown? Lastly, does an employer have to pay an employee on FMLA leave holiday pay?

#1 - Does a Holiday Count Against an Employee's FMLA Leave Entitlement?

Let's say you have an employee who is out on FMLA leave from Monday, December 3, 2012 through Thursday, January 31, 2012. Let's also say that your office is closed Tuesday, January 1, 2013 to celebrate New Year's Day. Does the January 1, 2013 holiday count against the employee's FMLA leave entitlement?

The FMLA itself does not directly answer this question, so we look to the general rule for counting FMLA leave during a holiday week. The key here *is whether or not the employee is absent for the entire week in which the holiday is observed*. In our example, the answer is "yes." Under the FMLA, leave is calculated in workweek increments. While there are some exceptions when employers have to deal with intermittent or reduced schedule leaves when shorter periods of leave of observed, the week is the standard unit. If an employee is out on FMLA for the entire workweek, like in our example, the holiday *would count* against the employee's FMLA leave entitlement.

If, however, the employee works part of the week, *e.g.,* if the FMLA leave is certified from Friday,

December 21, 2012 through Wednesday, January 2, 2012, then only the days the employee would have been expected to report to work *would count* against the employee's FMLA leave entitlement. In this case, the holiday days will not count against the employee's FMLA leave entitlement unless the employee was otherwise scheduled to work as the FMLA provides:

> For purposes of determining the amount of leave used by an employee, **the fact that a holiday may occur within the week taken as FMLA leave has no effect; the week is counted as a week of FMLA leave**. However, if for some reason the employer's business activity has temporarily ceased and employees generally are not expected to report for work for one or more weeks (*e.g.,* a school closing two weeks for the Christmas/New Year holiday or the summer vacation or an employer closing the plant for retooling or repairs), the days the employer's activities have ceased do *not* count against the employee's FMLA leave entitlement.

29 C.F.R. § 825.200(h) (emphasis supplied).

Here's what it looks like in application. In our example, the employee has FMLA leave certified from Monday, December 3, 2012 to Thursday, January 31, 2012. So, the whole week, which includes the holiday, counts against the employee's FMLA leave entitlement.

Monday Dec. 31	Tuesday Jan. 1	Wednesday Jan. 2	Thursday Jan. 3	Friday Jan. 4
FMLA	HOLIDAY	FMLA	FMLA	FMLA

-- Count Whole Week as FMLA Leave --

In the second example, where the employee has FMLA leave certified from Friday, December 21, 2012 through Wednesday, January 2, 2012, only Monday and Wednesday count against the employee's FMLA leave entitlement.

Monday Dec. 31	Tuesday Jan. 1	Wednesday Jan. 2	Thursday Jan. 3	Friday Jan. 4
FMLA	HOLIDAY	FMLA	WORK	WORK

-- Count Monday and Wednesday as FMLA Leave --

Now the hard part: Determine what fraction of FMLA leave the employee used for the week. For this, divide the hours the employee missed for FMLA leave over the hours the employee would have worked *but for* the FMLA leave and get the fraction of FMLA leave to charge the employment's leave allotment. Using our second example, and an 8-hour workday, here is what that looks like:

Hours missed for FMLA	16	= **1**
Hours would have worked but for FMLA	32	**2**

Instead of

Hours missed for FMLA	16	= **2**
Hours would have worked but for FMLA	40	**5**

In our example, the employee missed 16 hours for FMLA leave divided by the 32 hours the employee would have worked that week *but for* the FMLA leave. Divide the hours missed for FMLA, which is 16, over the hours the employee worked have worked, 32, and you get 1/2 a workweek FMLA used, instead of 2/5 the employee would be charged in a five-day workweek.

If an employer cannot determine how many hours the employee typically works in a workweek, *i.e.,* the employee's schedule varies from week to week, the employer should take the average number of hours the employee works (including hours worked, leave time used and overtime) taken over the past

twelve months. The 12-week period is a look-back period from the date of the leave, not the date of the request for leave. When it comes to overtime, the regulations provide a bright-line rule that if an employee is typically required to work overtime, but is unable to do so because of an FMLA qualifying reason that precludes that employee from working overtime, the overtime hours should be counted against that employee's FMLA entitlement. This is essentially intermittent leave, and the hours counted against the employee are counted at straight time, not time and a half. Voluntary overtime, however, is not to be counted against the employee's FMLA leave allotment.

