

Consensual Relationships Policies in the #MeToo Era

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The #MeToo movement and the steady stream of news reports involving sexual harassment incidents and claims have put a spotlight on the larger issue of workplace relationships. Yet many organizations have not considered or implemented a policy governing consensual relationships that may arise in their workplace. A consensual relationships policy can serve a critical function for both employees and employers in establishing clear expectations, boundaries, and procedures for any romantic

involvements that may occur at work, thereby ensuring a fair and respectful workplace for all employees. While a variety of different approaches to workplace relationships may be appropriate depending on workplace culture, employers should make sure to develop and articulate a policy that sets forth well-defined guidelines should such a relationship develop.

**Debevoise
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AN AGE-OLD ISSUE UNDER MODERN SCRUTINY

It's a truism that many employees find romance on the job.¹ But for every happy-ever-after that starts in the office, one can likely also find an employee resentment or dispute stemming from the intra-office romance. Relationships in an office can upend the work environment by distracting employees, causing concerns about unfairness, or giving rise to simmering resentments or a sexually charged atmosphere. They also carry significant legal consequences: An employee who is asked to date in the workplace may feel pressured to say yes to preserve their employment or may face negative career consequences after saying no—a textbook example of sexual harassment.² Even if a relationship starts well and is clearly consensual, an employee involved in such a situation may come to believe that continuing in the relationship is a condition of

¹ See, e.g., <https://www.cnbc.com/2018/02/01/in-the-midst-of-the-metoo-movement-office-romance-hits-a-10-year-low.html> (explaining that 36% of employees have dated a co-worker, a high number that is nonetheless a 10-year low).

² See, e.g., *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 59 (1986) (sexual harassment claim where employee agreed to sexual relationship with supervisor out of “fear of losing her job”); *Shrout v. Black Clawson Co.*, 689 F. Supp. 774, 780 (S.D. Ohio 1988) (sexual harassment claim where employee was denied pay increase due to refusal to participate in sexual relationship).

employment or that he or she has received adverse treatment upon breaking up.³ Co-workers outside the relationship might also bring sex discrimination claims related to changes in the work environment or perceived favoritism arising from the relationship.⁴

The perils of workplace relationships have been highlighted and heightened by the recent #MeToo movement. #MeToo has shined a spotlight on the ways in which power imbalances in a workplace can place implicit pressures on those in a subordinate position and can confuse or complicate consent. Numerous news stories have revealed individuals who acquiesced to work-related relationships or sexual encounters because they felt they could not say no without risking their careers, their professional reputations, or their safety, and who suffered as a result. In addition to prompting greater discussion of how authority can interact with romantic interest to create a coercive situation, the #MeToo movement has also inspired greater openness on the part of employees to come forward and express concerns about their work environments and expectations, potentially leading to more claims of sex discrimination or harassment.

POLICIES ON RELATIONSHIPS IN A SUPERVISORY CONTEXT

While complete elimination of workplace romance and the risks associated with it may not be possible or even desirable, employers can still take steps to ensure a safe and inclusive work environment by establishing clear guidelines so that all employees understand the implications of sexual involvements in the workplace and know where they can go should issues arise. One indispensable such guideline is, of course, a legally compliant and thoughtfully crafted **sexual harassment policy**, including procedures outlining how employees can have concerns about harassment or retaliation addressed.

A related measure, which is less common but which all employers should consider, is a **consensual relationships policy**, which outlines the employer's expectations and the processes for employees to follow should they develop a sexual relationship with another employee.

Consensual relationships policies often focus on reporting or supervisory relationships, as dating within the line of command or evaluation carries the greatest risk that

³ See, e.g., 29 C.F.R. § 1604.11 (defining harassment as when submission to sexual conduct “is made either explicitly or implicitly a term or condition of an individual’s employment”); *Perks v. Town of Huntingdon*, 251 F. Supp. 2d 1143, 1155-58 (E.D.N.Y. 2003) (sexual harassment claim where supervisor allegedly took adverse actions against former paramour).

