

The Rundown on the Law of Workplace Romance

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What's Love Got to Do with Employment and Immigration Policies?

As February marches on, one can't help but see Valentine's Day cards and candy and romantic movie trailers. But what happens when love and romance enter the workplace? (Hint: It's not always a fairy tale ending.)

This article examines what policies or actions Human Resources should consider when it comes to two critical issues that may arise when cupid's arrow hits employees: workplace relationships and whether a company should pay for a marriage-based green card.

Why Does HR Need to Keep Tabs on Workplace Romance?

Workplace romance is widespread and so are the problems related to such relationships. In a 2018 Vault survey, 52% of respondents indicated they had at least one office romance. While not all workplace romances end poorly, when they do, the results can be problematic for the employer.

Sometimes, when a relationship ends, the legal claims may begin. Although employers bear a higher risk when workplace romance involves a supervisor and subordinate, courts consistently reject harassment claims involving consensual workplace relationships. For example, the Sixth Circuit Court of Appeals held that a jury could not reasonably rule in favor of the terminated subordinate employee plaintiff, where the plaintiff and her supervisor had a five-year consensual on-again-off-again sexual relationship. The employee was fired one month after the supervisor ended their relationship, but the court found that the plaintiff's case lacked merit because she did not claim the romantic conduct was unwelcome and she admitted the supervisor did not seek sex in exchange for employment.

In the Eastern District of New York, two employees unsuccessfully sued their former employer after they engaged in a workplace romance and were fired. In that case, the two employees began a workplace relationship and eventually married. They continued to work well together until one of the employees engaged in an affair with another coworker. This resulted in workplace gossip and multiple disputes among the three employees.

In response, the employer gave the employees numerous warnings to prevent their personal problems from impacting the workplace. However, the three employees did not heed these warnings. Instead, they engaged in a physical confrontation in the employer's parking lot. After this fight, all three employees were fired. Two of the employees sued claiming discrimination, but the court found that they were fired because of the parking lot fight (a nondiscriminatory reason).

Luckily for the employers above, no harassment was found. Sexual harassment claims are grouped into two types: quid pro quo harassment or hostile work environment harassment. Quid pro quo harassment occurs when a supervisor requests sexual favors in return for an employment benefit or to avoid an adverse employment action. When a sexual relationship begins as consensual, plaintiff employees can meet their burden of demonstrating a quid pro quo harassment claim if they can show:

- The supervisor/ex-romantic partner continued to demand sex in exchange for employment benefits after the consensual relationship ended
- They suffered a tangible employment injury because they refused to engage in continued demands for sexual activity

They can establish that their sexual conduct with a supervisor was reluctantly consensual if such conduct was also unwanted. By way of example, the Second Circuit Court of Appeals held that quid pro quo harassment existed where a supervisor made repeated advances toward his subordinate and the subordinate eventually “yielded” to her supervisor’s pressure.

What Can HR Do?

What are some practices employers may implement to mitigate the risk of legal claims and negative consequences of romance in the workplace? While outright banning of workplace romance is an option, but it is difficult to enforce and detrimental to attracting and retaining professional talent.

Less drastic options include written policies contextually prohibiting and/or limiting romantic relationships between supervisors and their subordinates, internal department members, and/or staff members on the same internal team. Special consideration should be given to creating clear guidance on relationships between supervisors and their subordinates, including but not limited to written policies prohibiting such relationships – particularly supervisors and their direct reports.

In addition, prudent written policies include mandatory employee disclosure to Human Resources of romantic relationships between coworkers. Any written policies addressing workplace relationships should clearly articulate the consequences for policy violations.

The most aggressive employers may implement so-called “love contracts” to supplement overarching written policies and add an additional layer of risk mitigation regarding workplace romantic relationships. Love contracts are signed agreements between the romantically involved employees, which expressly acknowledge that the relationship is consensual and does not involve sexual harassment.

As a catch-all, risk-mitigation tool, anonymous employee hotlines are an effective way to give all employees the opportunity to report harassment and discrimination in any context, including but not limited to workplace romances.

Employer-Sponsored Green Cards for Spouses

HR getting involved in workplace relationships makes sense. But love and marriage outside of work are in the realm of the personal, so should the cost of employees’ green card love stories

be supported by their employer? Traditionally, when employers sponsor foreign national employees for green cards, they do so to retain the best and brightest talent indefinitely.

Typically, this involves a lengthy three-step process that includes:

- A test of the labor market
- The filing of an employment-sponsored immigrant petition
- The filing of the adjustment of status green card application

The first step is stressful for employers and employees alike. As part of that step, companies must actively recruit in the open market to ideally show that there are no willing, able, or qualified U.S. workers to do the job offered to the foreign employee.

If a foreign national employee is lucky enough to not only find a job in the United States, but also to find love with a U.S. citizen, should his employer think about supporting the costs related to marriage-based green card sponsorship? The answer may surprise you. Arguably, it's time for some companies to do so.

As an aside, the authors do not intend to explain the fiancé visa (the K-1 visa) since we have not yet experienced an employer whose sponsorship policy covers expenses related to an employee in the United States who finds love outside the country and must sponsor and marry their betrothed in 90 days. As we know from the television show of the same name, sometimes a 90-day fiancé is just that.

Since the employment-based green card typically requires the employer to conduct a test of the labor market and go through a long, highly regulated, and expensive process (this is because, in part, to the fact that the Department of Labor still requires employers to pay to post two Sunday ads in a newspaper of general circulation), employers would be wise to explore all options before making a commitment to start the employment-based green card sponsorship.

This has become increasingly important in 2023 because if a qualified U.S. worker is found based on the employer's labor market test, the green card sponsorship may end abruptly. Given the number of tech layoffs in 2022 and 2023, employers are more likely to find a potentially qualified worker based on the sheer number of workers recently laid off and applying for open positions.

During the marriage-based green card process, U.S. citizens can sponsor an immediate relative for a green card through a one-step process that includes a concurrent filing of two forms with the United States Citizenship and Immigration Services. Yes, there are only two steps instead of three and those two steps can be filed at the same time. This provides overall time and costs savings to employers who will not have to post Sunday ads or spend up to one year just getting to the filing of the labor market test application. It can allow an employer to get a foreign national employee to the green card more quickly, also allowing the employer to stop supporting extensions of underlying status. The cost savings can be substantial.

For a company that hesitates to become involved in paying for green card legal services for an employee applying under a family-based application, your policy could allow for a short consultation with counsel to ensure counsel sees no cause for concern with respect to the types of evidence to be presented as part of the marriage application. If counsel sees no issues, then

conduct the cost-benefit analysis. Employers may be surprised to find they can potentially free up some of their budget. Cost savings lurking behind an international love story? Yes, please!

This Valentine's Day, people across the country will celebrate their love. But when it comes to office romances, it's not always that simple. Employers should take steps to mitigate the risks posed by workplace relationships – and evaluate potential benefits that may arise from supporting an employee's marriage-based green card application.

As they say, love always finds a way. For HR, there's no better time to make sure they'll be prepared for when it does.