

Brachers Bitesize

Festive Fallout

Common challenges during this festive time of year

14 November 2023

Presented by:

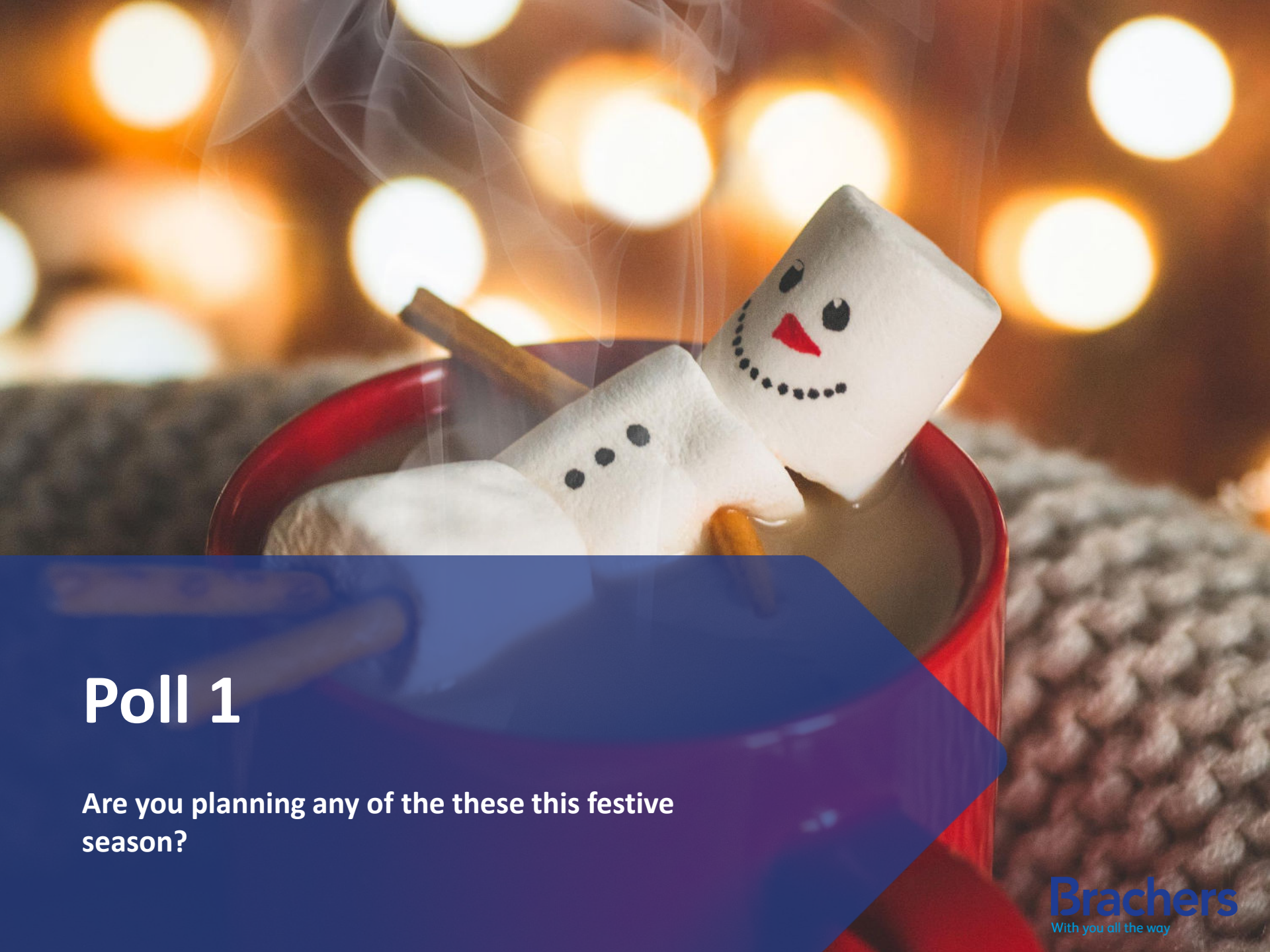
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A festive winter scene featuring a large, snow-covered evergreen tree in the center. The tree is decorated with numerous colorful lights in shades of red, green, blue, and purple. The ground is covered in a thick layer of snow, and a dark line of trees is visible in the background under a deep blue, starry night sky. A large, semi-transparent blue arrow shape points from the left towards the right, partially overlapping the tree and the ground.

