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PERSPECTIVE

## Will you sign this love contract so I don't get fired?

By Todd R. Wulffson

Valentine's Day filled the workplace with bouquets of flowers, boxes of chocolate, and other conspicuous tokens of affection. It also called attention to those currently in a romantic relationship, which, if it involves another employee, can bring a whole host of potential problems that neither the lovers, nor the company, may see coming.

If you force people with common interests and goals together for 40+ hours per week, office romances are unavoidable, humans being the social and often hormone-driven, animals that they are. When polled, the majority of employees in the U.S. admit to at least one serious office flirtation, if not an actual romance (about half claim to have dated or more) — despite the fact that the vast majority of office romances do not work out long term (let's face it, there is a limit to how much time people should spend together), and despite the fact that the #MeToo movement has focused attention on workplace romantic relationships. Notwithstanding the liability concerns for employers and the relative ubiquity of dating in the workplace, however, 75% of U.S. employers surprisingly do not have any policy covering office romances.

If this Valentine's Day motivated your company to implement some limitations on dating in the workplace, there are a few important considerations, particularly in California.

### You Cannot Ban Office Romances

Certainly a quick and easy fix would simply be to prohibit employees from dating each other. After all, it seems less intrusive than reading employees' emails, or dictating how long they take for lunch, and there is reliable evidence that workplace romances can lead to poor judgment, breaches of ethics, favoritism, lost productivity, poor employee morale, sexual harassment claims and even workplace violence. Contrary to this apparent logic, however, a policy that prohibits all dating in the workplace is rarely appropriate, unless very specific conflict of interest issues exist. It also violates human nature and drives any such relationships underground, creating an environment where employees seem to enjoy breaking the policy because of the risk involved, and in the process, undermine, and lose respect for, other company policies. The number one thing that seems to end office romances is having them come out in the open — so keeping them in the dark and perpetuating the “forbidden fruit” feeling, likely makes the situation worse.

Moreover, in California, employers cannot fire or take any other negative employment action against an employee for engaging in lawful, off-duty activity, which would include dating. Labor Code Sections 98.6 and 96(k). Since any violation of law can be the basis for a wrongful discharge in violation of public policy lawsuit, such a policy will either not be enforced (thus undermining the entire

Employee Handbook), or it will get the company sued. It is also important to point out that having such an Orwellian policy is likely not going to further the company's recruitment and retention efforts. Millennials in particular, are very concerned with their privacy, and, combined with their penchant for social media, your company could become a hiring desert quickly.

Companies should have a policy that covers “conflicts of interest,” prohibiting things such as business relationships with customers, accepting gifts from vendors, and romantic relationships between supervisors and their supervisees. Whether it interferes with management decisions or not, there is enough of an apparent conflict of interest when a supervisor dates his or her actual subordinate, that it must be prohibited in the workplace. Employees should be advised that there are many things that can be done to resolve potential problems if the relationship is brought to the attention of management at the outset (changing reporting relationships, transferring an employee, etc.), but disciplinary action may result (likely for the supervisor) if the relationship is not disclosed and problems ensue. Some businesses refer to a “non-fraternization” policy as a specific version of such a conflict of interest policy, but the concept is the same.

### How About a Love Contract?

Putting aside the fact that at first blush (pun intended), this sounds like something illegal,

“love contracts” have gained popularity in the age of #MeToo, under the theory that if the parties involved agree on paper that their relationship is consensual, the company can avoid liability. After all, if the employees are willing to bring their relationship to the attention of HR, the best time to document that relationship is when it is in its “honeymoon phase.” Before creating a document that may very well become “Exhibit A” in a lawsuit against the company, however, employers need to be careful. There are several important drafting considerations; and a love contract is by no means a legal panacea (and if such a thing existed, lawyers would certainly find a way to eradicate it).

