

Key Considerations for Companies in Deciding Whether to Institute Anti-Fraternization Policies

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In recent years, numerous senior executives have resigned or been terminated for engaging in undisclosed consensual relationships with subordinates.¹ Such relationships are gaining particular attention in the wake of the heightened scrutiny around workplace behavior, because they raise concerns relating to, among other things, potential power imbalances and conflicts of interest in the workplace. Thus, it is increasingly important for companies to consider whether to institute policies governing close personal relationships, and what those policies might look like. We address a few key considerations to guide those decisions.

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¹ See, e.g., *Five CEOs Who Were Fired for Doing the Dirty with Their Employees*, Yahoo! News (Nov. 4, 2019), <https://in.news.yahoo.com/five-ceos-were-fired-doing-082736254.html>; Don Clark, *Intel C.E.O. Brian Krzanich Resigns After Relationship With Employee*, N.Y. Times (June 21, 2018), <https://www.nytimes.com/2018/06/21/technology/intel-ceo-resigns-consensual-relationship.html>. While executive employment agreements typically do not include provisions relating to close personal relationships in the workplace, they often provide that a violation of firm policy is grounds for termination for cause.



Should My Company Have an Anti-Fraternization Policy?

The percentage of companies that have instituted policies regarding close personal relationships in the workplace is decidedly on the rise.² Some companies have policies governing close personal relationships between all employees, while others' policies are limited to relationships between supervisors and subordinates. These latter types of policies are the focus of this posting (and we will refer to them, in short, as "anti-fraternization" policies). As of last year, over half of surveyed HR executives reported that their companies have formal, written policies regarding close personal relationships between employees, and 78% reported that their companies discourage such relationships between subordinates and supervisors.³

However, not all companies have anti-fraternization policies, and there are pros and cons to such policies. How those pros and cons weigh against one another will depend in large part on the specific circumstances of the employer, such as its culture, its experience with potentially inappropriate workplace behavior, its size and its organizational structure.

On the "pro" side, adopting an anti-fraternization policy...

- Sends a message against sexual harassment: The most obvious concern raised by workplace relationships among subordinates and supervisors is that, in light of the inherent imbalance of power, such relationships may not be, or remain, consensual and welcome, notwithstanding appearances. As the #MeToo movement has prominently brought to light, a subordinate may not feel comfortable saying "no" to a supervisor,

instead acquiescing to the relationship out of fear of adverse employment action. Thus, what on the surface may appear to be a welcome relationship may in fact constitute sexual harassment from the perspective of the subordinate. Instituting a policy addressing such relationships sends a message to employees – of all seniority – that the company is cognizant of these risks and takes them seriously enough to act pre-emptively. Such a policy can thus serve as an important complement to a company's policies against sexual harassment.

- Mitigates legal risk: When and if a workplace relationship ends, the employer may have derivative legal exposure for the conduct of the employees involved in the relationship, including if the subordinate claims that the relationship was the result of an unwelcome advance or if post-relationship contact between the individuals is acrimonious. Prohibiting the relationship should mitigate that risk.
- Avoids certain toxic work environment situations: A relationship between a supervisor and a subordinate also raises the risk of actual and/or perceived favoritism. In the case of actual favoritism, such conduct exposes the employer to claims of discrimination or sexual harassment in the form of a hostile work environment (*e.g.*, other employees may claim that a *quid pro quo* is the only way to get ahead). Moreover, whether the favoritism is actual or perceived, it may reduce the productivity of other employees, who may feel that their contributions are going unnoticed and thus may become disengaged. The productivity of the two employees involved in the relationship

² See #MeToo Survey Update: More Than Half of Companies Reviewed Sexual Harassment Policies, Challenger, Gray & Christmas, Inc. (July 10, 2018), <http://www.challengergray.com/press/press-releases/metoo-survey-update-more-half-companies-reviewed-sexual-harassment-policies> ("Challenger Survey") (reporting increased percentages of employers who require employees to disclose close personal relationships, as well as of employers who discourage relationships between a supervisor and a subordinate); see also *Survey Findings:*

Workplace Romance, Society for Human Resources Management (Sept. 24, 2013), <https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/pages/shrm-workplace-romance-findings.aspx> (finding that, while in 2005 only around 25% of U.S. employers had policies addressing consensual relationships, by 2013 that number had risen to 42%).

³ See Challenger Survey, *supra* note 2.

may likewise suffer, to the extent they pursue the relationship during work hours.

- Provides employees with notice regarding potential consequences of a workplace relationship: Workplace relationships can be difficult, even when a fraternization issue is not present. Close personal relationships – particularly between employees of varying seniority – further exacerbate such difficulties. If a workplace relationship impacts employees’ work performance, it may result in reassignment – or, in certain circumstances, termination – of either or both parties. Giving employees notice of such potential consequences through a formal policy allows them to make more informed decisions about whether to pursue a workplace relationship. It may also reduce the risk of future litigation, particularly in situations with significant labor protections, such as in foreign jurisdictions or in unionized workplaces.
- Affords employers a bright line rule: When workplace relationships break down and dysfunction arises, the causes may be subject to dispute and legitimately unclear. The employer is often left managing the fallout, including having to decide which of the employees in the relationship should be reassigned to a different role or part ways with the company. An anti-fraternization policy may provide a useful bright line rule.

On the “con” side, an anti-fraternization policy...

