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Top 10 Ways to Deal with Workplace Romances

By: Jennifer Brown Shaw and Alayna Schroeder

The recent spotlight on David Letterman's alleged affairs with female subordinates is a useful reminder for careful employers: create a systematic plan for dealing with workplace harassment and romantic relationships. And then follow it.

As Letterman's case shows, the line between inappropriate behavior, romantic relationships, and harassment can blur. Consensual relationships sometimes sour. Other times, employees enter relationships because they feel compelled to, believing that doing so is a prerequisite to success or advancement. And in the worst cases, employees are explicitly told or threatened that the relationship is a job requirement.

To protect themselves and their employees, employers must walk the difficult line between preventing and correcting harassment, without stifling all consensual, non-workplace conduct. Here are our top 10 ways to help employers walk that walk.

10. Start with a Harassment Prevention Policy

A solid harassment prevention policy is the first line of defense. But the existence of a policy on its own is not enough. To be effective, a policy must clearly identify who is protected, explain conduct that is prohibited, and tell employees where to report problems and get help.

Moreover, supervisors and managers need to know what to do with information or complaints they receive from their employees. And to make sure everyone knows the rules, employers must be sure each employee has a copy of the current policy and know who to ask when they have questions.

9. Provide Required Training

California law requires employers with 50 or more employees to provide supervisors with sexual harassment prevention training once every two years. The training must meet certain requirements—for example, trainers must have minimum qualifications, the training must be “interactive,” and the material must cover specific subject matter. Savvy employers devise methods to track and ensure compliance with these legal mandates.

8. Consider Training Everyone

Employers should consider training employees even where not required by law to do so, such as training non-supervisors. Training lets employees know company standards, and it tangibly demonstrates the organization's commitment. It is also a good opportunity to share information about the employer and its management. If that is not enough, taking steps to prevent unlawful harassment and discrimination can

help the employer avoid or reduce potential damages in litigation.

Some employers provide anti-harassment training more frequently than every two years. Employers may present more current materials in a field that changes often. It also reinforces to employees that the company takes the issue seriously, keeping the issue in the front of employees' minds.

7. Adopt a Conflict of Interest Policy

Strict non-fraternization policies, prohibiting or strongly discouraging workplace romances, are not viable options in California. The California Constitution guarantees individual privacy rights. Labor Code section 96(k) protects certain lawful, off-duty conduct. These mandates prevent employers from entirely prohibiting workplace romances, at least to the extent they do not affect the workplace. Some argue such policies can do more harm than good. Employees may not follow the policies, and instead engage in covert relationships, which are revealed only after something goes wrong.

On the other hand, employers can restrict relationships that can create an actual or potential conflict of interest—such as a relationship between a superior and a subordinate. In these situations, employers legitimately worry about the potential for the personal relationship to interfere with

business judgment. For this reason, many employers policies discourage or prohibit relationships that can cause this conflict. Such policies may also specify that employees are expected to disclose relationships that may create a conflict, so the employer can take appropriate action to ameliorate any potential conflict (such as reassigning one of the employees).

6. Distinguish Harassment from Relationships

Not every romantic relationship is “harassment.” While employees may engage in consensual relationships that employers may balk at—between two married employees, for example—employers can and should not get involved in those relationships unless they violate the harassment prevention, conflict of interest, or other legitimate employer policy. Such scrutiny can lead to trouble. For example, singling out consensual adulterous relationships that do not result in conflicts of interest, while permitting other relationships, may violate California law prohibiting marital status discrimination.

Relationships can change, though. When consensual relationships end, for example, employers must take seriously later complaints of mistreatment. In a 2007 case in the First Circuit U.S. Court of Appeals, *Forrest v. Brinker Int'l Payroll Co., d/b/a Chili's Grill and Bar*, an employee claimed a co-worker, with whom she had an on-again, off-again romantic relationship, created a hostile work environment. When the relationship ended, the employee complained to the company about her co-worker's behavior, and the company responded by disciplining the co-worker. When the employee later sued, the company prevailed on its motion for summary judgment

because it had acted quickly to resolve the employee's complaints.

5. Do Not Create Temptation

While employers have little control over how employees spend time away from work, they can do things to control conduct that can affect the workplace. For instance, employers should make clear that harassment prevention policies apply to all work-related events. Management should avoid holding company-sponsored events at venues that may encourage behavior that violates conduct policies. One obvious example is the high correlation between alcohol and unwanted conduct. Employers also can reinforce that its technology, such as email and telephones, are for business use and not for conducting workplace romance.

4. Look into Love Contracts

Some employers ask romantically involved employees to sign a “consensual relationship agreement” or “love contract.” This document generally acknowledges a relationship, confirms that it is consensual and will not interfere with job performance, and reinforce the principles of the employer's harassment prevention policy. The agreement usually states the employee's obligation to notify the employer of conduct that violates the policy. The legal effect of love contracts remain unclear in California courts. But they may help an employer defend against a later claim if the relationship sours. Because the agreement should put the onus on the parties involved to give the employer notice of a change, or of unwelcome behavior, it facilitates efforts to prevent liability.

3. Stay out of Employee Private Time

As hard as it may be to accept, employers must recognize there is little they can do about consensual relationships between employees that do not affect their workplace performance or conduct. As explained above, the California Constitution protects employees' right to privacy, and California Labor Code section 96(k) protects “lawful conduct occurring during nonworking hours away from the employer's premises.” Courts have not interpreted Labor Code section 96(k) when it comes to consensual relationships between two peers, but in *Barbee v. Household Automotive Finance Corporation*, a California appellate court held that the Labor Code provision and the Constitution did *not* protect a manager's right to date a subordinate without notifying the employer, in violation of a company conflict of interest policy. The employer had a legitimate interest in avoiding a conflict of interest. And the employee had a diminished expectation of privacy because he knew his relationship violated the no dating policy.

2. See it From the Eyes of Others

Employees engaged in relationships are not the only ones who may be subject a hostile work environment. In *Miller v. California Department of Corrections*, the California Supreme Court established that a manager's favoritism for multiple paramours can create a hostile work environment for other employees. In that case, a supervisor engaged in romantic relationships with several women who reported to him, and they were promoted and treated favorably. While a single act of preferential treatment is not unlawful harassment, the Court held, “severe or pervasive” sexual favoritism can be actionable conduct. Moreover, the person

suing need not be the victim of the conduct.

1. Act on Violations or Complaints

An employer's top duty is to act on complaints or anytime it becomes

aware of potential violations of its harassment prevention policy. An investigation need not be error-free or conducted with sophisticated methods. But it must be prompt, conducted in good faith, and sufficiently thorough under the

circumstances. Employers should take all complaints seriously because employees find it very difficult to bring forth such complaints. A complaint may involve a relatively trivial incident, but an investigation may reveal a larger problem.

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Jennifer Brown Shaw is a partner at Shaw Valenza LLP. Her practice includes providing regular advice and counsel to private and public sector employers. She also develops and presents seminars on legal issues in the workplace for management and non-supervisory employees.

jshaw@shawvalenza.com



300 Montgomery Street, Suite 788
San Francisco, California 94104
Tel: (415) 983-5960
Fax: (415) 983-5963

520 Capitol Mall, Suite 630
Sacramento, California 95814
Tel: (916) 326-5150
Fax: (916) 497-0708

<http://shavalenza.com>