Conflicts of Interest [1]

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Widespread corporate scandals of the last decade have heightened public awareness about self-dealing and other conflicts of interest in the corporate context. Congress responded by enacting federal legislation mandating corporate accountability[2] and the formalization of policies governing business ethics in public companies. However, there are many circumstances other than self-dealing that also give rise to conflicts of interest, only some of which are addressed by existing federal and state laws.

A conflict of interest is a divergence between different interests. In the employment context, conflicts of interest are commonplace and take many different forms, but generally arise when an employee's personal or private interests interfere or are likely to interfere with the employee's obligations to the employer. Such conflicts may arise from personal relationships (*e.g.,* nepotism or romantic relationships), or from outside financial or professional relationships or interests (*e.g.,* commitments to other employers, financial interest in a supplier). Conflicts can compromise, or be perceived as compromising, an employee's loyalty, objectivity, or other aspects of job performance. In addition, certain conflicts can result in legal liability or otherwise damage the employer's reputation with its employees and customers, and in the community. It is, therefore, helpful to understand how divergent interests can create problems for a company.

The most common way of managing conflicts is to institute policies to manage them. Employees are often unaware that certain relationships may create an appearance of a conflict and that legal consequences to the employer may result. Preventing conflicts by educating employees and instituting policies to address conflicts can protect an employer from some legal consequences of employee misconduct.[3] This article provides an overview of circumstances that could result in a

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[1] This memorandum contains a summary of information obtained from laws, regulations, court cases, administrative rulings and legal publications, and should not be viewed or relied upon as legal advice. Ater Wynne LLP urges readers of this memorandum to consult legal counsel regarding specific legal issues and factual circumstances.
[2] *See* the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley), 15 USC § 7201 *et seq*.
[3] For example, the *Federal Sentencing Guidelines for Organizations* provide that if a company is found criminally liable as a result of its employees' unlawful actions, the company can reduce its penalty by showing that it established an effective program to prevent and detect violations of law. *See generally, Notes, The Good, The Bad, and Their Corporate Code of Ethics: Enron, Sarbanes-Oxley, and the Problems with Legislating Good Behavior,* 116 Harv L Rev 2123, 2126 (2003).

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conflict of interest, some of the laws governing conflicts of interest, some of the major issues that employers may want to address through policies, contracts, and/or training.

I. Types of Conflicts

There has been no shortage of high-profile news articles in recent years exposing scandals in government and in public and private businesses. The following are some examples.

A. Financial Conflicts

Unrecognized or unmanaged conflicts of financial interest represent a major risk for employers. Self-dealing,[4] insider trading,[5] kickbacks,[6] and other financial transactions can result in civil and/or criminal liability for corporations and individual employees.

- *Boeing Company: Darlene Druyun and CFO Mike Sears*[7]

Darlene Druyun retired in 2002 from her position as the Air Force's Principal Deputy Acquisition Secretary. In 2004, Druyun admitted that she negotiated her new job with Boeing's Chief Financial Officer Michael Sears while she held her government position and exercised authority over Boeing's contract activities. Both Druyun and Sears were fired and received prison sentences for their conduct. Boeing not only lost a significant government contract, but certain of its business units are indefinitely barred from bidding on Air Force launch business, and its reputation was severely damaged.

- *City of Portland: David Hallberg and Nora Mullane*[8]

David Hallberg, a housing inspector, and his wife, Nora Mullane, an inspection supervisor, both worked for the City of Portland. In 2004, the City investigated an accusation that Hallberg and Mullane were buying or attempting to purchase houses on which they had open inspection cases.[9] Dana Turner, whose home was purchased by Hallberg and Mullanne after she lost it to foreclosure, claimed that Hallberg used his position to target homes "owned by the elderly, the infirm, the poor, and others whom Hallberg knew or felt would not have the strength or resources to fight the City's bureaucracy, even to save their homes." The alleged conduct violated state and city ethics and conflict of interest laws.[10] Hallberg lost his job and Mullane was reprimanded in connection with the incident.

