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BKCG
BURKHALTER KESSLER CLEMENT & GEORGE LLP

COVID Year Two - Holiday Party Options

As we head into a second holiday season with COVID-19 still impacting most businesses, once again employers find themselves asking "what do we do to safely say thank-you to our employees for a hard year's work?" If businesses decide to answer that question by planning a holiday party, employers generally find themselves with more options than last year. But planning that event carefully will be more important than ever, now that many places have eased COVID safety restrictions.

For example, some organizations have required that employees be fully vaccinated before returning for in-person work. This is affording a level of protection businesses did not have last holiday season and many fully-vaccinated businesses are now eager to host an in-person holiday event. Of course, where and how a business hosts that event raises safety issues that need to be thoughtfully considered. For example, is the event outside or inside? An outside event is, for obvious reasons, safer and, at least in California, the weather is usually temperate enough to allow for such events.

Businesses should also consider whether the location hosting the event also has a vaccination or masking requirement for its employees. Employers should also decide whether their employees will be limited in any way regarding who they can bring as a guest. For example, must "plus-ones" also be fully vaccinated? The safest route will be for businesses to follow the current Center for Disease Control guidelines for hosting an in-person gathering of fully vaccinated persons. Also, businesses should check their local ordinances and rules in case there are restrictions and requirements regarding in-person gatherings that are more stringent than the CDC's.

Along with COVID safety issues, businesses must also be cognizant of other liabilities if they host an in-person event. If a business plans to have alcohol served (or even if it is available at the venue), make sure to lay ground rules ahead of time to limit liability. If the employer itself is making alcoholic drinks available, it should consider providing a limited number of "drink tickets" to each invitee, only serving wine and beer and no hard alcohol and/or providing Uber, Lyft or another ride-share alternative to employees so the risk of drinking and driving is decreased. Of course, there is always the option of holding a lunchtime event on work premises or at another location where alcohol is not available. Businesses should gauge their own risk tolerance when deciding these types of issues but, regardless, a business needs to make sure there are provisions in its employee handbook that provide clear guidance to employees about what is acceptable conduct at a work-sponsored event.

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Court Of Appeal Sets Oral Arguments In Columbo Hollywood Accounting Case

January 2022 (actual date TBD) is the date set by the Court of Appeal to hear oral argument in BKCG's Columbo Hollywood accounting case. This milestone comes four years after the lawsuit was filed in the Los Angeles County Superior Court and two years after a $70.6 million dollar judgment was entered in favor of BKCG's clients against Universal City Studios, a subsidiary of entertainment behemoth Comcast Corp.

The case stems from a 1971 agreement between BKCG's clients (William Link and Richard Levinson) who created, wrote and produced the popular Columbo television series. They were promised a 10% share of net profits, but while Universal grossed nearly $600 million, it represented that the creators were only due about $5 million in terms of their 10% net profit share. The huge difference was due to Universal's "Hollywood Accounting" in which nearly $200 million in "distribution fees" were deducted, creating a deficit that Universal then charged imputed interest against, virtually wiping out any profitability for Columbo. (continued on page 6)

In This Issue

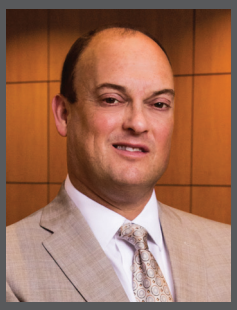
New CalSavers Law Goes Into Effect January 1, 2022 For All California Employers Of 5 Or More Employees Without An Employee Pension Plan

California employers of 5 or more employees who do not offer a retirement plan for their employees will be directly affected by the new CalSavers law that goes into effect on January 1, 2022.

The CalSavers program was established by the State of California Employment Development Department ("EDD") and is intended to provide employers with an easy way to help their employees save for retirement. **Employer participation is mandatory for employers of 5 or more employees if they have not already established their own retirement plans, such as a 401(k), 403(b), SEP IRA or Simple IRA.**

The registration deadline has already passed for employers with more than 100 employees (June 30, 2021) and with more than 50 employees (September 30, 2021), but employers with 5-49 employees may still timely register for the CalSavers program at https://employer.calsavers.com/home.html. Registration requires an Employer Identification Number and a CalSavers Access Code, which the EDD will issue for you automatically. Failure to comply within 90 days of the registration deadline will result in a $250 fine per employee. After 180 days, non-compliant employers are fined an additional $500 per employee. Accordingly, employers with 51-99 employees may avoid the additional $500 per employee fine by registering by December 27, 2021 and employers with 50-99 employees may avoid a late fine altogether by registering by December 29, 2021.

