

ROMANCE IN THE WORKPLACE AND OTHER WORKPLACE INDISCRETIONS

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I. OVERVIEW

- A. Understanding the Legal Context in Which Consensual Workplace Relationships Operate, Their Effects on the Workplace, How to Manage Them, and What Other Employers are Doing.
- B. Determining When Employers Are Liable for Employee Conduct at Work-Sponsored or Related Social Events and Employer Policies and Best Practices.
- C. Discussing Policies and Best Practices for Managing Employee Behavior on Social Media.

II. CONSENSUAL WORKPLACE RELATIONSHIPS

- A. Workplace romance is a common issue across the United States.
 - 1. In a 2017 Vault survey, fifty-seven percent (57%) of individuals responding said they have engaged in a romantic relationship at work.
 - a. This makes a lot of sense, considering people spend the majority of their time at work and are likely to share common interests with those they work with.
 - b. Some employers may even support employees finding romantic relationships at work.
 - 2. However, workplace romance creates the potential for intimidation, sexual-harassment or retaliation claims, real or perceived favoritism, and a negative effect in the workplace.
- B. Legal context of consensual workplace relationships.
 - 1. There is nothing illegal about a consensual, romantic or sexual relationship between coworkers.
 - 2. However, workplace relationships can lead to legal issues.

- a. Title VII of the Civil Rights Act of 1964 prohibits discrimination based on sex and sexual harassment. Additionally, many states have anti-harassment statutes, such as Michigan's Elliott-Larsen Civil Rights Act.
 - i. These laws prohibit many forms of sexual harassment that pertain to workplace relationships, including:
 - (a) Any unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature.
 - (b) "Hostile Work Environment" - Any offensive conduct that is based on sex or gender and is severe or pervasive enough that it creates a hostile, offensive, or intimidating work environment for the targeted person.
 - (c) "Quid Pro Quo" harassment, such as, people in positions of power making sexual demands in exchange for a promotion or other employment benefit.
 - b. Employers can be held vicariously liable under Title VII to a victimized employee for actionable discrimination caused by a supervisor. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998).
 - c. Additionally, Title VII contains an anti-retaliation provision that makes it illegal for employers to retaliate against an employee who has "made a charge, testified, assisted, or participated in" a Title VII proceeding or investigation.

C. Effects on workplace.

- 1. The presence of workplace relationships may have negative effects on the workplace and employees' attitudes.

- a. Supervisor and subordinate relationships are a major cause of concern.
 - i. For example, if a subordinate employee is engaged in a romantic relationship with a supervisor and is somehow benefited (whether it be promotion, raise, or just special treatment), co-workers are bound to notice and may think “must I sleep with a supervisor to get ahead?”
 - ii. Relationships lead to gossip and rumors that can cause a general disturbance in the workplace that leads to lower productivity and a negative office morale.
 - iii. Also, what happens when the relationship ends? What if it ends badly? Will there be animosity between the parties? Will one party be retaliated against in the workplace for what happened in the relationship?
 - iv. All these questions pose major concerns for employers.
- b. Extra-marital affairs are another major concern.
 - i. Nineteen percent (19%) of employees admitted to stepping out on their partner with a colleague at work.
 - ii. These relationships are particularly problematic for organizations because these employees will naturally want to keep the relationship secret. If the organization is unaware of the relationship, it makes it more difficult to monitor to ensure there is no favoritism and to guarantee that professionalism is maintained in the workplace.
 - iii. Commonly in these situations, it is the spouse of the employee that finds out about the extra-marital relationship and creates issues for the employer.
 - (A) The non-employee spouse may persuade their spouse to claim sexual harassment, or worst-case

scenario, might decide to commit an act of workplace violence in a fit of rage.

D. How to manage romantic relationships in the workplace.

1. Fraternalization Policies

- a. What is a fraternization policy?
 - i. Fraternalization or anti-fraternization policies are also referred to as dating policies or workplace romance policies.
 - ii. These policies explicitly communicate to the employee the company's policies, expectations, procedures, and consequences regarding romantic relationships in the workplace.
- b. A SHRM workplace romance survey found that only forty-two percent (42%) of companies have developed a formal, written, workplace romance policy.
- c. Benefits of having a fraternization policy:
 - i. Supervisors feel better because they know what to do if a romance springs up on their team.
 - ii. Employees understand what is expected of them if they decide to engage in a romantic relationship with a co-worker.
 - iii. Such policies can also demonstrate an employer's good-faith effort to comply with sexual harassment laws.
- d. Employers should consider including the following components in their fraternization policies:
 - i. The policy's goal of upholding appropriate boundaries between personal and business relationships.

