

SEX, DRUGS AND ROCK & ROLL

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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. Discussing policies and best practices for managing employee behavior on social media.
- C. Addressing the legalization of cannabis in the workplace.

II. CONSENSUAL WORKPLACE RELATIONSHIPS

- A. Workplace romance.
 - 1. Historically, sitcoms and dramas in the pre-2000s era romanticized a pairing between co-workers or between a boss and their subordinate. The shows relied upon workplace romances to provide the dramatic and much-anticipated event of a coupling. The resulting romantic liaison rarely encountered legal implications. However, with the turn of the 21st century, sitcoms and dramatic television shows began to address workplace romances realistically and included plots of legal implications, threats, affairs and the trickledown effect of a workplace romance. A weekend spent binge-watching *The Morning Show* and *The Bear* reflects some recent realistic trends, on opposite ends, addressing the concept of a “work-spouse.”
 - 2. Newsrooms are not safe from the unfortunate circumstances resulting from work-place romance tales and harassment. However, unlike television sitcoms and dramas, these unscripted scandals cover front-page news of printed publications and social media feeds.
 - 3. In the “real world,” the issues that unfold are different, yet the same.
- B. Workplace romance is a common issue across the United States.
 - 1. In January 2024, Society for Human Resource Management (SHRM) conducted a survey with a sample of 1,073 workers. Of those surveyed, twenty-two percent (22%) of U.S. Workers are currently, or have previously, been in a workplace romance.
 - 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. A different SHRM survey found U.S. workers who are in a current relationship with a co-worker, or have been in a past relationship with a co-worker, were mostly motivated by love (57%) or self-interest (28%) while only one percent (1%) were motivated by

power, career advancement or security. The remaining U.S. workers surveyed said none of these factors influenced their desire for a workplace romance.

- c. According to SHRM research, thirty-three percent (33%) of Generation Z and younger Millennials are more apt to be open to being in a workplace relationship.
 - d. 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.
 - a. Ten percent (10%) of U.S. workers who have been in a workplace romance left their employment because of the break-up.
 - b. Of those U.S. workers who have been in a relationship, one in five, or eighteen percent describe the break-up as negatively impacting their career.
- C. Legal context of consensual workplace relationships.
1. There is nothing illegal about a consensual romantic or sexual relationship between co-workers.
 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).

- i. According to a June 2023 Psychology Today article, work spouse relationships present both advantages and disadvantages:
 - (A) Work spouses function together as a team, protecting one another from information and/or actions which may present as punitive or hurtful.
 - (B) Work spouses celebrate successes, navigate the complexities which may arise by way of organizational dynamics, and offer one another an outlet for venting frustrations.
 - (C) Work spouses, however, are often misunderstood and subject to questioning.
 - (1) Some believe a work spouse is simply a cover for sexual attraction or romance and become targets for office gossip;
 - (2) When work spouses are identified as a unit, it becomes difficult to recognize either of their contributions individually.
- ii. The 2024 SHRM survey identified that thirty-four percent (34%) of the U.S. workers surveyed share an emotionally intimate, close and platonic relationship with a co-worker or business associate.
 - (A) Additional data found, however, forty-three percent (43%) harbor feelings for their work spouse, while forty-five percent (45%) felt their relationship with their work spouses needed to be hidden from their significant other.

E. 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. 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.
- c. 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.
 - (1) 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.
 - vi. Prohibiting U.S. workers from using company resources such as e-mail, Teams and Slack to further a romantic relationship with a colleague.
- d. 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. Of the U.S. workers surveyed in 2024, thirty-one percent (31%) surveyed said that their employer requires disclosure of workplace romance, while forty-four percent (44%) provide disclosure of workplace romance is not required, and twenty-five percent (25%) do not know the policy regarding disclosing a workplace romance.
 - b. It is 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.
4. U.S. Workers have opinions about workplace policies.
 - a. The 2024 SHRM workplace romance research survey reported sixty-four percent (64%) of the U.S. workers surveyed stated their employer should not have a policy prohibiting romance in the workplace.
 - b. However, seventy-eight percent (78%) of the U.S. workers surveyed agree the employer should provide guidelines to employees on how to handle workplace romance.
5. What other companies are doing:
 - a. Many organizations forbid intimate relationships even outside supervisory relationships. Organizations may enact policies forbidding romances between employees who report to the same supervisor or prohibiting employees in different departments to date.
 - i. 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.
 - ii. 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.

- iii. 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.
 - iv. Google has moved employees to different roles in the event that a relationship between a supervisor and subordinate does occur.
 - v. Additionally, Google provides regular training to executives in order to best address the topic.
- b. 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.
 - i. 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.
 - ii. These ‘love contracts’ protect companies from future claims that may be brought by the parties involved in the relationship against the company.

III. CHALLENGES OF SOCIAL MEDIA IN THE WORKPLACE

A. Overview.

- 1. Hackers and online scams can result in security and/or data breaches.
- 2. Outlet for employees to provide negative comments about the employer and/or customers.

B. A previous SHRM article addressing social media and its influence in sexual harassment allegations provided “Social media is another way employees complain about harassing behavior...”

