

Don't Get Burned by Summertime Employment Issues

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**The temperature is rising.
Be aware of these possible
summertime workplace
issues.**

What We Will Cover

- Employer-Sponsored Events
- Workplace Attire
- Summer Safety – Heat-Related Illnesses
- Summer Fridays
- Working Remotely
- Summer Vacations
- Summer Interns
- Summer Flings
- Workplace Hygiene

Employer-Sponsored Events

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Employer-Sponsored Events

- During the summer, many employers throw office parties or events like barbeques, baseball games, and cocktail parties to show appreciation to their employees
- Events like these are a great way to thank employees for their work and allow them to socialize, but employers should take precautions

Employer-Sponsored Events

- Wage and Hour Issues
 - Employees who are non-exempt from overtime requirements could claim that they should be compensated for attendance at the event
 - Under FLSA, employers are required to pay all non-exempt employees for hours that the employees are required to work in addition to overtime
 - If attendance at an employer-sponsored event is mandatory, non-exempt employees could claim that they should be paid

Employer-Sponsored Events

- To avoid such wage and hour issues:
 - Ensure that attendance at employer-sponsored events is voluntary
 - Hold events outside of normal business hours
 - Avoid discussing work-related matters
 - Don't make employees feel guilty for not attending

Employer-Sponsored Events

- Sexual Harassment
 - At social events where alcohol is served, employees feel more relaxed and there is potential for sexual harassment or unwanted sexual advances
 - This type of behavior can lead to claims of sexual harassment against the employer

Employer-Sponsored Events

- To avoid claims of sexual harassment:
 - Remind employees of sexual harassment policies before events
 - Ask supervisors to watch out for inappropriate conduct
 - Allow employees to bring significant others

Employer-Sponsored Events

- Dram Shop or Social Host Liability
 - Under state dram shop laws, if an establishment continues to serve alcohol to a visibly intoxicated patron, it can be liable for harm that the patron does to himself or to a third party
 - Certain states extend such liability to social hosts in addition to businesses like bars, restaurants, etc.
 - Under social host liability laws, an employer can be liable for damage done to an employee or by an employee who became intoxicated at an employer-sponsored event

Employer-Sponsored Events

- *Respondeat Superior*
 - Even in states that do not have social host liability, an employer can be liable under *respondeat superior* for any negligence claims brought by third parties
 - In a 2013 case, an employer was held liable under *respondeat superior* for the actions of one of its employees, who became intoxicated at the company's holiday party and while driving home struck and killed another driver.

Employer-Sponsored Events

- To avoid liability for the actions of intoxicated employees:
 - Control alcohol consumption by providing employees with vouchers for drinks instead of an open bar
 - Serve food and provide plenty of nonalcoholic drinks
 - Consider providing transportation home (e.g., Uber codes and cab vouchers)
 - Remind managers to keep an eye on employees who have had too much to drink
 - Invite significant others

Employer-Sponsored Events

- Workers' Compensation
 - If an employee is injured during an employer-sponsored event, there is the potential for workers' compensation claims
 - Although workers' compensation only covers job-related injuries, employers should nevertheless try to minimize the risks involved in such activities
 - Make employer-sponsored events as safe as possible to avoid injury:
 - Require employees to wear appropriate safety gear
 - Make attendance voluntary
 - Remind managers to watch out for possible safety hazards
 - Consider requiring a release

Workplace Attire

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Workplace Attire

- A relaxed summer dress code policy is an inexpensive way to boost employee morale by:
 - Allowing employees to work comfortably when temperatures rise
 - Conveying the image that the employer cares about the employees' happiness
- A relaxed dress code can also lead to several issues for employers

Workplace Attire

- Sexual Harassment
 - When employees wear more revealing clothing this can lead to unlawful harassment by other employees
 - An employer can be held liable for the actions of its employees if (1) the employer knew of should have known about the harassing conduct; and (2) the employer failed to stop the conduct

Workplace Attire

- Sex Discrimination
 - Employers can adopt dress codes that impose different standards for men and women, but they cannot impose an unequal burden on one of the sexes
 - For example, dress codes cannot require women to wear uniforms if men are not required to do so where the employees are performing the same job
 - If adopting a summer dress code policy, ensure that it imposes an equal burden on both men and women

Workplace Attire

- Religious Discrimination

- Employers should also be wary of possible religious discrimination claims if the workplace attire policy does not provide for religious expression
 - E.g. wearing religious garb, observing a religious prohibition on wearing certain clothing, or adhering to certain grooming practices

