



**DOL STUDY FINDS THAT ADA ACCOMMODATIONS COST LITTLE**



According to a study published by the Department of Labor's Office of Disability Employment Policy, half of the respondents to a DOL survey found there is no cost to providing the accommodations requested by disabled workers. The most common

**Celeste Watson**.....  
 "The most common accommodation appeared to be changing employees' schedules."

accommodation appeared to be changing employees' schedules. Another 42% stated that they were able to accommodate a disabled employee for a one-time cost - the median being \$600.00, while 7.5% said they had to pay some additional costs for accommodations. Seventy-six percent of employers surveyed said the accommodations used were extremely or very effective. The report, "Workplace Accommodations: Low-Cost, High Impact," is [www.jan.wvu.edu/media/lowcosthighimpact.pdf](http://www.jan.wvu.edu/media/lowcosthighimpact.pdf).

**Editor's Note** - *The ADA accommodation process is not as complicated or costly as it first appears. One of the simplest approaches is to invite the employee to attend a meeting to discuss the interactive process, and consider any suggestions the employee might offer. The above survey does reveal that many accommodations cost nothing but that employers can be expected to incur some additional costs for other accommodations.*

*Further, many employers believe it is not worth the time or effort to try to analyze whether an employee who requests an accommodation is legally "disabled," since the issue may be a close one and many state laws go beyond the requirements of the ADA. Some employers urge that it is better to spend their time trying to see how the employee might be accommodated from a practical standpoint. Some questions include who is the best person for engaging in the accommodation process with that particular employee; whether the specific*

*accommodations proposed should be documented in case problems arise later; and who is the best person for making the accommodation decision.*

**MAJORITY OF HOUSE OF REPRESENTATIVES BACKS UNION CARD-CHECK BILL**



For those of you that think that elections don't matter or that unions have lost their economic and political clout in this country, consider the following. The union-backed bill (S.842 H.R. 1696) that would require employers to recognize a union through a "card-check" process, currently has 215 co-sponsors in the House of Representatives and is likely to add a few more. Currently, virtually all

**Bill Seale** .....  
 "The bill would make the card-check process mandatory for employers."

House Democrats have signed on to the measure, joined by a handful of labor-friendly Republicans. Under current law, employers can request secret ballot elections when workers seek representation and are not required to agree to recognize the union through the so-called "card-check" process, in which organizers present companies with signed statements from a majority of bargaining unit employees seeking union representation. The bill would make the card-check process mandatory for employers.

Unions argue that the National Labor Relations Board's secret ballot election process is too slow, and

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## KNOW YOUR ATTORNEY

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## SOME CASES SUPPORT MANAGEMENT RIGHTS IN HANDLING FMLA LEAVE



**PRESTON PIERCE** .....  
"...the employer had the right to terminate employees for falsification of personnel or other company forms."

Employers are winning many FMLA cases, as illustrated by a recent Seventh Circuit Court of Appeals ruling in Trouch v. Whirlpool Corp., 11 WH Cases 2d 716 (C.A. 7, 2006). The court found that an employer lawfully terminated an employee upon his return from leave after determining that he had falsely applied for FMLA leave. A company official had noticed a pattern in the employee's and his fiancée's leave requests over two summers, and hired a private investigator who videotaped the employee doing yard work during his leave. Other circumstances suggested that the employee had feigned a knee injury in order to vacation in Las Vegas with a co-worker, who was his fiancée, having been denied vacation leave for the same period of time.

Under the employer's rules, the employer had the right to terminate employees for falsification of personnel or other company forms. An employer's honest suspicion that the employee is not using his medical leave for its intended purpose is enough to defeat the employee's claim that his rights were violated, the court found. The court further rejected the employee's argument that, under the FMLA, the employer should have asked him for a second medical opinion if it had doubts about the legitimacy of his leave request.

