

Brachers Bitesize

Christmas parties after lockdown

Common challenges during this festive time of year

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Welcome

Brachers
With you all the way

Today's Seminar

1. Poll
2. Christmas party excess
3. Day-after absences
4. Inappropriate Secret Santa gifts
5. Practical matters



Poll 1

Are you planning to have a face-to-face Christmas party this year?

A festive Christmas wreath is the central focus of the image. It is composed of a variety of greenery, including large, smooth-edged leaves, smaller pointed leaves, and several types of evergreen branches. Interspersed among the foliage are clusters of bright red berries, some on thin stems and others in larger bunches. Two small, round, green pumpkins with white stripes are also part of the arrangement. The wreath is set against a light-colored, horizontally-grained wooden background. A dark blue, semi-transparent banner is overlaid on the bottom left portion of the image, containing the text for the poll.

Poll 2

Which of the following Christmas period pitfalls are you most concerned about?



Christmas Party Excess

Christmas party excess

Potential problems:

- *Harassment*
- *Discrimination*
- *Assault*
- *Drink Driving*
- *Social media posts*

Employer liability

- *Technically:*
 - *Vicarious liability or secondary liability for tortious acts*
 - *Vicarious liability for breaches of statutory duties*
 - *Secondary liability for statutory discrimination under the Equality Act 2010*

Vicarious Liability

"Vicarious liability does not involve any attribution of wrongdoing to the principal.

It is merely a rule of law under which a principal may be held strictly liable for the wrongdoing of someone else.

This is one reason why the law has been able to impose it as broadly as it has.

It extends far more widely than responsibility under the law of agency: to all acts done within the course of the agent's employment,

Employer liability

however humble and remote he may be from the decision-making process, and

even if his acts are unknown to the principal,

unauthorised by him and adverse to his interest or contrary to his express instructions (Lloyd v Grace Smith & Co [1912] AC 716),

indeed even if they are criminal (Lister v Hesley Hall Ltd [2001] UKHL 22)." (Paragraph 70.)

Employer liability

- *Two-stage test:*
 - *Is there a relationship between the primary wrongdoer and the person alleged to be liable which is capable of giving rise to vicarious liability?*
 - *Is the wrongful conduct so closely connected with the acts the primary wrongdoer was authorised to do (or the role or "field of activities" entrusted to the wrongdoer) that, for the purposes of the liability of the employer, it may fairly and properly be regarded as done by the employee while acting in the ordinary course of its employment*

Close Connection Test

- *The close connection test requires identification of the nature of the wrongdoer's job or field of activities, or what the employee was authorised to do, but this is addressed broadly.*
- *It requires an evaluation of whether this is a sufficient connection.*
- *In an employment relationship, it 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 such that it would be fair to hold the employer to be vicariously liable*

Vicarious Liability

- *This is to be approached by applying the principle of social justice that those who carry on a business should bear the loss caused by risks associated with the business materialising, including the risk of an employee misusing his position, such a risk being "one of life's unavoidable facts.*
- *In evaluating the closeness of the connection, "it is appropriate to consider whether the wrongful act can fairly be regarded as a risk reasonably incidental to the purpose for which the [employee] was employed"*

Vicarious liability

- *Anything done by an employee in the course of their employment is treated as having also been done by the employer*
- *A Christmas party may still be ‘at work’ or ‘closely connected’ to it.*
- *Legal obligation to ensure safe work events from a wider health and safety perspective.*

Parties and After Parties

- *Weddall v Barchester Healthcare Ltd; Wallbank v Wallbank Fox Designs Ltd 2012:*
- *The Court of Appeal reviewed when an employer could be liable for deliberate assault by one employee on a colleague.*
- *The decision illustrated where the line can be drawn as to what is "in the course of employment".*
 - *The assessment of closeness of connection entails considering closeness not only in terms of the nature of the work but also in relation to time, place and causation.*

After-parties

- *In the case of a violent event, this would involve looking at:*
 - *how soon after the work-related matter this occurred;*
 - *whether it occurred at or near work; and*
 - *whether it was caused by a work-related matter.*
- *However, while consideration of the time and place at which the relevant acts occurred will always be relevant, it may not be conclusive. For example, acts of passion and resentment or of personal spite may fall outside the scope of employment.*