When registering, employers must submit information for each eligible employee, which begins an automatic enrollment process for those employees. Employees then have 30 days to decide to participate or opt out of the CalSavers program and are auto-enrolled, at 5% of their gross pay, unless they affirmatively opt out, which will be taken through automatic payroll deductions. Employees can opt out, opt back in, and change their contribution rate, at any time. Also, unless the employee opts out or changes the contribution rate, the program will automatically increase the employee's savings rate by 1% annually until the employee's savings rate reaches 8% of gross pay. CalSavers accounts are akin to Roth IRAs and therefore, due to Internal Revenue Service rules, employees making over $140,000 individually, or $208,000 as a married couple filing jointly, are ineligible to participate in CalSavers.



Employers' role and responsibilities in the CalSavers program consist merely of registering maintaining their employee roster and submitting contributions via a payroll deduction, which payroll services will handle in the normal manner. Employers are not responsible for answering questions about the CalSavers program, managing investment options, processing distributions, or giving investment/tax advice. As such, unlike with a conventional 401(k) plan, employees have no fiduciary duty to their employees with respect to the CalSavers program. Employees will select their investments and maintain their account directly through the CalSavers program.

More information about the CalSavers program is available on the California State Treasurer's website at https://www.treasurer.ca.gov/calsavers/

Please contact Greg Clement at gclement@bkcglaw.com or call (949) 975-7586 if you have any questions about any issue discussed in this article, or any other employment or corporate law matter.

Who Is A Corporate Fiduciary?

Under the law, the term 'fiduciary duties' has many meanings, depending on the context in which the term is used. For corporations and other business entities, what it means is that directors, officers, and in the case of LLCs, managers have a duty to use their best judgment, in good faith, to seek the best interest of the corporation and its shareholders. For example, a corporate officer cannot engage in 'self-dealing,' meaning that she cannot pursue her own interests above those of the corporation's interests. Individual officers, directors, or managers who breach their duties to the business entity often find themselves at the business end of lawsuit.

As many business owners have come to learn the hard way, it is often very difficult under California law to successfully pursue a lawsuit against a former employee. In our practice, we have occasionally come across instances of business owners trying to work around this problem by naming non-managing employees as corporate officers to fabricate the ability to claim that they breached their fiduciary duty in the event of alleged misconduct (e.g. setting up a rival company while employed).

California law is clear, though, that in order for a corporate officer to have fiduciary duties, that officer must have actual discretionary management power. In *Gab Bus. Servs. v. Lindsey & Newsome Claims Servs.*, (2000) 83 Cal.App.4th 409 (overruled on other grounds), the Court stated that "We conclude that an officer who participates in management of the corporation, exercising some discretionary authority, is a fiduciary of the corporation as a matter of law. Conversely, a "nominal" officer with no management authority is not a fiduciary." *Id.* at 420.

Whether an alleged "officer" of the company is actually a fiduciary is a question of fact to be resolved by courts, but at the very least there must be some measure of involvement in management decisions.

As our clients form companies, reorganize companies, or make other changes in corporate governance, the rights and responsibilities accompanying such decisions, such as who inherits fiduciary duties, should be carefully considered in the process. That consideration should also involve an examination of the job duties of any newly appointed officers to ensure that everybody has the same understanding and expectations of the legal effect of these decisions.

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Third Party Discovery: A Potential Pitfall Of Arbitration

Many standard contracts that have become a part of modern life–such as terms of service agreements and employment contracts–now very often include mandatory arbitration clauses. For many businesses, arbitration provides an efficient and cost-effect alternative to traditional litigation to resolve any disputes that arise from a contract. This efficiency is solely a creature of contract, however, and this efficiency comes at a cost. The rules and procedures in arbitration are necessarily more relaxed than those that apply in traditional litigation, which allows for faster and cheaper resolution of disputes. When drafting a contract to include an arbitration clause, one must pay careful attention not to inadvertently forfeit discovery mechanisms that may prove crucial should a dispute go to arbitration.