In another recent case, an employer did not violate the FMLA where it required an employee on FMLA leave to call-in if he left his home during working hours. The Third Circuit Court of Appeals held that the policy did not interfere with the employee's rights as the employee was able to take his leave and return to work. Callison v. City of Philadelphia, 430 F.3d 117 (C.A. 3, 2005). The employer had a policy which required employees on sick leave to call in to the "sick control hotline" if they left home during working hours. One day when the plaintiff was home on a sick day, the employer telephoned his home and he was not there. He was given a warning. On a subsequent occasion, the employer conducted an investigation and discovered that he had left his home without contacting the hotline, and he was suspended from work when he returned from leave. The employee sued the employer for violations of the FMLA, claiming that it had interfered with his leave rights.

The court framed the issue as "whether the [employer] denied [plaintiff] of his entitlements under the FMLA by enforcing its own sick leave policies against him while he was on leave." The court emphasized that the "FMLA is meant to prohibit employers from retaliating against employees who exercise their rights, refusing to authorize leave, manipulating positions to avoid application of the act, or discriminatorily applying policies to discourage employees from taking leave." The court found that the employer did not engage in any of these prohibited acts. The court noted that the call-in procedure was not a pre-requisite to be entitled to FMLA leave, and instead, the court stated, "The procedure merely sets forth obligations of employees who are on leave, regardless of whether the leave is pursuant to the FMLA."

In another case, an employee sought "temporary" FMLA leave to take unrestricted bathroom breaks. The medication the employee was taking for Type II Diabetes caused him to need many visits to the bathroom. However,

## EVERYBODY LOVES A GOOD PARTY - BUT AVOID THE LIABILITY "PART" OF THE "PARTY"



**SUZANNE ROTEN** .....  
"Employers may be liable for not only what happens at the event, but also what happens after the event."

Company parties are not only traditional, but they are thought to boost morale. A Society for Human Resource Management poll conducted several years ago found that 83% of organizations of all sizes host a holiday party for their employees. Since then, many employers are thought to be cutting back on company social events, or at least modifying such functions, to avoid the liability "part" of the "party."

Unquestionably the most dangerous aspect of a holiday party is alcohol. Employers may be liable for not only what happens at the event, but also what happens after the event. As a general rule, employers are regarded as social hosts and have a duty not to furnish alcohol to an intoxicated person. If the concept is violated, the employer may be liable for the acts of its employees during or after the party. Employers must also be aware of other types of potential liability occurring where there is excessive alcohol consumption, including harassment-type comments and issues.

There are many "holiday party cases" in which alcohol was consumed and sexual harassment allegations were made as a result of events that took place at the party. Some participants and employees were drinking, and there were various alleged invitations made to go up to rooms and the like. It appears that these invitations came about as a result of the "loose" talk generated from alcohol use at this particular function.

Additionally, there are documented cases in which allegedly inappropriate costumes and/or themes were used, seemingly enjoyed by all, but in which a plaintiff later claimed was part of a "hostile environment." Indeed, even the use of "beer girls" at company functions and/or scantily clad models, with accompanying jokes, were cited as part of the case. The plaintiff's theory was to show that the environment of the company was one of a demeaning, hostile, or sexual attitude toward women. Also, although it is unlikely that a religious accommodation issue would arise, since the Christmas season is based on a Christian holiday, an employer should be sensitive to the non-Christians in its workforce.

This writer suggests that matters occurring during

company parties must be investigated just like other incidents of harassment or employee misconduct. Similar issues can arise with employer-sponsored recreational events that occur on or off the employer's premises. Some arguments for employers' liability can be avoided by following certain preventive steps:

- it is suggested that: company parties not be mandatory,
- not be held during working hours,
- employees not be paid to attend,
- and it may also help somewhat if the function is held at a commercial establishment.

The following suggestions would also be helpful to minimize the risk of employer liability, as well as to encourage a constructive holiday celebration.

