

Podcast: *Hiring to Firing* Podcast

Episode: What Happens at the Retreat Doesn't Stay at the Retreat

Hosts: Tracey Diamond and Emily Schifter

Guest: Rachel Keene

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Tracey Diamond (00:00):

In this episode of [Hiring to Firing](#), we're going to talk a little bit about the pros and cons of hosting a company retreat, which got me thinking, Emily, about our own company/partners' retreat here at Troutman Pepper Locke. Is there anything in particular that stands out to you when we are doing our partner retreats?

Emily Schifter (00:16):

Well, it's always fun getting everyone together in person, the whole benefit of a partner retreat, company retreat, as we'll talk about in the episode. But one of my best memories from the retreat is actually sitting together with you and watching the talent portion. We had a live band karaoke, and it was amazing to me to see how many talented singers and performers we had at the firm. So always nice to see the other side of people that you don't see at work, right?

Tracey Diamond (00:38):

And also very good for us to be sitting in the audience and not the ones up on that stage.

Emily Schifter (00:42):

Exactly. No one wants to hear me sing.

Tracey Diamond (00:45):

Me neither. Well, listen into this episode where we talk with our guest, Rachel Keene from Accolade, about the pros and cons of company retreats.

[INTRO]

Emily Schifter (01:02):

Welcome to *Hiring to Firing* the podcast. I'm Emily Schifter, and I'm here with my partner and co-host, Tracey Diamond. Together we cover all employment issues from hiring to firing.

Tracey Diamond (01:11):

Today we welcome Rachel Keene, who is vice president and assistant general counsel at Accolade. Welcome, Rachel. So excited to have you on today.

Rachel Keene (01:19):

I'm really excited to be here as well. So great to see you, so happy to be here. I, as Tracey said, am vice president and assistant general counsel at Accolade. In my role, I advise the company on a broad range of employment, litigation, privacy, and operational risk issues, and I work closely with our human resources department and business leadership on everything from workplace investigations and compliance to broader governance and risk management matters. A big part of my practice involves helping companies navigate the kinds of workplace dynamics and legal challenges that can arise during company events and retreats.

Tracey Diamond (01:54):

So you are a perfect guest for our topic today, which is about the legal issues involving company retreats. So to illustrate our points, as we always do, we're going to draw from a TV show, and today we are drawing from the reality TV sitcom Jury Duty Presents: Company Retreat. So for those who haven't seen the show, or either season of the show, I should say, season one followed a solar contractor from San Diego who was unaware that his jury duty service was fake and that everyone in the courtroom aside from him was an actor. It was a very popular season, and so season two, which just dropped recently, we meet Anthony Norman, who is led to believe that he has been hired as a temp worker to assist the HR department of a family-owned business called Rockin' Grandma's Hot Sauce to help them host their annual company retreat. So like in the first season, every participant besides Anthony is an actor and the retreat, like the company itself, is a hoax.

Emily Schifter (02:54):

So just to start with, the whole construct of this show and the first season, the Jury Duty version, raises the first issue, which is whether the TV show violated any laws in taping these poor people who didn't realize they were kind of the butt of the joke without their knowledge, at least. What do you think, Rachel?

Rachel Keene (03:11):

Yes. So with Anthony not knowing that he was being recorded, but video surveillance is generally legal in public, but audio recording requires compliance with state consent laws. In one-party states, currently 38 states and D.C., you can legally record conversations or audio if you are a party to it or have consent from one person in the conversation. In two-party states, there are 11 states, including California and Pennsylvania, the consent to all parties is required. Here, the show seems to get around this because Anthony knows he's being recorded and is actually interviewed during the show, but it's under false pretenses. So he thinks they're recording a documentary about a small business, Rockin' Grandma's Hot Sauce, but in actuality, they're recording him to make a really funny video for the rest of us to all see.

Tracey Diamond (03:59):

And I have to say, they do present Anthony as the hero, and if you watch the very last episode of the show, they actually internally were referring to him as "hero" throughout

the recording of the show. And he seems to be very happy to have been on the show, so there is no evidence that I've seen that he is at all upset about the fact that he was recorded. But it is an interesting question about whether or not any employer or other entity can record audio of its employees or individuals without their consent, for sure.

Emily Schifter (04:28):

Definitely. And I feel like we see this come up sometimes too with employees wanting to record. They get on a meeting with human resources or their manager and they start recording. So kind of the opposite construct, but definitely interesting to think about it in the situation that we had here. So what about if a company is putting on a company retreat and they want to record what happens there? What kind of rules do they have to think about in that context?