- 1. According to a Cigna Vitality Report, the top five social media platforms are YouTube, Instagram, TikTok, Snapchat, and Facebook.
- 2. 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.
- 3. 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.
- C. 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.
- 6. Legal actions to identify anonymous posters.
 - a. Glassdoor provides a platform for people to anonymously post their opinions about their jobs.
 - i. If legal action is taken to try and determine who (User) wrote a review, Glassdoor fights for the User's First Amendment Right to post anonymous opinions.
 - ii. Glassdoor's website provides a list of their "Greatest Hits" in defending their users' anonymity.
- D. 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.

E. 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.

- iii. With respect to employees who may be too impaired to work, only 42% reported feeling comfortable reporting the impairment to a supervisor while 71% of employers believed the employees would feel comfortable reporting the impairment to a supervisor.
- b. A 2022 survey by Substance Abuse and Mental Health Services Administration (SAMHSA), conducted in-person or via the web, provides statistics re illicit drug use and substance use disorders.
 - i. Marijuana was the most commonly used illicit drug.
 - (A) Adults 18-25: 38.2% or 13.3 million people;
 - (B) Adults 26 or older: 20.6% or 45.7 million people.
 - ii. Substance use disorders:
 - (A) Adults 18-25: 27.8% or 9.7 million people;
 - (B) Adults 26 or older: 16.6% or 36.8 million people reported a substance use disorder.
- c. National Institute of Health – National Institute on Drug Abuse: Cannabis Research Report July 2020. Studies suggest certain links between marijuana use and adverse consequences in the workplace (ex: injury or accidents).
 - i. A study conducted with postal workers, comparing workers who tested positive for marijuana on the pre-employment drug screen (urinalysis) versus workers who tested negative, found:
 - (A) 55% more industrial accidents;
 - (B) 85% more injuries; and
 - (C) 75% greater absenteeism.
- d. In 2022, Quest Diagnostics reported on urine drug tests and occurrence of positivity rates of marijuana.
 - i. In a sample based on more than 6 million urine tests performed in the general US workforce, positive rates continue to climb.
 - (A) 2017 – 2.6%
 - (B) 2020 – 3.6%

B. Work policies.

1. Miscellaneous facts and statistics.
 - a. Written policies are significantly higher in states where cannabis is illegal than states where cannabis is legalized. A written policy addressing cannabis exists in less than half of organizations.
 - b. According to a 2022 report from the US Bureau of Labor Statistics, 16% of private-sector employers test for drugs and/or alcohol.
 - c. Drug testing for marijuana faces hurdles based on the evidence of the days and weeks the drug can stay in one's system. There is no marijuana drug test currently available to determine an employee's sobriety at work.
2. Policy recommendations.
 - a. Establish a succinct policy to prevent impairment while also offering employee support.
 - b. Include language detailing cannabis used both during work hours and after-work.
 - c. Define tolerance policies for cannabis use (ex: consider zero-tolerance for safety-sensitive positions).
 - d. Review of compliance specific in application of federal vs. state law.
 - i. Requirement;
 - ii. Expense;
 - iii. Employee response;
 - iv. Retaliation.
3. Implement cannabis education and training.
 - a. Proper training for management and supervisors including how to recognize signs and symptoms of impaired workers and detailed steps for response.
 - i. Changes in physical appearance;
 - ii. Changes in behavior patterns;
 - iii. Changes in job performance.

- b. Educate all staff regarding safety risks of cannabis.
 - c. Regularly disseminate internal office communication which detail government regulations, internal policies and appropriate disciplinary action.
 - i. Define use.
 - ii. Define possession.
 - iii. Establish protocols for post-accident testing.
 - d. Support for employees with a SUD, including formal assistance programs such as EAP and referrals for local resources.
- C. Legal definitions and precedents.
1. Unemployment Insurance Agency (UIA) claims.
 - a. Disqualifiers to claims.
 - i. Positive drug test for marijuana was caused by the ingestion of marijuana at the workplace.
 - ii. Discharge is based on the fact that the claimant was under the influence of marijuana at the workplace.
 - iii. Inability to demonstrate that he or she is a qualifying patient who has been issued and possesses a registry identification card under the Michigan Medical Marijuana Act.
 - b. Hurdles.
 - i. As the Medical Marijuana Act does not define “under the influence,” investigations need to demonstrate the use of the medical marijuana placed the safety of people and/or product at risk.
 2. Michigan Civil Service Commission Policy: This policy and regulation established the standards as they relate to authorized testing.
 - a. Prohibited activity includes consuming drugs while on duty; reporting for duty while under the influence with a prohibited level of drugs; and refusing to submit or interference with required drug test and sample.
 - b. Types of testing.
 - i. Pre-appointment testing;

- ii. Reasonable suspicion testing;
- iii. Follow-up testing; and
- iv. Defining testing of new hires and conditional offers of employment.

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. 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.
- C. Given the current limitations to identify when an employee may have used cannabis, employers best way to test in its current application cannot determine when cannabis was last used. Employers can only get ahead of this issue through the solid work place policies.

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 _____, 20_____.

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:

1. Be responsible;
2. Conduct yourself in an appropriate business, non-impaired, manner;
3. Consume alcoholic beverages only in moderation;
4. The Company will make transportation arrangements for employees who request a ride;
5. If you become impaired, ask the Company to provide a ride;
6. You will not be subject to repercussions if you request a ride; and
7. 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]