

# What to Do About

# PERSONNEL PROBLEMS

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## Beware of Supervisor/Subordinate Affairs

There's been much media talk lately about Dave Letterman's affairs, not to mention the one involving ESPN's Steve Phillips. In those cases, the personal ramifications for the two men were damaging—the kind of fallout that's typical of such entanglements, even when the participants are just ordinary, non-high-profile people. But guess who else could be liable? Yes, their employers.

**Are such relationships none of your business?** Most employers recognize that people who work closely together often become intimate; a CareerBuilder survey found that 40 percent of office workers polled admitted to having dated a co-worker. And, 31 percent said the relationships led to marriage. We asked Attorney Michael McAuliffe Miller, a member in

Eckert Seamans Cherin & Mellott's Harrisburg, Pennsylvania, office, to discuss these kinds of situations with us.

His first comment addressed whether employers should just stay out of it. "For anyone entering into an employment relationship," said Miller, "there are a few areas of privacy. But a sexual relationship between a boss and a subordinate is definitely *not* private. The relationship may be consensual at the start, but things can go wrong later." But what about the technical point, which observers were quick to point out, that Letterman was not the boss of the CBS employees with whom he got involved, because he works for his own company, Worldwide Pants? That doesn't change anything, said Miller. Courts would see Worldwide Pants and

*(continued on page 2)*

## Do Merit Increases Promote High Performance?

Halogen Software, a provider of employee performance and talent management solutions, recently gathered a panel of 10 experts in human resources to debate an equal number of key issues in human capital management. As you may imagine, given their different backgrounds and philosophies, the experts disagreed with one another a great deal. We chose one question and summarized some of their responses to give you a flavor of the panel's views—and the level of disagreement about the ever-inexact art of motivating and managing people. Regarding whether merit increases motivate, they said:

**Josh Bersin**, head of Bersin & Associates, which offers research and advisory services on corporate learning: "Yes. My experience in my own career and with many organizations is that merit pay and individual pay-for-performance programs

are very important elements in a high-performing organization. [But] they must be accompanied by strong goal setting, transparency (showing the entire organization who the high-performing groups are), and a focus on how to succeed."

**Peter Cappelli**, professor of management at The Wharton School and director of its Center for Human Resources: "Probably not. The reason is that at present, the differences in merit pay are pretty trivial. No one wants to give pay cuts, and with low inflation and increase pools of about 2%, even a great performer is likely to get around 4%. So they are unlikely to want to kill themselves for that. It was high-inflation environments where merit pay increases mattered."

**David Creelman**, head of Creelman Research and writer and worldwide

*(continued on page 2)*

CBS as joint employers of the women affected. “The biggest issue in such relationships is the disparity in power,” he stressed.

Forbidding all romantic relationships between employees isn’t necessary—and might well be impossible to enforce. But employers absolutely must strive to discourage relationships in which the lower-level employee might feel pressured to begin or continue a romance with a powerful company employee. As *Boston Globe* reporter Joseph Kahn observed, “the probability [is that] these liaisons will have negative professional consequences for one party or both.”

**So let’s talk consequences.** Someone tried to blackmail Letterman, and Phillips’s mistress allegedly harassed his wife and family. In both cases, and dozens of others, the high-profile, powerful person suffered a job loss at worst and a damaged reputation at the very least. But the impact on the lower-level partner, and the workplace as a whole, can be far greater. If the relationship ends, or the less-powerful person moves to end it, he or she will perceive any negative treatment at work—a poor evaluation, denial of promotion, disadvantageous transfer, or another step—as retaliation.

Another consequence can be that co-workers of the lower-level person involved in a relationship with a powerful person perceive favoritism—that, while the relationship lasts, the romantic partner gets less work, more privileges, and so on. Act now to prevent the damage, says Miller. See more of his advice, especially on whether specific charges would stand up in court, in “Compliance Checklist.”

speaker on critical issues of human capital management: “I’m not convinced they do. There are lots of high-performing people in nonprofits who don’t get merit increases. It’s really a matter of culture. If you have a money-focused culture, then a lack of merit increases may signal to the person that there is no point trying. [In other cultures,] community, purpose, and pride are motivators.”

**Kris Dunn**, vice president of people at software firm Daxko, and HR blogger: “There are lots of ways to get [the desired] discretionary effort (career pathing, promotions, incentive pay, etc.), but common merit pay alone will not lead to the promotion of sustained high performance.”

**Sharlyn Lauby**, head of consulting firm Internal Talent Management Group and also an HR blogger: “No. Everyone has a price for which they will only tolerate so much. There are countless studies that show money is not the ultimate motivator. Even in tough economic times.”