⁴ See, e.g., Jennifer Bercovici, *The Workplace Romance and Sexual Favoritism: Creating A Dialogue Between Social Science and the Law of Sexual Harassment*, 16 S. Cal. Interdisc. L.J. 183 (2006) (discussing cases in which relationship-based favoritism has given rise to sexual harassment claims from co-workers).

employees may feel coerced or harassed and that negative consequences may follow from the relationship.⁵ Regarding these relationships, policies tend to take one of the following three forms:

Prohibition

- Employers may ban relationships between employees in a supervisory relationship altogether.
 - This approach has the benefit of clarity and simplicity, leaving employees knowing exactly what the organization's expectations are for workplace romance.
 - However, because even a firm ban is unlikely to stop all romance from developing, a rigid approach may drive relationships underground, creating dynamics of secrecy and illicitness that can themselves harm the work environment. A strict ban may also force employees to choose between a relationship and continuing their employment, which could result in the loss of talent the company would otherwise like to keep. And given the ubiquity of office romances, denying employees any ability to date within the workplace may also negatively impact morale and employees' attitudes toward management and the work environment, making current employees feel resentful or boxed-in and presenting a competitive disadvantage in recruiting prospective employees.
 - Employers also need to consider in advance what the consequences for policy violations will be and ensure they are consistently applied.

Disclosure

- Employers may require that employees disclose to management when they engage in a relationship where one has supervisory authority over the other. These policies generally require the supervisory employee to report the relationship; they also outline the types of actions that the company might take in response to the disclosure, such as reorganization to remove any reporting relationship or supervisory authority.

⁵ In doing so, employers should also consider carefully what it means to be in a "supervisory" relationship or position of authority in their particular workplace. For instance, for some workplaces, there may be one clear line of reporting or chain of command; in others, there may be a wide array of individuals in a team or department who could control or affect an employee's work opportunities, compensation, or prospects for advancement. See, e.g., Debevoise & Plimpton LLP, Report of the Independent Investigation, Appendix B at 3-5 (Jan. 11, 2016) (discussing different views of academic supervision for purposes of university consensual relationships policies).

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- This allows management to take appropriate action to ensure that both employees continue to receive fair treatment and to minimize any negative consequences in the workplace.
 - However, disclosure of a relationship can be daunting. Some employees may not want to disclose a relationship knowing that it will result in changes in their work structure or may fear management looking at them askance. Employees may also be uncertain at what point a relationship is sufficiently developed to warrant disclosure (e.g., at a first date? At the third? Does a one-night stand count?). As with a total prohibition, a disclosure policy carries the risk of negatively affecting workplace morale and creating friction between employees and management.
 - Employers considering this policy model may also consider using a consensual relationship agreement or “love contract.” Such an agreement confirms and documents that the relationship was entered into voluntarily, that the employees are aware of the employer’s sexual harassment policy and the risks of entering into a workplace relationship, and that they will abide by that policy and keep management apprised of any issues.
 - Though it is unclear how helpful the existence of such a “love contract” would be in the context of a lawsuit, as no reported cases have directly addressed the effect of a “love contract” on a sexual harassment or discrimination claim, the process of committing to the contract can itself be useful to all parties by making sure that everyone is on the same page and that the employees are aware of the steps management is taking and can take to keep the workplace safe and inclusive, hopefully starting a constructive dialogue about the relationship and the work environment.

No Specific Restrictions

- Employers may also choose to simply leave the decision to date up to employees. However, in these circumstances, the employee handbook or sexual harassment policy should still discuss the issue of intra-office dating and make clear the hazards of romantic involvement where employees work together or report to one another. Employers may also wish to state in writing that they discourage, or even strongly discourage, such relationships, albeit without specifically forbidding or conditioning them.

No one approach is necessarily right for every employer, type of organization, or even every department within an organization. Universities, for instance, may wish to ban outright relationships within a supervisory structure, given how closely faculty and supervised students often work together, while requiring disclosure of co-worker

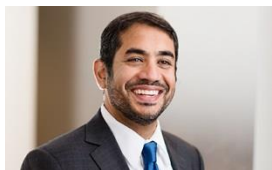
relationships within a wider department.⁶ Companies with more diffuse teams may be more comfortable allowing employees to decide in the first instance what is appropriate, while a large company may feel more comfortable enforcing a disclosure policy knowing that it has more room to reassign employees to different departments if needed. Very small employers, meanwhile, may find a strict ban appropriate because of the significant impact a workplace romance would likely have on a small, tightly knit team and the unfeasibility of steps, such as reorganization, to negate that impact.

Whichever approach is ultimately right for the particular work environment, it is critical for employers to consider how workplace relationships should be handled and to make that policy clear to employees to help ensure that their work environment remains safe, fair, and respectful.

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⁶ *Id.* (noting that the majority of universities have policies that prohibit relationships between faculty members and students or post-doctoral fellows over whom they have supervisory authority and discussing some schools' additional disclosure requirements).