A love contract essentially is an agreement between two consenting adult employees (do not ask minors to sign one ever) that clarifies in writing that the relationship is in fact voluntary and legitimate, and not the result of a subordinate being forced into a relationship by someone with power over them. The goal is to memorialize the intentions of the employees when the relationship is working — so that when it fails, the subordinate employee will have a significantly harder time establishing that he or she was the victim of some lascivious scheme by a sexually charged coworker. As noted above, it is preferable for a manager and their direct subordinate never to date, but if they do, a love contract should explain all the steps that have been taken to prevent the manager from having any actual influence over the

subordinate's employment (i.e., steps taken to prevent any actual conflict of interest — leaving only the apparent ones which are dealt with below). The employee with less power in the workplace may inevitably claim that they were coerced into signing the love contract, but the document will still have helpful evidentiary value in the future if it is detailed and has the right components.

Perhaps the most important aspect of the love contract is to describe what happens if the relationship ends (as if the love contract is not uncomfortable enough — you need to add a pre-nup to it as well), or more importantly, what happens if the relationship ceases to be consensual. Since it is a document that may very well wind up in front of a jury, it is a good idea to state in the love contract the company's commitment to providing a harassment-free workplace, the steps the company takes to investigate and resolve claims of sexual harassment, and most importantly, the consequences for either party to violate the love contract, and hence, company policy. If either party to the love contract at any time wants to end the relationship or feels that a company policy is being violated, the love contract should encourage them immediately to bring the issue to the attention of Human Resources if they cannot resolve it on their own. The love contract should emphasize that there is a zero tolerance for sexual harassment in the workplace, and that no retaliation of any kind will be allowed against the party who wants to exercise the "escape clause" in the love contract.

With the foregoing in mind,

here are some of the specific elements to include in the love contract:

- Acknowledgment and agreement by both parties that the relationship is consensual;
- Agreement that, up to the date of the contract, no behavior has occurred that either employee believes violated company policy;
- Specific procedures to follow if (or perhaps, when) the relationship ends or becomes nonconsensual in any way;
- A statement stating or at least summarizing the company's policies on conflicts of interest, sexual harassment, workplace conduct and business ethics;
- An acknowledgement (under penalty of perjury) by both parties that they understand these policies, and the potential impact each has on their relationship; and,
- A clear statement explaining what happens if either employee fails to abide by the terms of the contract, and by association, company policies.

### **Vigilance Is Still Important**

Even with a masterfully-worded love contract, there are still issues that could lead to potential liability if left unchecked. Primary among these is the fact that the parties to the love contract, with their written document authorizing and validating their romance, may be more likely to engage in workplace behavior that affects others. PDA (public displays of affection) are a common basis for hostile work environment sexual harassment claims. Let's face it, work is stressful enough, without having to be subjected to kanoodling

in the hallway or break rooms. Also, although the subordinate employee in the love contract has agreed that favoritism is not influencing their decision to be romantically involved, all the other employees have made no such commitment, and an open and notorious relationship in the office can impact morale if the perception is that the paramour is getting superior assignments or other perks because they are "sleeping with the boss." The love contract needs specifically to advise the lovebirds to keep PDA in the office to a minimum. It is also very important that once the love contract goes into effect, human resources still takes affirmative steps to prevent the relationship from interfering with the work environment of other employees.

### **Best Practices**

Start with reviewing your company's policies on conflicts of interest generally, and relationships in the workplace specifically. If you do not have one that specifically prohibits subordinates and their managers dating, consider implementing such a policy immediately. Make sure the policy does not violate the California Labor Code protections for lawful, off-duty conduct. For employees who come forward with such relationships, consider whether a love contract is a good idea — i.e. is it worth the risk of documenting a relationship that obviously has everyone worried, in order to have helpful evidence in the future if the relationship goes south. Also, consider the impact a love contract may have on other employees and the workplace as a whole — there is a palpable

impact on morale when employees feel the employer has the right to document and relegate their personal relationship. Finally, work with employees both in and out of the relationship at issue to ensure that there is no unintended negative impact on the work environment after the love contract goes into effect. Most importantly, regardless of whether you decide actually to use a love contract, review your company's sexual harassment policy and consider adding additional training that addresses workplace romances and the special circumstances that come with them (and remember, as of Jan. 1, 2020, training is mandatory for all employees in California for businesses with more than five employees).

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