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Is Your "Non-Fraternization" Policy Lawful?

As Valentine's Day approaches it may be a good time to review and, if necessary, revise your Company's non-fraternization policies. Nearly one of every two employees admit to having been involved in workplace romance.[1] Moreover, a recent poll revealed that 46% of job seekers believe workplace romance is acceptable, so long as those involved remain "professional", whatever that means.[2] Still, very few employers have policies in place designed to address workplace romances. Of those who do, the policies may be unlawful if not carefully drafted. It's not difficult to imagine why such policies are recommended. As workplace romances sour, so do working relationships among those who once were romantically involved. Even if relationships do not sour, a perception of favoritism may be created if the romance is public (or fodder for workplace gossip). This may result in claims of sexual harassment, gender discrimination, equal pay violations and the list goes on. Still, before employers rush to draft a policy designed to dull Cupid's arrow, it must make certain its policy does not run afoul with applicable law, including the National Labor Relations Act ("NLRA").

The NLRA protects workers' rights to engage in protected concerted activity. This means that workers, whether unionized or not, must be permitted to discuss the terms and conditions of their employment with one another without their employer's interference or discipline. Some courts have held that employers' use of the term "fraternize" in non-fraternization policies, without additional explanation, may "chill" employees' rights to engage in protected concerted activity. See, e.g., Guardsmark, L.L.C. v. Nat'l Labor Relations Bd., 475 F.3d 369 (D.C. Cir. 2007). As one court explained, the primary definition of "fraternize" is the term "fraternal association" (i.e. union). Id. As a result, an employee reasonably could interpret a "non-fraternization" policy as preventing employees from discussing the terms and conditions of their employment with one another or so the NLRA may find when it reviews your Company policy. Id.

This is not to say that the use of the term "fraternize" is, *per se*, an NLRA violation. Indeed, the risk that such a policy could be viewed as overbroad can be mitigated by clearly defining terms therein, including the term "fraternize." Another remedy may be to "carve out" a provision indicating that nothing in the policy is intended to infringe upon employees' rights to engage in protected concerted activity. The key is to draft a policy that is sufficiently specific and narrowly tailored. As a practical matter, given that no force known to man can stop love, not only should an employer have a well-drafted policy, the policy also should include a reporting mechanism whereby employees are responsible for notifying management of any such relationships so that steps can be taken to avoid workplace issues.

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[1] Kathryn Tyler: Can "love contracts" decrease an employer's litigation risks and keep office romances in check?, http://www.shrm.org/Publications/hrmagazine/EditorialContent/Pages/2Tyler-Love%20Contracts.aspx (last visited January 14, 2013) (indicating 50% of individuals polled admit to being involved in workplace romances).

[2] Monster's Guide to Office Romance, http://www. career-advice.monster.com/in-the-office/work-life-balance/monster-guide-to-office-romance/article.aspx (last visited January 14, 2013) (indicating 46% of job seekers believe workplace romances are acceptable, so long as those involved remain professional).