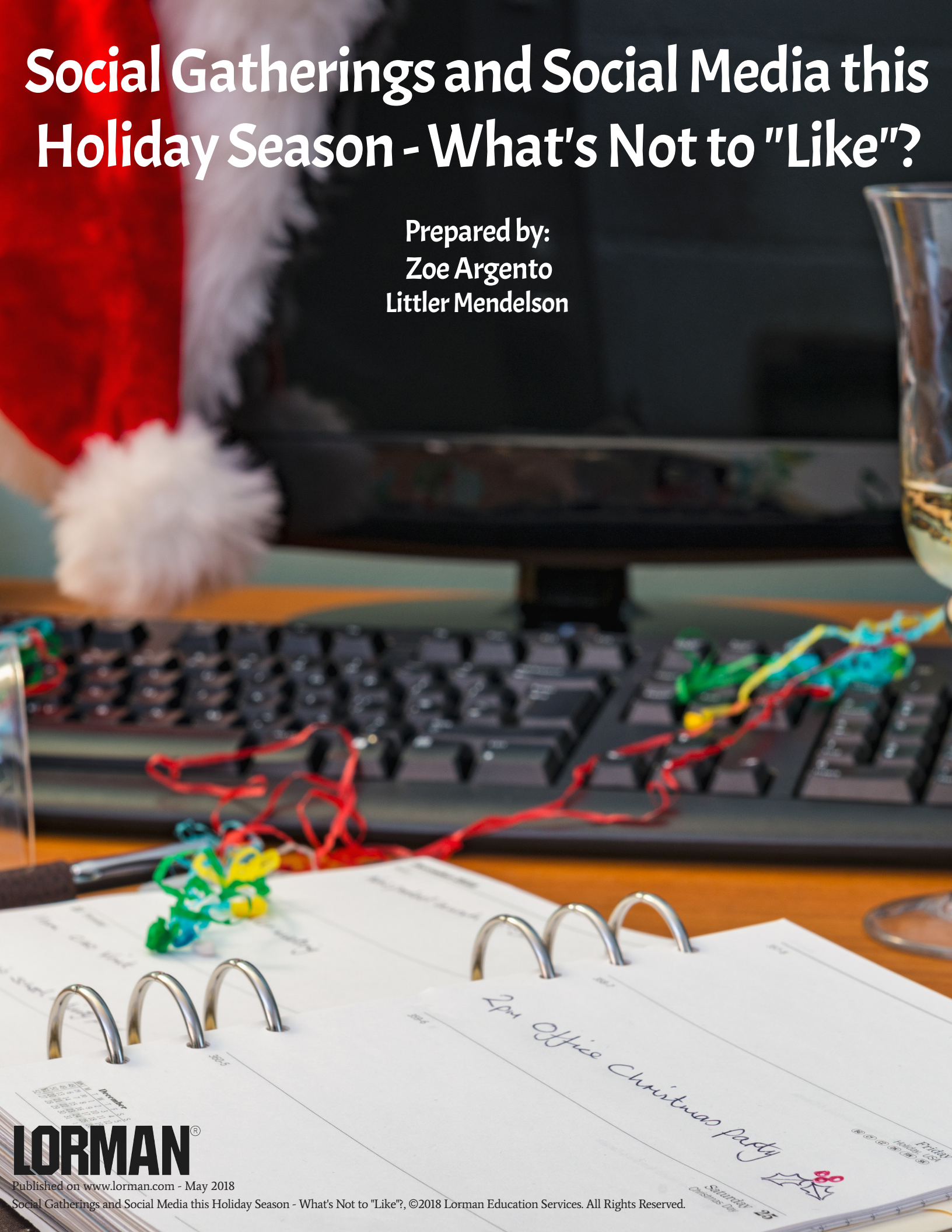


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Social Gatherings and Social Media this Holiday Season – What's Not to "Like"?

BY ZOE ARGENTO

According to a survey by the Society for Human Resource Management, almost 90% of employers throw a holiday party. Taking into account holiday parties hosted by employees for co-workers, there is a very good chance your company's employees will be rubbing shoulders by the eggnog this year.

