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Love contracts in the workplace: "What's love got to do with it?"

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With Valentine's Day approaching, love is in the air—and at work. Tina Turner keeps asking her eternal question, and for workplace romances at least, we have a few answers for employers just in time for the holiday.

As employees spend more and more time at work, the water cooler, happy hour, or a lunch meeting is seemingly as good an option as any to find romance. A 2005 survey by CareerBuilder.com revealed that 56% of U.S. employees had dated a coworker during their careers, and 25% of those surveyed admitted to dating a superior. Not all of these relationships can be characterized as "office flings" either, as 22% of respondents in Vault's 2005 Office Romance Survey reported having met their spouse or significant other on the job. Of course not all office relationships end happily ever after for employees—or their employers. Cupid does not always play fair, and alas, workplace romances can place employers at serious risk of discrimination and sexual harassment lawsuits. Recent case law is generally not the most romantic reading, and not surprisingly, case poetry usually tells of relationships gone awry, with ever-increasing stakes for employers.

In *Miller v. Dep't. of Corrections*,[1] a prison warden's alleged concurrent affairs with multiple subordinate employees were the subject of a sexual harassment lawsuit. The warden allegedly engaged in favoritism, including preferential transfers and promotions for his paramours. The plaintiffs, female employees who were not on the warden's social calendar, alleged that the only way to get promoted in their workplace was to have sexual relationship with their boss. The California Supreme Court ruled that consensual workplace affairs do not normally constitute sexual harassment, except when "sexual favoritism in a workplace is sufficiently widespread it may create an actionable hostile work environment" for others in the workplace.

An even more recent California case indicates that employers should be concerned about potential liability stemming from unwanted advances occurring off-site, as well. In *Myers v. Trendwest Resorts*,[2] the plaintiff claimed that her supervisor repeatedly made unwanted sexual advances during off-site

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[1] 115 P.3d 77 (Cal. 2005).
[2] 148 Cal. App. 4th 1403 (2007).

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events and business trips, which included driving to isolated locations and groping her while returning from sales activities. A state appellate court ruled that the employer was strictly liable for the supervisor's actions unless the harassment resulted "from a completely private relationship unconnected with the employment."

Although neither of these cases is binding outside of California, they are decisions that all employers should be cognizant of, because they reflect the types of arguments that plaintiffs throughout the country will attempt to make going forward.

With questions of potential liability swirling around office romances, some employers may be tempted to ban such relationships altogether, or at the very least require employees to disclose relationships with coworkers to supervisors. But implementing such policies can create terrible HR problems. In some states, doing so can also run the risk of invasion of privacy claims. In any event, such policies are difficult for employees to follow and even more incredibly difficult for employers to enforce.

Some years ago, Jeff Tanenbaum, who now chairs NP's Labor & Employment group, created a document for a client looking for an alternative. Jeff called the document a consensual relationship agreement. It has since entered the popular lexicon as a "love contract." Such a contract can be a useful approach for minimizing the potential for discrimination or harassment arising out of certain workplace relationships. Love contracts can be particularly appropriate if the relationship is already causing problems in the workplace or where the relationship is between a supervisor and a subordinate.

A love contract is essentially a written agreement in which the romantically involved parties acknowledge the following:

- Their relationship is voluntary and consensual.
- They agree to abide by the employer's antidiscrimination, antiharassment, and workplace conduct policies (which are described in, referenced in, or attached to the agreement).
- They promise to report any perceived harassment to management, if it occurs.
- They agree to behave professionally and not to allow the relationship to affect their work.
- They agree to avoid behavior that offends others in the workplace.
- They agree not to engage in favoritism.

While such a contract can seem at first blush excessively legalistic (hey, what did you expect; we are lawyers after all), its execution can help eliminate sexual harassment in the workplace and limit liability. Both employers and employees can benefit from a well-drafted love contract. From an employer's perspective, such an agreement is evidence that the employer took steps to prevent sexual harassment and can supplement the employer's sexual harassment policy. From the perspective of an employee accused of sexual harassment, love contracts can provide strong evidence of a consensual relationship. From the perspective of a potential victim of harassment, love contracts help to remind employees of their right to work in an environment free of sexual harassment and discrimination. In addition, such agreements reiterate the proper avenues for reporting unwelcome and inappropriate conduct and can make employees feel more comfortable discussing these issues with management.

In order to avoid claims of duress or coercion, the employees involved should be given plenty of time to review the terms of the agreement and to ask questions. The employer should retain a copy of the executed agreement and provide a copy to each of the employees. Please note that love contracts, while gaining popularity, are still new and are not appropriate for all workplace relationships, but they may be appropriate for certain situations. We recommend that employers contemplating the use of a love contract discuss the circumstances with legal counsel to determine if it is appropriate for the particular circumstances and, if so, how it should be presented. As one example, a love contract can be offered on a voluntary or mandatory basis—and careful consideration should be given to such options.

So as workplace relationships abound this Valentine's Day, employers should remember that resisting such developments may be futile and ignoring them may lead to liability. However, employers have some options for keeping the workplace free of discrimination and harassment. In addition to antiharassment training and the enforcement of existing policies, under the appropriate circumstances, a consensual relationship agreement—or love contract—may be an additional logical and progressive solution.

For more information on this issue or any other labor or employment law matter, please contact your regular Nixon Peabody attorney or:

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