#2 – How Does This Work In Case of a Weeklong Plant, Office or School Shutdown?

If there is a weeklong shutdown, like a plant closing or school shutdown, where employees are not expected to work, the regulations are clear that the shutdown period cannot count against the employee's FMLA allotment. This is referred to in 29 C.F.R. § 825.200(h), cited above.

#3 - Do Employees on FMLA leave Get Holiday Pay?

Last issue: Do employees on FMLA leave get holiday pay if they are on FMLA leave during the holiday? This issue has presented quite a conundrum, and if you Google this issue, you will be find a number of varying responses.

There are two regulations on point. 29 C.F.R. § 825.09, which provides how an employer must maintain an employee's benefits while on FMLA leave, provides "[a]n employee's entitlement to benefits other than group health benefits during a period of FMLA leave (e.g., holiday pay) is to be determined by the employer's established policy for providing such benefits when the employee is on other forms of leave (paid or unpaid, as appropriate)."

In addition, 29 C.F.R. § 825.215(c)(2), which provides how an employer must maintain equivalent pay, provides:

> Equivalent pay includes any bonus or payment, whether it is discretionary or non-discretionary, made to employees consistent with the provisions of paragraph (c)(1) of this section. However, if a bonus or other payment is based on the achievement of a specified goal such as hours worked, products sold or perfect attendance, and the employee has not met the goal due to FMLA leave, then the payment may be denied, unless otherwise paid to employees on an equivalent leave status for a reason that does not qualify as FMLA leave. For example, if an employee who used paid vacation leave for a non-FMLA purpose would receive the payment, then the employee who used paid vacation leave for an FMLA-protected purpose also must receive the payment.

Here's what these regulations mean: Under FMLA, you treat FMLA leave like you would treat comparable non-FMLA leave. Suppose you have an employee who is taking vacation time during the holiday week and your policy provides that if an employee is on vacation the day before the holiday the employee will get paid for the holiday, but will not get paid for the holiday if the employee is on an unexcused absence the day before the holiday. Now suppose an employee is absent for an FMLA-qualifying reason the day before the holiday. The way you treat that holiday pay may depend on whether the FMLA leave is going to be running concurrent with the employee's paid vacation leave, or whether it is simply an unpaid leave under the FMLA. If the employee is using vacation, and the employer policy would allow the employee to take holiday pay if they are using vacation the day before the holiday, the employer would have to allow that for the employee on FMLA leave. On the other hand, if an employer does not ordinarily pay an employee for the holiday if the employee is absent on some other kind of unpaid leave the day before the holiday, the employer would not have to pay the employee on FMLA leave. Employers just

have to be sure they are treating employee consistently with similar forms of non-FMLA leave under your policies.

This year, the United States Court of Appeals for Eighth Circuit held in *Keeler v. Aramark*, that an employee out on FMLA leave was *not* entitled to holiday pay when his employer had a policy of not providing such pay to employees who did not work the day before the holiday regardless of the reason. In *Keeler,* the employer requested various leaves in the fall of 2007. His FMLA time went through Labor Day, a day the employer typically paid its employees, even though they were not required to work.

The employer's policy provided that it did not provide holiday pay for any employee on unpaid leave during the holiday, or for any employee who did not work the last regularly scheduled workday before the holiday, unless that absence was previously approved. Pursuant to this policy, the employer did not pay the employee for Labor Day because the employee was absent on the last workday before Labor Day.