**Don't serve alcohol.** Based on the dangers arising from the use of alcohol, the safest course of action would be to avoid serving alcohol at employer-sponsored social functions. Besides the potential that the employer would be liable should an accident subsequently result, employers should consider the potential improper message they are sending to their workforce by sponsoring a function that encourages heavy use of alcohol. Decreased inhibitions may lead to inappropriate behavior or comments that everyone regrets the next morning.

**Limit alcohol.** If alcohol is served, caution employees to be responsible; communicate to employees in advance that excessive alcohol consumption will not be tolerated. Remind employees to be careful and responsible in the consumption of alcohol. Consider having employees pay for any alcohol they consume.

Other measures include the following:

**Serve alcohol only at designated portions of the evening.** Stop serving alcohol at least one hour before the party is scheduled to end. Further, use some type of drink ticket mechanism whereby employees are issued only one or two tickets for alcoholic drinks. Have plenty of nonalcoholic beverages and food and snacks available to dilute the effects of alcohol.

**Provide backup transportation.** The employer should assist in arranging backup transportation (taxicabs, car service) so that intoxicated people are not allowed to drive home.

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## MAJORITY OF HOUSE OF REPRESENTATIVES BACKS UNION CARD-CHECK BILL *continued from page 1*

during the delays employers can intimidate workers and defeat the union. Employers argue that the card-check process allows union organizers to misrepresent the facts or intimidate workers into supporting union representation.

Even though a majority of the 435 member House of Representatives may co-sponsor the bill, House Republican Leaders have not scheduled a floor vote on the union organizing measure. However, the number of sponsors indicates that unions still have a great deal of political clout.

## SOME CASES SUPPORT MANAGEMENT RIGHTS IN HANDLING FMLA LEAVE *continued from page 2*

he was not prevented from going to work, nor did he seek medical treatment beyond his diagnosis. The court ruled that he did not have a chronic serious health condition, and thus did not meet the requirements for FMLA leave. The court found that the diabetes would have been a chronic health condition if it caused episodic incapacity, but this employee did not experience episodic or

continuing incapacity. Mauder v. Metropolitan Transit Authority of Harris County, 446 F.3d 574 (C.A. 5, 2005).

*Editor's Note - While the employers won all of the three cases noted above, the litigation was undoubtedly was costly, and not free from doubt. Further, many employers have determined that it is not worth the trouble or expense to be too strict in their enforcement of their FMLA policies.*

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## EVERYBODY LOVES A GOOD PARTY - BUT AVOID THE LIABILITY "PART" OF THE "PARTY" *continued from page 3*

**Provide monitors.** It would be helpful if someone has a responsibility at the function, on the part of the employer, to monitor the situation to determine if any individuals are noticeably intoxicated. If someone is noticeably intoxicated, it would be advisable for the employer to take steps to see that this person does not drive home.

**Don't hold the function on company premises.** If an employer wants to do the most to avoid potential liability and to uphold its work rules — particularly if the employer is going to serve alcohol, then it's preferable not to hold the party on the company's premises but at some commercial establishment.

**Entertainment.** Entertainment should appeal to a broad segment of the workforce and, at a minimum, should not be offensive to any religious, minority or ethnic group involved in the holiday party.

Additionally, consider alternatives to the traditional holiday cocktail party. Some "family-friendly" alternatives include hosting a day or night at the circus

or a sporting event. Instead of a party, get the employees to work together on a volunteer activity benefitting a charitable organization.

**Make attendance voluntary.** Participation in the function should be voluntary. If the employer requires attendance, holds the party on company property, or pays employees for their attendance, there is a greater chance for legal liability to result should some type of injury result from the function.

**Clarify who is invited.** To avoid confusion, "gatecrashers", and other complications, clearly make known to the employees who is invited. As part of the invitation, consider allowing employees to invite their spouses or dates.

Everybody loves a good time, but following the above suggestions and help an employer avoid unforeseen legal and personnel difficulties arising from a "party" that gets out of hand or results in some type of incident or accident.