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## Office Romances and the Risk of Liability

by Jennifer Brown Shaw

A recent study revealed that at least seventy percent of employees will date someone at work at least once during their careers. In fact, nearly one-half of all married couples met each other in the workplace. In light of these statistics, employers cannot ignore the various issues that may arise when employees engage in romantic relationships with people they meet at work.

### The Legal Landscape

California's Fair Employment and Housing Act ("FEHA") requires employers to "take all reasonable steps necessary to prevent unlawful harassment from occurring." Employers who fail to properly address workplace romances can find themselves in trouble.

A relationship in and of itself is not "harassment." But when the relationship spills over into the office, employment laws may come into play. For example, the office romance-turned-sour scenario is a common source of harassment litigation. Attempts to reignite a former relationship can turn into a legal claim. One of the former lovers may be able to affect the other's employment conditions, wages, etc. Employees may

complain about others engaging in explicit sexual conduct at work, such as kissing or other "public displays of affection." If these complaints are not appropriately addressed, an employee later may claim that the conduct contributed to a "hostile work environment." Similarly, although a discreet relationship typically will not create an actionable hostile environment, an openly romantic relationship between a supervisor and subordinate may lead to claims that sexual relationships with management are the only way to "get ahead."

Inappropriate conduct at work is not the only concern in this area, however. Recently, the California Court of Appeal ruled that employers can be liable for sexual harassment even when the alleged harassment occurs away from the workplace. In Myers v. Trendwest Resorts, a female employee alleged her male supervisor sexually harassed her during off-site events and business trips (she claimed he invited her to his house for drinks, asked her to participate in purely social activities, etc.). The employer argued such conduct was outside of the supervisor's scope of employment. Siding with the employer, the trial court dismissed the case. However, the Court of

Appeal reversed, concluding that an employer is strictly liable for a supervisor's actions unless the harassment resulted "from a completely private relationship unconnected with the employment."

In addition, in Miller v. California Department of Corrections, a 2005 decision, the California Supreme Court held that widespread sexual favoritism in the workplace may create an actionable hostile environment in violation of the FEHA. In that case, the plaintiffs alleged that other female employees received preferential treatment because they were having consensual sexual affairs with a supervisor. The plaintiffs claimed they were "forced to work in a hostile work environment where women got ahead and were promoted if they performed sexual favors for employees of [CDC]." The Court held that a single act of preferential treatment arising out of a consensual sexual relationship is not unlawful sexual harassment. However, sexual favoritism that is severe or pervasive and creates an abusive working environment may be actionable harassment, even if the person suing was not the victim of the sexual conduct.

In light of these decisions, some employers may consider prohibiting all workplace romances to reduce their risk in this area. However, California law complicates this approach. The California Constitution guarantees employees a right to privacy. Additionally, California Labor Code section 96(k) indirectly protects employees' lawful off-premises conduct. California courts have not yet interpreted the reach of section 96(k) in these circumstances. However, employers who prohibit dating among their staff risk claims for invasion of privacy and/or wrongful termination in violation of public policy. In short, if two employees involved in a relationship do not behave inappropriately at work, it will be difficult for an employer to prohibit them from fraternizing outside of the workplace.

### **Employer Options to Address Workplace Romances**

Employers attempting to reduce their liability in the area of workplace romances have various options available to them, including: (1) adopting "relationship = termination" policies; (2) adopting anti-nepotism policies; and (3) requiring employees to execute "love contracts."

Some employers may wish to deal with dating in the workplace issues by adopting a strict policy that any supervisor or manager who enters into a romantic relationship with a

subordinate will be terminated. The benefit to this approach is that it is a bright-line rule with no case-by-case analysis. It also avoids potential morale problems, such as favoritism and jealousy, and eliminates hostile working environment claims caused by "public displays of affection." Such a policy, however, should apply only to supervisor-subordinate relationships, or relationships that may cause an actual conflict of interest (such as the Human Resources Manager dating a line manager, for example). Employers also should consider the negative impact on employee morale if a well-liked supervisor is suddenly discharged. Obviously, summary firing increases the risk of wrongful termination claims.

Non-fraternization policies prohibit or strongly discourage employees from dating or pursuing a romantic or sexual relationship with fellow employees. To ensure such policies comply with California law, they, too, should be limited to supervisor-subordinate relationships or relationships involving a direct conflict of interest. These policies should include an explanation of the motivation for the policy (e.g., to avoid conflicts of interest) and the consequences for violating the policy, such as reassignment or transfer at the employer's option. Of course, employers must be careful not to intrude on their employees' private lives without justification.

Another option is to require "love contracts." A "love contract" is an agreement between employees involved in a romantic relationship in which the employees agree to: (1) comply with the employer's harassment prevention policy and report any perceived violations; (2) behave professionally in the workplace; and (3) acknowledge the relationship is consensual. A love contract is not a release from liability, but it can reduce liability. Love contracts establish that the relationship was "welcome," at least when the contract was signed. They also help defeat an argument that one party was "forced" to be involved in a relationship (to obtain a promotion, for example). However, requiring employees to announce a romance in writing may involve fundamental right to privacy issues. In addition, the validity of love contracts is untested in the California courts, so their effectiveness remains an open question. Finally, they require voluntary participation by employees, which can always be disputed down the road in litigation.

### **Tips to Avoid Liability**

Employers should take various steps to reduce their potential liability in this area. First, all supervisors and managers should be trained to avoid workplace romances with subordinates and how to discreetly address overt sexual behavior at work. They

should also understand the need to immediately report any inappropriate behavior to Human Resources or some other internal department (e.g., Personnel, the EEO Office, etc.).

In addition, employers should ensure their harassment prevention policy is well-publicized and enforced. While the policy cannot prevent all dating in the workplace, it should address potential conflicts of interest that can be created by workplace romances and contain a clear explanation of the organization's procedure for investigating and responding to claims.

Finally, employers must be willing to take action against employees who violate their harassment or other policies (e.g., a non-fraternization policy), regardless of the employee's seniority or influence. Allowing high-level management employees to engage in inappropriate conduct is a surefire way to end up with problems later on.

## Conclusion

Romantic relationships in the workplace pose a significant risk of liability for employers, especially when those relationships involve supervisors and their

subordinates. While employers have various options for potentially decreasing this risk, every option has its pros and cons. For that reason, employers cannot simply adopt a cookie-cutter approach to dealing with office romances. When faced with the issue, employers must carefully evaluate their legal risks and take action that is appropriate in the circumstances.

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