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[4] *See* ORS 60.361 (defining conflict of interest transactions in private corporations).
[5] *See* Securities Exchange Act of 1934, 15 USC § 78j, and SEC Rule 10b-5 (prohibiting insider trading).
[6] *See* Anti-Kickback Enforcement Act of 1986, 41 USC § 51-58 (prohibiting gifts and gratuities in federal contract procurement).
[7] Washington Technology, 11/22/04; Infotech and the Law: Druyun fallout will be felt long and hard; http://www.washingtontechnology.com/news/19_17/federal/25009-1.html.
[8] *See Portland Tribune*, 3/12/04; Trust may come with changes; http://www.portlandtribune.com/archview.cgi?id=23460; *Turner v. Hallberg,* 2005 WL 708341 (D Or 2005).
[9] *Turner v. Hallberg*, 2005 WL 708341 (D Or 2005).
[10] *See* ORS 244.040; Portland City Code § 1.03.

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B. Professional Conflicts

Outside commitments may infringe on an employee's time, energy, and use of company resources. Community service, moonlighting, and competing with an employer are the kinds of activities that present professional conflicts of interest. Employers often address such conduct through policies and/or agreements that define what property belongs to the company, what use of company property is authorized, and restricting the employee's ability to compete during and after employment. Such agreements are often subject to limitations under state law.

- *Western Medical Consultants, Inc. v. Johnson*[11]

Shannon Johnson signed an Employee Confidentiality Agreement with Western Medical Consultants that prohibited her from competing with Western within 50 miles of any Western office for five years after her employment terminated. Western had Johnson research the market potential for opening an Alaska office, but did not act on the opportunity while she worked there. When she later resigned and opened an office in Alaska, Western sued. The court found no violation of the noncompete because Western had no Alaska office when Johnson opened her business, and she was convinced when she left Western that it did not intend to develop the Alaskan market. The court also found no improper use of Western's resources and confidential information because the data Johnson used to market her business was readily available from public sources.

- *Alexander & Alexander Benefits Servs., Inc. v. Benefit Brokers & Consultants, Inc.*[12]

Donald Econe worked in the Portland office of Alexander & Alexander, a benefits consulting firm, for over 20 years. His last position was managing vice president. While still employed, he recruited the three other key employees in the office to start a competing business. These employees used company time and resources to make plans to set up the competing business, including the solicitation of Alexander & Alexander customers. Although the employees had not signed confidentiality or noncompete agreements, the court found that such actions, if proved, would constitute a breach of fiduciary duty. While the employees could prepare to compete with Alexander & Alexander while still employed, they could not use Alexander & Alexander's time, resources, and confidential information to do so. Econe could not lawfully solicit co-workers to leave Alexander & Alexander for a competing business while they were all still employed, and the en masse resignation amounted to a breach of fiduciary duty by all of the employees. Having accepted the benefits of the employees' breach, the new business could also be held liable.

C. Personal Conflicts

Personal conflicts of interest most often arise when a company employs members of the same family, or co-workers are involved in a romantic relationship. Many companies address these

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[11] 80 F3d 1331 (9th Cir 1996) (applying Oregon law).
[12] 756 F Supp 1408 (D Or 1991) (applying Oregon law).

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situations through non-fraternization[13] and anti-nepotism[14] policies, which have been upheld in Oregon.[15] Despite the attention such conflicts have received over the years, the problem remains fairly common.

- *Boeing Company: Former CEO Harry Stonecipher*[16]

Harry Stonecipher, who implemented Boeing's code of conduct after the Darlene Druyun scandal and insisted that all employees sign whistle-blowing agreements imposing a duty to report ethical issues, was forced to resign over a consensual extra-marital affair with a Boeing employee in March of 2005. An outside investigation followed a complaint by another employee and Boeing's board ultimately concluded that his behavior violated a code stating employees "will not engage in conduct or activity that may raise questions as to the company's honesty, impartiality, reputation or otherwise cause embarrassment to the company."[17] There has been speculation that it was not the affair, but the exchange of "raunchy e-mail" between the two lovers that resulted in Stonechipher's dismissal.[18]

- *Guardsmark, LLC and Service Employees International Union Local 24/7*[19]

Guardsmark, a private security firm, instituted three rules, two of which restricted fraternization. One rule required employee complaints to be lodged through the chain of command and prohibited employees from complaining to any client representative. Another rule provided that employees could not "fraternize on duty or off duty, date, or become overly friendly with the client's employees or with co-employees." The union filed unfair labor practice charges with the NLRB against Guardsmark, claiming that the rules infringed its employees' Section 7 rights.[20]