Rachel Keene (04:51):

Having your employees sign a disclosure and consent form indicating that they may be part of a video and audio recording during the retreat would be a great idea. As we know, a lot of companies like to use some of these videos or pictures on their social media, and definitely getting permission from their employees is important. You should never, ever record employees in private areas such as restrooms, their hotel rooms, and always use the recordings only for a legitimate business purpose. Under the National Labor Relations Act, recordings cannot be used to monitor or restrict employee organizing or discussions about working conditions, which are all protected activities. So really, really important to make sure you use it for a legitimate business purpose.

Tracey Diamond (05:34):

So those are all really good foods for thought when using a recording for any type of company event, including a company retreat. So let's take a step back now and talk about what are some of the reasons why a company would want to host a retreat in the first place?

Rachel Keene (05:48):

It's really good for company morale, right? You have an opportunity for team building, networking, shared learning, helps with retention, helps with recruiting. They're meant to be really fun. During this entire program, you can see that they mean for it to be super silly and fun. And especially now that most folks are hybrid or remote, companies are trying to recreate that spontaneous interaction that used to happen naturally at offices.

Tracey Diamond (06:13):

That's a really good point. And this leads us to our first clip when the company's owner, Doug Womack, gives an overview of the agenda for the company retreat. Let's listen in.

[BEGIN CLIP]

Doug (06:23):

I would like to welcome each and every one of you to Rockin' Grandma's annual retreat.

Give it up. Come on. Fantastic. And I think that this is definitely gonna be our best retreat yet. That's because you have got so much to look forward to. We have got team building, fantastic motivational speakers and seminars. Kate, I know you like that. We have got the client cookout. I'm hungry. Yes. And then, not to mention the Doug-athlon, ladies and gentlemen. Last but not least, the "Rockin' Grandma's Got Talent" talent contest. Now, come on.

[END CLIP]

Tracey Diamond (07:07):

Rachel, what are some reasons that an employee might be reluctant to go on a company retreat? You just said they're supposed to be fun, but there seemed to be a little hesitation there.

Rachel Keene (07:16):

Yeah, totally. If you can't make it to a company retreat, it could be your own family obligations, personal commitments, work deadlines that you have. It might contribute to social anxiety, which I think one of the characters in the show who was a hundred percent remote demonstrated her anxieties about being in person. And to be honest, not everybody wants to have mandatory fun for three days with their colleagues. It can be quite exhausting.

Tracey Diamond (07:29):

Very true.

Emily Schifter (07:42):

So what are some of the legal challenges that companies should think about when they're planning an event like this?

Rachel Keene (07:48):

Like holiday parties, company retreats create opportunities for employees to engage in less than professional conduct. They tend to blur workplace boundaries. People are traveling together, socializing at night, drinking more, and honestly forgetting that the HR policies didn't just stay back at the office. And this can lead to allegations for harassment. For example, if a boss hits on their subordinate, or two coworkers make lewd jokes that another coworker might find offensive.

Emily Schifter (08:17):

All great points and a good reminder that this is a lot like the holiday party kind of construct. And we do have an episode where we talked about some of those issues. For those who haven't listened in, it's a fun one, for sure. That brings us to our second clip. In the show, the HR manager proposes to one of the employees in the first episode, to the surprise of that employee who wasn't even dating him. Another employee even lodges a complaint because he found the proposal to be offensive. So let's listen in.

[BEGIN CLIP]

Doug (08:43):

Someone has filed an anonymous complaint with HR about Kevin's proposal to Amy.

Amy (08:49):

Oh.

Doug (08:50):

Yes. So evidently it made somebody feel very uncomfortable.

Amy (08:53):

It wasn't... No. Oh my gosh, no, it wasn't me. I promise I'm really okay. I feel good.

Doug (08:55):

Yeah. No. It doesn't matter. Amy, it doesn't matter who it was. That's why there's a system in for anonymous complaints.

Jimmy (09:03):

It's brave, though, whoever did do it, though, because that's not easy to do.

Doug (09:08):

Okay.

Steve (09:09):

Can we not say who it is?

Anthony (09:11):

It's anonymous. Nobody knows.

Doug (09:12):

You know what anonymous means, you know, so...

Jimmy (09:13):

I applaud them because...

Jackie (09:17):

Wait. Jimmy, was it you?

Jimmy (09:20):

It's supposed to be anonymous, but yes, it was me.

[END CLIP]

Tracey Diamond (09:24):

I don't even know where to start. What is she seeing here, Rachel? What is she seeing, Rachel?

Rachel Keene (09:29):

I was cracking up that this man proposed to this person who he never went on a date with. And the way he presented it to Anthony was just like they knew each other. No. Oh my goodness, sir, relax.

Tracey Diamond (09:42):

But Anthony, to his credit, just kept going with it, right? Along with everything else that kept getting thrown at him.

Rachel Keene (09:49):

They could not have found a more pleasant person to be the one getting pranked for this show.