In many disputes, third parties who are not named in a lawsuit possess key evidence. In traditional litigation, obtaining evidence in the possession of a third party would require a party to the lawsuit to issue a subpoena. In an arbitration, the process is not nearly so easy. Because the purpose of arbitration is to streamline the resolution of a dispute, some mechanisms–such as third-party subpoenas–are not necessarily available by default. Generally, the arbitration clause must explicitly allow for expanded discovery mechanisms such as third-party subpoenas.

Choice of law provisions–the clauses that determine which law govern the contract–become very important, particularly if the parties and witnesses reside in different states. If the contract provides that it is to be governed by California law, for example, the arbitration clause must incorporate California Code of Civil Procedure section 1283.05 in order to empower the arbitrator. However, the law regarding arbitration discovery differs significantly in neighboring Arizona. Complicating matters further, the Federal Arbitration Act is a federal law that may preempt state law on the issue. Thus, careful attention must be paid to the drafting of each arbitration clause to avoid potentially forfeiting important tools to prove your case if arbitration is indeed necessary.

As described above, arbitration is a creature of contract. That means that, because only the parties to the contract which featured the arbitration clause actually agreed to it, the arbitrator generally lacks the power to compel third-parties to comply with discovery mechanisms such as subpoenas. Thus, even if the arbitrator actually *issues* a subpoena, enforcing that subpoena may prove difficult. Unfortunately, non-compliance with subpoenas is a fairly common issue that must therefore be considered when drafting a contract with an arbitration clause.

To enforce a discovery subpoena issued by an arbitrator, a party must first file a motion with the arbitrator to secure an order compelling the third party's compliance with the subpoena. However, since the arbitrator lacks power over third-parties as mentioned above, that order must then be taken to the appropriate court for enforcement, which is determined by the applicable law as well as the particular facts of the case. This may prove burdensome in an arbitration, for example, where an arbitration proceeding is taking place in California, and the witness resides in another state. This situation is not uncommon, and often requires a complex analysis regarding which court is appropriate to enforce the arbitration subpoena.

After selecting the appropriate court, then a party must open a case in that court and file a motion to enforce the arbitrator's order. Assuming that the motion is successful and the court confirms the arbitrator's order, then the order has to be served (as with all other papers, motions, and orders). Service of an order can be an unexpectedly difficult obstacle to overcome, particularly when it comes to third parties who feel they have no connection to the litigation. If a recalcitrant witness consistently attempts to evade service, the arbitration process can be significantly delayed.

While arbitration clauses are now very popular, and arbitration can prove to be effective and cost-efficient, it does come with certain risks and pitfalls. It is imperative to keep in mind the potential evidence you may need to gather to regarding disputes that could arise out of a particular contract, and craft the arbitration clause appropriately. A well-drafted arbitration clause can help avoid many of the procedural pitfalls that litigants run into when arbitrating their claims.

If your business needs advice regarding the drafting of arbitration agreements, or requires representation in an arbitration proceeding, BKCG's experienced attorneys can assist with any issues your business faces.

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The Future Enforceability Of Mandatory Employment Arbitration Agreements Is In Doubt Following The Ninth Circuit's Decision In Chamber Of Commerce v. Bonta

Prior to October 10, 2019, California law generally permitted employers to require employees to arbitrate their employment disputes as a condition of employment (or even as a condition to remain employed), so long as the agreement to arbitrate was not unconscionable, it obligated the employer to pay the arbitrator's fees, and satisfied other legal requirements. However, the legal landscape concerning the enforceability of mandated employment arbitration agreements began to shift dramatically on October 10, 2019 when Governor Gavin Newsom signed into law California Assembly Bill 51 ("AB 51").

Among other things, AB 51 prohibits an employer from requiring an employee to sign an agreement to arbitrate employment disputes, and thereby forfeit the employee's right to a jury trial, as a condition of employment. To enforce this prohibition, AB 51 provides that any violator is guilty of a misdemeanor, punishable by imprisonment in a county jail, not exceeding six months, or by a fine not exceeding $1,000, or both. The law further exposes an employer to investigation by the Department of Fair Employment and Housing ("DFEH") and potential civil liability from either the DFEH on behalf of an aggrieved employee or by an individual in a private suit.