**Ed Lawler**, author and professor of business at the Marshall School of Business: “The research on merit increases shows that they are a waste of time and money with respect to influencing performance.”

**Laurie Ruettimann**, SPHR and HR blogger: “No one wants to work for an employer who pays poorly and doesn’t share the success of the company with its workforce.”

For the panelists’ opinions on another controversial topic, see “A Closer Look.”

## Compliance Checklist

### Avoid Liability for Workplace Romances

Like romances everywhere, some workplace romances go wrong. And, as Eckert Seamans’s Michael Miller points out, if there’s a power disparity between the partners, things are very likely to go wrong. So what should employers do? Here’s more of his advice:

- ✓ Put policies in place. Make it clear that (a) intimate relationships between a boss and a subordinate—including what Miller calls “a line-drawing exercise” from any employee to anyone in his or her reporting hierarchy—are prohibited, and (b) that high-level executives are barred from having a sexual relationship with any company employee. Says Miller, “Where a person has the ability to supervise or otherwise materially affect an employee’s terms and conditions of employment, they should not be involved in a relationship.”
- ✓ But the real key to compliance is training, advises Miller. Policies aren’t always “entirely consistent with what is realistic in human relationships. So ... repeated training on issues related to sexual harassment for all supervisors is a necessity to protect the company and to further an atmosphere of appropriate respect.”

- ✓ “Don’t condone the behavior by your silence,” says Miller. If you learn that a boss is involved in an inappropriate relationship, go to him or her immediately. Don’t involve the lower-level partner. Instead, give the boss a choice between ending the relationship and losing his or her supervisory status.
- ✓ If the boss flat out denies the relationship, all you can do is to carefully document your conversation with him or her.
- ✓ It’s risky to rely on so-called ‘love contracts,’ specifying that employees involved in a relationship can’t sue the company. Employees can still go to court.
- ✓ What are the risks? Miller recommends that training include explanations of four key Supreme Court rulings: The *Ellerth* and *Faragher* rulings in 1998 established that employers can be liable for sexual harassment if a supervisor was involved, even if no tangible negative employment action was taken against the subordinate. The *Burlington Northern v. White* 2006 decision extended the definition of an adverse employment step, while the *Crawford v. [county governments] of Tennessee* 2009 ruling broadened the class of people who can charge retaliation; both cases involved sexual harassment.

# QUESTIONS From Our READERS

## I Need Help with Wage & Hour Laws!

The federal Fair Labor Standards Act (FLSA) and its state equivalents (which can be more employee-friendly than federal law) probably represent a greater hassle for HR pros than anything else—with the possible exception of the Family and Medical Leave Act. So here's a collection of the FLSA questions our legal experts have received in recent weeks.

**Q:** *If a nonexempt employee fails to turn in a timesheet at the end of the pay period, can we refuse to pay him until we have the timesheet? Or must we estimate his hours, pay him, and then make necessary corrections when we finally get the timesheet?*

**A:** FLSA puts the burden on the employer to track employees' hours worked. And, it's essential to pay for all hours worked. So you're obliged to pay an individual on time for whatever hours you believe he or she has worked. That said, though, you can discipline an employee for failing to timely submit his or her hours worked.

**Q:** *Currently, we deduct a day's paid time off (PTO) when a salaried, exempt employee is out sick for a full*

*day. But we want to account, in terms of pay, for partial sick days taken by these employees. Here's our plan: Whenever a salaried, exempt employee calls in sick or leaves for part of a day, we want to track the time as intermittent leave under the Family and Medical Leave Act. We would ask the employee to agree in writing to an FMLA deduction but not require medical certification, and we would deduct the absence from PTO if the person had enough, or it would be unpaid if there's no PTO. Will that work?*

**A:** No, it will not. FMLA leave may only be taken for a "serious health condition." So a half-day's sick time now and then is unlikely to qualify. If a salaried, exempt employee does have a serious health condition, you can require him or her to use paid time off concurrently with unpaid FMLA if you so inform the employee in writing. Meanwhile, if you feel an exempt employee is abusing partial-day absences, you can discipline the person, but you can't reduce his or her pay.