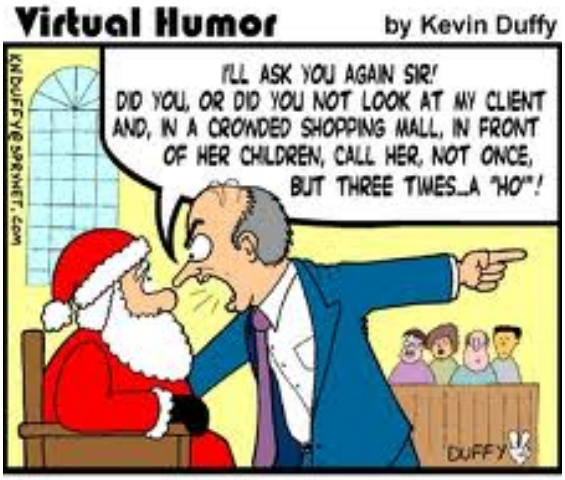
The employee sued claiming he was entitled to holiday pay for Labor Day even though he was out on FMLA leave. The employee argued that because the FMLA prohibits an employer from using an employee's use of FMLA leave as a negative factor in employment actions, he was entitled to the same paid leave he would have received as had he not been out on FMLA leave. The court disagreed and relied on 29 U.S.C. § 825.215(c)(2), set forth above, in particular: "if a bonus or other payment is based on the achievement of a specified goal such as hours worked … or perfect attendance, and the employee has not met the goal due to FMLA leave, then the payment may be denied." Relying on this regulation, the court found that so long as the employer treats other employees who were absent for non-FMLA reasons in the same manner. This regulation, with the employer's policy of not providing holiday pay for any employee on unpaid leave during the holiday, meant the employee had no claim.

The takeaway here for employers is simple: check your leave policies and check them twice, and make sure you are applying FMLA leave entitlements in conformity with the FMLA and your own policies.

Avoiding Holiday Party Liability When the Office Santa Tries to Teach His Employees a Few "Reindeer Games"

As much as everyone loves them, the holidays create increased risk of employer liability and can result in a long list of legal problems for an unprepared employer. As our holiday gift to you, we've put together our top five holiday headaches for employers, which will be provided to you in a week-long series starting today. ***Numero uno* on our list: Sexual harassment at the office holiday party.** Who doesn't have at least one inappropriate office holiday party story? If you don't, you've at least heard a couple doozies. The mix of sparkly outfits, tasty snacks, free-flowing libations and people who typically spend their working hours together and you have a recipe for jaw-dropping, not to mention, litigious situations. For example, there's the uncomfortable flirtation, the inappropriate comment about someone's appearance or outfit, the misconstrued invitation, and the just-asking-for-problems mistletoe decoration, which should never be featured at a holiday party. And lest we forget, there is a whole host of problems that ensue when the office Santa keeps asking female employees to sit on his lap. Holiday-related sexual-harassment lawsuits are not new and not unusual. Under federal and state law, employers have a legal obligation to prevent harassment in the workplace. This duty extends to work-sponsored events, like holiday parties and even extends to the appropriateness of gifts for a holiday gift exchange. When it does not abide by this duty, an employer can be vicariously liable for employee behavior that concerned sexual harassment committed in the course of employment. There is a bright side: generally, employers will not be vicariously liable for the actions of its employees if it can demonstrate it took reasonable steps to prevent the sexual harassment or that the employee did not use the employer's complaint procedures to alert the employer of the problem. Some cases on this subject have addressed comments with suggestive innuendos and some have been more overt. Take *Grigaliunas v. Rockwell Intern. Corp*. (defended by our own Charlie Warner), where the plaintiff alleged a co-worker kissed her at a holiday party for example. While that employer was lucky enough to get the

case thrown out early by showing it took reasonable steps to correct the problem when notified, some employers aren't so lucky, and in any event, it costs a lot of money to get the case tossed out.



Santa's sexual harassment trial takes a dramatic change for the worse

No matter how well planned or well-intended and despite an employer's best efforts to train their employees, office parties tend to encourage employees to behave in odd ways. This is despite an employer's best efforts to train their employees. Thus, employers are advised to remind their employees, not only of the company's anti-harassment policy, but to remind them that it applies to employer-sponsored parties and events. Here are some other tips to help keep your office Santa off the real one's "*Naughty List*":

- **Review, Update, Remind**: Review your employment handbook and, if necessary, update it so it expressly notes that employees are subject to the employer's anti-harassment policy at company-sponsored events. Once reviewed and updated, remind employees of the company's anti-harassment and reporting policies. Let them know that the policies apply to social and non-social events inside and outside the office equally and that they will be subject to discipline if they are involved in harassment during the holiday party. Don't forget to make sure your employees know this applies to their social media activities too ... just in case one of them decides to make a co-worker's dance with the lampshade the new YouTube sensation.