- ii. The employer's decision whether to prohibit or just discourage fraternization between managers and subordinates.
 - iii. The requirement to report participation in such relationships, including those with vendors and other business associates.
 - (a) Disclosure is an effective way to limit the potential for favoritism, retaliation and sexual harassment claims.
 - iv. The employer's right to modify reporting structures, such as transferring a boss who is in a relationship with a subordinate.
 - (a) The employer should maintain the company's discretion. The company may allow the relationship in some cases and prohibit/change reporting structure in other cases.
 - v. The prohibition on physical contact between employees during work hours.
 - (a) Encourage open communication
 - (i) If the company is willing to work with the couple, then it is more likely that the involved parties will communicate their problems in an appropriate manner.
 - e. It is not recommended that fraternization policies prohibit dating, sex, and romance entirely. Any policy that is seen as overreaching or intrusive may discourage reporting to HR.
2. Policies should be broadcasted to all employees.
- a. Almost half (41%) of employees don't know their company's policy regarding office romances.

- b. If more than half of the workforce has engaged in workplace romance, it's critical that organizations guide employees on how to go about pursuing romance in a professional manner.
 - c. Employees should know what is expected from them and what they should expect from the company in the case of a romantic relationship in the workplace.
 - 3. Provide training to HR, supervisors, and employees.
 - a. Another proactive measure is to advise HR, supervisors, and managers as to how they might discreetly address romantic and sexual behavior in the workplace.
 - b. Companies may also consider bystander training to recognize, report, and prevent harassment in the workplace.
- E. What other companies are doing:
 - 1. Surveys by SHRM show that ninety-nine percent (99%) of employers with romance policies in place indicate that love matches between supervisors and subordinates are not allowed.
 - 2. Many organizations forbid intimate relationships even outside supervisory relationships. Thirty-three percent (33%) of organizations forbid romances between employees who report to the same supervisor, and twelve percent (12%) won't even allow employees in different departments to date.
 - 3. Facebook has a "no means no" policy that prohibits one worker from asking another out again if the co-worker has already said no once before.
 - a. Facebook has internal "Managing A Respectful Workplace" training sessions in which the nuances of employee interactions and what is considered to be appropriate behavior are discussed using examples and hypotheticals.
 - 4. Google strongly discourages employees from involving themselves in

relationships with colleagues that they manage or report to, or if there is any question whether one individual has power over the other.

- a. Google has moved employees to different roles in the event that a relationship between a supervisor and subordinate does occur.
 - b. Additionally, Google provides regular training to executives in order to best address the topic.
5. Some organizations now opt for 'love contracts' that set out a clear code of conduct and require employees to disclose their status as a couple to HR.
- a. These 'love contracts' entail having the dating parties sign a contract stating that the relationship is consensual, explaining what the parties should do if the relationship ever ceases to be consensual, and affirms that the employees are aware of the company's policies on sexual harassment and workplace ethics and understand the consequences of failure to follow those policies.
 - b. These 'love contracts' protect companies from future claims that may be brought by the parties involved in the relationship against the company.

III. WORKPLACE SOCIAL EVENTS

- A. Work-sponsored and work-related events.
1. Work-sponsored events refer to events such as a company holiday party, a conference, company picnics, etc.
 2. Work-related events refer to work golf leagues, softball leagues, or other events that are related to the employer.
 - a. These events can be very beneficial for companies.
 - i. They are a great way for companies to show appreciation towards their employees.

- ii. Employees have fun at social events.
 - iii. They boost team-building, morale, retention rates, and workplace relationships.
 - b. However, they can also impose liability onto companies for the actions of their employees.
- B. When can an employer be held responsible for employee behavior?
 - 1. Under Michigan law, an employer's vicarious liability for the acts of its employees under the doctrine of *respondeat superior* is as follows: a master is responsible for the wrongful acts of his servant committed while performing some duty within the scope of his employment but is not vicariously liable for acts committed by its employees outside the scope of employment, because the employee is not acting for the employer or under the employer's control. 9 Mich. Civ. Jur. Employment Relationship § 202.
 - a. In the context of social events, courts have explained that conduct is "within the course and scope of employment" if the employer (1) directly or implicitly endorses and may derive benefit from the social event or (2) requires or expects employee attendance at the event.
 - i. If the event is likely to benefit the employer in a significant way, it is more likely that the employer will be held liable for the employee's actions.
 - (a) For example, sending an employee to a major conference to learn and network would be seen as an event that significantly benefits the employer.
 - ii. Attendance at work-sponsored and related events should be voluntary.
 - (a) Be sure that event notices specify that the activities are not mandatory.

