

Sex, Drugs, Art & Rock n' Roll

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Presenters



- Mr. Gutierrez is the chair of Holland & Hart's Labor and Employment practice group.
- He litigates claims concerning wrongful termination, breach of express or implied employment contracts, violation of covenants not to compete, contracts for the protection of trade secrets, employment discrimination, wage matters (including FLSA collective actions), FMLA claims, defamation, torts and claims of retaliatory discharge.
- He speaks frequently at national programs on topics that address the employment relationship and provides training to professionals on a wide range of employment-related topics, including workplace investigations techniques and practice and workplace violence prevention.

Presenters

- Alyssa Yatsko
- Ms. Yatsko provides labor and employment advice to human resource personnel and in house counsel.
- She provides advice on many areas of employment law and has extensive experience is discrimination and retaliation lawsuits.

Summary

- Sex: Workplace Romance
- Drugs: Illegal, Prescription and Marijuana
- Art: Tattoos and Other Dress Code Issues
- Rock n' Roll: Generational Differences
- Investigations and Audits

Workplace Romance



Workplace Romance

- Why more prevalent now?
 - More women in the workplace
 - Employees with shorter job tenure
 - Employees waiting longer to get married
 - Employees work long hours

Workplace Romance

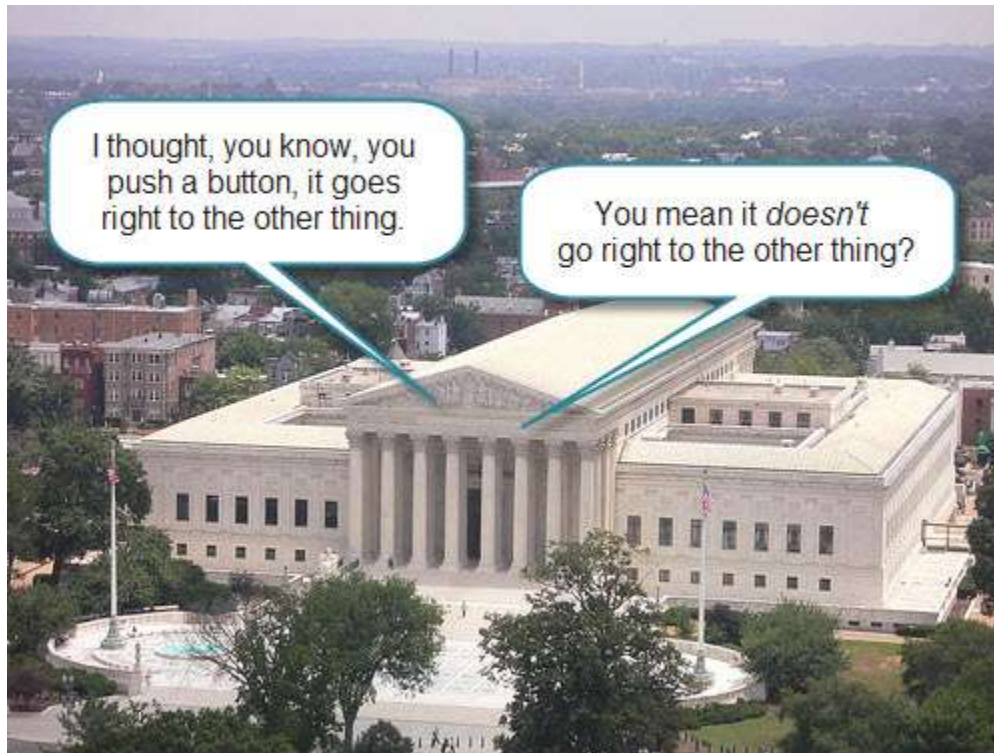
- 40% of workers say they have dated someone they worked with over their career
- 30% report they went on to marry a person they dated in the office
- 65% of workers said they aren't keeping their romance a secret
- 1/3 of women said they have dated someone who holds a higher position in their organization; 20% of men report they have done the same.

Source: CareerBuilder's 2011 Office Romance Survey

Workplace Romance

- Sexting

SCOTUS to SWAT Officer: No Prvcy 4 Ur Txts



Workplace Romance

- Potential Liabilities and Dangers
 - Sexual Harassment
 - Workplace Violence
 - Tort Liability
 - Retaliation
 - Employee Privacy Concerns

Workplace Romance

- Sexual Harassment
 - Subordinate reports relationship was unwelcome after the relationship ends.
 - Hostile Work Environment
 - Quid Pro Quod

Workplace Romance

- Tort Liability and Workplace Violence
 - Intentional Infliction of Emotional Distress
 - Assault
 - Battery

Workplace Romance

- Retaliation
 - Usually occurs when a subordinate ends a relationship and claims his or her supervisor then took an adverse action against him or her.

