Valentine’s Day is upon us and companies are experiencing workplace romance at its finest, which is why it is a good time to consider updating or implementing office romance policies. According to a survey conducted by CareerBuilder, four out of 10 workers admit to having dated a colleague during their careers, and 31 percent of those relationships resulted in marriage. The survey indicated that 34 percent of employees have dated a more senior person within the company hierarchy (among which 42 percent have dated their direct supervisor). The survey further showed that 72 percent of employees “go public” with their office romance. While many office romances lead to marriage, others may unceremoniously lead to claims for sexual harassment. Because it is not an uncommon scenario, companies should take proactive measures to avoid love turning into litigation.

**POTENTIAL EMPLOYER LIABILITY**

Regardless of whether the relationship involves a supervisor and a subordinate or two co-workers of equal rank, employers are at risk for claims of sexual harassment. These types of claims commonly involve an employee who is subject to continuing advances after the relationship ends. While sexual harassment is the most common legal risk associated with workplace romance, when a relationship involves a supervisor and a subordinate, the employer may be exposed to a retaliation claim, if the terms and conditions of the subordinate employee’s employment changed after the relationship ended. Further, the subordinate may claim that the relationship was never voluntary in the first place.

**THE CASE OF THE ‘OTHER’ EMPLOYEE**

While once characterized by more or less secretive interactions at the workplace, more employees now go public about their office romances, requiring employers to be mindful of the effect the relationship has on other employees. Specifically, uninvolved third parties may establish claims of sexual harassment by demonstrating widespread sexual favoritism that was severe or pervasive enough to alter the employees’ working conditions and create a hostile work environment. Claims alleging third-party sexual favoritism arise when a supervisor engages in romantic relationships with subordinates, causing other subordinates to believe they are professionally disadvantaged because they would not submit to the coerced sexual demands of the supervisor.

For example, in Miller v. Department of Corrections, 115 P.3d 77 (Cal. 2005), the California Supreme Court held that widespread sexual favoritism in the workplace may create an actionable hostile environment claim by demonstrating that widespread sexual favoritism was severe or pervasive enough to alter an employee’s working conditions. However, the court made clear that a single act of preferential treatment arising out of a consensual sexual relationship is not unlawful sexual harassment. In Miller, the plaintiff employees claimed that their supervisor accorded unwarranted favorable treatment to numerous female employees with whom he was having sexual affairs. Specifically, evidence included an internal affairs investigation, which confirmed that the supervisor’s sexual favoritism occurred and was broadly known and resented in the workplace, and that several employees — including an employee involved in a romantic relationship with the supervisor — concluded that engaging in sexual affairs was the required way to secure advancement. Although the court held that the presence of mere office gossip was insufficient to establish the existence of widespread sexual favoritism, other evidence of such favoritism included admissions by employees in romantic relationships with the supervisor concerning
the nature of the relationships, boasting by the favored women, eyewitness accounts of incidents of public fondling, repeated promotion despite lack of qualifications, and the supervisor’s admission that he could not control a subordinate’s conduct in the workplace because of his sexual relationship with her.

By contrast, courts have held that favoritism toward a single person (often referred to as “paramour favoritism”) is lawful and does not rise to the level of gender discrimination or harassment under Title VII of the Civil Rights Act, because paramour favoritism disadvantages all employees who are not the paramour, both male and female alike. Similarly, the Equal Employment Opportunity Commission takes the position that Title VII does not prohibit isolated instances of preferential treatment based upon consensual romantic relationships. (See “Policy Guidance on Employer Liability Under Title VII for Sexual Favoritism,” available at http://goo.gl/h0K8i.) The EEOC guidance explains that an isolated instance of favoritism toward a paramour may be unfair, but it does not discriminate against women or men in violation of Title VII, because both are disadvantaged for reasons other than their gender. Specifically, a female charging party who is denied an employment benefit because of such sexual favoritism would not have been treated more favorably had she been a man, nor, conversely, was she treated less favorably because she is a woman.

EMPLOYER BEST PRACTICES

• Draft and enforce realistic office romance policies.

First and foremost, employers should have a sexual harassment policy that includes a complaint-reporting procedure, conduct training on the policy and ensure that it is enforced. Further, employers should consider implementing a formal office romance policy. This policy should address issues, such as conduct in the workplace, in an effort to decrease perceptions of sexual favoritism, particularly because courts have recognized the viability of third-party claims of sexual harassment.

Effective office romance policies should include the following guidelines:

• Limitations or prohibitions regarding supervisor/subordinate romantic relationships, internal department romantic relationships or any kind of on-the-job romantic relationships.

• Disclosure of the relationship to human resources or another internal department within the company.

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• Conduit expected from employees. For example, the policy may require employees to refrain from public displays of affection or suggestive talk while at the workplace or at a company-sponsored event. Employers must be mindful to only limit conduct in the workplace, because of employee privacy interests that are implicated by creating such rules.

• Potential consequences for violating the policy (i.e., transfer to another position, discipline or termination of employment).

All employees should receive a copy of the office romance policy and sign an acknowledgement that they have received a copy, which they have read, understood and agree to abide by. Further, supervisors and managers should be trained to avoid workplace romances with subordinates and how to discreetly address overt sexual behavior at work. They should also understand the need to immediately report any inappropriate behavior to human resources or the appropriate internal department.

• Consider love contracts.

Love contracts are essentially agreements signed by both people engaged in the relationship to officially disclose it as consensual. An effective love contract should address the following issues:

• Mutual consent of the participants (both parties agree that the relationship is consensual and not based on intimidation, coercion or harassment).

• Acknowledgement of related company policies (sexual harassment policy, anti-discrimination policy and any applicable office romance policies).

• Appropriate conduct in the workplace.

• No favoritism or preferential treatment.

• Termination of the relationship will not result in retaliation.

Because the validity of love contracts is untested in the courts, a love contract is not necessarily a release from employer liability, but many employers are using love contracts in an effort to reduce liability should litigation arise later. For example, an employer may use a love contract in an attempt to establish that the relationship was consensual when the contract was signed. Further, love contracts can be used as a tool to have the parties reaffirm that they will comply with the company’s sexual harassment policy and report any perceived violations.

Given the unpredictable vicissitudes of love, companies would be wise to take proactive measures to prevent Cupid’s arrow from landing in court.