- (i) This also prevents employees from claiming that they are entitled to overtime for attending the event.
 - (b) If attendance is required at an event, it is more likely that the employer will be held liable for the employee's actions.
 - b. This test is closely related to worker's compensation law where courts look at whether the employee's action is "within the course and scope of employment."
 - 2. Sexual harassment at events
 - a. Work social events are a common place for sexual harassment to occur because it is a less formal setting than the normal workplace.
 - b. However, employers are potentially still liable for sexual harassment that happens at a work sponsored or related social event.
 - c. Tips to prevent sexual harassment at events
 - i. Have a separate policy that addresses conduct at employer-sponsored events.
 - ii. Consider not serving alcohol.
 - iii. Remind employees of the appropriate standards of behavior prior to the event.
 - iv. Permit employees to bring significant others.
 - (a) Employees will be discouraged from engaging in inappropriate behavior in front of their spouses or significant others.
 - d. Responding to reports of sexual harassment at events.

- i. Take the complaint seriously, investigate quickly, and take prompt remedial action if necessary, just as you would for a traditional workplace complaint.

C. Alcohol

1. If your company does decide to serve alcohol at an event:
 - a. Explain to employees before the event that all company policies apply to social events, including prohibitions on harassment and inappropriate behavior.
 - b. Serve food, such as appetizers, so employees are not drinking on an empty stomach.
 - c. Provide a late-night snack buffet before employees hit the road to end a company event.
 - d. Offer a variety of non-alcoholic beverages, to remove the emphasis from alcohol.
 - e. Consider serving just beer and wine, instead of liquor.
 - f. Limit the number of drinks the company provides by using drink tickets or another informal method of tracking the amount of alcohol served.
 - g. Provide free non-alcoholic beverages, but make it a cash bar. When employees have to purchase their own drinks, they drink less.
 - h. Arranging transportation for employees to and from the event.
 - i. Recruit HR, your managers, and event planning committee members, in advance, to keep their eyes open for employees who may be overindulging.
 - j. Have a policy for supervisors to intervene if they see someone who is inebriated.

- k. Have a clear statement that employees are prohibited from driving if they are inebriated or impaired.
2. Be aware of Dram Shop laws.
- a. Michigan is one of the states that has adopted a Dram Shop law.
 - b. Under Michigan's "dram shop law," a person serving alcohol can be held liable for the later actions of the person they served alcohol to if:
 - i. the person is "visibly intoxicated" when being served alcohol, or
 - ii. the person is under 21 years-of-age.
 - iii. For example, an employee is obviously served too much alcohol at a company Christmas party. The employee attempts to drive home and gets into an accident, killing an innocent person. The employer may be held liable for that employee's actions in that case if the employee was "visibly intoxicated" and the company allowed the employee to continue drinking alcohol.
 - c. To prevent employer liability:
 - i. Making sure no one under 21 years old is drinking alcohol.
 - ii. Never allow employees to serve coworkers or themselves.
 - iii. Host the event at a restaurant or bar licensed to serve alcohol, or hire a licensed bartender to come to the event to serve alcohol.
 - (a) That way, the restaurant, bar, or bartender is required to comply with the Dram Shop laws and they are the ones who are liable if they do not.

- iv. Make sure your bartenders are clear that they are not to serve alcohol to any person who appears to be inebriated or under age.

IV. OFF SITE EMPLOYEE BEHAVIOR ON SOCIAL MEDIA

A. Introduction

1. The majority of us have a Facebook, Twitter, Instagram, Snapchat, LinkedIn, or other social media account on which we post about our lives, thoughts, feelings, and even work.
2. Thanks to social media, we seem to be opening up and freely discussing topics, such as politics, in the public space where we might not have done so even in the recent past.
 - a. However, this is leading to major issues for employers.
 - i. What if an employee posts something negative about their employer?
 - ii. What if an employee posts a company's confidential information onto social media?
 - iii. What if an employee insults a co-worker or supervisor on social media?
 - b. If any of those situations occur, it could significantly impact the workplace.

B. This raises the question of whether or not an employer can discipline an employee for something they post on social media.

1. Interestingly, private employees do not have a constitutional right to free speech at work.
 - a. The First Amendment protects citizens from the government, not from private companies.
2. However, private employers cannot prevent all speech by employees.