- **Take a Top Down Approach**: Start at the top and remind supervisors of the company's anti-harassment policies and what to do if they learn of or witness potential harassment.

- **Caution Gifting**: If there is going to be a holiday party gift exchange, employers should inform employees that gifts should be workplace appropriate. If necessary, employers should expressly state that employees are not to bring gifts/cards that contain derogatory images, language, innuendos or otherwise humorous gifts to which someone might take offense.

- **More the Merrier**: Consider inviting your employees' spouses/partners/families. Their presence may change the dynamic, in a good way, and keep the inappropriate conduct at bay.

- **Dress for Success**: Consider implementing a dress code that maintains a professional environment, *e.g.*, instead of "holiday attire," which could mean sparkly tube tops to some, keep it "business casual."

- **Act Fast**: Should all else fail and you find yourself dealing with a sexual harassment issue, act promptly! All acts of sexual harassment, even those that occur at a holiday party, should be taken seriously and dealt with properly. This includes a proper investigation and implementation of disciplinary procedures as necessary.

Being Inclusive Without Being A Grinch

Religion is also a hot-button workplace issue in December because so many different religious groups celebrate different holidays in December. For example: Christians commemorate the birth of Jesus at Christmas; Buddhists celebrate Buddha's Enlightenment with Bodhi Day; Jewish people celebrate Hanukkah, the Festival of Lights; African-Americans celebrate Kwanzaa, Muslims celebrate Eid al-Adha, or the Feast of Sacrifice; Seinfeld enthusiasts celebrate Festivus, and there are many others.

Federal and state laws prohibit discrimination and/or harassment on the basis of religion. This means that an employer cannot treat persons of different religions differently or appear to favor one religion over another. As such, having a party that is focused on a single religious theme, ***i.e***., a "Christmas" party, excludes employees who do not practice Christian beliefs. As such, employees should be mindful of varying cultural differences among their employees and determine a neutral way to celebrate this special time of year. Here are some tips:

- **Keep Decor Wintery, Not Religious-Centered**: In the office, its goodbye to the Christmas tree, the nativity scene and the menorah. Unless you allow all types of religious symbols during the holidays, its best to deck the halls with neutral themes, like wintery snowmen, snowflakes and colorful lights.

- **Give Peas a chance!** Some religious observances restrict diets or require fasting during certain periods. Do what you can to avoid holiday parties during times of fasting and offer food options that are sensitive to various religions and nationalities that are likely to be represented at your party.

- **Music Makes the World Go Round**: Music sets the tone of the party, and if done wrong your party can have two left feet. Music can be tough, especially with a workforce of varying ages, cultural backgrounds and/or religious beliefs. One suggestion is to avoid overly religious Christmas carols.

- **Foster an Atmosphere of Inclusion not Cliques**: Take steps to keep employees from hanging out with their workplace friends. Encourage employees to mix and mingle by assigning seats randomly and/or have everyone engage in an activity, like a gift exchange. Most importantly, make sure everyone feels welcome and included. Holiday parties should promote office morale and bolster workplace cohesion, not remind employees of high school.

"Holiday Attire" Does Not Include "Beer Goggles"

So the question on everyone's mind when it comes to holiday parties: Will alcohol be served? For employers this is a big decision and, depending on where the holiday party is held and how it is contained, one that may come to expose an employer to liability. For the most part, whether an employer can be held responsible for alcohol-related incidents at or after company-sponsored events depends on the state in which the party is held and the circumstances.

First things first: If the event involves a business purpose that can be considered to have a direct effect on the commercial profitability of the business or if attendance is mandatory, the employer could find itself exposed to liability, so it is important to make attendance optional. Normally, however, merely attending an employer sponsored party will not expose the employer to liability for injuries that an intoxicated employee may cause once away from the premises.