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[13] Non-fraternization policies typically prohibit dating between co-workers or supervisors and subordinates. This type of policy has been upheld in Oregon and many other states.
[14] While Oregon law prohibits discrimination based solely on employment of another family member, an employer may impose restrictions based on familial relationship in limited circumstances that could amount to a conflict of interest (*e.g.,* when an individual would be placed in a position of exercising supervisory, appointment or grievance adjustment authority over a member of the individual's family). *See* ORS 659A.309.
[15] *See, e.g., Patton v. J.C. Penney,* 301 Or 117, 719 P2d 854 (1986) (employee terminated for dating co-worker failed to state a claim for wrongful discharge or intentional infliction of emotional distress); *but see Rulon-Miller v. International Business Machines,* 208 Cal Rptr 524 (1984) (employee fired for dating employee of competitor prevailed against on claims for wrongful discharge and intentional infliction of emotional distress); *see also* California Labor Code § 96(k) (prohibits employers from taking adverse actions against employees for engaging in lawful off-duty conduct).
[16] *Extramarital affair topples Boeing CEO*, USA Today, 3/7/05; http://www.usatoday.com/money/industries/manufacturing/2005-03-07-boeing-stonecipher_x.htm.
[17] *Fatal Attractions,* Guardian UK Observer, 3/13/05, http://www.guardian.co.uk/ethicalbusiness/story/0,14713,1436231,00.html.
[18] *Id.*
[19] 344 NLRB No. 97 (2005).
[20] Section 7 of the National Labor Relations Act grants workers the right to "self-organization, to form, join, or assist labor organizations***and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection***." 29 USC § 157.

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In June 2005, the NLRB held that Guardsmark's "chain-of-command" rule infringed on the employees' right to enlist the support of an employer's customers or clients regarding complaints about the terms and conditions of employment. However, the NLRB upheld the fraternization rule, finding that the rule was designed to provide safeguards to avoid compromising security due to personal entanglements and was, therefore, justified. One NLRB member dissented, pointing out that the rule already mentions dating, making it likely that workers would understand fraternization to mean something else ("the primary meaning of the term 'fraternize' * * * is 'to associate in a brotherly manner,' *** and that kind of association is the essence of workplace solidarity.").

- *Miller v. Department of Corrections*[21]

The EEOC has long held that favoritism afforded a paramour is not actionable under Title VII.[22] However, an exception exists when "(1) the relationship was coerced, not consensual or (2) favoritism based on sexual favors is widespread (thus creating a sexual hostile environment or otherwise creating the message that employees must submit to advances to get ahead in their careers)."[23] That exception recently played out in California.

In *Miller*, the chief deputy warden at a state prison had overlapping affairs with three female subordinates over a five-year period. Those involved were not discreet and the affairs were common knowledge at the workplace. The plaintiffs, two female employees, alleged that the warden gave preferential treatment to his paramours. The California Supreme Court stated that while isolated instances of favoritism by a supervisor toward an employee with whom the supervisor is conducting a consensual sexual affair ordinarily would not constitute sexual harassment, "when sexual favoritism in the workplace is sufficiently widespread it may create an actionable hostile work environment in which the demeaning message is conveyed to female employees that they are viewed by management as 'sexual playthings' or that the way required for women to get ahead in the workplace is by engaging in sexual conduct with their supervisors or the management."

D. Misuse of Company Property or Funds

Employees often use company time and equipment to pursue their own personal interests. In recent years, this has particularly been a hot topic for government and nonprofit employees, prompting more rigorous government oversight.[24]

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[21] 2005 WL 1661190 (Cal 2005).
[22] EEOC Policy Guide on Employer Liability for Sexual Favoritism Under Title VII, http://www.eeoc.gov/policy/docs/sexualfavor.html ("Title VII does not prohibit isolated instances of preferential treatment based upon consensual romantic relationships. An isolated instance of favoritism toward a 'paramour' (or a spouse, or a friend) may be unfair, but it does not discriminate against women or men in violation of Title VII, since both are disadvantaged for reasons other than their genders.").
[23] Id.
[24] *See footnote 10, supra.* The Oregon Government Standards and Practices Commission has developed *A Guide for Public Officials* (available at www.gspc.state.or.us) that deals with conflict of interest issues for public servants, including misuse of public equipment for personal purposes.