Welcome

Brachers
With you all the way



Poll 1

Are you planning any of the these this festive season?

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 concerned about?

Bah Humbug

Being the Festive Grinch

Common Legal Risk Areas

Potential problems:

- Sexual Harassment
- Racial Harassment
- Other Discrimination
- Assault/Personal Injury/Common Law Negligence
- Drink Driving

Common Legal Risk Areas

Potential problems:

- Social media posts
- General bullying and harassment – Constructive Dismissal
- General inappropriate comments – Constructive Dismissal
- Bribery

Key Legal Concepts

- Common Law Vicarious Liability for Negligence/Breach of statutory duty (e.g. personal injury or health and safety breaches)
- Harassment under the Equality Act 2010
- Mutual Trust and Confidence Contractual Duty
- Duty to take reasonable steps to prevent bribery

Employer liability – Common Law

- Vicarious 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

- 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
- 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”.

Common Law - Vicarious liability at Christmas

- 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.
- A Christmas party after party may still be ‘at work’ or ‘closely connected’ to it.
- A Christmas Work event may still be ‘at work’ or ‘closely connected’ to it.
- Legal obligation to ensure safe work events from a wider health and safety perspective.

Equality Act 2010 – Harassment

- A person (A) harasses another (B) if:
 - (a) A engages in **unwanted conduct** related to a relevant protected characteristic, and
 - (b) the conduct has the **purpose or effect of—**
 - (i) violating B's dignity, or
 - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

Equality Act 2010 – Harassment

(2) A also harasses B if—

(a) A engages in unwanted conduct **of a sexual nature**,
and

(b) the conduct has the purpose or effect referred to in
subsection (1)(b).

Equality Act 2010 – 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.

Equality Act 2010 – Secondary Liability

- An employer can be secondarily liable for the primary discriminatory acts of its employees or agents.
- Section 109 EA 2010.
- 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.
- Policies alone will not normally be sufficient to meet this reasonable steps defence.

Mutual Trust and Confidence

- Super implied terms – basis of many constructive unfair and constructive wrongful dismissal claims.
- Malik and another v Bank Of Credit & Commerce International SA 1998:

"The employer must not, without reasonable and proper cause, conduct itself in a manner calculated and [or] likely to destroy or seriously damage the relationship of trust and confidence between employer and employee"

- Judged objectively
- Not a good faith duty (innocent mistakes can breach)



Examples

Case Law – After events

- *Weddall v Barchester Healthcare Ltd and Wallbank v Wallbank Fox Designs Ltd 2012:*
 - An assault by one employee on a colleague.
 - Looked at "*in the course of employment*" test.
 - 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.

Case Law – after events

- 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.

Case law – Xmas Parties and third parties

- *Shelbourne v Cancer Research UK 2019*
 - A female employee was dropped after being picked up on the dancefloor at the Xmas Party 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.

Case Law – after party events

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

Case Law – after party events

- *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.



Application to Festive Examples

Festive Season Areas of Risk

The Work Xmas Party



Festive Season Areas of Risk

The After Party



Festive Season Areas of Risk

The Work Xmas Event



Festive Season Areas of Risk

The Work Xmas Event



Festive Season Areas of Risk

The Work Xmas Event



Festive Season Areas of Risk

The Work Xmas Event



Festive Season Areas of Risk

Secret Santa



Festive Season Areas of Risk

Xmas Jumpers/Outfits



Festive Season Areas of Risk

Christmas Cards



Festive Season Areas of Risk

Christmas Decorations



Festive Season Areas of Risk

Xmas Hospitality





Summary of Legal Risks

Summary of Risks

Issue	Common Law/Personal Injury Risk	Equality Act Discrimination Risk	Unfair/Wrongful Dismissal Risk
Official Xmas Party	✓	✓	✓
Team Xmas Parties/Events	✓	✓	✓
After parties	✓	✓	✓
Secret Santa	✓	✓	✓
Xmas Jumpers		✓	✓
Xmas Cards	✓	✓	✓
Xmas Decorations	✓	✓	✓