On the one hand, employers often benefit from the holiday cheer. Parties can build rapport among employees and goodwill to all, including to the employer hosting the festivities. On the other hand, a quick search on YouTube highlights the many ways a holiday party can go horribly wrong. And, these moments are often captured on social media for the world to see. Employers can then compound the problem by potentially running afoul of an array of state and federal laws when investigating employee misconduct on social media.

Fortunately, there are straightforward precautions employers can take to help reduce the social media-related risks of the holiday season. This article discusses the top five social media-related risks and steps to address them.

Risk #1: Company Embarrassment: Employer-Hosted Parties

The most likely social media-related risk of holiday parties is simply embarrassment to the company. Of course, what happened at the office party never stayed at the office party. Prior to the digital age, however, the antics tended to merely result in office gossip. Now, when almost every employee carries a smartphone, any embarrassing moment can quickly reach the public at large.

Once online, the embarrassing photograph or video may remain online indefinitely. The employer can try to have it taken down, but removing the content altogether may be impossible if users copy and repost it. Even worse, a particularly embarrassing moment could "go viral" and end up being seen by millions. At that point, the cringe-worthy speech by a drunken employee or inappropriate joke could cause serious damage to the company's reputation and even potential legal liability.

Risks of Imposing a Complete Ban on Photographs and Videos

Given these risks, employers may be tempted to require employees to give up their smartphones at the door. This approach entails its own risks under the National Labor Relations Act (NLRA), however.

The NLRA prohibits employers from restraining non-supervisory employees from engaging in "concerted" activity, i.e., activity for "mutual aid or protection", related to the terms and conditions of their employment ("protected concerted activity"). The National Labor Relations Board's (NLRB) General Counsel generally takes the position that bans on taking photographs or videos of the workplace may violate the NLRA because such bans could prevent employees from organizing or documenting the terms and conditions of employment. Although an employer-hosted holiday party at the worksite for which attendance is voluntary may not seem like the workplace, the NLRB has taken an expansive view of protected concerted activity in recent years. However, holiday parties that occur off-site are unlikely to raise this issue because images taken during the party would not reflect the employer's own worksite.

In addition, for many employers, insisting on a ban on smartphones may not be a viable solution. Employees generally dislike handing over their smart phones. And smart phones are only part of the problem. Increasingly, employees carry a range of devices with recording features, including smart watches, iPads, and smart glasses. Consequently, employers may find implementing a complete ban on recording devices impracticable.

Alternative to a Complete Ban: Prohibiting Non-Consensual Photographs and Recordings of Other Employees

A less risky approach than imposing a recording ban is to instruct employees not to photograph or record co-workers without their permission. While the Board itself has not ruled on the lawfulness of such a policy, at least one Administrative Law Judge has held that a ban on nonconsensual photographs and videos in the workplace did not violate the NLRA. Such a restriction may strike the NLRB or a court as reasonable because recording without permission could violate state and federal wiretap laws. In addition, posting photographs and videos without consent on social media may violate state rights of publicity and privacy.

Avoid Embarrassing Moments in the First Place

Nevertheless, as long as employees have their smart phones or other recording device on hand, some employees are likely to post about the party on social media regardless of the employer's instructions. At the same time, employers may want to permit the social media posts. The posts can provide a way for employees to remember and bond over a fun experience – and may even help with recruitment.

Given these considerations, the better approach, at least at an employer-hosted party, may simply be to keep the party under control. Employers already have plenty of reasons to keep festivities from getting out of hand. High spirits mixed with alcohol can potentially lead to a broad spectrum of employee misconduct, from harassment to drunk driving to fights. In addition to possible danger to employees and the effect on employee morale, the employer could potentially be liable for some of this employee misconduct under theories of social host liability and *respondeat superior* (employer liability for employee's actions), among others.