In Ohio specifically, a social host, (i.e., the employer, in the case of an office holiday party) who provides alcohol on company premises is typically not liable to a third person subsequently injured by the intoxicated person. Ohio courts have refused to impose liability on a social host in a situation where a guest becomes intoxicated and injures a third party. Specifically, in *Settlemeyer v. Wilmington Veteran's Post No. 49*, 11 Ohio St.3d 127 (1984), the Ohio Supreme Court has held that a social host is not liable for injuries to a third-party that occur as a result of the negligence of an intoxicated social guest. *Settlemeyer* has been applied in the employer-holiday party context and been found controlling. *See Gilkey v. Gibson*, No. 98AP-1570, 2000 WL 4973 (10th App. Dis. Jan. 6, 2000); *Knox v. Bell Optical Lab, Inc.*, No. 1145, 1989 WL 126857 (1st App. Dis. Oct. 24, 1989). In this context the courts typically have reasoned that the proximate cause of the injury is the consumption of the alcoholic beverage itself, not the act of furnishing the beverage. This is especially true when it concerns an adult guest; it's a little different for minors, as set forth below. If the event is held at a restaurant or off-site, the vendors selling/providing the alcohol for profit may be liable for resulting injuries to third parties if they provide alcohol to noticeably intoxicated guests; however, the employer sponsoring the event generally has no liability.

When minors are involved, Ohio courts in some instances have found a furnisher of alcohol liable for injuries to a third person as a result of an intoxicated guest's actions. These instances include cases where a person under 21 is provided beverages and when a liquor license holder knowingly violates the law relative to the sale of alcoholic beverages. In each such instance, the courts have determined that by enacting specific statutes that forbid the furnishing of alcohol to minors, the legislature meant business. Because these instances constitute statutory violations, Ohio courts have imposed liability on the social host and/or license holder in the event that the intoxicated minor causes injuries to a third party.

A minority of the states have adopted social host liability, in order for an employer to be found liable in one of these states, typically there must be an affirmative showing that the social host served alcohol to a person when the host knew or should have known that the person was intoxicated, and further knew that the intoxicated guest would be driving away from the event.

The problem for employers, even those in Ohio where there is no social host liability typically, is that there is no law that prohibits an intoxicated adult from suing a social host for injuries to that adult guest as a result of the intoxication. This means that if something happens to an employee or someone else due to the actions of an employer who became intoxicated at a company holiday party, the employer can still be named as a defendant in a lawsuit and spend money defending the suit.

If you decide to have alcohol at your company holiday party, here are some steps that might lessen the possibility of being held responsible for an employee's conduct after drinking too much:

- **Don't Serve Minors**: Make sure no minors are served. Check IDs, pass out wrist bands, and post signs that guests must be 21 in order to consume alcohol beverages. If fraternities can do it, so can you.
- **Be Aware of Your State Law**: Be familiar with your state's laws regarding liability and alcohol at company-sponsored events.
- **Make Attendance Optional**: Make it clear to employees that attendance at a company-sponsored event is purely optional, not mandatory. This also means, keep the itinerary for the event social, not work related. Keep work-related events, like handing out of bonuses/awards or discussing yearly goals, for another day.
- **Remind Employees of Policies**: Remind employees of your policies regarding proper decorum. While you can encourage them to have fun, remind them that they are expected to act responsibly, which includes not drinking too much and then driving. With this, also remind salaried-exempt managers to keep an eye on employees even though technically it's not work time.
- **Limit Consumption**: Use a cash bar or drink ticket system to limit alcohol consumption.
- **Take it Outside**: Have the party at an off-site restaurant, party hall or hotel where the facility will serve the drinks. This will reduce the risk o employer liability. If the party is on-site, at a minimum hire a professional wait staff or bartenders so the alcohol is being served by non-company employees. Ask the bartenders/caterers to prepare low-alcohol mixed drinks or punches that look and taste as festive as their high-alcohol content counterparts. DO NOT have managers/supervisors/co-workers making and serving their colleagues/subordinates beverages.
- **Be Careful with Your Choice of Beverages and Food**. Provide a variety of non-alcoholic beverages and plenty of food. Stay away from sweet punches that contain alcohol, which make it difficult for

employees to monitor how much alcohol they are consuming. Go easy on the greasy, salty or sweet foods, which tend to make people thirsty, and serve starchy and protein-heavy foods that slow the absorption of alcohol into the bloodstream. If possible, serve appetizers that are easy to eat while standing and mingling. Employees who have to choose between holding a drink and holding a plate of food may choose the drink only.