Although AB 51 was set to become effective on January 1, 2020, the Chamber of Commerce of the United States and others filed a lawsuit challenging the law before it went into effect, seeking declaratory and injunctive relief in the United States District Court for the Eastern District of California (the "District Court"). That lawsuit sought a ruling from the court that the Federal Arbitration Act (the "FAA") preempted AB 51 (meaning that AB 51 improperly conflicted with federal law that permits arbitration of employment disputes), such that it should not be enforced, and asked the court to preliminarily, and ultimately permanently, enjoin California from enforcing AB 51. Because the District Court concluded that AB 51 was likely preempted by the FAA, it issued a preliminary injunction that temporarily enjoined California from enforcing AB 51. However, that ruling was closer to the beginning than the end of AB 51's legal journey, as California appealed the District Court's ruling to the Ninth Circuit.

On September 15, 2021, a three-judge Ninth Circuit panel largely reversed the District Court's decision and ruled the preliminary injunction should be vacated. That panel concluded that AB 51 is, for the most part, *not* preempted by the FAA, and thus is largely enforceable. However, the Ninth Circuit did partially affirm the District Court's holding in so far as ruling the civil and criminal penalties associated with AB 51 are preempted in circumstances in which an employee refuses to sign an arbitration agreement (but, as the dissenting Ninth Circuit Justice pointed out, this ruling created the bizarre outcome in which the criminal and civil penalties only apply if the employee rejects the employer's agreement to arbitrate, yet do not when the employee accepts it).

Despite the Ninth Circuit's panel's ruling, AB 51 (which is now known as section 432.6 of the Labor Code) likely remains unenforceable today because its ruling is not yet the final word on this issue. On October 20, 2021, the Chamber of Commerce filed a Petition for Re-Hearing of the Ninth Circuit's Ruling En Banc, which means the Chamber of Commerce requested that *all* of the Ninth Circuit active justices review the District Court's ruling, rather than just a three-judge panel. It is not yet clear whether the Chamber of Commerce's Petition will be granted such that the entire Ninth Circuit will weigh in. And, if the petition is denied, many legal experts believe the United States Supreme Court may elect to review the matter and stay enforcement of the AB 51/Labor Code section 432.6 pending that review.

In the meantime, significant uncertainty exists for California employers concerning the future enforceability of mandated employment arbitration agreements, as well as the long-term enforceability of such agreements that employees enter into now, while the appellate courts litigate AB-51's enforceability. What remains clear, however, is that agreements to arbitrate employment disputes entered into *before* January 1, 2020 will remain enforceable regardless of AB 51's long-term viability, as will *voluntary* employment agreements to arbitrate entered into after January 1, 2020. As such, employers that prefer to arbitrate employment disputes with employees may want to consider continuing to propose agreements to arbitrate to new-hires and current employees, but do so in such a way that it is clear the agreement is fully voluntary, and the employee's assent to arbitration is not a condition of employment.

If you have additional questions concerning AB 51, its enforceability or employment arbitration agreements in general, please reach out to BKCG for assistance.

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Does "As Is" Really Mean "As Is" In Real Estate Contracts?

Most of us have heard of the phrase "caveat emptor" at some point in our lives. It means "let the buyer beware" and essentially shifts the risk from the seller to the buyer regarding the condition of the property that is being sold. This concept is typically memorialized in a real estate contract in the form of an "as is" clause where the buyer agrees to purchase the property in its "as is" condition. But does "as is" really mean "as is"?

The meaning of "as is" in a real estate contract depends on the state law that applies. In some states, "as is" clauses are enforced subject to any fraud on the part of the seller. Other states like California, however, have chipped away at the concept to prevent a seller from shifting all of its risk as it relates to the condition of the property being sold.