Employers should consider the following steps to decrease the social media-related risks of over-consumption of alcohol:

- Remind employees ahead of time that all policies regarding employee conduct apply at the event;
- Discuss with managers the importance of setting a good example;
- Make attendance voluntary and schedule the party outside of working hours;
- Provide limited drink tickets and/or hire a professional bartender trained to stop serving alcohol to inebriated guests;
- Offer food and non-alcoholic beverages;
- Hire a bouncer or designate individuals, who must not drink, to oversee the event;
- Provide some form of entertainment other than drinking, such as music, a slide-show, or a comedian;
- Set a time limit for the party; and
- Clearly indicate when the party is over.

In addition, although not precisely a social media-related risk, employers should always take steps to minimize the risks of drunk driving. For example, employers should consider distributing taxi vouchers or arranging other forms of transportation if alcohol is served. At a minimum, employers should insist that inebriated employees hand over their car keys.

If All Else Fails: Taking Down Social Media Content

If, despite the employer's best efforts, embarrassing content about the employer's holiday party does appear on social media, the employer may be able to have the offending content removed from the social media site.

Employers must exercise caution when requesting that employees remove social media postings. In recent years, the NLRB has held in dozens of cases that employers have violated the NLRA by restricting employees' protected concerted activity on social media. As a result, to reduce the risk of an unfair labor practice charge, employers should carefully consider whether an employee's posting constitutes protected concerted activity before asking the employee to take it down or disciplining the employee for posting it in the first place.

Even if the employee does take down the posting, a third party may have already re-posted it elsewhere. The next step at that point would be to ask the social media site to take down the posting. Most social media sites have a take-down mechanism. To attract users and maintain a welcoming social media platform, social media providers sometimes respond to take-down requests by removing content that the provider finds offensive or otherwise unacceptable.

Under the Communications Decency Act (CDA), however, social media providers generally are not liable for third-party content posted on their sites. With the exception of intellectual property infringement, the CDA protects social media sites from liability even for tortious third-party content, such as defamatory postings. Consequently, the social media sites often do not respond to take-down requests and generally face no liability for their lack of response.

Points to consider when attempting to take down posts on social media:

- Before requesting that an employee take down a social media post, evaluate whether:
 - The post concerns the terms or conditions of employment;
 - The post constitutes "concerted" activity; and
 - To call an attorney experienced in this area if the answer to either of the above points is "yes" or ambiguous.
- Before requesting that a social media site remove a post:
 - Review the social media site's terms of use to determine if the post clearly violates any of the acceptable use guidelines;
 - Explain in the take-down request why the post violates the social media site's own terms of use; and
 - If applicable, clearly explain why the post infringes the employer's intellectual property rights.

Risk #2. Company Embarrassment: Employee-Hosted Parties

Parties put on by the employer may segue into an after-party, perhaps at a bar or employee's home. In addition, employees often host parties themselves and invite co-workers. These get-togethers can lead to risks similar to those of employee misconduct at an employer-hosted party – for example, sexual harassment, intimidation, and even violence. Images of employee holiday mayhem at an employee-hosted party are just as likely to go viral as those of an employer-hosted party. In addition to the legal risks of sexual harassment and other misconduct, the images could be quite embarrassing to the company.

Employers can and should discipline employees for employment-related misconduct that occurs at an event not sponsored by the employer when the employer is on notice that the misconduct occurred. Ignoring reports of misconduct with a connection to the workplace could expose

the employer to liability for not preventing that misconduct from entering the workplace. Employers should also consider implementing a social media policy that requires employees to comply with the employer's policies when engaging in personal social media activity, even after hours and while off-premises.

To diminish NLRA-related risk, however, social media policies should avoid overbroad prohibitions that could be deemed to restrict protected concerted activity. For example, the NLRB has consistently held that prohibitions on "inappropriate" or "unprofessional" social media postings violate the NLRA because such restrictions could chill protected, concerted complaints about management.

Steps to address social media-related risks of employee-hosted holiday parties:

- Respond promptly to employee misconduct with a connection to the workplace and impose discipline as appropriate;
- Develop a social media policy that imposes restrictions on social media postings; and
- Review the social media policy in light of NLRB rulings to avoid overbroad prohibitions.