- a. Speech related to protected concerted activities is protected by Section 7 of the NLRA.
 - i. Protected concerted activity includes dialogue between co-workers about working conditions, pay rates, or management.
 - (a) This “concerted activity” is protected by federal labor law.
 - (b) Employees do not have to be unionized to enjoy this protection.
 - b. Employees also have the right to talk about possible unlawful conduct in the workplace.
 - i. Under various federal laws, employees may complain about harassment, discrimination, workplace safety violations and other issues without being retaliated against by an employer.
- 3. Employees have the right to:
 - a. Discuss terms/conditions of employment (wages, hours, policies, complaints).
 - b. Criticize employer’s labor practices and treatment.
 - c. Discuss terms and conditions of employment with third parties, including the media.
- 4. Where the employer has a legitimate protectable interest, employees’ posts are not protected.
 - a. Such legitimate protectable interests include:
 - i. Interaction with clients and customers.
 - ii. Protection of confidential information.
- 5. Additionally, employees are not protected when they express racist,

sexist or other discriminatory comments.

C. Policies and practices to manage employee behavior on social media.

1. Social media policies.

- a. The best way to combat issues presented by employees' social media usage is through a comprehensive social media policy with sufficient examples, distributed at the commencement of employment, and enforced consistently.
 - i. Social media policies should:
 - (a) Include a definition of what the term "social media" includes.
 - (b) Define what is and isn't proper use of social media.
 - (c) Include a disclaimer for speech protected by law to comply with the National Labor Relations Act.
 - (d) State that the employee is solely responsible for what they post online.
 - (e) State that inappropriate posts that may include discriminatory remarks, harassment, and threats of violence or similar inappropriate or unlawful conduct will not be tolerated and may subject the employee to disciplinary action up to and including termination.
 - (f) Include a "no social media while at work" provision.
 - (g) Include an anti-retaliation provision for reporting violations.
 - (h) Include a requirement that employees include a disclaimer on their social media stating that any views expressed are not the views of the company.

2. Confidentiality Policies
 - a. Companies should update their confidentiality policies to include prohibitions against employees sharing confidential company information on social media.
 3. Open-Door Policy
 - a. Employers should encourage open communication between all employees and management at work.
 - i. Encourage employees to bring complaints to supervisors or HR, instead of posting on social media.
 4. Tips:
 - a. Supplement your policy with training. Having a policy isn't enough. Company owners, managers, and supervisors should be trained on the policy and informed of what can happen when they use social media to vent about an employee or a workplace situation.
 - b. Discourage supervisors (or any other higher-ups) from being Facebook friends, becoming Twitter followers of, or connecting via social media with their subordinates.
 - c. Prohibit employees from engaging in social media activities during compensable work time.
 - d. Address complaints made on social media the same way you would respond to any other complaint about inappropriate workplace conduct. That means HR should thoroughly investigate the allegations and respond by taking proper corrective action.
- D. Monitoring of employees' social media.
1. There are a handful of approaches that employers commonly use when monitoring their employees' use of social media:

- a. No monitoring: Employee can access all social networks on company or personal devices with no monitoring or supervision.
 - i. The riskiest approach for an employer is to allow employees full, unmonitored and unsupervised access to all social networks.
 - ii. In this case, an employer is exposing their business and employees to a myriad of risks associated with social media activities including strategic, operational, legal, financial and reputational risks.
 - b. “Unofficial” Monitoring: Many employees, managers or leaders will connect with each other on LinkedIn or Facebook, “outside the office”. This can be construed as “monitoring” their teams’ personal social media activities.
 - i. If this is the case, make sure employees are aware of and consent to any monitoring that is taking place of their personal social media profiles.
 - c. Intentional Monitoring of Specific Networks: Allow and monitor employee use of “approved” social networks while monitoring employees’ personal and work-related use of social media.
 - i. Intentional monitoring should include processes to gain monitoring consent from employees, approvals of specific social networks for use by employees, methods for employees to request an exception, and letting employees know they are being monitored.
- E. Other claims an employee might bring for adverse employment actions related to social media posts.
- 1. Discrimination.
 - a. If an employee posts something about their religion, sexual orientation, ethnicity, or any other protected characterization

and then is later fired, the employee may claim they were fired for an illegal reason.

i. For example, if an employee posts something about their religion on Facebook and is later fired, the employee may claim that they were fired by their employer because of their religion (and not the actual post), which would be an illegal reason for termination under Title VII.

2. Invasion of privacy.

a. Any employee may claim that an employer invaded their privacy by checking their social media accounts.

i. However, since social media activity is available for public viewing, it is a very hard cause of action for employees to win on.

3. Michigan has enacted the Internet Privacy Protection Act.

a. Prohibits employers from:

i. Requesting an employee or an applicant for employment to grant access to, allow observation of, or disclose information that allows access to or observation of the employee's or applicant's personal internet account.

ii. Discharging, disciplining, failing to hire, or otherwise penalizing an employee or applicant for employment for failure to grant access to, allow observation of, or disclose information that allows access to or observation of the employee's or applicant's personal internet account.