- **Close the Bar Early**: Close the bar well before the end of the event, no less than a half hour, but keep serving food.

- **The More the Merrier**: Consider opening the party to spouses/partners/significant others, which tends to reduce alcohol intake in addition to providing a possible designated driver.

- **Plan Ahead**: Discuss transportation ahead of time with employees and encourage them to coordinate rides with designated drivers. Another option: Arrange for taxis, a shuttle, or other transportation at the company's expense. Let employees know that transportation options are available so they can plan ahead. Announce during the party that transportation is available, even for employees who did not make an advance request.

Holiday Pay and How Not to Get Scrooged by The FLSA

Many employees believe they are entitled to holiday pay, even if they do not work on the holiday. This is not the case. In fact, neither the Fair Labor Standards Act ("FLSA") nor most state laws, including Ohio, require a private employer to pay hourly employees for working or not working on holidays (federal or otherwise). (For employers in Massachusetts, however, be sure to check your Blue laws.) This type of pay, if provided, is typically considered a fringe benefit and is a matter of agreement between an employer and an employee (or the employee's union representative). Please note that this does not apply to salaried, exempt employees who get paid for holidays (even ones they don't work) because the law prohibits employers from making wage deductions if the company is closed on a holiday.

What if an employer pays its employees for holidays for which they don't actually work?

Some employers may choose to pay their employees for the holiday, e.g., eight hours for New Year's Day, so it is important that employers understand the FLSA and comparable state law overtime implications. While employers may choose to pay employees for an additional eight hours on a holiday they did not work, these additional eight hours of time that did not constitute actual work cannot be used to go into a calculation for overtime purposes. Federal and most state laws require employers to pay nonexempt employees one and one-half times their regular rate for each hour worked over 40 in a workweek. These non-worked hours don't count.

Here's what it looks like in application:

Say an employee works 42 hours in a workweek and gets an additional 8 hours of pay for New Year's Day, even though the employee did not actually work on New Year's Day. The employee earns $10 an hour. The employee is entitled to 48 hours of straight pay and 2 hours of overtime, not 40 hours of straight pay and 10 hours at time and a half.

48 hours x $10	$480
2 hours x $5 (half time)	$10
TOTAL	$490

What if an employer gives an employee a holiday bonus?

Some employees really get into the holiday spirit and include holiday bonuses, along with other compensation. The FLSA excludes eight types of payments from the regular rate, one of which is the discretionary bonus. Discretionary bonuses are when the employer has discretion both on whether the payment is actually awarded and on the amount of the payment until a time close to the end of the period for which the bonus is paid. Nondiscretionary bonuses, on the other hand, typically are those agreed to, promised or contracted. Thus, for FLSA purposes, only nondiscretionary bonuses affect the overtime calculation.

For purposes of the FLSA, nondiscretionary bonuses must be included in the calculation for regular pay when computing overtime. For example, if an employee earns $10 an hour and works 45 hours in a work week, the employee would be entitled to 40 hours at $10 an hour and 5 hours at time and a half, or $15 for a grand total of $475.

Now let's go one step further. Let's say the employer gives the employee a holiday bonus that is a matter of contract between the employee and the employer paid out the bonus in the amount of $500 in the week discussed above, when the employee worked 45 hours. To calculate the overtime due for a week covered by a nondiscretionary bonus, the employer must first calculate the average rate of pay for the week, given the impact of the bonus. Here's how that calculation works:

Step 1: Add the nondiscretionary bonus paid (or the value of the nondiscretionary bonus given) to the total pay for the week.

Regular pay = ($10.00 x 45 hours) + $500 nondiscretionary bonus = **$950.00**

Step 2: Calculate the *premium* regular rate by taking the amount from Step 1 and divide that by the number of hours worked.

$950.00/45 hours = **$21.11** an hour is the *new* regular rate

Step 3: Determine the *premium pay* owed by dividing the *new regulate rate* in half and multiply that by the number of overtime hours worked.

$21.11 x .5 x 5 hours worked = **$52.78**

Step 4: Determine total weekly compensation by adding amount in Step 1 to amount of premium pay due in Step 3.