Risk #3. Employee Embarrassment

Not only employers but also employees may be embarrassed by events at holiday parties. In one office party, for example, a newly divorced employee was mortified to receive a sex toy in front of the whole office as a gag gift. To make matters worse, the incident was then captured on social media.

The steps outlined above to decrease the risks of company embarrassment can also go a long way to diminishing employee embarrassment. In addition, employers should consider how party games might go awry when planning an employer-hosted party.

The following steps may reduce the risk of social media-related employee embarrassment at holiday parties:

- Ensure that any party games are purely voluntary;
- Avoid unsupervised gag gifts, speeches and skits; and
- Last but not least, ban mistletoe and drinking games.

Risk #4. Mistakes Made by Employers When Posting on Social Media

Employers also often post about holiday parties on social media, both internally and externally. Before taking photographs and videos of employees on social media, employers should, in most cases, obtain employee consent to photograph or record and to post on social media. In many states, publicly posting an individual's image on social media without permission may violate a common law right of publicity or a statute protecting personality rights from misappropriation. In addition, taking a photograph or video of employees at a private moment—in the restroom, for example—could invade their privacy rights under state law.

Moreover, federal and state wiretap laws prohibit recording communications without prior consent of at least one party to the conversation and, in some states, without the consent of all parties. This means that recording an employee's conversation without his or her permission could violate wiretap laws and even potentially lead to criminal liability.

These legal protections apply not only to employees but also to family members. Employers should take special care to obtain the consent of a minor's parent or guardian before photographing or recording the minor.

Employers should also ensure that any employee tasked with posting on social media, perhaps "live-blogging" the party, remains sober.

Finally, employers should think twice about posting details about the party invitation on social media. Even if the posting is not public initially, depending on the social media platform, the invitation may end up publicly available. Moreover, employees will likely post about the party details themselves. As a result, the employer may be surprised to see strangers at the door looking for a drink.

Steps to address risks related to employer social media posts about holiday parties include:

- Obtaining clear written consent from employees for taking photographs, videos and statements and for posting them on social media;
- Carefully vetting and supervising employees tasked with posting on the company's social media sites;
- Not posting party invitations on social media; and
- Maintaining a guest list and monitoring the entrance to the party.

Risk #5. Social Media Investigations

For employers, the fact that employee misconduct sometimes appears on social media has a silver lining. Social media can provide evidence for employer investigations. For example, social media postings may provide proof of sexual harassment. Before conducting investigations using social media content, however, employers should be aware of the risks of these investigations and take steps to decrease them.

Stored Communications Act

First, accessing an employee's social media account without her permission risks violating the Stored Communications Act (SCA). The SCA prohibits intentionally accessing "electronic communications" stored on third-party electronic communications services without authorization.

Courts have tended to construe the authorization requirement strictly. The fact that the employee accesses the social media account on the employer's computer system does not impliedly authorize the employer to access the account, even if the employee leaves the account accessible.

Contracting around the authorization requirement is difficult. Courts have required that employee agreements and policies very explicitly allow the employer to access employees' social media accounts in order to meet the authorization requirement.

Social Media Password Protection Laws

Second, asking an employee for the password to her social media account could potentially violate state law. Twenty-three states have enacted statutes prohibiting employers from requesting an employee's login credentials to his or her social media account. In many of these states, even accepting an employee's "friend request" or looking over an employee's shoulder at her social media account could run afoul of the law. The statutes generally create an exception for workplace investigations, but in more than half of these states, this exception is narrow. For example, Maryland only allows employers to access an employee's social media account to investigate suspected securities fraud violations or misappropriation of trade secrets.

To help reduce the risks associated with social media investigations, when possible, limit investigations to:

- Publicly available social media content; or
- Social media content provided voluntarily by another employee or third party; and
- Avoid fishing expeditions; focus the social media investigation on work-related employee misconduct based on information from another source.

Here's to a fun holiday party season free of social media mishaps.

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