- May create a perception of paternalism: Recent survey data suggests that around 35-40% of employees have had a consensual romantic relationship with a coworker, and 72% would do so again.⁴ Most notably, 22% of employees reported having dated someone who supervised them.⁵ Thus, romantic relationships do form and

oftentimes flourish in the workplace, and an employer’s efforts to discourage them may be perceived by employees as paternalistic and as an encroachment on their personal lives. This is especially likely to be the case for a company that has a more hierarchical organizational structure with many levels of supervisors, because a large portion of its employees would be affected by an anti-fraternization policy, even one limited to close personal relationships among supervisors and subordinates. This could also be a concern for less formal workplace cultures, in which the paternalistic aspect of the policy might cut particularly hard against the grain of the overall culture.

- Calls for difficult line-drawing: Defining what constitutes a close personal relationship in the workplace is not an easy task. It requires making judgment calls about highly subjective and fact-specific questions. Moreover, it requires grappling with topics rarely discussed in the workplace. Having HR professionals who are willing and able to answer these questions is critical to an effective policy.
- Is difficult to “police”: Given the highly private nature of the subject, instituting an anti-fraternization policy also raises complicated questions about what types of steps an employer may or should take – both from a legal and practical perspective – in monitoring for policy violations. For example, do supervisors have to certify compliance with the policy? How do companies demonstrate to stakeholders that the policy is enforced? Does the company do any monitoring for compliance, for example, reviewing email or social media of supervisors?

⁴ *Attention Cubicle Cupids: The 2019 Office Romance Survey Results Are In!*, Vault Careers (Feb. 14, 2019), <https://www.vault.com/blogs/workplace-issues/2019-vault-office-romance-survey-results>; *Office Romance Hits 10-Year Low, According to CareerBuilder’s Annual Valentine’s Day Survey*, CareerBuilder (Feb. 1, 2018) (“CareerBuilder

Survey”), <http://press.careerbuilder.com/2018-02-01-Office-Romance-Hits-10-Year-Low-According-to-CareerBuilders-Annual-Valentines-Day-Survey>.

⁵ See CareerBuilder Survey, *supra* note 4.

What Should My Company's Anti-Fraternization Policy Say?

If an employer chooses to institute an anti-fraternization policy, there is a broad spectrum of approaches, including with respect to the scope of prohibited conduct and the consequences of engaging in close personal relationships.

What conduct is prohibited?

At one extreme, the employer may choose to prohibit relationships among all employees. Alternatively, the employer may choose to limit its anti-fraternization policy to relationships among employees of varying seniority or, more narrowly, between supervisors and their direct or indirect reports. In our experience, a ban on relationships between supervisors and their direct or indirect reports presents the best balance of considerations for most large companies.

A workable approach may be for the anti-fraternization policy to:

1. outline the employer's concerns with respect to workplace relationships (including the concerns discussed above, as well as any others applicable to the employer's workplace);
2. require employees to report close personal relationships through designated channels (depending on the employer's culture and specific circumstances, such a reporting requirement could apply to all employees or be limited to relationships between employees of varying seniority); and
3. prohibit relationships between supervisors and their direct (or proximate) subordinates (bearing in mind that every employee reports to the CEO), and perhaps between employees in certain sensitive business functions, such as finance, audit and legal, where a relationship can give rise to particularly difficult concerns.

Instituting a reporting requirement may, depending on the corporate culture, provide some comfort to more junior employees concerning the potential risk of harassment. It may also address some of the other

concerns discussed above, by allowing the employer to monitor for any negative effects of the relationship on the overall work environment and provide employees with more particularized notice of the potential consequences of the disclosed relationship.

What constitutes a "close personal relationship"?

As previewed above, instituting an anti-fraternization policy requires navigating some grey areas, including, most notably, what types of relationships should come within the ambit of the policy. In our experience, most companies that adopt anti-fraternization policies use the phrase "close personal relationship" to describe the conduct that is the focus of the policy.

Because of the highly subjective and diverse nature of interpersonal relationships, it is usually difficult to come up with a "one size fits all" approach. Thus, employers may opt to leave this undefined, placing the onus on employees to determine whether, under the circumstances, their relationship is within the scope of the employer's policy. Another approach is for the anti-fraternization policy to provide that a relationship is within its scope to the extent it is either subjectively or objectively impacting the work performance of the employees in the relationship and/or of other employees. For example, the policy would apply if the relationship is causing tensions between the employees in the relationship and others, or if the employees in the relationship are not meeting their day-to-day responsibilities.

Most importantly, the policy's definition should be tailored to the employer's culture and workplace environment, and it should also be flexible, given the varying circumstances under which the policy may be implicated.

What are the reporting obligations and implications?

If the employer institutes reporting obligations with respect to close personal relationships, those obligations should be placed on the supervisor or more senior employee in the relationship, to mitigate against the inherent power imbalances. Depending on the specific circumstances of the employer, the reporting

channel can be to a business supervisor or to a representative of the human resources team.

The policy should also lay out what steps the employer will take, once the relationship has been disclosed, in order to mitigate the concerns discussed above. For example, the employer should consider measures that will remove the supervisory relationship among the employees, such as reassigning one or both of them, and should also recuse the supervisor from any employment or performance-related decisions regarding the subordinate. Particular care should be taken that reassignments are not implemented in a way that may give rise to a gender discrimination claim against the employer.

Conclusion

It is essential that employers gain a nuanced understanding of the risks and root causes of potentially inappropriate behaviors in their workplace, and develop effective tools for mitigating against such risks. An anti-fraternization policy may serve as one such tool, and employers should evaluate the benefits and drawbacks of having such a policy in the context of the unique circumstances of their workplace.

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