Workplace Romance

- Invasion of Privacy/Wrongful Termination
 - Can occur when an employer terminates employees for dating
 - Lawful Off-duty Conduct Statutes: Colorado, California, Connecticut, New York and North Dakota

Workplace Romance

- Practical Tip for Managing Risk
 - Notification
 - Interview
 - Advise on Sexual Harassment Policy
 - Advise on Professional Conduct
 - Conflicts of Interest

Workplace Romance

- Love Contracts
 - Policies typically used as a supplement to a sexual harassment policy
 - A contract signed by both parties which acknowledges that the relationship is consensual (does not constitute harassment) and agreeing that based on such representation, the employer should not intervene.

Workplace Romance

- No Fraternization Policies – three types
 - Prohibits Supervisors from dating non-management employees.
 - Prohibits Supervisors from dating any employee.
 - Prohibits Employees from dating each other.

Workplace Romance

- Privacy Concerns: Quon: Supreme Court finds public employer DID NOT violate employee's privacy rights by searching his personal – and often sexually explicit – text messages that were sent and received on employer-issued pager
 - Not illegal search under Fourth Amendment
 - City did not search off-duty records
 - As police officer – no expectation of privacy
 - If need cell phone for personal matters, buy your own

Workplace Romance

- *Quon* suggests that employers should:
 - Have a detailed policy
 - Explain that employees have limited expectations of privacy in the workplace
 - Communicate to employees the policy
 - Any audit, review or search must have a legitimate business purpose and should involve only work-related items (e.g., communications sent during work hours or that are work-related)
 - Least intrusive method
 - Advise employees to purchase and use his/her own cell phone/text messaging device and service plan

Drugs

- The Direct Cost of Using Drugs

Drugs

- Medical Marijuana



Drugs

- Consider how tolerant you want to be about medical marijuana in the workplace
 - Tolerance towards medical marijuana: If you assume your employees who are medical marijuana users will not smoke pot at work or show up under the influence, be sure your drug policy allows for reasonable suspicion testing
 - Intolerance towards medical marijuana: If you do not want to accommodate medical marijuana at all, make sure that your D&A policy includes pre-employment, random, reasonable suspicion, and post-accident testing.

Drugs

- Legal and illegal drugs can both present safety problems at work
 - Consider stating in your D&A policy that employees are prohibited from being under the influence of any lawful or unlawful substance that would impair their ability to perform their jobs in a safe or appropriate manner
 - Policy should require employees to notify manager of any lawful or unlawful drug that, if used on the job, may impair their ability to perform their jobs safely and appropriately

Drugs

- Comply with federal laws and enforce prohibited activities under state medical marijuana laws.
 - If you are subject to the Drug-Free Workplace Act, make no exception for medical marijuana users who test positive for marijuana.
 - If you are a transportation employer and subject to DOT drug testing, follow guidance that medical marijuana is not an excuse for a positive drug test.
 - If the medical marijuana user drives a vehicle or airplane, consider reassignment.
 - Similarly, if the medical marijuana user is a school bus driver, consider reassignment.

Drugs

- How to Manage Drug Testing Policies & Education

Art

- Tattoos & Dress Code Issues
 - Public Image and Business Considerations
 - Regulating Employee Appearance
 - How does Dress Become Protected Religious Activity
 - How to legally address issues in Hiring and Vetting

Art

- Sex discrimination
- Religious discrimination
- Race discrimination

Art

- Have clear examples in your policy of what is not acceptable clothing at your workplace
- Have management training on the policy
- Make sure your local management contacts HR when there is an employee who they believe is wearing something inappropriate

Art

- Ban ponytails or earrings for men while allowing women to have them
- Ban facial hair or headwear
- Require women to wear skirts

Rock n' Roll

- Generational Differences: Social Media Today
 - What is Social Media and Why Should You Care
 - Confidential Social Media Sites
 - The Risks with LinkedIn and Facebook
 - Blogging
 - Cyberloafing
 - NLRB and Social Media
 - Liability and Legal Standards