Tracey Diamond (09:52):

Very true.

Rachel Keene (09:55):

So first of all, it was amazing that they had a company hotline for someone to make an anonymous complaint, right? And that could happen so expeditiously. Not amazing that the company management decided to reveal it in front of the entire team. And really, really not amazing was the fact that everybody could figure out who it was that made the complaint, which is basically the opposite of how all HR reporting systems are supposed to work.

Tracey Diamond (10:19):

Examples of what not to do. But Rachel, do you think the proposal itself could give rise to a level of harassment? Maybe with regard to the person being proposed to, but what about to third parties? Would witnessing that proposal meet the standard for harassment?

Rachel Keene (10:36):

The standard for harassment in most jurisdictions is severe and pervasive, which means either extremely serious or part of a repeated pattern. So the proposal definitely was unwanted, but the HR manager left right after the proposal happened rather than doubling down to try to get her to date him. So it's probably not severe and certainly not pervasive. Unlikely the employee who brought the hotline complaint has a claim, even if he was offended by watching the HR manager propose to the employee. That doesn't make a ton of sense there.

Tracey Diamond (11:06):

Probably doesn't rise to the level of severe or pervasive there, right?

Rachel Keene (11:10):

Correct.

Tracey Diamond (11:10):

Yeah. One thing I should say is that when the HR manager abruptly left on the first day of the retreat, he appointed poor Anthony as head of fun or something like that.

Rachel Keene (11:21):

Lieutenant or Captain or Fun.

Tracey Diamond (11:23):

Captain Fun, yeah.

Rachel Keene (11:25):

He got the hat. Yeah.

Emily Schifter (11:27):

So another issue that can come up with corporate retreats or any kind of off-site event is worker safety and possibility of injuries. And that brings us to our final clip. In this clip, an employee and the owner of the company that is trying to acquire the company participate in a kind of boxing match on top of an inflatable balloon, using large inflatable dumbbells to try and knock each other off the balloon, leading to a bloody nose. Let's listen in.

[BEGIN CLIP]

Elizabeth (11:53):

You're goin' easy on me. Don't go easy on me, girl boss.

Anthony (11:57):

I told you! Come on! Whack it! There you go! There you go!

Elizabeth (12:12):

I'm bleeding. Am I bleeding?

Elizabeth's Assistant (12:13):

Oh my God! Oh my God! There's blood! There's so much blood! Oh my God!

Anthony (12:17):

Oh! Oh my God!

Elizabeth's Assistant (12:20):

We need a medic! Oh my God!

Elizabeth (12:20):

I think it's broken.

Kate (12:21):

I'm so sorry!

Elizabeth (12:21):

Oh my God!

Kate (12:21):

I'm so sorry!

Marjorie (12:21):

It's a nose, it just bleeds easy.

Doug (12:23):

It'll be okay. It'll be alright.

Kate (12:28):

Oh my God, it won't stop bleeding!

Anthony (12:30):

It's okay. It's okay.

Marjorie (12:31):

She's okay.

Anthony (12:32):

It just happened to be a lot of blood.

Elizabeth (12:34):

My nose!

Elizabeth's Assistant (12:35):

Oh my God!

Kate (12:36):

Oh my God!

Elizabeth's Assistant #2 (12:36):

Okay, just keep it elevated. Keep it back.

Kate (12:37):

Oh my God.

Anthony (12:39):

It has been a day, you guys. It has been a day.

Elizabeth's Assistant #2 (12:41):

Keep it back.

Elizabeth's Assistant (12:43):

Can we have a medic? We need ice.

[END CLIP]

Emily Schifter (12:44):

Of course, like everything else about the show, we later learned that even the bloody nose wasn't real. But it does bring up the issue of worker safety generally at a company retreat. It's one thing to maintain a safe workplace when you've got your controlled office environment, but quite another when you've got employees ziplining through the jungle or engaging in inflatable boxing.

Tracey Diamond (13:05):

Yeah, there was actually an infamous corporate retreat in Honduras in 2017 where pretty much everything that could go wrong went wrong. The employees, including the CEO, got food poisoning, there were medical emergencies, stinging ants that required one employee to get an antihistamine injection, and some employees who were literally stranded on an island overnight when the plane could not land on time. So let's talk about that for a minute. If an employee becomes ill or is injured during a company retreat, would that give rise to a workers' comp claim?

Rachel Keene (13:37):

It could. An injury at a company retreat can give rise to a workers' comp claim if it occurred within the course and scope of employment. Coverage largely depends on whether the event is mandatory or is considered to directly benefit the employer, for example, by contributing to team building or training. Injuries during voluntary, purely social activities are less likely to be covered.

Tracey Diamond (14:00):

So it really depends on whether the person's voluntarily going off-site to go ziplining versus being mandatory or it's somehow work-related, right?

