

WEB EXCLUSIVE: HOW ANTI-FRATERNIZATION POLICIES CAN ENSURE A HAPPY VALENTINE'S DAY

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Valentine's Day is fast approaching, which means love in the air – and employers should beware. Statistically speaking, the workplace can be the epicenter of romance. According to a 2019 survey from Vault.com, 58% of employees have engaged in a romantic relationship with a colleague. With the rise of the #MeToo movement, such statistics may make you uneasy – and for good reason.

The question that inevitably arises is whether employers can or should prohibit workplace romances and implement strict anti-fraternization policies. The answer to this question is not always simple. There are numerous types and components of workplace anti-fraternization policies, as well as potential unintended consequences.

RISKS OF WORKPLACE ROMANCE

In deciding if or what type of anti-fraternization policy to implement, it is important to fully understand the risks associated with workplace romances. Considering the #MeToo movement, the first risk that comes to mind is the potential for sexual harassment claims. This begs the question: when do workplace romantic relationships amount to sexual harassment and when are they consensual? Indeed, one of the key elements of a sexual harassment claim is that the conduct was unwelcome.

The surprising answer is that it is not always clear whether the relationship is consensual, especially if examined years later during contentious litigation. Some federal courts have

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held that an employee may appear to participate in romantic or sexual conduct without necessarily welcoming that conduct. In one recent case, in fact, a federal court permitted a Title VII sexual harassment claim to proceed where the plaintiff had admitted she had “played along” with the alleged harasser’s romantic overtures. The court reasoned that, despite this admission, a trial was required so that a jury could determine whether the conduct was really unwelcome. The theory is that harassment may be subtle, and what on its face appears consensual or voluntary may truly be coerced in light of all of the circumstances.

Additionally, when a consensual relationship ends, there are a number of potential pitfalls for employers. Intense emotions can be involved, as both parties often do not share the same feelings about ending the relationship. In these situations, the spurned lover may act out of emotion and not consider your anti-harassment policies or prior training. Any continued advances, sexual requests, or intimidation after the relationship ends may constitute sexual harassment. Even spreading rumors or gossip regarding the intimate details of the relationship may amount to sexual harassment.

Furthermore, consensual romantic relationships could give rise to claims of sexual harassment by coworkers not party to the relationship. One common claim is sexual favoritism – an employee claiming that they are being subjected to less favorable terms and conditions of employment compared to another employee who is involved in a romantic relationship with a supervisor or manager. The EEOC divides these favoritism claims into two categories: isolated incidents of a supervisor directing attention at one individual (which it contends is not actionable under Title VII), and widespread favoritism (which is actionable).

ANTI-FRATERNIZATION POLICIES CAN MITIGATE THESE RISKS

Fortunately, there are many options available to employers to reduce risks when it comes to workplace relationships. In addition to implementing robust anti-discrimination and harassment policies and training, there are various types of anti-fraternization policies directed specifically at this issue.

Some employers choose to implement a policy amounting to a complete ban on romantic personal relationships between all employees. Such a policy discourages workplace relationships by providing employers with the ability to

discipline employees involved in such relationships. The downside to such policies is that they impact employee morale and come across as an invasion of privacy and an attempt to govern off-duty behavior.

To address this concern, many anti-fraternization policies only prohibit specific romantic relationships between supervisors and subordinates, individuals within the same chain of command, or any relationship where one party has the ability to affect the terms and conditions of the other's employment. Such policies are more common and designed to prevent claims of favoritism or retaliation in the event that the relationship ends badly.

But there are also potential unintended consequences of such strict policies. In reality, many employers will not be able to prevent employees from dating. Once again, when it comes to romance, emotions are often going to supersede handbook policies. If you maintain strict policies banning such relationships under the threat of discipline, employees could simply conceal the relationship. This means that if the relationship ends and an employee later claims that it was not consensual, there may not be evidence or corroborating witnesses to support the defense that the relationship was welcome.

For example, imagine the scenario where a manager was involved in consensual romantic relationship with a subordinate employee. After the relationship ends amicably, the subordinate employee is terminated for wholly unrelated legitimate reasons. But the disgruntled employee then claims that the relationship was not consensual and was, in fact, sexual harassment. During the employer's investigation, the manager is put in a difficult position. If the manager admits that the relationship occurred and presents evidence of its consensual nature, the manager (and company) may be able to successfully defeat the harassment claim. However, by admitting to the relationship, the manager's employment may be terminated for violating the company's strict anti-fraternization policy. It is not difficult to imagine a scenario where the manager simply denies that the relationship ever occurred. This could create a nightmare litigation scenario for the company if the manager's lie is uncovered.

To address these issues, many employers have taken another route and have implemented permissive interpersonal relationship policies requiring employees

involved in certain types of romantic or personal relationships to report them to the company immediately. Rather than disciplining employees for such relationships, these policies encourage and require employees to come forward with the relationship at the earliest opportunity.

Such policies recognize that employees are going to date, regardless of what a handbook says, and provide employers the opportunity to proactively address the situation. Employers can remove any supervisory or managerial oversight between the employees involved in the relationship and require that the employees sign acknowledgments attesting to consensual nature of the relationship and the understanding that if that were to change, each would be responsible for notifying the company immediately.

CONCLUSION

With Valentine's Day approaching, it is prime time to review your stance on employee relationships and develop a plan of action should cupid's arrow happen to strike in the workplace. While workplace romance may seem inevitable, there are numerous ways to ensure that it doesn't result in disruption to the workplace while mitigating against legal liability.

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