4. State laws protecting employee's off duty conduct.

a. Michigan does not have a specific state law that protects employee off-duty activities and behavior.

- b. However, some states like California, Colorado, New York, Nevada and North Dakota, have laws which protect the legal off-duty conduct of employees.
 - i. Employers in those states may be prevented from disciplining or terminating an employee for off-duty conduct that was legal, even if the message of the conduct was contrary to the values of the employer.

V. CONCLUSION

- A. Consensual workplace relationships are a common issue that employers need to handle with care. Although they are not illegal, workplace relationships can lead to negative effects in the workplace and plethora of legal issues for employers. Employers should manage workplace relationships with a publicized, comprehensive, and tailored Fraternization Policy.
- B. Workplace social events create liability for companies through the actions of their employees. Companies can minimize this liability by implementing comprehensive and tailored policies, responding to issues appropriately, following best practices if serving alcohol, and being aware of state and local laws such as Dram-Shop laws.
- C. With the pervasive presence of social media, employers should have policies that address employee behavior on social media and are careful not to infringe on employee rights under the NLRA.

VI. POLICY TEMPLATES:

- A. Disclaimer: These policies are for informational purposes only and do not constitute legal advice.

Dating and Relationship Agreement and
Acknowledgement of Harassment-Free
Workplace Policy

It is (the "Company's") policy to provide an equal opportunity in hiring, employment, promotion, compensation and all other employment-related decisions without regard to race, color, being over the age of 40, religion, sex, marital status, national origin, citizenship, veteran status, sexual orientation, being a qualified person with a disability; or any other basis set forth in the applicable laws or regulations relating to discrimination in employment.

The Company does not tolerate unwelcome or offensive conduct or conduct that creates a hostile work environment that is in any way based upon or related to a person having any of the characteristics described above.

In addition, the Company does not tolerate sexual harassment, which is a form of unlawful discrimination. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:

- a. submission to such conduct is made, explicitly or implicitly, a condition of an individual's employment or advancement;
- b. submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or
- c. such unreasonable conduct interferes with an individual's work performance or creates an intimidating, hostile or offensive working environment.

We, the undersigned employees, have entered into a personal relationship with each other. We have read and understand the Company's Harassment-Free Workplace Policy, part of which is outlined above, and we agree as follows:

1. Our relationship is entirely voluntary.
2. Our relationship will not have a negative impact on our work.
3. We will not engage in any public displays of affection or other behavior that creates a hostile work environment for others, or that makes others uncomfortable.
4. We will act professionally towards each other at all times, even after the relationship has ended.
5. We will not participate in any Company decision making processes that could affect the other's pay, promotional opportunities, performance reviews, hours, shifts, or career.
6. We will inform the Company immediately if the relationship ends, or if the conduct or advances of the other person are no longer welcome.

7. We agree that, if the relationship ends, we will respect the other person's decision to end the relationship and not pursue that person or seek to resume the relationship or engage in any other conduct towards the other person that could violate the Harassment-Free Workplace Policy.
8. We understand that, after the relationship ends, one of us may choose to date others in the workplace, and that we will not react with jealousy or spite or in any manner that is less than professional with respect thereto.

Dated this _____ day of _____, _____.

Employees: _____

Social Event Policy

Purpose

The purpose of this Social Event Policy (the "Policy") of . . . (the "Company") is to provide guidance on the expectations of the Company regarding "Social Events".

Definition

"Social Events" refer to any Company mixer, party, activity, or event, whether conducted on or off Company premises. Social Events are designed to improve Company morale and strengthen relationships. Alcohol may be served at Social Events.

Social Events are Strictly Voluntary

Your attendance at Social Events is strictly voluntary and on unpaid time. Participating in Social Events and/or consuming alcohol (if served) is optional. Employees will not be subject to any disciplinary actions or repercussions for failing to attend or participate in Social Events.

Appropriate Decorum

When attending Social Events:

- Be responsible;
- Conduct yourself in an appropriate business, non-impaired, manner;
- Consume alcoholic beverages only in moderation;
- The Company will make transportation arrangements for employees who request a ride;
- If you become impaired, ask the Company to provide a ride;
- You will not be subject to repercussions if you request a ride; and
- Stop drinking alcohol several hours before you intend to drive or request the Company to make transportation arrangements.

Updates

From time to time, the Company may update this Policy in its sole and exclusive discretion.

Acknowledgment

I have read this Policy and understand its contents. I agree to abide by this Policy and understand that my conduct will be governed by this Policy.

[Employee Signature]

[Print Name]

[Date]