- Race Discrimination

- Although race discrimination claims based on dress codes are uncommon, a notable exception is a no-beard policy
 - Policies that require all men to be clean-shaven have been found to violate the discrimination laws because of their disparate impact on African-American males because pseudofolliculitis barbae — a skin condition aggravated by shaving — occurs mostly in African-American males

Workplace Attire: Protective Measures

- Craft a clear summer attire policy
 - Publicize the policy
 - Employers should be clear about when employees are allowed to wear summer attire
 - Whether it is every Friday or every day from Memorial Day to Labor Day, employees must easily be able to remember the policy
 - Go into as much detail as possible
 - Describe the type of clothing that will and will not be tolerated
 - Do not let infractions go unnoticed and apply disciplinary measures consistently and equally
 - However, make sure to ask if the employee has a reason for violating the dress code, such as disability or religion
 - Keep a record of every dress code violation so any disciplinary measures are conducted in a transparent manner

Summer Safety – Heat Related Illnesses

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Heat-Related Illnesses

- Many employers require employees to spend a lot of time working outside
- During the summer months, hot temperatures can cause employees to develop various heat-related problems including:
 - Sunburn
 - Heat stroke
 - Heat exhaustion
 - Heat cramps
 - Heat rash
 - Dehydration

Heat-Related Illnesses

- OSHA can fine employers who do not take appropriate measures to protect their employees from the heat
 - In 2013, OSHA cited the employer for a serious safety violation after the heat-related death of one of its mail carriers, who collapsed after walking his route for five hours in 95-degree heat
 - OSHA found that an employer exposed its employees to health hazards by failing to implement an adequate heat stress management program
 - In 2014, OSHA cited an entertainment company after the collapse of a seasonally employed teenage worker at an amusement park

Heat-Related Illnesses

- Companies cited by OSHA for “serious violations” face fines of \$12,675 per violation (up from \$7,000)
 - A serious violation “occurs when there is substantial probability that death or serious physical harm could result from a hazard about which the employer knew or should have known”
- Companies may also be liable to their employees for damages for injuries sustained while working

Heat-Related Illnesses: Protective Measures

- Utilize OSHA's Guidance
 - OSHA offers posters and safety guides on its website
- Provide Training for Employees
 - Educate employees about steps that they can take to protect themselves, like wearing sunscreen or a hat and drinking plenty of water
 - Inform employees about the protections that the employer provides, such as water on-site or periodic breaks

Heat-Related Illnesses: Protective Measures

- Keep Employees Out of the Sun
 - Take precautions to ensure workers have access to water, rest, and shade
 - Set up work sites in the shade
 - Shut down work during peak heat times
- Recognize the Symptoms of Heat Illness
 - Employers should train supervisors and managers to recognize problem signs and respond quickly when employees are in distress

Summer Fridays

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Summer Fridays

- Many companies use the summer time to reward employees by having a “Summer Friday” policy
 - Summer Friday policies range from letting employees leave early or giving them the day off entirely

Summer Fridays

- Summer Fridays are a great way to boost morale, but many employers dock their employees' pay for the time that they take off, or force employees to use vacation days
- Is docking pay legal?

Summer Fridays

- Exempt Employees
 - Section 13(a)(1) of the FLSA provides a minimum wage and overtime pay exemption for any employee employed in a bona fide executive, administrative, or professional capacity
 - Such employees are paid on a salary basis
 - An employer likely cannot dock the pay of exempt employees for time that the employee does not report to work because of a Summer Friday policy
 - Subject to several specific exceptions, an exempt employee must receive his or her full salary for any week in which the employee performs any work without regard to the number of days or hours worked 29 C.F.R. § 541.602(a)
 - If an employer violates this policy, the employee may be considered non-exempt

Summer Fridays

- Non-Exempt Employees
 - An employer can dock the pay of non-exempt employees for time that the employee does not report to work because of a Summer Friday policy
 - Non-exempt employees are required to be paid for “hours worked” only
 - Employers should make it clear that employees cannot work on Summer Fridays without prior authorization

Working Remotely/ Summer Vacations

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Working Remotely

- Employees spend more time outside of the office in the summer, leaving early and taking more vacation days

Working Remotely

- If employees have the ability to work remotely, employers may be liable for any unpaid wages or overtime for the time spent working
 - This creates potential for wage and overtime claims

Working Remotely: Protective Measures

- Require employees to record time spent working outside of the office
 - Accurate timekeeping is important if a wage and hour dispute arises
- Require supervisor or manager approval for employees to work remotely
- Create a policy that has guidelines delineating when it is appropriate for an employee to work remotely
- Discipline employees who fail to follow the policy (but still pay for every hour worked)