Parties and Vicarious Liability

- *Shelbourne v Cancer Research UK 2019*
 - *Lady was dropped after being picked up on the dancefloor by an intoxicated visiting scientist.*
 - *Employer found not liable as there was not a sufficient connection.*
 - *The visiting scientist's attendance was not held to be connected to the work he was undertaking for CRUK.*
 - *Not an employee, his only field of work was scientific research.*

Parties and Vicarious Liability

- *Livesey v Parker Merchants 2004*
 - *Sexual assault occurred in a car on the way home immediately after the party*
 - *Held to be a continuation of workplace sexual harassment*
 - *Therefore held there was a sufficiently close connection.*

Parties and Vicarious Liability

- *Bellman v Northampton 2018*
 - *Employee assaulted by the Managing Director at an unscheduled after party/drinks*
 - *The event was not a one-off, but a follow-on event from the Christmas party*
 - *Employer held liable for physical altercation that occurred at a hotel where the party continued from*
 - *Assaulter was a senior employee/Assault triggered by criticisms of the MD's management abilities.*

Equality Act – Secondary Liability

- *An employer can be secondarily liable for the primary discriminatory acts of its employees or agents.*
- *Section 109 EA 2020*
- *Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.*
- *Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.*
- *It does not matter whether that thing is done with the employer's or principal's knowledge or approval.*

The Defence for Employer's

- *In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A—*
 - *from doing that thing, or*
 - *from doing anything of that description.*

Risk Mitigation

- *An employer must take **all reasonable steps** to prevent the employee from doing the discriminatory act or from doing anything of that description (section 109(4))*

Steps could include:

- *Implementing equal opportunities and anti-harassment and bullying policies*
- *Reviewing those policies and educating managers on them*
- *Make clear to employees what is deemed inappropriate behaviour*

Mitigating risk

- *Making a clear distinction between official social events and unofficial social events*
- *Remind staff workplace standards are expected?*
- *Appoint someone from management to monitor alcohol intake at an event?*
- *Limit how much alcohol is served at an event?*
- *Complete a risk assessment of the event*
- *Investigate fully any complaints made by staff and follow internal procedures consistently*



Day-after absences

Day-after absences

- *Do not assume the sickness is not genuine*
- *Investigate*
- *Contact the employee*
- *Decide whether disciplinary action is necessary*
- *Be consistent in your approach*
- *The option to be flexible*
- *Warn employee's non-attendance will be scrutinised?*



Inappropriate Secret Santa gifts

Inappropriate Secret Santa gifts

- *Understanding of “banter” “humour” differs from person to person*
- *Can lead to harassment claims as well as more general unhappiness.*
- *Could in theory lead to wider personal injury liability in extreme cases.*

Harassment

In deciding whether conduct shall be regarded as having the effect referred to above, the following must be taken into account:

- *The perception of B.*
- *The other circumstances of the case.*
- *Whether it is reasonable for the conduct to have that effect.*

Remember, it is not just the receiver who could find a present offensive.

Reasonable steps

- *Remind employees of policies and possible consequences*
- *Do not pressure employees to participate*
- *Designate an employee to check the presents and offer ideas?*
- *Set clear rules and a budget*
- *Trust your employees to be sensible adults?*



Practical matters

Inclement weather

- *Health and safety concerns*
- *Adverse weather policy*
 - *Business closure*
 - *Employee notification*
 - *Working from home provisions*
 - *Absence management and pay*
 - *School closures and other childcare issues*
 - *Consequences of policy breach*

Holiday booking issues

- *5.6 weeks holiday each annual leave year is mandatory*
- *All other considerations at employer discretion*
- *Consider Christmas in advance*
- *First come first served?*
- *Rotation?*
- *Bank holidays*

Other considerations

- *Christmas bonuses*
- *Christmas gift/hampers etc.*
- *Religion and belief issues?*
- *Dress code over the festive period*
- *Acceptance of Christmas gifts from clients*
- *Giving of gifts to clients*



Questions