Mitigating the Risks

Risk Mitigation

- Equality Act 2010:
 - 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))

Risk Mitigation - General

Steps could include:

- Implementing equal opportunities and anti-harassment and bullying policies
- Reviewing those policies and educating/training management and staff on them
- When was your last equality training business wide?
- Make clear to employees what is deemed inappropriate behaviour and that this still applies at Xmas 😞

Mitigating risk – Xmas Parties/Events

- Making a clear distinction between official social events and unofficial social events? (no guarantee)
- What oversight do you have of Team level/Department level xmas events being planned?
- Are they appropriate?
- Complete a risk assessment of the event?
- Investigate fully any complaints made by staff and follow internal procedures consistently

Mitigating risk – Parties/Events

- Remind staff workplace standards are expected at such events?
- Appoint someone from management to monitor alcohol intake at an event? (bah humbug – but....)
- Limit how much alcohol is served (or at least paid for by the employer) at an event?
- Consider whether locations with alcohol are appropriate and inclusive at all for the event?

Mitigating risk – Secret Santa etc.

- Do you need to specifically remind people that decency/non harassment rules apply to Xmas too? (in addition to education/training?)
- For example:
 - Xmas is not a licence to wear an offensive jumper?
 - Or send an offensive card?
 - Or gift an offensive gift
 - Or suggest rude things under the mistletoe!
 - Funny or risqué to you can be rude and offensive to others

Mitigating risk

- Remind employees of possible consequences?
- Do not pressure/require employees to participate either as giver or receiver (cards, secret santa etc.)
- Designate an employee to check the presents and offer ideas?
- Set clear rules and a budget?
- Trust your employees to be sensible adults?

Looking forward to Xmas 2024

- The Worker Protection (Amendment of Equality Act 2010) Act 2023 will come into force in October 2024.
- All employers will be under a statutory duty to take reasonable steps to prevent sexual harassment in the workplace.
- If employers fail to take reasonable steps to prevent sexual harassment, the Equality and Human Right Commission can take enforcement steps, plus any successful tribunal claim will be subject to a compensation uplift of up to 25%.
- But provisions requiring employers to prevent third party harassment are not proceeding.



Gifts and Socialising

Gifts and Hospitality

- Bribery Act 2010.
- Duty on employers to put in place adequate procedures to prevent bribery.
- Do you have a policy on giving of gifts or hospitality?
- Do you have policy on receiving gifts or accepting hospitality?
- Peak in application over the festive period.
- Do you need to review and remind personnel of the rules before the festive season?

