ATTORNEYS SERVING PRIVATELY HELD BUSINESSES AND THEIR OWNERS

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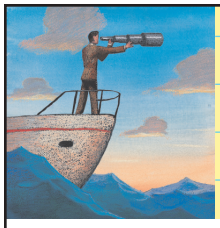

Legal Advisory

IDEAS AND STRATEGIES FOR YOU AND YOUR BUSINESS / FOURTH QUARTER 2017

inside

Make It a Happy New Year

During the upcoming holiday season, your company might celebrate by hosting a party for workers. But your good intentions could lead to problems—or even tragedy.

Case in point: Suppose one of your employees causes a serious accident when he or she drives away from the party in an intoxicated state. Besides the obvious moral issues at stake, you or your company may be held liable for damages.

If you were not the one who caused the injury, why would you be liable? It all has to do with the "social host" theory of law. Depending on state law, the same basic legal principles that could hold business establishments responsible for accidents caused by patrons may be extended to hosts of social gatherings.

As a general rule, to succeed with a claim based on social-host liability, an injured party must prove that the following three conditions existed:

1. The host owed that person a duty not to provide alcoholic beverages to the guest or to limit the quantity of alcohol consumed by the guest.

2. This duty was violated by the host.

3. The plaintiff suffered an injury or loss as a result.

For example, say you serve an alcoholic drink to someone who is visibly drunk or a known alcoholic. A subsequent accident caused by this person may be viewed as a foreseeable consequence of your negligence.

Note that it is possible for a company to be held liable even if the party takes place off the business premises and not during regular working hours. But company liability is less likely to be imposed if the employees organize the get-together and provide the alcohol themselves.

If you decide to go ahead with a holiday party, how can your company best protect itself? Although there are no absolute guarantees, here are several "common sense" suggestions to observe:

*(see **Happy New Year** on next page)*

Roundup of Key Estate-Planning Terms

You do not have to be an attorney to engage in estate planning—although usually your attorney should assist you—but it helps to have a basic understanding of the key terms. The following is a mini glossary for your benefit.

Administrator: The person or entity appointed by the probate court to supervise the estate of someone who died intestate.

Beneficiary: The person designated to receive proceeds from an estate or trust.

Bequest: A gift of cash or property given to a beneficiary under the terms of a will.

Codicil: A legal document that makes minor revisions to a will.

Decedent: The person who has died.

Estate tax: A tax, imposed by the federal or a state government, on the transfer of estate property to beneficiaries.

Executor: The person or entity named to carry out the provisions of a will.

Gift tax: A tax imposed on lifetime gifts.

Grantor: The creator of a trust.

Guardian: A person named in a will or appointed by a court to act on behalf of minors or someone incapable of taking care of his or her own affairs.

Inheritance tax: A tax imposed by a state upon the transfer of property from an estate. As opposed to estate tax, it is based on the status of the beneficiary.

Intestate: When a person dies without a will.

Living will: A legal document in which a person states wishes as to medical treatment and lifesaving techniques in the case of a terminal illness or accident.

Marital deduction: A tax provision that exempts transfers of property between spouses from tax.

Power of attorney: A legal document that authorizes one person to act on behalf of another. A "durable" power of attorney remains in effect if the person who created it becomes disabled or incapacitated.

Probate: The court-supervised process for determining the validity of a will and governing the distribution of the estate's assets.

Revocable living trust: A type of trust created by a grantor to hold assets that will pass to beneficiaries without going through the probate process.

Trust: A fiduciary relationship in which a person or entity (i.e., the trustee) holds and manages property for the benefit of another person (i.e., the beneficiary).

Trustee: The person or entity responsible for administering a trust.

Unified estate- and gift-tax exemption: A tax provision that exempts transfers of property to nonspousal beneficiaries from tax (up to a limit).

Will: A legal document that directs the distribution of property upon death. A will may also designate a guardian for minor children.

Make It a Happy New Year

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- If you absolutely must provide alcohol, hire trained bartenders or waiters to serve measured drinks. Don't put out unsupervised punch bowls, kegs or coolers.
- Assign someone to observe guests. Refuse drinks to any employee who is obviously intoxicated.
- Arrange for transportation—such as carpools, taxicabs, Uber, etc.—for employees unfit to drive.
- Make sure the company insurance policy covers all liabilities arising from company parties.

Be aware that some states have laws on the books that provide immunity for social hosts. The best approach is to obtain expert legal advice before you send out your invitations.

When Your Spouse Has Debts

Are you liable for your spouse's debts? It depends on the applicable state law.

In community property states, most debts incurred by one spouse during the marriage are attributed to both spouses. However, in other states that follow "common law" property rules, the debts of one spouse are generally that person's debts alone, unless the debt was incurred for a family necessity, such as food, shelter or tuition for children.

The exact rules vary from state to state. Obtain legal guidance for your situation.

Five Top Cases from the Top Court

The U.S. Supreme Court recently concluded its 2016–17 term. (It is set to begin the 2017–18 term in October.) Here is an overview of five new cases significant for businesses.

1. ERISA exemption: The Employee Retirement Income Security Act of 1974 (ERISA) offers certain protections to participants in qualified retirement plans. However, church plans are specifically exempted from ERISA requirements.