In California, the rule is that the "as is" clause does not shift all risks to the buyer. Instead, "as-is" clauses are interpreted to mean that the buyer takes property in the condition that is visible or observable to the buyer. In other words, undisclosed material issues that are known to the seller but not observable or visible to the buyer are exceptions to the "as is" contractual provision. The risk therefore stays with the buyer. In *Lingsch v. Savage* (1963) 213 Cal.App.2d 729, the contract between the buyer and seller contained a typical "as is" clause whereby the buyer purchased the building in its "as is" condition. After the sale, the buyer learned that the information provided to him by the seller and his agent about the condition of the property was incorrect. The units in the building were actually illegal and the City of San Francisco was going to condemn the building. In refusing to enforce the "as is" clause in the contract, the Court stated that "where the seller knows of facts materially affecting the value or desirability of the property which are known or accessible only to him and also knows that such facts are not known to, or within the reach of the diligent attention and observation of the buyer, the seller is under a duty to disclose them to the buyer." See also, *Shapiro v. Hu* (1986) 188 Cal.App.3d 324, 333.

Even assuming that the seller could establish it had no duty to disclose the information, a claim for fraud based on non-disclosure also exists under California law. The elements of a cause of action for based on fraudulent nondisclosure include: (1) nondisclosure by the seller of facts materially affecting the value or desirability of the property and (2) seller's knowledge of such facts and of its being unknown to buyer. In other words, a dilapidated staircase would not have to be disclosed because it is visible to the buyer but a missing structural member behind a wall would have to be disclosed – assuming the seller was aware of that condition. California Civil Code section 1668 further limits an attempt by a seller to contractually waive damages for fraud or willful injury to another or violation of the law.

Clearly, the old rule of "caveat emptor" that we may all recognize has limits under California law. Information about the property that is known only to the seller which impacts the price or desirability of the property may have to be disclosed regardless of any attempt to shift liability to the buyer in a contract through an "as is" clause.

If you have any questions about the duty to disclose information in connection with the sale of real estate or purchased a property only to later learn of latent defects in the property, contact Keith Butler at kbutler@bkcglaw.com.

California Courts Continue To Grapple With The Meaning Of "Prevailing Party"

If you win your lawsuit, you can make the loser pay your attorney's fees, right? In California, the answer to that question depends on whether there is a statute or a contract provision that provides something like, "The prevailing party is entitled to an award of attorney's fees."

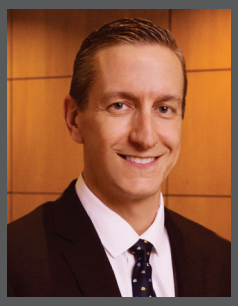
But what does it mean to be the "prevailing party"? The low-hanging fruit is easy to pick off. The California Supreme Court recognized long ago, in *Hsu v. Abarra* (1995) 9 Cal.4th 863, that a party who earns a "simple, unqualified win" is entitled to their fees and costs. Those "simple, unqualified wins" are much less common, however, than you might expect, and California courts continue to grapple with this debate.

In *Friends of Spring Street v. Nevada City* ((2019) 33 Cal.App.5th 1092, 1104), the Court of Appeal determined that a party who obtained relief on just one of four alleged claims could still be the prevailing party in the lawsuit. Although the plaintiff was successful on just one of those four claims, the appellate court held that a successful party is the party who achieves its objectives and succeeds on any significant issue or achieves some benefit sought. Because the plaintiff was successful in its primary objective, which was to prevent the operation of a bed and breakfast in a residential district, it was the prevailing and successful party and was entitled to its fees and costs.

In a decision handed down earlier this year, *Harris v. Rojas* ((2021) 66 Cal.App.5th 817), an appellate court held that the trial judge has discretion to declare a "pyrrhic victory" and deny the recovery or attorney fees after the jury verdict was significantly less than sought at trial. Harris involves a landlord tenant action that arose from a commercial lease agreement. Litigation continued for nearly three years and culminated in a seven-day jury trial, in which the plaintiff asked the jury for $200,000 in damages. The jury awarded Plaintiff $6,450 on his contract claim, just three percent of his request and which the court offset and reduced in the final judgment. For this, his lawyers sought $296,744.68 in attorney's fees. The trial court denied the fee request on the ground there was no prevailing party.

The Court of Appeal affirmed the holding for two reasons. First, the Plaintiff's recovery was slight compared to his demand, and the skimpy record he provided gave no other basis for assessing his litigation objective. When a court rules that there is no prevailing party, the Court of Appeal reviews the order for an abuse of discretion. The plaintiff failed to include trial transcripts, trial briefs and opening statements in the record on appeal, essentially blocking the Court of Appeal from any insight into Plaintiff's litigation objectives.

