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EMPLOYMENT POLICIES

With employers facing liability for harassment and retaliation claims, disastrous adverse publicity, untold workplace disruption, and attorneys' fees, can so-called ''love contracts'' between employees who enter a willing romantic relationship protect the employer? Management attorney Ann Margaret Pointer of Fisher & Phillips in Atlanta explores the increasing use of agreements to document the consensual relationships of employees.

What's Love Got To Do With a Contract? The Role of 'Love Contracts' in the Workplace

BY ANN MARGARET POINTER*

Can a so-called ''love contract'' between an executive and a peer or subordinate employee who willingly enter into a romantic relationship save an employer from liability for harassment and retaliation claims, disastrous adverse publicity, untold workplace disruption, and attorneys' fees? The answer is maybe—in the right cases and assuming that the employer sensitively and selectively uses such written agreements together with meaningful enforcement of good no-harassment/no-retaliation and no-conflicts of interest policies.

While this article will use the colloquial phrase ''love contract,'' what most employers really accomplish when they use such documents is to obtain the parties' written confirmation that the romantic relationship they have is completely voluntary on the part of both of them and that they understand and know how to use employer policies that are designed to avoid the parade of horrible consequences outlined in the introductory paragraph of this article. As such, a better name for such a written agreement may be a ''Declaration Affirming Nature of Personal Relationship and Understanding of Responsibilities'' to memorialize the nature of their relationship—that it is welcome and uncoerced—and their understanding of their responsibilities to each other, to other employees, and to the employer.

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Many companies expressly forbid managerial level employees from dating or having other close personal relationships with peers and subordinate employees that might lead to sexual harassment claims, conflicts of interest, or potentially clouded judgment in choosing between the interests of the organization and the interests of the person with whom the manager has a personal relationship. Besides forbidding relationships between persons in a direct chain of management, companies are legitimately concerned about favoritism on the one hand and sabotage on the other hand by employees in a position to influence the pay, promotional opportunities, training, work assignments, and other job enhancements of another employee with whom the person currently has or previously had an intimate, undisclosed personal relationship. Real or perceived problems can occur, for example, where a staff manager in finance or human resources consults with a line manager and thereby affects decisions by the manager concerning an employee with whom the staff manager has a current or prior close relationship. At the same time, the privacy rights of employees who are peers, and who are thus unlikely to affect each other on the job, to have personal relationships in which their employers do not interfere must be respected in some states.

Evenly Enforced Policies Generally Permissible. While evenly enforced policies that forbid dating by persons in a direct reporting chain and that forbid employees from engaging in other conduct that constitutes a conflict of interests with those of the employer are generally permissible and upheld by the courts, some employers today have adopted policies that do not absolutely forbid employees from dating employees whose terms and conditions of employment they could affect so long as they are not in a direct reporting relationship. These policies 1) discourage such dating and other close personal relationships, 2) absolutely require disclosure of such relationships, and sometimes 3) publicize employees' obligations to disclose the existence of such relationships to their employer, typically to a human resources official. By requiring disclosure of such relationships and publicizing the requirement, the employer can take steps to protect itself legally and practically and may be able to give other employees some level of assurance that processes are in place to prevent harassment, favoritism, or retaliation because of personal relationships.

Why do some employers now officially allow disclosed, but ''regulated'' dating relationships between managers and subordinate-level employees who they do not directly supervise? At least a partial answer is that multiple surveys show that many employees do find love at the workplace. Often managerial level employees eventually do know about and end up condoning some of these relationships, regardless of what official policies say about the subject. Inconsistently enforced policies against dating and close personal relationships may lead to employees being able to claim that they entered into a relationship based on observed cases of other employees having done so but were nonetheless afraid they might lose their own job if they came forward to disclose complaints about harassment, retaliation, etc.

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Employers are legitimately concerned about being held legally responsible and liable if a romance sours and one party claims he or she could not end a relationship without fear of on-the-job harassment, retaliation, and other adverse employment actions by the jilted former love interest. Moreover, employers are concerned that what might have been perceived by both parties in the beginning as a mutually ''welcome,'' desired romantic relationship may later be recalled in a lawsuit as one that began and existed only because of implicit or explicit job-related coercion and harassment.

Besides possible claims by an employee or former employee who claims that he or she was coerced into beginning or continuing in an unwelcome intimate relationship as a quid pro quo for an advancement or to avoid some adverse employment action, courts in some states, California for instance, say that other employees may not be subjected to a working environment of severe and pervasive sexual favoritism by a supervisor toward persons with whom he has such personal relationship. Finally, employers are frequently concerned about workplace morale issues created by perceptions of favoritism even if other employees may not bring suit over employment decisions they suspect were based on personal relationships rather than merit.

Provisions of a Typical 'Love Contract.'

