Managing Holiday Party Liability Risks

If serving alcohol is part of your holiday party plans, you need to understand and manage your liability risks. Here's how.

WHAT ARE YOUR LIABILITY RISKS?

You can be liable for injuries caused by employees who drive home drunk after the holiday party. The legal basis for liability is negligence, specifically, "host liability." (See the box below for an analysis of host liability, how it came about and how it came to be applied to employers.) The steps you must take to manage liability risks that come with serving alcohol will depend on what kind of host you are:

Commercial hosts including bars, clubs, restaurants and other businesses that serve alcohol to the public are required to monitor the alcohol consumption of their patrons and not let them get behind the wheel if they're intoxicated.

Social hosts include persons who invite guests to a party where alcohol is served. Unlike commercial hosts, social hosts are *not* expected to actively monitor the alcohol consumption of their guests; nor are they required to prevent drunk guests from driving. In the words of the Canadian Supreme Court, consumption of alcohol and the risks of impaired judgment it entails "is a personal choice and an inherently personal activity." Accordingly, social hosts "are entitled to respect their guests'" autonomy and may allow them to make their own decisions [*Childs v. Desormeaux,* [2006] 1 S.C.R. 643, May 5, 2006].

Is an employer a commercial or a social host? "Employers probably fall somewhere in the middle," according to an Ontario employment lawyer. "Companies don't profit from alcohol consumption at holiday parties the way a club owner does," she explains. "On the other hand, the relationship between employer and employee is more like that between bar owner and patron than between a private host and a guest," she adds.

Bottom Line: Unless and until courts decide the issue, employers may be *either* commercial *or* social hosts. So from a liability risk management standpoint, the smart move is to play it conservatively and take the measures necessary to meet the more stringent commercial liability standard.

DO 3 THINGS TO MANAGE YOUR LIABILITY RISKS

According to the Canadian Supreme Court, there are 3 things a commercial host must do:

1. Monitor How Much Guests Drink

Explanation: You must keep track of how many drinks each of your guests has consumed. For example, one of the reasons the employer was found negligent for letting an employee drive home after she drank too much at a holiday party was that it had an open and unsupervised bar. As a result, employees were able to help themselves to cocktails and there was no way to monitor how much each person had drunk [*Hunt v. Sutton Group Incentive Realty Inc.,* (2001) 52 O.R. (3d) 425].

What To Do: Before the party, designate 1 or more persons to monitor consumption. Whether you use your own people or outsiders, caution monitors not to drink during the party. Monitors need to be sober to do their job effectively," notes an Ontario consultant. Consider hiring professional bartenders who are trained to keep an eye on how much their customers drink. You can also keep track and control drinks consumed more easily by issuing drink tickets. The consultant's preferred solution: the cash bar. The problem with tickets," she explains, "is that the guests who don't drive give their tickets to the guests who do."

2. Monitor Whether Guests Are Intoxicated

Explanation: The Canadian Supreme Court says commercial hosts must make "reasonable assumptions" about whether guests are impaired based on how many drinks they've had.

What To Do: Have your monitors make judgments about intoxication. Refer to legal limits in defining intoxication levels. Under the *Canada Criminal Code*, individuals can be charged with a crime if they drive with a Blood Alcohol Content (BAC) of over .08%. Keep in mind that several provinces, including BC and ON, impose fines, licence suspensions and other penalties on drivers in the BAC "warn range" of .05%.

No, you don't have to administer blood tests and breathalyzers to your guests. All you need to do is make "reasonable assumptions" about intoxication. You can in fact estimate a person's BAC level by observing how many drinks she's had. But you need to consider that individuals get impaired at different rates. It depends not just on the number of drinks they've had but on their gender and weight (among other things). You can give your monitors the charts on the HR Compliance Site **[Embed link to N17C]** to help them make reasonable assumptions about whether particular guests are intoxicated.

3. Prevent Intoxicated Guests from Driving

Explanation: If you know or have reasonable grounds to suspect that the guest is impaired you must make an effort to prevent him from getting behind the wheel. How far does an employer have to go to keep an intoxicated guest from driving?

There's only been one case where a court had to answer that question—the *Hunt* ruling. The employer did try to dissuade the employee from driving. It offered to call her husband; and it arranged for another employee to drive her home. But the court said that this wasn't enough. The employer should have taken her keys, her car, brought her to a hotel and, if none of that worked, call the police. Although *Hunt* isn't the final word, the law clearly expects commercial hosts to make a determined effort to keep drunk guests off the road. A token protest or offer to drive the person home probably isn't going to be enough.

What To Do: Use carrots such as appointing designated drivers, giving out taxi vouchers and even reserving hotel rooms where drunk guests can go to "sleep it off." But be prepared to use the stick, too, including:

- Adopting a zero tolerance policy for drinking and driving;

- Sending employees a note a day or 2 before the party reminding them of the policy;
- Collecting the names and phone numbers of employees' spouses or, if they're unmarried, other person who can pick them up if they get drunk;
- Making guests turn in their car keys if they plan to drink;
- Appointing a monitor to watch the parking lot in case an intoxicated guest tries to sneak out;
- If necessary, disciplining intoxicated employees who don't cooperate; and
- If all else fails, calling the police.

One of the things employers do to try and limit their liability is have workers sign a waiver promising not to hold the company responsible if they get drunk at the party and get hurt driving home. Courts aren't likely to enforce such waivers, lawyers tell us, especially if the waiver is signed after the employee has started drinking. "The alcohol washes away the employee's capacity to enter into a binding waiver," explains one lawyer. Moreover, the waiver doesn't bind third parties that the employee might injure. On the other hand, getting employees to sign the waiver might make them act more responsibly.

Conclusion

Of course, the easiest way to avoid liability risks for drunk driving after holiday parties is not to serve any alcohol at your holiday party. But if going dry isn't appealing, make sure you use this article to scope out and manage your liability risks to keep guests and motorists with whom they share the road free from harm and your company free from legal trouble.

Download this tool.