Second, considering the entire action, Plaintiff was no winner at all. To support its reasoning, the Court of Appeal stated that trial courts are well positioned to evaluate what counts as a win. The court's task is to compare the sum Plaintiff sought with the sum the jury awarded, the court of appeal deferred to the trial court's finding that a five or six thousand dollars recovery after spending three years pursuing $200,000 fell drastically short of the goal. As such, the Court of Appeal held the trial court's ruling that there was no prevailing party for purposes of the motion for attorney's fees was well within its discretion.



Under some circumstances, there may be "no prevailing party", even though there was a winner and loser at trial. In *Marina Pacific Homeowners Assn. v. So. Cal. Financial Corp.* (2018) 20 Cal.App.5th 191, the dispute arose concerning the amount of an assignment fee due to defendants following the assignment of a leasehold estate interest – defendant claimed that it was owed almost $97 million in assignment fees, while plaintiffs sought to eliminate the entire fee. The result after trial was somewhere in the middle: approximately $38 million, and both sides claimed that they were the prevailing party as a result. The trial court disagreed with both of them and exercised its discretion to find that there was no prevailing party at all and that neither side was entitled to fees or costs.

So, even when you win, you might not recover your attorney fees after trial, no matter what your contract says. And even if you lose, depending on what your opponent sought, you might not always be on the hook for your opponent's fees and costs.

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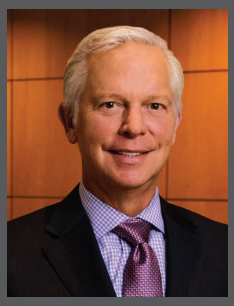
Court Of Appeal Sets Oral Arguments In Columbo Hollywood Accounting Case (continued from page 1)

Following a February 2019 jury trial, the jury deliberated less than 2 hours before returning a unanimous 12-0 verdict on all questions. The jury trial was followed by two additional phases of trial, a bench trial and an accounting before three CPAs, before judgment was finally entered on October 31, 2019.

Immediately after judgment was entered, Universal moved for a new trial, arguing that the trial court should have instructed the jury on the meaning of certain terms in the parties' agreement. The trial court agreed and granted a partial new trial. BKCG immediately appealed, and Universal cross appealed a number of issues, including statute of limitations.

The appellate court will review the contract terms de novo, which is the most favorable appellate standard of review. A decision is expected in early 2022. A favorable ruling could reinstate the $70.6 million judgment, and impose post-judgment interest of 10% per year for the past two years. An appellate order affirming the trial court's partial new trial order will send the parties back for a new trial on that issue.



The appeal has also given the court of appeal an opportunity to examine the trial court's refusal to shift the burden of proof on three additional accounting claims. The law in California requires the court to shift the burden of proof to the defendant to defend its accounting where all the documents and information are exclusively in the hands of the defendant. Here, Universal maintained all the books and records related to the Columbo production, and BKCG had challenged the accuracy of Universal's accounting concerning certain production costs, and various categories of revenue for which Universal never provided any supporting records. However, the trial court refused to instruct the accounting panel that the burden of proof had shifted to Universal.

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COVID Year Two - Holiday Party Options (continued from page 1)

Other businesses (fully vaccinated or not) might opt for a remote event such as the ones that many of us attended last year. There are many different platforms now that can allow a business to host a successful and entertaining event. But, as always, a business still needs to be cognizant of potential liabilities. Although alcohol related problems are greatly decreased for employers hosting remote events, employees might still become intoxicated (and less inhibited) during an online holiday gathering. In fact, because individuals are in their own homes and not driving there may be an increased risk of employees drinking too much and behaving inappropriately. If that situation arises, employers hosting such an event should make sure to use the platform tools available to mute unruly individuals or disable other features such as video or screen sharing.

In addition, businesses should be vigilant about monitoring all content shared at a remote event since everyone will likely see/hear it if something inappropriate is shared. One way to avoid opportunities for things to go off the rails may be to maintain a set structure such as a virtual white elephant gift exchange or games like virtual holiday bingo or karaoke.

Things in 2021 are greatly improved for most businesses from one year ago, but this year has still been challenging so it's a great idea to take some time and reward employees for their hard work. At the same time, employers must remember that employment liability exists at all work-sponsored events even though it is a more relaxed environment.

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