**Q:** *We classify a store manager as salaried exempt. But he wants to earn extra money by working a nonexempt, \$8/hour job in another department. Is that legal? And if he works over 40 hours/week in his salaried job, would*

*(continued on page 4)*

## A Closer Look



Here's another set of offerings from Halogen Software's debating panel of HR experts on central issues in the profession. The question was, "Should HR be responsible for the success of corporate social responsibility initiatives?" This is a sampling of responses from the gurus:

**Richard Hadden**, speaker and co-author of the *Contented Cows* series of leadership books: "HR should be responsible for the success of the business through its people strategy. To the extent that that includes social responsibility initiatives, then I suppose HR has some responsibility. But I think to make social responsibility a core function of HR dilutes the effectiveness both of HR and of social responsibility initiatives."

**Libby Sartain**, 30-year veteran of corporate HR, now author and HR adviser: "Social responsibility should be a corporate-wide initiative. It should really be part of the overall branding of the company, and, yes, HR should have a role to provide programming for workers to engage with initiatives. But making HR solely responsible for social responsibility and green initiatives doesn't assure success."

**Lawler** (see p. 2 for his bio): "I do not believe there is any automatic right answer to whether HR should be ...

especially responsible for the success of corporate social responsibility initiatives. I certainly know HR VPs who have this responsibility because of their competence and role in the corporation ... [but] I worry if HR always gets assigned to do things like social responsibility ... that are relatively low priority in corporations."

**Cappelli** (see p. 1 for his bio): "I'd be nervous about taking on that task. The reasons are that these are sometimes controversial initiatives [that] can generate heat ..., HR doesn't really have the ability to make these broad initiatives happen ..., and at least at present, they are not initiatives that drive the business. So these are programs that get noticed only if they cause trouble; I don't see a lot of upside to [HR's] doing them."

**Lance Haun**, VP outreach for MeritBuilder, a consulting firm on corporate culture and employee engagement: "This is purely a CEO-driven initiative. Social responsibility is much larger than HR (if you want to do it right)."

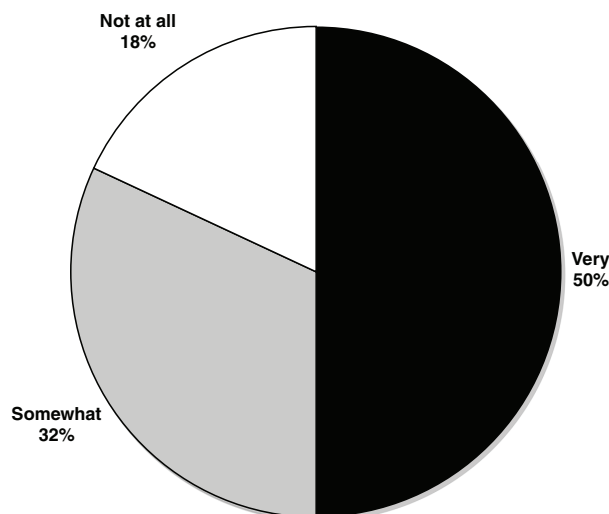
**Bersin** (see p. 1 for his bio): "No, HR can only communicate the value of such programs. Ultimately, social responsibility must be driven from the top and involves financial and time investments by the entire organization."

You can see the rest of the questions and responses from the whole panel, and vote on each response, at [www.halogensoftware.com/hr-raging-debates/](http://www.halogensoftware.com/hr-raging-debates/).

# SURVEY SAYS...

**Q.** How confident are you that all of your organization's exempt employees are classified correctly under FLSA?

**A.**



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## Questions From Our Readers (cont. from pg. 3)

*work at his supplementary job all be paid at time-and-a-half?*

**A:** Unless you handle this in a particular way, you may endanger the employee's exempt status in his store-manager job. You need to establish a salary for his additional job, rather than paying him on an hourly basis. That is, pay him the same amount every week for his second job. You must also ensure that he works fewer hours in the second job than in the first; otherwise, his "primary duty" may shift, and he would no longer qualify for exemption.

**Q:** *During an FLSA audit, we realized that several long-term employees were misclassified as exempt. We'll make them nonexempt, but how much back pay do we owe for overtime that we never tracked?*

**A:** You should estimate the number of overtime hours each of these employees has worked in the past 2 years and pay that amount. Also, require each to sign a release that frees you from further liability. You would only owe them 3 years' overtime if you had willfully misclassified them to avoid paying overtime.

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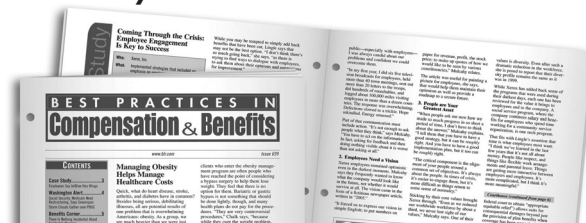
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