Are Employers Liable for Drunk Driving Employees?

Safety Management Tools – Liability

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Many companies don't realize they can be liable for injuries caused by employees who drive drunk after an office party (or other company-sponsored event) at which alcohol is served. Even companies that know the risk exists don't fully understand the exact nature of their potential liability and how to manage it.

Certain persons who serve alcohol to guests can be liable for negligence if the guests get drunk and cause injuries to themselves or others. This is called "host liability" and it extends to employers who furnish alcohol to their employees. Where does this law come from? And what does it mean? Let's answer these questions one at a time.

The Law of Host Liability—U.S.

Employer host liability for the drunk driving of workers isn't contained in any OSHA standards or other federal laws. Rather, it comes from state law. It's based on statutes and court cases. Some states, including Florida and Texas, have taken the position that employers should exercise reasonable care to prevent injuries by intoxicated employees. If they don't, they can be held liable.

Social host liability may be based on "dram shop" laws – or state statutes that prohibit the sale of alcohol to minors and hold distributors responsible for alcohol-related injuries. For the most part, these laws only apply to companies that are in the business of selling alcohol, such as bars or restaurants. But some states have interpreted the law as imposing a legal duty upon

social hosts (including employers) to exercise reasonable care when serving alcohol to their guests. In these states, courts have held employers liable for serving alcohol to a minor or an employee who becomes intoxicated and injures himself or someone else.

A major case occurred in 1992, when an employer was held liable after an employee got drunk at a professional trade meeting attended by other company employees. As he was driving home, the employee ran a stop sign and crashed into another car, killing the driver's son. The employee had had several drinks with the company's president and other employees, all of which were deducted as business expenses. Everyone watched as the employee left the bar, slurring his words. But nobody stopped him. The jury ordered the employer to pay $80,000 to compensate the victim's father and another $800,000 for punitive damages. On appeal, the Florida court upheld the verdict because the employer:

- Told employees to attend the meeting to benefit the business;
- Paid for all meeting expenses, including drinks;
- Reimbursed travel expenses to and from the meeting;
- Encouraged employees to entertain clients and buy them drinks at these types of meetings; and
- Let the employee leave by himself, despite evidence that he was too drunk to drive.

Holding the employer responsible for the employee's drunken conduct might seem unfair. After all, the employee was a responsible adult capable of making his own decisions. But the court in this case said the employer should be responsible because it had more control over the actions of its employees than other kinds of hosts typically have over their guests [Carroll Air Systems, Inc. v. Greenbaum, 629 So. 2d 914 (Fla. App. 1992)].

As the Carroll case shows, employers are especially vulnerable when they require their workers to attend a function or drink with clients. In 2002, the Supreme Court of Texas said that an employer who required employees to drink with clients could be responsible for injuries resulting from the employees' intoxication. In that

case, an exotic dance club required dancers to drink with the club's clients to boost their bar tabs [D. Houston, Inc. v. Love, 92 S.W.3d 450 (Tex. 2002)].

The Law of Host Liability—Canada

The legal situation in Canada is similar. Employer host liability for the drunk driving of employees is an outgrowth of the employer's obligation to protect its employees. But it's not contained in any of the provincial or territorial OHS statutes; nor is it in the regulations that implement those statutes.

The law comes from court cases. More precisely, host liability and its application to employers who serve alcohol to employees is part of negligence law.

It all started in 1974 when the Canadian Supreme Court decided a case called Jordan House Ltd. v. Menow, (1974) D.L.R. (3d) 105 (S.C.C.). A customer walked into a bar, drank too much and got run over by a car after stumbling into the street while walking home. The customer sued the bar for serving him to the point of intoxication and then letting him leave knowing that he couldn't properly care for himself.

The Court found the bar guilty of negligence. Bars, restaurants and other commercial establishments that serve alcohol have a duty to protect their patrons, it said. Essentially, the Court was saying that a bar can't just serve customers until they get drunk and then turn them loose on the streets.

The Menow case involved a commercial establishment. But in 1996, the BC Supreme Court applied host liability to an employer. A supervisor brought a cooler of beer to a crew erecting a trade show display on a hot day. A crew member got noticeably drunk and drove into a ditch on the way home. As a result, he became a quadriplegic. The Court found the company 75 percent responsible and ordered it to pay the victim $2.7 million in damages.

Holding the employer responsible for the victim's injuries might seem unfair. After all, the victim was a responsible adult capable of making his own decisions. But the Court said that the employer

in this case was just like the bar in Menow. It supplied the beer; the supervisor also knew the victim was drunk but didn't try to stop him from driving home. Employers have an obligation to guard employees against unreasonable risks, the Court said, just as bars have a duty to protect their customers [Jacobsen v. Nike Canada Ltd., [1996] B.C.J. No. 363 (B.C.S.C.)].

