

II. TYPES OF POLICIES REGULATING WORKPLACE ROMANCES

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There are a number of things that, from an employer's perspective, I think the employer needs to consider long before the case gets to any of you as a neutral or to any of our employee advocates or even to union advocates. One of the things to be considered is, who does the employer want to regulate, and the second is, what does the employer want to regulate. It is the classic who, what, where, when, how, and why.

With regard to the what, what is it that the employer is concerned about? Forget what the employer has the right to be concerned about. That is up to many of you in this room to tell us. The question really is, what is it that the employer wants to restrict or what is it that the employer wants to be concerned about? Is it merely social interaction? Since it is not terribly realistic to think that people will work like automatons, if the employer tries to restrict social interaction, that probably will not work. Is it something more? Is it socializing after work or during lunch? Is it dating? Is it dating plus? Is there a romantic element? What is it? The employer has to make that decision up front and has to make a determination about what kind of conduct it is concerned about.

The second thing then becomes, who is it the employer wants to regulate, now that it knows what kind of conduct it wants to regulate? Is the concern only about people in supervisory capacities? Even then, is the concern about those who directly supervise the person who is at risk because of the power relationship? Should the policy run companywide, banning all of the conduct that the employer is concerned about? If it is only people who work in the same department or people who have influence over the employment lives or the terms and conditions of employment, that is another decision that has to be made.

Another issue is, should the policy be prospective or retroactive? It can become quite a surprise to people who are engaged in a relationship that all of a sudden it has now become outlawed by the employer. So, it is easier to say prospective but that may not address the situation at hand.

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Finally, another question would be why? Why is it that the employer wants to do this? Is it to eliminate perceived favoritism or concerns about perceived favoritism between paramours? Could it be that there has been an actual problem that the employer is trying to address and wishes to eliminate? Is there an inherent power relationship, for example, between a teacher and a student or in a small company, for example, a direct supervisor and subordinate?

There can also be the situation involving business interests and competition. That is your classic Coke and Pepsi situation, or, in my neck of the woods, it is a classic New York Rangers-New York Islanders kind of situation. Basically, where there are competing interests, the employer is concerned that the reasons may blow up in its face.

Now, once the employer has answered these questions, we are along the road to getting to where all of you will be dealing with the situation, and there are probably at least four different common types of ways to address these situations.

One is what we call a reporting relationship. We have one of those in our own firm. A reporting relationship is when the employees, for example, are beginning to date, become intimate, or even just looking at somebody at a water cooler. The employees are obligated to report this fact to the managing partner or the human resources director, whomever it might be. Then a determination can be made as to whether or not the employer's policy, if there is one, has been implicated. If the policy is not involved, then only one more person knows. If the policy is implicated, however, those involved can be informed about why the employer is concerned and guidance can be provided about their rights and potential liabilities.

The second type of issue—the antinepotism policy—goes one step beyond that and regulates the who, what, where, when, how, and why of people who are related by blood or by marriage. That is something that has been around for years in American workplaces. I know that some of you have dealt with and published reports and awards on those issues.

A spin-off on that something that is a little bit more recent, going back maybe 15, 20 years, are the antifraternization policies that, rather than simply regulating people who are related by blood or by marriage, are concerned about social relationships.

If an employer is concerned about people who begin to date or engage in the romantic type of relationship, then it has to be

concerned about the degree of relationship between them. For example, if it is a nepotism policy, is the employer talking grandparents and granddaughters? If the issue is fraternization, maybe the employer will not be concerned about a social relationship, on the one hand, but, perhaps will be concerned if the relationship becomes intimate. But those are the types of things that have to be dealt with in the policy.

Finally, there is something that is known as a romance agreement. It is literally a contract—almost like a prenuptial agreement. It has the party of the first part, the party of the second part, and the employer has the right to details. There are a lot of fill in the blanks. Once the employer becomes aware of the relationship, the employer then can sit down with the people involved, particularly when it is a supervisor-subordinate, and say, “We want to be certain that you folks have a wonderful time together, enjoy yourselves, but if things go south we do not want to have to deal with it, at least not before an arbitrator or a court of law.” The employer literally encourages people, on a voluntary basis, to fill in the blanks, sign the document, have it notarized 15 times. That way the employer has tried to do something to ensure that both sides knew what their rights and responsibilities were.

Those are at least four different types of ways that employers deal with these situations. Of course, where there are violations or breaches, grievances or lawsuits are filed and you get to hear those cases.

III. STATUTES LIMITING REGULATION OF WORKPLACE ROMANCES

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Let us say that you are a forward-thinking employer and you really want to do something about this issue. How far can you go in regulating this relationship? As if it was not difficult enough, the issue becomes a lot more complicated because of the different kinds of statutes that began to be enacted in the early 1990s. These kinds of statutes were advocated by the cigarette and smoking lobbies and were essentially intended to preclude employers from discriminating against employees who were smokers but not smoking at work.

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