1. Inevitably these contracts or declarations contain an express affirmation by both parties to the relationship that they welcome the personal, romantic relationship and that they each entered into and continue the relationship voluntarily and of his or her own free will and choice. A typical contract or declaration further confirms that neither party harassed or threatened the other to enter into the relationship and that neither party felt or feels compelled or forced to enter into or to maintain the relationship in order to retain his or her job or employment benefits or in exchange for a promise to receive employment opportunities or benefits of any kind.

2. Both parties acknowledge their understanding that either or both may terminate their personal, romantic relationship at any time without any adverse consequence to their employment. They acknowledge their understanding of the terms of the employer's no-harassment/no-retaliation policy, which is often attached and made an exhibit to the contract or declaration. In other words, in the contract or declaration, each

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party expressly confirms his or her understanding that neither may use his or her employment position to affect in any adverse way the terms and conditions or other benefits of employment of the other person.

3. Besides promising not to take adverse action against the other party to the relationship, each party to the contract or declaration also acknowledges that, in accordance with the employer's policy, he or she may not engage in any sort of favoritism or preferential treatment for the other in connection with their employment. The individual who stands in a position of potentially affecting the other person's pay, promotional opportunities, etc., must generally agree to step aside and not participate in or try to influence in any way decisions by other management officials of the employer vis-a-vis the love interest.

4. Both parties typically affirm their understanding of the employer's policy that they may not allow their personal relationship to distract them from or interfere with their job performance.

5. Employers often ask employees to acknowledge that under its policy they may not engage in any conduct in the workplace that other employees could perceive as intimate physical conduct, such as touching, kissing, hugging, giving each other massages, and engaging in other conduct of a personal nature.

6. Both employees typically are asked to acknowledge their understanding of the employer's policy against sexual harassment, typically expressed as a ''zero tolerance'' for pressuring an employee to engage in romantic, sexual, or other intimate relationship as a condition of employment and forbidding retaliation for rebuffs of advances.

7. Some contracts or declarations require employees to notify a human resources management official when and if either decides to end the relationship. Including such a provision may be useful because it should allow the HR manager to ''check in'' with both employees to make sure there are not current unresolved work-related issues that could implicate or involve the employer in potential litigation. Such a requirement also would tend to allow the HR manager to check in with both parties from time to time in the future to make sure that there are no unresolved issues or concerns that have developed.

8. Most employers provide employees notice that all computers, telephone equipment, electronic mail, and voice-mail systems are company property and may be accessed by the employer at any time without prior notice to individuals who use the equipment. Employer policies also typically forbid use of any of its software and equipment in ways that constitute unlawful harassment. Some love contracts and declarations contain provisions that reiterate employees' understanding of these policies.

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9. Because a dispute involving a personal romantic relationship that involves managerial employees can be especially headline-grabbing and create public perception problems for an employer, some employers seek to have employees engaged in personal relationships agree that insofar as they may later have a dispute with each other or the employer regarding such matters, they will resolve it through confidential, binding arbitration rather than through the court system. Employers may not, however, be able to preclude employees from filing charges of discrimination and retaliation with governmental fair employment practice agencies under the same principles that preclude employers from requiring employees to agree not to file charges of age discrimination under the federal Age Discrimination in Employment Act, and they will not be able to prevent employees from filing charges of criminal misconduct. Nonetheless, the process by which the parties' personal civil dispute must be resolved can potentially be specified.

10. Some employers, while obtaining confirmation that the parties' relationship is and always has been voluntary and mutually desired, also seek to obtain a waiver by both parties of any claims against the employer that either was forced or coerced into entering into or continuing the relationship in the past in violation of employer policies and applicable law.

11. Some employers advise employees to seek legal advice and counsel before entering into ''love contracts'' or declarations of the sort described in this article. To the extent that the employer is seriously concerned about contractually enforcing the waivers of claims and obligations undertaken in the ''love contract,'' treating the parties' entry into such a contract or declaration as an event with legal consequences enhances the likelihood that the obligations undertaken in it can be enforced.

Are the above provisions enforceable as ''contracts''?

The answer to this question depends on state law and specific facts and circumstances in individual cases. For example, some states recognize that continued at-will employment is sufficient consideration, that is, a benefit granted by the employer that binds the employee to the commitments undertaken in a written, signed document. In other states, mere continued at-will employment is not sufficient to create a binding, enforceable contract. In those cases the value of such a so-called ''contract'' or declaration is really that a signed, written acknowledgment that the relationship is a welcome one, that it always has been a welcome relationship, and that both individuals understand their rights and duties to use the employer's policy that requires report-

ing any improper later conduct is a powerful weapon against a later ''changed story'' by either party.

Any employer that contemplates the need for such a contract or declaration should consult with legal counsel who is familiar with the applicable law in its jurisdiction. In the right circumstances, love contracts and declarations may prevent the parade of horribles outlined at the beginning of this article, at least by deterring people from forgetting what they said when love was fresh and hopes were high.

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