Rachel Keene (14:09):

Correct.

Emily Schifter (14:10):

Is there anything a company can do to protect itself from a claim for that sort of an injury?

Rachel Keene (14:15):

While you cannot force an employee to sign a waiver forfeiting their rights to workers' compensation for any on-the-job injury, you can have employees sign a document clarifying that certain activities are purely voluntary, like the ziplining activity, and done

at the employee's own risk. But companies should still understand that those waivers are not magic shields and you still need reasonable safety planning for your employees.

Tracey Diamond (14:38):

Yeah. That's a really good point. So, turning to the subject of compensation generally, are there any issues companies need to be aware of when they're having non-exempt employees participate in a retreat?

Rachel Keene (14:50):

If attendance is mandatory, then non-exempt employees have to be paid to attend during normal working hours. Travel time during normal working hours is normally compensable as well. If attendance is purely voluntary, outside regular working hours, non-job-related, for example, an evening talent contest, then that would be non-compensable time. But if the employee is asked to work at the event, like Anthony, for example, recording, making sure everybody's having the most fun, manning a ticket booth, then the time would be compensable. Time spent sleeping or on personal unassigned time, for example, if the employee decides to go do some activity on their own, like the ziplining or canoeing, would not be compensable. And if the compensable time at the retreat exceeds 40 hours, then the employee would be eligible for overtime. It really depends on whether attendance is truly voluntary. That's a question that often comes up, and you need to be aware that employees cannot volunteer their time to an employer without pay. That's not a thing. A lot of well-meaning companies accidentally violate wage and hour laws because they think employees are just "pitching in" and the law sees that very differently.

Tracey Diamond (16:01):

So the employees can't volunteer, but if it's a personal activity that's purely voluntary, the company's not making them do it and it doesn't have to do with the actual job, then that's okay, right?

Rachel Keene (16:10):

Yeah, it wouldn't be compensable time, or the employer wouldn't have to be obligated to pay them for that time.

Tracey Diamond (16:15):

I have to say, your example about an evening talent contest, I don't think you could pay me to participate in that.

Rachel Keene (16:23):

That's right. I'd want to be paid to have to suffer through and watch it.

Tracey Diamond (16:28):

Particularly if I was the one who's doing the talent contest, trust me.

Emily Schifter (16:31):

So if a company is thinking about putting an event like this on, what are some things that they can do to reduce their risk?

Rachel Keene (16:37):

You know us lawyers, we gotta think of the worst-case scenario. So plan the retreat out carefully. Think about what can go wrong and how to mitigate against potential issues. Think about what you're hoping to achieve on the retreat and what you have planned as something your employees are interested in and available for. Is it likely to boost morale or create frustration? Set out expectations for how employees should conduct themselves at the company retreat ahead of time, preferably in writing. Supervise and manage employees during the retreat to make sure things don't get out of hand. Because the ultimate goal of a retreat is stronger culture and connection, not creating evidence for future litigation.

Tracey Diamond (17:17):

Good points. Captain Fun needs to be a little bit careful that he doesn't let the fun get out of hand, right?

Emily Schifter (17:23):

Exactly right.

Rachel Keene (17:24):

Yeah, and I think the reality is that these retreats can be incredibly valuable and most companies are trying to do something positive for employees. And the legal risk comes from poor planning, unclear expectations, or assuming that people stop being employees once all the activities start.

Emily Schifter (17:41):

It reminds me, and we talked about this a little bit in our holiday party episode, I think especially with COVID and people getting together less, it caused a lot of employers to stop and think of, "Hey, we've always done this annual party, but let's rethink. Is that really the best thing?" And we talked about, we had some clients who realized, our employees really appreciate a potluck lunch where we can all get together and share a special dish from our family or our heritage, or they really appreciated a day of service, or maybe they just appreciated a gift card to go to dinner. And thinking about if the goal is getting everyone together and, like you said, building culture, thinking hard about what's the best way to do that. Is that a retreat or is it something different?

Tracey Diamond (18:17):

It definitely forced some employers to really think outside the box, which is a nice thing. Although I do think that getting people together in person from time to time, it's really hard to do anything else that's gonna have the same level of impact. But there's getting together and then there's getting together for complete craziness.

Emily Schifter (18:35):

Very true. Definitely.

Rachel Keene (18:36):

Yeah, definitely.

Tracey Diamond (18:37):

Well, Rachel, you certainly have given our listeners a lot to think about when planning a company retreat. So thanks so much for joining us. Thank you to our listeners for listening in. Don't forget to check out our blog at hiringtofiring.law and subscribe to our podcast on any of the major platforms so you don't miss an episode. And check out our firm's other podcasts at troutman.com/podcasts. We look forward to next time.

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