In this case, a group of employees worked for a health care network formed via a merger of two hospital systems affiliated with churches. The employees argued that their retirement plan is subject to ERISA. However, the U.S. Supreme Court ruled that the exemption for church plans applies to the church-affiliated employer.

2. Patent jurisdiction: An Indiana company shipped its products to Delaware under contracts. But a major corporation, organized in Delaware with its main place of business in Illinois, claimed the products infringed on its patents for similar products.

The Indiana company argued that Delaware lacked jurisdiction over the lawsuit. In affirming a prior decision, the Supreme Court held that a corporation "resides" only in its state of incorporation for this purpose, thereby rejecting a broader definition of venue.

3. Works of art: The plaintiff manufactures clothing used in cheerleading and other sports. Its designs incorporate several elements without consideration of the functionality of the final clothing. The plaintiff received copyrights for artwork designs that were very similar to ones the defendant began using.

After the plaintiff alleged that the defendant had violated the federal copyright law, the defendant argued the copyrights were invalid because the designs were for "useful articles," which cannot be copyrighted. But the top court ruled copyright protection is allowed if a design feature incorporated into a useful article would stand alone as a work of art.

4. Bankruptcy: A trucking company filed for bankruptcy, owing about $53 million to its first-priority secured creditors and about $20 million to general unsecured creditors. Two lawsuits were initiated in bankruptcy court: (1) an action by truck drivers regarding violations of layoff notifications and (2) a fraudulent conveyance action on behalf of the unsecured creditors.

After the parties to the fraudulent conveyance action negotiated a settlement, the drivers objected to being left out. In analyzing various Bankruptcy Code provisions, the Supreme Court ruled that bankruptcy courts may not approve structured dismissals that do not follow the priority favoring the other creditors.

5. SEC disgorgement: The Securities and Exchange Commission (SEC) sued an investment adviser for misappropriating funds. Subsequently, the adviser was ordered to pay a $34.9 million fine. But the adviser argued this "disgorgement" remedy is barred by a five-year statute of limitations.

The Supreme Court stated that because SEC disgorgement functions as a penalty, it is subject to the statute of limitations. The holding is viewed as a chink in the SEC's enforcement armor.

This is just a brief overview of Supreme Court decisions in 2017. This publication will keep you informed about significant developments in the courts.

Legal Issues on Employment Referrals

A former assistant, Jenny Reese, just asked you for a job reference. But Jenny did not perform well and was often abusive. What should you do? This is a sensitive area fraught with potential legal perils.

Employers may adopt a "no-comment policy" or at least significantly restrict what can and cannot be said about an employee in a reference. But some states have laws requiring employers to provide references to ex-employees upon request.

Typically, an ex-employee may sue an employer for defamation if unfavorable references lead to a job rejection. The employer may be liable if false statements damage his or her reputation. Conversely, employers are generally protected if they disclose, in good faith, truthful statements to help a prospective employer make an informed decision.

Thus, keep the following points in mind:

- **Be truthful.** Statements are defamatory only if they are false. If possible, support the information with objective facts. Stay away from speculation and gossip.
- **Be clear and concise.** Statements that are technically true may still be defamatory if they are incomplete or misleading.
- **Be professional.** It is not only what you say but also how you say it. Discuss the facts without expressing emotion.
- **Respond appropriately.** Limit your responses to requested items. Do not go overboard in your praise or criticism.
- **Focus on job matters.** Stick to the necessary information. Avoid discussing personal matters that are irrelevant or obtrusive. Even if your comments are true, they might raise privacy issues.
- **Limit the scope.** Only provide information to the employer who requested the reference. Be especially careful about giving out information over the phone.
- **Request consent.** To better protect yourself against a defamation claim, you may want to ask the former employee for written consent to the release of information.

Finally, be aware of legal risks for failing to disclose information when you have a duty to do so (e.g., illegal acts were committed).

Practical advice: Develop a policy that accounts for these points. Make sure it complies with the applicable federal and state laws.

BRIEFS

- **Zero Tolerance Policy**—An employee who had previously filed a complaint with the Equal Employment Opportunity Commission (EEOC) got into an altercation with a coworker. The employer had a zero tolerance policy against fighting and fired both employees. The employee then sued and claimed the employer was retaliating against her for the EEOC complaint. But the Court tossed out the case because the policy was applied fairly.
- **On a Break**—Are you required to allow workers to "take a break" during the day? Although federal law does not include any specific mandates for meal and rest breaks, employers must pay employees if lunch breaks last less than 30 minutes or employees work through their breaks. However, the vast majority of states have laws relating to meal and rest breaks. Find out the applicable rules for your state.
- **Double Trouble**—The Fair Labor Standards Act (FLSA) requires a double payment if workers entitled to overtime pay are misclassified as exempt workers, unless the employer can show it was an innocent mistake. In a new case, workers in a Texas sheriff's office sued for overtime pay under the FLSA and won. Although the job descriptions in the handbook said the workers were exempt, this was not enough to get the employer off the hook.
- **Gift-Tax Exclusion**—Under the current law, you do not have to pay any federal gift tax on gifts to a recipient—for example, a child or grandchild—valued up to $14,000 for the year. This gift-tax exclusion doubles to $28,000 per recipient if your spouse consents to the gift. Giving gifts each year is a systematic way to reduce the size of your taxable estate. Keep this in mind as 2017 draws to a close.