Summer Vacations

- During the summer it is common for employees to request time off

Summer Vacations

- Employers should make sure to communicate the vacation policy to all employees
 - Vacation policies should be applied uniformly to prevent claims of discrimination
 - Specify what criteria will be used in approving vacation time
 - Require employees to request time off in advance
 - Document all requests for vacation and responses
 - Keep in mind that non-exempt employees who work remotely while on vacation may be entitled to unpaid wages or overtime
 - Ensure that employees who want to work remotely obtain prior authorization
 - If employees do work remotely while on vacation, require them to record the amount of time spent working

Summer Interns

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Summer Interns

- Employers in many different industries hire interns during the summer
- A 2016 survey of more than 5,600 graduating or recently graduated college students reveals that more than half of the students (56%) had worked as an intern; 56% of those were paid; 44% were unpaid (NACE)

Summer Interns

- Unpaid Internship Lawsuits
 - It all began on September 28, 2011, when two interns who worked on the 2010 movie, *Black Swan*, sued Fox Searchlight Pictures for wages and benefits, alleging that Fox violated minimum wage laws by not paying production interns
 - After that, more than 30 lawsuits filed
 - Fox Searchlight Pictures settled in August 2016

Summer Interns

- The Second Circuit Court of Appeals set forth a test for analyzing whether an intern should be classified as an employee:
 1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee – and vice versa;
 2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions;
 3. The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit;
 4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar;
 5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning;
 6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern; and
 7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job when the internship concludes.

Summer Interns: Protective Measures

- Employers who want to hire unpaid interns should:
 - Establish a timeframe before the internship begins. Internships that last a long time may create an employer-employee relationship
 - Ensure that advertising for internship programs emphasizes a classroom environment
 - Give interns shadowing and mentorship opportunities
 - Ask interns to sign an acknowledgement that the internship is unpaid
 - Consider partnering with a university that would provide credit for students who participate in the internship program
 - Make sure that your company does not benefit from the interns' work and that the interns are not displacing regular employees
 - Supervise the interns closely and ensure that the internship is a learning experience
 - Do not promise the interns a job after completion of the program
 - Ensure compliance with any specific state laws governing internships or training programs

Summer Flings

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Summer Flings

- With love in the air in during the summer, interoffice relationships can develop between employees
 - In fact, almost half of employees admit to having been involved in an office romance (Glamour)
- Even if such romances end happily they create a myriad of problems for employers

Summer Flings

- Favoritism
 - If a supervisor has a romantic relationship with a subordinate this creates ethical concerns and can lead to other employees claiming that the supervisor is favoring the subordinate
 - Romantic relationships could also make co-workers uncomfortable if the couple engages in public displays of affection or fights in the office and may create a hostile work environment

Summer Flings

- Sexual Harassment or Retaliation
 - After a relationship ends, the employee can claim that the relationship was not consensual and bring a claim against the employer for sexual harassment
 - The employee can also claim that he/she was retaliated against if he/she received a poor performance review

Summer Flings: Protective Measures

- Consider developing a relationship policy in addition to the traditional policies against discrimination, harassment, and retaliation
 - Employers can choose to ban all interoffice dating or prohibit relationships between a supervisor and his or her subordinates
 - Some employers have even adopted a policy, albeit excessive, that permits relationships, but requires disclosure of such relationship
 - An outright ban on relationships may be challenging because employees will inevitably engage in such relationships anyway

Summer Flings: Protective Measures

- Monitor employee relationships to ensure that it is consensual and that favoritism or harassment does not occur
 - If the relationship is between a supervisor and subordinate, transfer either party to avoid a direct reporting relationship
- Provide training to all employees on appropriate behavior in the workplace
- Create an effective complaint system that allows employees to voice their concerns and provides an immediate response from the employer

Workplace Hygiene

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Workplace Hygiene

- As the summer approaches, employers may be more likely to face employee hygiene issues such as body odor or excessive sweating

Workplace Hygiene

- There are many reasons to promote good hygiene in the workplace, including:
 - Productivity
 - Health concerns
 - Public Image
 - Safety Hazards
- Poor hygiene such as body odor may be a symptom of a disability or may be related to a religious belief
 - If an employer approaches the employee and learns of the disability or religious belief (or is on notice), the employer will be required to make reasonable accommodations

Workplace Hygiene: Protective Measures

- Address the hygiene issue with the employee
 - Ensure that the conversation is confidential
 - Try to speak to the employee at the end of the day
 - Express empathy
- Allow the employee a chance to explain
 - If the issue is a result of medical, religious, or cultural reasons the employer will have to accommodate the employee's needs
- Find a solution
 - Do not handle the discovery of a hygiene issue as a disciplinary matter, but inform the employee that the problem must be corrected



Thank you!

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