$950.00 + $52.78 = **$1,002.78**

Failing to include the $500 non-discretionary bonus when calculating the regular rate of pay would violate the FLSA and could mean steep penalties for the employer. So, if you decide to give holiday bonuses, make sure you comply with the FLSA and comparable state laws regarding overtime pay or make sure your holiday bonuses qualify as discretionary so they can be excluded from this calculation.

What if Santa Was the One Who Got Run Over By a Reindeer?

It is important not to require employee attendance at holiday parties and that pressure to attend is properly managed. Mandatory attendance at company-sponsored functions, like holiday parties, can result in workers' compensation claims if an attending employee is injured. It can also mean that the employee is entitled to be compensated for his or her time spent at the event pursuant to the Fair Labor Standards Act ("FLSA").

For workers' compensation liability, if the employee is required to attend a company-sponsored event, or there is significant business that takes place at the event that essentially makes attendance mandatory, then the employee will be considered to have been acting in the course of his or her employment and the same rules that apply to typical workers' compensation claims apply to injuries the employee suffers while at the holiday party.

The timing of the event is important for determining if and when workers' compensation laws may come into play. For example, if the event is held during normal working hours, then employee's attendance will likely be considered as "in the course and scope of their employment" though courts will also typically look at:

- The extent to which the employer expects/ requires employees to attend;
- The extent to which the employer benefits from the event, *e.g.*, will clients be present and/or will work be done;
- The degree of participation by the employer;
- Whether the activity takes place on the employer's premises or off-site; and
- When the event takes place in relation to the employee's normal work hours.

Several courts have recognized that an employee's voluntary attendance at a social event sponsored by his employer off the employer's premises and outside normal working hours cannot reasonably be viewed as conduct within the scope of his employment.

To help make your company holiday event festive while reducing your liability, keep the following tips in mind:

- **Make Attendance Optional**: Make it clear to employees that attendance at a company-sponsored events is purely optional, not mandatory. This also means keep the event social, not work related. Keep work-related events, like handing out of bonuses or awards, for another day.

- Pony Up the Pay: If attendance is required or the event is during work-time, compensate your employees, including overtime pay if their hours for the week exceed 40.

About the Author

Sara concentrates her practice in employment litigation and she has significant experience representing employers in all facets of employment-related litigation. She defends businesses before administrative agencies and in federal and state court involving employment-related claims including, but not limited to, claims arising under the FLSA, FMLA, FCRA, ERISA, COBRA, ADA, the ADEA, Title VII, the Ohio Civil Rights Act, diverse state law wrongful discharge, statutory contract, and other discrimination, retaliation and whistleblower laws.

As part of her extensive compliance practice, Sara has drafted company handbooks, workplace policies (e.g., social media, non-compete/non-solicitation policies, drug and alcohol testing); 50-state surveys detailing compliance standards with respect to meal/break, vacation pay, reimbursement, payroll deductions and others; severance agreements; releases; among others.

Sara has worked for companies of all sizes, from start-ups to the Fortune 100, in many different industries, including healthcare, foodservice, manufacturing, technology, professional services, consumer products, and financial services, as well as non-profit organizations and public employers.

Sara frequently presents training seminars regarding a variety of employment law issues. Her clients rely on her to guide them through difficult personnel issues prior to litigation erupting and in navigating litigation in the event it occurs. She is a frequent writer on our blog as well as other resources.

Here are links to a few of Sara's most popular blog posts from 2012:

***Complying With the FCRA Amendments before January 1, 2013** – a Step-By-Step Guide*

***Anything You Post or Are Tagged in on Facebook Will Be Used Against You . . .** The Sixth Circuit Upholds Honest Belief Defense to Employee's FMLA Retaliation Claim Who Went on a Pub Crawl While on Leave, But Skirts Issue As Applied to FMLA Interference Claims*

Can a Statement Like "How Could I Keep the White Girl?" Bring Down the House? Bet On It!

There's No "I" In At-Will Disclaimers: NLRB Acting General Counsel Advises on Two At-Will Disclaimers and Gives Employers a Halloween Treat

One Day You're In, the Next You're Out: A Policy-by-Policy Analysis of the Fallout for Employer Policies in the Wake of the NLRB's Decisions in *Costco* and *EchoStar*