Rock n' Roll



Rock n' Roll

- Social Media Policy Provisions
 - Employees work harmoniously and respectfully with coworkers
 - Employees behave professionally
 - Employees treat customers, vendors, and other business partners and third parties with respect
 - Employees refrain from use of offensive, abusive, insulting language
 - Employees maintain confidential and proprietary company information in confidence

Rock n' Roll

- Social Media Policy Provisions
 - Whether or not employees are authorized to participate in social media at work
 - If employees choose to participate in social media at work, they have no expectation of privacy irrespective of whether the social media activity is password protected
 - Company has right to monitor all internet activity on company devices, including social media activity

- Social Media Policy Provisions

- No posting of information about co-workers, customers, clients, vendors, business partners without written permission of person or entity
- No posting of photographs taken at work without written permission of subject of photograph and employer
- No posting disparaging or defamatory statements about company, its products or business to general audience

Rock n' Roll

- Social Media Policy Provisions
 - No disclosure of confidential and proprietary company information
 - No use of company logo, brands, slogans and other intellectual property
 - No discriminatory or offensive language or statements

Rock n' Roll

- NLRB issued a complaint
 - Facebook postings constituted protected concerted activity
 - Maintained and enforced overly broad blogging and internet- posting policy
 - Prohibited employees from making disparaging remarks about supervisor or company
 - Prohibited employees from depicting the company in any way over the internet without company permission

Rock n' Rock

- NLRB's Division of Advice: 4 cases where discipline violated NRLA
 - EE asked coworkers on her Facebook page for their reaction to another employee's complaints about work quality and staffing levels at the employer;
 - EE complained on her Facebook page about her supervisor's refusal to permit a union representative to assist her in responding to a customer complaint about the EE;
 - Salesmen criticized, on his Facebook page the dealership's handling of a sales event intended to promote a new car model and posted mildly mocking photographs that included his coworkers;
 - EEs posted on Facebook about the employer's failure to withhold state income taxes, resulting in the employees' receiving payment demands from state tax authorities.

Rock n' Roll

- NLRB's List of Policy Provisions Found Overbroad:
 - Inappropriate Discussions
 - Defamation
 - Disparagement
 - Privacy
 - Confidentiality
 - Contact Information
 - Logo
 - Photographs

Rock n' Roll

- Liability and Legal Standards
 - Sexual harassment
 - Lawful drug use policies
 - Defamation
 - Whistleblower claims
 - Concerted activity under the NLRA
 - Invasion of privacy claims

Investigations & Audits

- 5 Methods of Workplace Investigations
- Deadly Mistakes and Risks
- Conducting Workplace Audits to Keep Up with Generational Changes

Why Conduct a Workplace Investigation?

- Improve Personnel Decision Making
- Avoid Repeat Incidents
- Because The Law Requires It
- To Avoid Or Limit Legal Liability

Authority Governing Investigations

- Legal duties to investigate
- Corporate Policy

Five Phases of Investigation

1. Preparation and planning
2. Information gathering
3. Verification and analysis
4. Discipline and/or corrective action
5. Prevention and education

Phases

1. Preparation and Planning

- Duty to Investigate
- Pre-investigation investigation
- Timeline and budget
- Determine the objectives
- Standard of proof

Phases

2. Information Gathering and Fact-finding

- Fact pattern
- Fact-finding strategy

Phases

3. Verification and Analysis

- Administrative Interviews
- Subject interviews

Phases

4. Discipline and Corrective Action

- Material facts
- Reliable witnesses
- Corroborative or supporting evidence
- Statements or admissions

Phases

5. Prevention and Education

- Measure results
- Analysis
- Identify process failures and opportunities for improvement
- Make appropriate modifications
- Educate and train

Phases of Investigation

- Plan ahead and follow our company practice
- Team consult
- Treat all people with respect and dignity
- Good faith investigation/reasonable conclusion

Conduct Regular Audits

Performing regular audits of employee classifications and hours worked by all employees is a prudent step employers can take to protect their businesses from prospective liability under the FLSA.

Audits can produce better “risk management mechanisms” and internal payroll and timekeeping controls for non-exempt employees, which can further reduce the risk of violating the FLSA’s overtime provisions.



An audit can also be useful in developing “proper decision-making protocols for dealing with particular employment-related risks.”

All in all, an audit of your human resource policies and procedures can prove immensely helpful, as it will assist your organization in complying with the FLSA and a host of other federal and state employment statutes.



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