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- *United Way*[25]

Oral Suer, the former chief executive of the United Way of the National Capital Area (UWNCA) for 27 years until his retirement in February 2001, pleaded guilty to defrauding the charity of almost $500,000. Suer charged the organization for personal expenses such as bowling equipment and trips to Las Vegas, paid himself $333,000 for annual leave he had taken, and took $94,000 more than his share from the charity's pension plan. The investigation revealed that during his tenure, the United Way withheld from charities more than $1 million it had collected for them.

Since the scandal broke in 2002, the UWNCA's fundraising drive among private employers last fell from its peak of $90 million raised in 2001 to about $19 million. It laid off more than half its workforce, closed several regional offices, and relinquished its contract to run the workplace campaign for federal employees.

- *Paul C. Cabot, Jr.* [26]

A member of one of New England's oldest families, Paul C. Cabot, Jr., of Needham, has agreed to pay back more than $4 million to a family charitable foundation that he drained over several years to support a lifestyle that included a palatial family compound in Boca Grande, Fla., and a lavish wedding for one of his daughters. [27]

II. Laws Governing Conflicts

In this part 2, we identify specific statutory and common law constraints on conduct that raises a conflict of interest. However, as the examples in part 1 suggest, the public's perception of conflicts of interest may be a significant a problem, even when the conduct in question does not violate the law. Consequently, employers should consider requiring employees to disclose potential conflicts even when the conduct at issue is not illegal.

A. Anti-Kickback Enforcement Act of 1986

The Anti-Kickback Enforcement Act of 1986[28] prohibits government contractors and subcontractors from giving or receiving anything of value that is intended to result in favorable treatment.[29] The term "kickback" is defined broadly to include "any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind which is provided, directly or indirectly, to any prime contractor, prime contractor employee, subcontractor, or subcontractor

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[25] *Area United Way's Ex-Chief Admits $500,000 Fraud*, Jacqueline L. Salmon, Washington Post, 3/5/04, http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&contentId=A31702-2004Mar4¬Found=true.
[26] *Foundation Chief Agrees To Repay Over $4M - Papers show Cabot spent funds on self*, Boston Globe, 12/14/04; http://boston.com/news/local/articles/2004/12/16/foundation_chief_agrees_to_repay_over_4m/
[27] *Id.*
[28] 41 USC § 51 *et seq.*
[29] 41 USC § 53.

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employee for the purpose of improperly obtaining or rewarding favorable treatment in connection with a prime contract or in connection with a subcontract relating to a prime contract."[30]

Violators are subject to ten years' imprisonment and a fine of up to twice the amount of the kickback, but not exceeding $10,000 per violation.[31]

B. The Sarbanes-Oxley Act of 2002[32]

Congress passed the American Competitiveness and Corporate Accountability Act, commonly known as Sarbanes-Oxley, following a series of high-profile public company scandals and bankruptcies (*e.g.,* Enron, Tyco, Worldcom).[33] The Act was designed to increase transparency, integrity, and corporate accountability of public companies, and to combat the fraud and deceit that gave rise to the corporate disintegration of the last few years. Section 406 of the Act and the corresponding SEC regulations require publicly traded companies to disclose whether they have adopted codes of ethics for senior financial officers (chief executive officer, chief financial officer, and controller, or persons performing similar functions). Any failure to adopt such a code, or any related waivers, must be explained.[34]

The code of ethics is supposed to include standards that are designed to deter wrongdoing and promote:

1. Honest and ethical conduct, including the ethical handling of actual or apparent conflicts of interest between personal and professional relationships;

2. Full, fair, accurate, timely, and understandable disclosure in reports and documents that a registrant files with, or submits to, the Commission and in other public communications made by the registrant;

3. Compliance with applicable governmental laws, rules and regulations;

4. The prompt internal reporting of violations of the code to an appropriate person or persons identified in the code; and

5. Accountability for adherence to the code.[35]

The SEC does not proscribe the use of any particular language, but rather encourages companies to adopt codes of conduct that are more comprehensive than necessary to meet the disclosure

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[30] 41 USC § 52(2).
[31] 41 USC §§ 54-55.
[32] 15 USC § 7201 *et seq*.
[33] See generally, *Notes, The Good, The Bad, and Their Corporate Code of Ethics: Enron, Sarbanes-Oxley, and the Problems with Legislating Good Behavior*, 116 Harv L Rev 2123 (2003); Lyman P.Q. Johnson and David Millon, *Recalling Why Corporate Officers Are Fiduciaries*, 46 Wm. & Mary L Rev 1597, 1599 (2005).
[34] 15 USC § 7264(a).
[35] 17 CFR 229.406.

