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## Nine festive dilemmas for employers to deal with before the holidays

Douglas Strang of BTO Solicitors highlights the pitfalls which could puncture the season of goodwill in the office unless employers are on their guard



Sometimes staff can get a little bit too swept up in the season of goodwill

Offices throughout Scotland may be winding down for **Christmas** over the next couple of days, but for employers there may be a few festive matters that are still in the 'in' tray.

Here are nine that might vex the minds of business managers before the bells signal the end of 2017 and the beginning of a new year.

## Christmas Bonuses

For employees it is extremely welcome. But for employers facing challenging economic circumstances looking after the bottom line is paramount - and this may be the year it goes.

Do consider though whether you have the right to withhold the bonus – if it has been paid every Christmas over a prolonged period of time, it could have become a contractual entitlement by “custom and practice”.

This is particularly the case if the bonus is the same every year, has become an expectation, is paid without any real thought or consideration, and has become universally seen as a payment that staff automatically get every Christmas.

If it is discretionary and being given to some staff but not others, bear in mind that an unreasonable exercise of discretion could be challenged and could even contribute to a claim of constructive dismissal.

Make sure your decision is reasonable, can be justified, and is not **tainted by discrimination**.

## Corporate gifting

While companies may get swept up in the season of goodwill, they should remember that gifts to and from clients and suppliers are subject to the same rules as at other times.

The **Bribery Act** imposes obligations to ensure that commercial organisations are operating correctly and that proper commerce is not being affected by improper bribes.

To mitigate any risk, you should have a bribery policy in place which staff are aware of, and ensure that gifts are appropriate, and logged and recorded where required.

## Secret Santa

A common workplace activity at this time of year is the **Secret Santa**. Although generally viewed as harmless, it can unfortunately be potentially problematic.

Steps should be taken to ensure that employees are not under any pressure to participate in this, or other festive celebrations.

Equally it's maybe not a good idea to buy any risqué, sexually suggestive gifts - particularly if they are opened in front of a crowd of people.

This could be humiliating for the recipient and could amount to harassment.

Remember that where one employee unlawfully harasses another, the employer is liable unless it took all reasonable steps to prevent such acts occurring. Make sure your equal opportunities policy is up to date, publicised and enforced, and that staff have had training on equality issues.

## **Religious discrimination**

Remember Christmas is ostensibly a Christian festival and care must be taken to ensure that those with other religious beliefs are not being forced to join in any celebrations.

Be sensitive, and in particular, if staff do not wish to attend the Christmas party, do not suggest they are being "party poopers".

Similar issues arise with drinking. There should be no pressure to attend functions at pubs, and an unwillingness to engage in such events should in no way affect a person's career prospects.

If any concerns are expressed by staff, make sure they are handled carefully and sensitively.

## **'Bad Santa' behaviour**

The Christmas countdown may see staff taking a more relaxed attitude to the organisation's policies and procedures. These might include drinking at lunchtime, poor timekeeping, using the internet to Christmas shop or even feeling the after-effects of a particularly lengthy and boozy lunch!

If such actions are contrary to your rules and policies, then you are entitled to take action in the normal way.

Be careful though if a precedent has been set in the past - if such conduct has been tolerated widely during previous festive seasons, then staff should be told that this tolerance is ending, before seeking to discipline staff for their actions.

Equally, ensure there is consistency. Having one rule for some staff, and another for others, will not just cause resentment, but could leave any disciplinary decision open to challenge.

## Work nights out

This can be the biggest bane for employers - as some might already realise having held their Christmas office celebrations already.

While it's good for everyone to let their hair down and enjoy themselves, it is NOT good to allow carte blanche in the drunkenness department.

Much as it can be seen as 'killjoy' behaviour, health and safety issues, plus acts of misconduct - sexual or otherwise - could lead you down a path to an unwanted tribunal in 2018.

So it's worth considering some options:

Encourage staff in advance to know their limits and explain they will be held liable for their conduct while under the influence.

Ask staff to consider in advance how they will get home.

If it is during the week, make arrangements for a slightly later starting time and remind staff not to be late for work or absent because of the night before.

If customers or clients are going to be there, make sure everyone is clear they must be on their best behaviour.

Conversely, staff may need guidance on how to deal with badly behaved clients!

Stress to staff in advance that the equal opportunities policy still applies and any inappropriate behaviour will be dealt with and may amount to gross misconduct - not a very festive message to convey to staff but better to be safe than sorry.

## Holiday pay

Holidays at this time of year are standard in most organisations.

But be aware of the implications of the ongoing litigation relating to the calculation of holiday pay.

The current authorities state that for at least four weeks per year, holiday pay must represent an individual's "normal remuneration".

## **Holiday bookings**

While some employers will shut down between Christmas and New Year, others need to stay operational - for some it may be one of their busiest periods.

Many employees will want an extended break with their families, and you may well have excessive requests to take holidays at this time.

Be clear about what the policy is and what the contract says. How are holidays agreed? Is it first come first served, or is there a rota arrangement? Managing expectations in advance will help to avoid disappointment, resentment - and good staff moving on.

## **Dream ahead before a 'white' Christmas**

While a white Christmas is great for those who are off, adverse weather could lead to severe short staffing for those battling to get into the office.

It is important to have a clear policy, but this can build in an element of flexibility and discretion.

Solutions may include allowing employees to take a holiday, allowing them to work from home, or simply making payment for the first day or two of absence assuming you are satisfied it is not reasonably practicable for the employee to safely attend work.

If you don't set out the rules in advance, however, you increase the risk of disputes and discontent.

## **Remember... it's still the season of goodwill!**

Despite all this, try to make sure you enjoy the festive period with your staff. After all, they are your business's biggest asset.

So have a great Christmas and a Happy New Year!

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