The Nike principles apply equally to employers who host parties where liquor is served. In 2001, an Ontario company was held 25 percent responsible for injuries caused by an employee who got into an accident after drinking wine at the company Christmas party. Keeping an employee from driving home drunk after a party it hosts is part and parcel of the duty to ensure workers a safe workplace, according to the court [Hunt v. Sutton Group Incentive Realty Inc.,(2001) 52 O.R. (3d) 425].

Note: The Ontario Court of Appeal later reversed the Hunt case on a technicality. The Court said the jury was subject to improper influences; but it didn't say that the case was wrong to impose a duty on the employer. Thus, the concept of host liability on the part of an employer remains the law until and unless a court or the legislature say otherwise.

I'm not going to tell you that you shouldn't serve alcohol at your holiday party. I'm no moralist. But I am a lawyer. And I have a fair sense of the liability risks you'll be incurring if you do serve liquor at your party. Here are some suggestions of the things you can do to manage the risks.

U.S. & Canada: 3 Strategies to Avoid Liability

There are three things employers can do to limit liability for losses that employees and other guests inflict as a result of getting drunk at a company event where alcohol is served.

1. **Monitor Alcohol Consumption**

Keep track of how many drinks each of your guests has. Monitoring the number of cocktails consumed will be much simpler if you have a closed bar as opposed to one that's open, unlimited and unsupervised.

What to Do: Before the party, designate one or more persons to serve as drinks monitor, advises lawyer and alcohol liability consultant Shelley Timms. One possibility is to designate your own people as monitors. Caution them not to drink during the party. "Monitors need to be sober to do their job," Timms explains. Another possibility is to hire professional bartenders who are trained to keep an eye on how much customers drink.

In either case, issuing drink tickets to each guest enables you to not only track but control consumption. The same is true of a cash bar. This is Timms's preferred solution. "The problem with tickets is that the guests who don't drink give their tickets to the guests who do," she cautions.

2. **Determine Whether Guests Are Intoxicated**

The second thing a host must do is try to figure out if a guest is intoxicated. No, you don't have to administer blood tests and breathalyzers. According to court decisions, you need to make "reasonable assumptions" about whether a guest is impaired based on how many drinks he's had.

What to Do: The person monitoring how much a guest has drunk should probably make the call on intoxication. You'll also need to tell your monitors what "intoxication" means. You don't have to make up a definition. Just use the legal limits for impaired driving. In most states and provinces, individuals can be charged with a crime if they drive with a Blood Alcohol Content (BAC) over .08 or .10 percent.

But here's where things get tricky. To make "reasonable assumptions" about intoxication, monitors need to estimate a guest's BAC level by observing how many drinks he's had. That's asking a lot, especially when you consider that individuals get impaired at different rates. It depends not just on the number of drinks they've had but, on their gender, and weight (among other things).

To help you overcome these problems, there's a briefing paper below that shows monitors how to identify impairment based on

drinks consumed, gender and body weight. The briefing is based on data from the U.S. Department of Health. And while it's not 100% precise, it should enable your monitors to make the "reasonable assumptions" required by the negligence law.

3. **Prevent Intoxicated Guests from Driving**

If you know or have reasonable grounds to suspect that a worker or guest is impaired, you must make an effort to prevent him from getting behind the wheel. This is fine when the guest cooperates. But what happens if he puts up a fight? How far does an employer have to go to keep an intoxicated guest from driving?

In the Houston case cited last week, the dancer's manager asked if she was OK to drive home. But the court said that wasn't enough. The employer should have gone further, either by taking her keys, calling a cab or requiring her to stay until she sobered up.

What to Do: Use carrots such as appointing designated drivers, giving out taxi vouchers and even reserving hotel rooms where drunk guests can go to "sleep it off." But be prepared to use the stick, too, including:

- Adopting a zero-tolerance policy for drinking and driving;
- Sending workers a note a day or two before the policy reminding them that they should behave responsibly during the event;
- Collecting the names and phone numbers of workers' spouses or, if they're unmarried, another person who can pick them up if they get drunk;
- Making guests turn in their car keys if they plan to drink;
- Appointing a monitor to watch the parking lot in case an intoxicated guest tries to sneak out;
- If necessary, disciplining intoxicated workers who don't cooperate; and
- If all else fails, calling the police.

Tip: One of the things employers do to try and limit their liability is to have workers sign a waiver promising not to hold the company responsible if they get drunk at the party and get hurt driving home.

Such a waiver isn’t worth much. Courts aren’t likely to enforce them especially if the waiver is signed after the worker has started drinking. “The alcohol washes away the worker’s capacity to enter into a binding waiver,” explains one lawyer. Moreover, the waiver doesn’t bind third parties that the worker might injure.

Conclusion

Of course, there is a much simpler way to manage host liability risks: Don’t serve alcohol at your company functions. If alcohol is served, safety directors and supervisors must take the necessary steps to ensure those who drink don’t end up behind the wheel.