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requirements.[36] While not binding on private companies, the Act provides guidance that may be used as an example of "best practices."

C. Statutory and Common Law Protection from Misuse of Company Property and Assets

Oregon allows employers to impose restrictions on employees' post-termination conduct to protect confidential information, trade secrets, and business relationships established by an employer that may be used by an employee to compete.[37] In the employment context, noncompetition agreements may be imposed only upon initial employment and in connection with a *bona fide* advancement.[38] There is no reported Oregon appellate decision construing the term "bona fide advancement."[39] However, the federal courts that have considered it all agree that an "advancement" generally requires an increase in responsibility as well as pay.[40] In addition to the statutory requirements limiting the circumstances in which noncompetition agreements are permissible, Oregon courts impose three additional requirements: (1) the agreement must be limited in its application as to time and geographic scope, (2) the agreement must be in exchange for good consideration, and (3) the employer must have a legitimate, protectible interest.[41]

Employers may define by contract the ownership of ideas and inventions developed during the employment relationship and impose restrictions on an employee's right to use and disclose confidential information and trade secrets both during and after employment. Even in the

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[36] SEC Release Nos. 33-8177; 34-47235; File No. S7-40-02; http://www.sec.gov/rules/final/33-8177.htm:

> We continue to believe that ethics codes do, and should, vary from company to company and that decisions as to the specific provisions of the code, compliance procedures and disciplinary measures for ethical breaches are best left to the company. Such an approach is consistent with our disclosure-based regulatory scheme. Therefore, the rules do not specify every detail that the company must address in its code of ethics, or prescribe any specific language that the code of ethics must include. They further do not specify the procedures that the company should develop, or the types of sanctions that the company should impose, to ensure compliance with its code of ethics. We strongly encourage companies to adopt codes that are broader and more comprehensive than necessary to meet the new disclosure requirements.

[37] ORS 653.295.

[38] ORS 653.295(1) and (2). While the noncompetition statute does not list the types of agreements that are *outside* the employment context, it does incorporate by reference the definitions of "employer" and "employee" from ORS 652.310, which limits the application of ORS 653.295 to parties in a current employment relationship, and a former employment relationship to the extent the employer has not paid the employee in full. The full range of circumstances in which noncompete agreements are permissible in Oregon is beyond the scope of this memorandum.

[39] *See Nike v. McCarthy*, 379 F3d 576 (9th Cir 2004).

[40] *Id.* at 582 (employee received a bona fide advancement where he was given a new title, new duties, in a new supervisory role, and received a higher salary); *see also, First Allmerica Financial Life Ins. Co. v. Sumner*, 212 FSupp2d 1235, 1241 (D Or 2002) ("bona fide advancement" necessarily requires an increase or improvement in job status or responsibilities that justifies a change in the way the employer entrusts client contacts and business related information with the employee).

[41] *Olsten Corp v. Sommers*, 534 FSupp 398, 395 (D Or 1982); *see also, Eldridge v. Johnston*, 195 Or 379, 403, 245 P2d 239 (1952).

