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PERSPECTIVE

## Holiday party: to supply or not to supply?

By Patrick J. Wingfield and Angela S. Rho

Generally speaking, employers in California are not civilly liable for providing alcoholic beverages to an employee who injures another because of his or her intoxication. However, under the doctrine of respondeat superior, an employer may be vicariously liable for an employee's acts if s/he became intoxicated within the scope of their employment. This principle applies if the injured party proves: (1) the existence of an employment relationship between the employer and employee; and (2) the employee committed the wrongful conduct "within the scope of employment."

Courts have determined whether an employee's wrongful acts were committed during the "scope of employment" in one of two ways: (1) was the act required by the employer or incidental to the employee's duties ("nexus test"); or (2) was the employee's misconduct reasonably foreseeable by the employer ("foreseeability test")? If the employee's conduct meets either test, the employer is vicariously liable for the employee's conduct. To establish scope of employment under the nexus test, a link must exist between the employment and the wrongful act. The foreseeability test is satisfied when an employee's conduct is not so unusual that it would seem unfair to factor the liability into the employer's cost of doing business.

Unfortunately, courts have shown a willingness to stretch what activities fall within an employee's "scope of employment," such as in *Purton v. Marriott International, Inc.*, 218 Cal. App. 4th 499 (2013), where Marriott hosted an employee holiday party. There, Marriott limited the alcohol options to beer and wine, and established a two drink maximum. However, before attending the party, one Marriott employee consumed a beer and a shot, and brought his own flask of whiskey to the party. Once there, a bartender refilled the employee's flask with whiskey from the hotel's liquor supply. After the party, the employee safely drove home with a colleague where they spent 20 minutes before leaving to drive the colleague home. It was on this second drive that the employee struck another vehicle, killing its driver. The employee was subsequently convicted of vehicular manslaughter and Marriott was sued for wrongful death under a respondent superior theory alleging Marriott held the party to improve relations between its employees and to promote continuity of employment.

At trial, Marriott moved for summary judgment



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arguing any potential liability under the doctrine of respondeat superior ended when the employee safely arrived home after the party. The trial court agreed, and plaintiff appealed.

The appellate court reversed, holding that a reasonable trier of fact could find: (1) the employee acted negligently by becoming intoxicated at the party; (2) this act was within the scope of his employment; and (3) it proximately caused the car accident. The employee's negligent act was found to have occurred within the scope of employment because there was evidence the party fostered "team building" and "benefited Marriott by improving employee morale and furthering employer-employee relations."

To the distress of restaurateurs, the *Marriott* holding is not an outlier. In a more recent case involving On the Border Mexican Grill & Cantina, Kai-Yen Cheng was riding his skateboard when he was struck by a vehicle driven by On the Border employee, Vincent Quintanilla. Prior to the crash, Quintanilla allegedly consumed alcohol at On the Border as part of his birthday celebration. Cheng claimed On the Border was negligent and responsible for his injuries because Quintanilla was acting within the scope of his employment when he consumed the alcohol and that the collision was a foreseeable consequence of that negligence.

On the Border denied all liability, arguing it was not liable because it did not sponsor the birthday party which occurred after Quintanilla clocked out and removed his uniform. Cheng disputed these facts, contending On the Border employees routinely sat in the bar after clocking out to await their nightly tip-out and On the Border effectively sponsored the party by giving Quintanilla a free birthday meal and discounted drinks.

Ultimately, the jury returned a verdict in favor of Cheng finding Quintanilla to be acting in the scope

of his employment with On the Border at the time he consumed alcohol.

### Mitigating Exposure

The most conservative practice for employers is to prohibit employees from consuming alcohol on premises or during a holiday function. If, however, alcohol is incorporated into a function, the following steps may mitigate exposure.

Set a clear policy on unacceptable conduct in the workplace that contains examples (e.g., driving while intoxicated) and the grounds for discipline.

Use a professional bartender/server who is trained to serve alcohol responsibly and directed not to serve anyone who appears intoxicated or underage.

Serve alcoholic beverages for a limited period of time, and consider limiting drinks per attendee.

Designate supervisors or managers to monitor alcohol service and consumption.

Stick to beer and wine and make sure non-alcoholic beverages are readily available.

Include a meal to help mitigate the effects of alcohol.

Provide taxis, car service, or hotel accommodations to employee attendees.

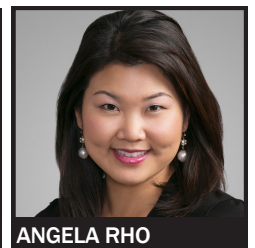
Carry "nonowned" automobile insurance coverage to mitigate risk.

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