

Consensual relationships and sexual harassment: How to prevent liability

Consensual relationships in the workplace can spell big trouble for employers. Such romances may not look like sexual harassment to outside observers. But once in a while, these morph into something else entirely. A spurned supervisor may lash out to punish her former lover. Or a dumped subordinate may decide the relationship wasn't so consensual after all.

What's an employer to do? Requiring employees to sign a consensual relationship agreement may help. Better yet, ban any workplace romantic relationships. Too draconian? Other options include limiting the ban to supervisor and subordinate relationships. Here are the factors to consider as you draft consensual relationship policies to augment sexual harassment rules.

What is sexual harassment?

It's important to understand exactly what sexual harassment is and what it is *not*. Theoretically, a completely consensual sexual or romantic relationship is not sexual harassment. However, the legal concepts that underlie sexual harassment create the possibility that what looks consensual may be coercive. That's one reason why dozens of major companies have banned every consensual relationship at work. Plus, behavior once ignored or below the legal liability standard is increasingly exposing employers to the court of public opinion. #MeToo is largely responsible for that shift.

Let's start by defining sexual harassment under Title VII of the Civil Rights Act and Supreme Court rulings. There are two forms of sexual harassment. These are:

- **Quid pro quo sexual harassment.** In this form, a supervisor wants sexual favors in exchange for a tangible benefit or to avoid losing a benefit. Tangible benefits are things like a job or a promotion. Threatening to fire a worker if he/she refuses to have sex with a supervisor is quid pro quo harassment. So is promising a promotion or job in exchange for sex.
- **Hostile work environment sexual harassment.** If a workplace is hostile to a worker's sex, that may be sexual harassment. To qualify, the employee must experience either severe or pervasive harassment. An occasional compliment or coarse joke is not enough. But constant demeaning comments, grabbing and pinching or displaying pornography is. The test of whether the environment is hostile is whether a reasonable person would find it so. Outright sexual assault is also a hostile work environment. That's true even if the assailant is a customer or client if the employer had reason to know the risk.

#MeToo and the evolving definition of sexual harassment

Whether behavior meets the technical standards for sexual harassment isn't the only factor employers should consider. There's more to sexual harassment than legal liability. Thanks in large part to the #MeToo movement, employers have had to revise their sexual harassment policies. Behavior that many employers ignored or didn't consider serious now carries huge risk for employers. Being outed on social media as an employer that tolerates any behavior that many women now consider hostile is disastrous. That includes purportedly consensual

relationships where one party reports to the other. This view essentially sees any such relationship as inherently unequal and coercive.

Outright consensual relationship bans

Not long ago, consensual relationships at work were fairly common. For example, Bill and Melinda Gates met at Microsoft where she was an employee and he the CEO. Now, more companies are banning all workplace relationships, whether consensual or not.

And they're firing CEOs who violate the new rules. In late 2019 McDonalds fired its CEO, Steve Easterbook, after discovering he was in a consensual relationship with an employee. That was despite the company's turnaround during his four years at the helm that saw a 96% share rise. The company had a strict no work relationships rule. It also removed its HR head the following day, in a move it insisted was unrelated.

Should you adopt a complete ban on consensual relationships at work? Before doing so, consider the possible consequences. Make sure your management team is willing to follow through even if the employee is extraordinarily valuable. Create a pre-approved discharge plan ahead of time. Your board of directors should approve both the policy and the removal plan before it goes into effect. Finally, you may want a phase-in period, or a grandfathering clause. Otherwise, you may have to discharge employees who have married or are in long term relationships.

Bans on superior/subordinate relationships

Another option is to bar only consensual relationships that involve direct reports. Under this policy, individuals at every level except the most senior could still have relationships if working in different divisions. If so, your policy needs to be clear and specific. For example, how will HR handle promotions that puts the individuals into a direct report position? Plus, you will still need the CEO removal contingency plan since all employees are in a direct reporting status.

Implementing consensual relationship agreements

Another possible solution is to implement a consensual relationship agreement and a policy requiring relationship disclosure. Under this plan, employees wishing entering a consensual relationship will have to sign the disclosure to retain their jobs. This is best done for co-workers and not those in a reporting relationship. Presumably, the agreement could later be used as a defense to sexual harassment or other discrimination claims. Here's how one might work:

- **Pass a disclosure policy.** Require that all employees currently in a relationship inform HR about their status. The policy should include a clear statement that *not* revealing the relationship is a dischargeable offense for both parties. Decide whether the policy applies to all or just direct report relationships. Don't limit the policy to male and female relationships.
- **Require action:** Your policy should require either signing a consensual relationship agreement or resignation of one party. If you only ban direct report relationships, decide whether you will transfer one of the employees. Don't mandate that this must be the subordinate. He or she may later allege that's discrimination.
- **Agreement terms:** The consensual relationship should include a clear disclaimer of coercion or harassment. It should spell out the consensual nature of the relationship. It should also require HR notification when and if the relationship ends.
- **Behavior:** Your policies and the agreement should require professional conduct at work, with no exceptions.
- **Disclaimer:** Include a disclaimer in the agreement promising not to pursue a sexual harassment or discrimination claim based on the relationship. One option is to mandate arbitration of any subsequent

employment related disputes.

- **HR monitoring:** If you find out the relationship has ended, monitor the situation. This is when a consensual relationship can change into a sexual harassment situation.

Bottom line

Romantic consensual relationships at work may be inevitable. But sexual harassment claims often arise from broken relationships. Sexual harassment and consensual relationships are not mutually contradictory. One party may later claim the relationship wasn't really consensual. Or in the aftermath of a breakup, a former lover turns angry or vindictive. Managing the potential fall-out requires planning ahead with either a full or partial ban or a good consensual relationship agreement.