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absence of a written agreement, courts will prohibit an employee from divulging an employer's confidential information or trade secrets for the employee's benefit or the benefit of a third party based on the statutory prohibition against the misappropriation of trade secrets[42] or a common law duty of loyalty or to act as a fiduciary.[43] A third party who benefits from an unlawful disclosure or misappropriation may be liable for intentional interference with economic relations.[44]

D. Foreign Corrupt Practices Act (FCPA)[45]

The FCPA, like the The Sarbanes-Oxley Act, was prompted by a series of corporate scandals. However, the FCPA deals with businesses, directly or indirectly, who bribe foreign officials:

> As a result of SEC investigations in the mid-1970's, over 400 U.S. companies admitted making questionable or illegal payments in excess of $300 million to foreign government officials, politicians, and political parties. The abuses ran the gamut from bribery of high foreign officials to secure some type of favorable action by a foreign government to so-called facilitating payments that allegedly were made to ensure that government functionaries discharged certain ministerial or clerical duties. Congress enacted the FCPA to bring a halt to the bribery of foreign officials and to restore public confidence in the integrity of the American business system.
>
> The FCPA was intended to have and has had an enormous impact on the way American firms do business. Several firms that paid bribes to foreign officials have been the subject of criminal and civil enforcement actions, resulting in large fines and suspension and debarment from federal procurement contracting, and their employees and officers have gone to jail. To avoid such consequences, many

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[42] *See, e.g.,* ORS 646.461 *et seq*. To establish a violation of Oregon's law prohibiting misappropriation of trade secrets, it must be shown that a defendant has been unjustly enriched by the intentional misappropriation of a "trade secret." *MAI Systems Corp. v. Peak Computer,* Inc., 991 F3d 511, 520 (9th Cir 1993). A "trade secret" includes information such as a drawing, cost data, customer list, formula, pattern, compilation, program, device, method, technique or process that (1) derives independent economic value from not being generally known to the public or others who can obtain economic value from its disclosure or use; and (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. ORS 646.461(4).

[43] *See, e.g., McCombs v. McClelland,* 223 Or 475, 483-484, 354 P2d 311 (1960); *see also, Stevens v. First Interstate Bank of California*, 167 Or App 280, 286, 999 P2d 551, 554 (2000) ("The gravamen of the tort of breach of confidentiality in Oregon and nationally is the affirmative disclosure of information by a person to whom the confidential information has been entrusted.").

[44] The elements of intentional interference with economic relations under Oregon law are: (1) the existence of a professional or business relationship; (2) intentional interference with that relationship; (3) by a third party; (4) accomplished through improper means or for an improper purpose; (5) a causal effect between the interference and the harm to the relationship or prospective advantage. Improper means under the second element can be established by showing a violation "of a statute or other regulation, or a recognized rule of common law, or perhaps an established standard of a trade or profession." *Top Service Body Shop v. Allstate Ins. Co.,* 283 Or 201, 209-10 (1978).

[45] 15 USC § 78dd-1 *et seq.*

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firms have implemented detailed compliance programs intended to prevent and to detect any improper payments by employees and agents.[46]

In general, the FCPA prohibits payment of a bribe in the form of money, products, or services to any foreign official to obtain or retain business from, or direct business to any person. The FCPA also prohibits payments to any third party knowing that the third party will then pass the payment along to a foreign official for the above purposes. The Department of Justice warns that "[i]n addition, other statutes such as the mail and wire fraud statutes, 18 USC § 1341, 1343, and the Travel Act, 18 USC § 1952, which provides for federal prosecution of violations of state commercial bribery statutes, may also apply to such conduct."[47]

To avoid liability for improper third party payments, companies should engage in appropriate due diligence to ensure they are partnering with reputable and responsible agents. Corporations and other business entities that violate the FCPA are subject to a fine of up to $2,000,000. Individual violators are subject to a fine of up to $100,000 and imprisonment for up to five years.

E. Further Restrictions on Corporate Officers and Directors

Corporate officers and directors are subject to statutory duties of care, loyalty, and disclosure of conflicts of interest.[48] For example, directors are expected to operate under "the business judgment rule," under which it is presumed that in making a decision, the disinterested directors acted on an informed basis, in good faith, and in the honest belief that the action was in the best interest of the corporation.[49] Enhanced duties are generally required under state and federal law when a corporation is the subject of a tender offer, merger proposal, proxy contest or other potential change of control.

III. Policies and Prevention

Individuals rarely live solely for their jobs and are generally free to engage in financial, business, and other private activities unrelated to their jobs. However, employers have the right to insist that such activities are lawful and free of conflicts from responsibilities to the employer.

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[46] Foreign Corrupt Practices Act Antibribery Provisions (Dec. 2004), http://www.usdoj.gov/criminal/fraud/fcpa/dojdocb.htm.