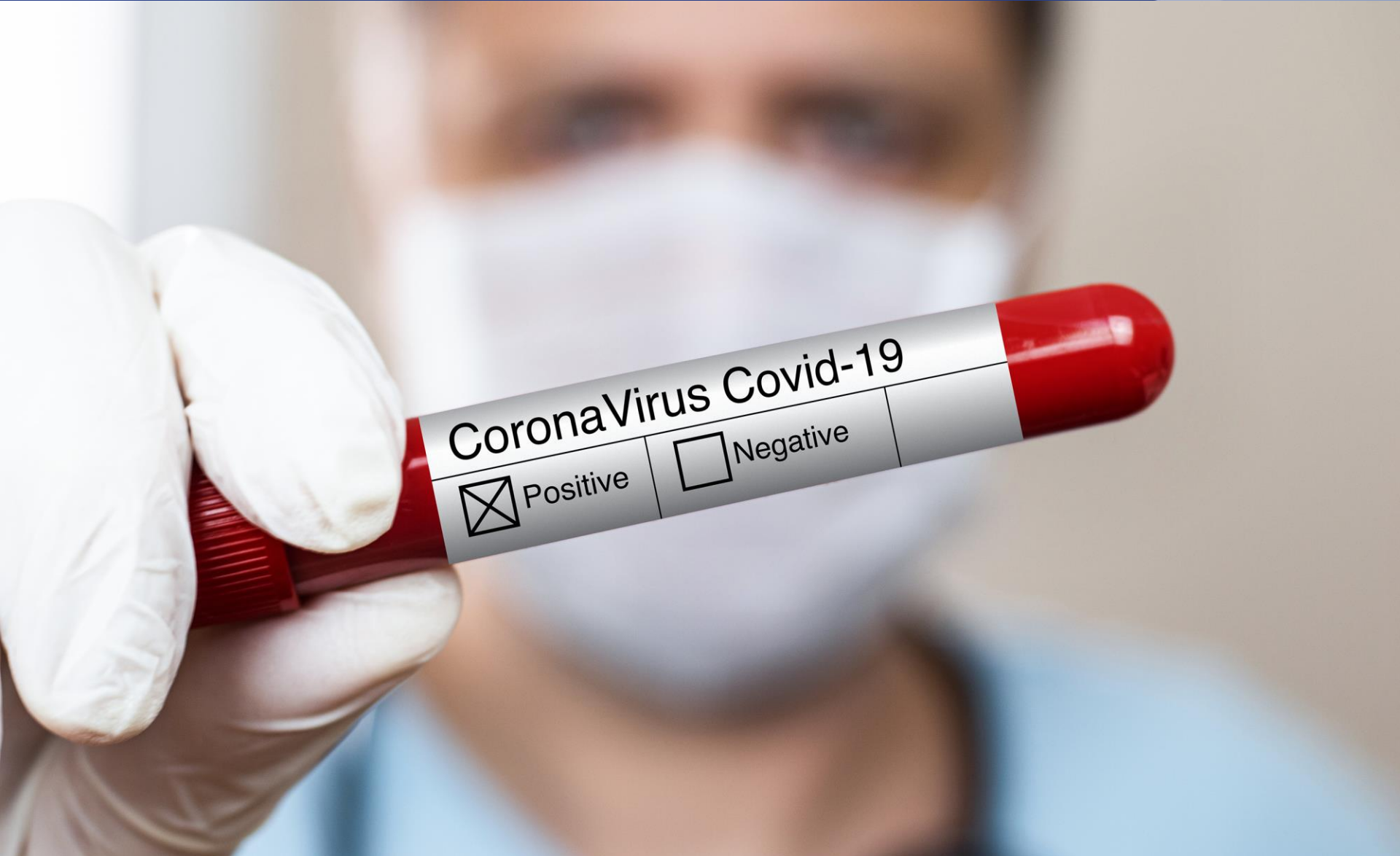
Gifts and Hospitality

- Prevention of Bribery Policy?
- Expenses Procedures?
- Hospitality Approval Procedures?
- Code of Conduct?
- Wider guidance on what is appropriate in terms of hospitality types and costs?



Xmas absence

A Covid Christmas



Xmas Absences

- Post Party Absences:
 - Do not assume the sickness is not genuine
 - Investigate
 - Contact the employee
 - Decide whether disciplinary action is necessary
 - Be consistent in your approach
- **Do you need to warn employee's now in advance that non-attendance will be scrutinised?**

Xmas Absences

- Festive Period Absences:
 - Do not assume the sickness is not genuine
 - Investigate
 - Contact the employee
 - Decide whether disciplinary action is necessary
 - Be consistent in your approach
- **Do you need to warn employee's now in advance that non-attendance will be scrutinised?**



Holiday matters

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

New Holiday Laws from 1 January 2024

- Draft statutory instrument containing amendments to the law on holiday pay, TUPE and working time published this month.
- Likely to come into force on 1 January 2024, include:
 - simplifying holiday pay calculations by making rolled-up holiday pay (12.07% of pay) lawful for part-year workers and those who work irregular hours;
 - defining 'normal remuneration' for the purposes of holiday pay for Regulation 13 leave to include commission payments and other payments, such as regular overtime payments.
 - removing the additional working time record keeping requirements set out in the ECJ judgment in CCOO v Deutsche Bank (which had held working hours and rest records must be kept for almost all members of the workforce, even if they worked regular hours).



Questions