[47] *Id.*

[48] Under ORS 60.361, directors are expected to disclose any conflict of interest. Under ORS 60.357(1), a director must discharge his or her duties "in good faith, with the care an ordinarily prudent person in a like position would exercise under similar circumstances and in a manner the director reasonably believes to be in the best interests of the corporation." Officers have a similar duty under ORS 60.377. *See generally, Enyart v. Merrick,* 148 Or 321, 329, 34 P2d 629 (1934) ("The general rule as stated in Fletcher's Cyclopedia of the law of corporation, is that directors and other officers, while not trustees in the technical sense in which that term is used, occupy a fiduciary relation to the corporation and to the stockholders as a body.").

[49] *See generally,* Lymon P.Q. Johnson and David Millon, *Recalling Why Corporate Officers Are Fiduciaries,* 46 Wm & Mary L Rev 1597 (2005).

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The most common ways to manage conflicts of interest are through agreements, policies, training, and good communication. Common subjects to address through policy development include:

- Code of Ethics/Conflict of Interest[50]
- Procurement
- Use of Company Resources (including use of telephone, computers, email, voicemail, Internet, vehicles, copiers, etc.)
- Outside Activities and Moonlighting
- Confidentiality of Proprietary Information and Trade Secrets
- Fraternization and Nepotism (to the extent permissible)
- Compliance with state or federal laws applicable to public companies and contractors (*e.g.,* insider trading, anti-kickback, foreign corrupt practices)
- Gifts and Gratuities
- Whistle-Blowing and Reporting Policies
- Communicating with the Media[51]
- Defamation and Disparagement (*e.g.,* in investor chat rooms)[52]

Of course, policies are only useful if they are communicated, understood, and consistently enforced. In perhaps the most infamous recent example, Enron's officers failed to comply with Enron's Code of Conduct of Business Affairs, resulting in significant corporate losses.[53] As the Enron ordeal made clear, "a corporate code of behavior is only as good as the people charged with enforcing it and those who must demonstrate the importance of compliance by their example."[54]

Of all the topics that may be addressed through written policies, restrictions on off-duty conduct and personal relationships are the most difficult. There is typically no easy way to determine whether employees are complying with such restrictions. In addition, enforcement may raise as many problems as the conflict itself.

Despite the difficulties they present, policies prohibiting fraternization and/or dating between co-workers, or limiting such relationships to employees who are not in the same chain of command, are fairly common. However, such policies force employers to more closely monitor the existence of workplace relationships. The failure to do so may result in unequal application of the policy (whether real or perceived) and lead to claims of discrimination.[55] On the other hand, monitoring employees' behavior may give rise to claims for invasion of privacy, particularly if

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[50] *See generally,* Simon M. Lorne, *Sample Code of Ethics Documents,* 1464 PLI/Corp 727 (2005).
[51] Public employers have constitutional limitations on their ability to control employee speech.
[52] *Id.*
[53] *See generally, Notes, The Good, The Bad, and Their Corporate Code of Ethics: Enron, Sarbanes-Oxley, and the Problems with Legislating Good Behavior*, 116 Harv L Rev 2123, 2129 (2003).
[54] *Id.* at 2120-2131.
[55] *See, e.g., Zentiska v. Pooler Motel, Ltd.*, 708 F Supp 1321 (SD Ga 1988) (employee established prima facie sex discrimination claim based on enforcement of no-dating policy where evidence showed male employees had not been disciplined for similar behavior).

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the employer's means of monitoring employees is intrusive.[56] In the event of a violation, such policies may provide for the termination of both employees, the termination of the less senior employee, or a decision between the employees as to which one will resign (failing which, the employer may fire one or both). While facially neutral, rules that require the discharge of the less senior employee may have a disparate impact on women (due to the "glass ceiling" effect or the less likely scenario of a male subordinate dating a female supervisor).

A date-and-tell policy allows a company to enforce a notice requirement (the “tell”) rather than impose discipline based on the existence of the dating relationship. Notice to the company may be required in all circumstances, or required only if the employees are in a supervisory-subordinate work relationship. Aside from the obvious intrusion into employees’ privacy, date-and-tell policies may force gay and lesbian employees out of the closet, or compel workers to admit to extramarital affairs.

A “love contract” is basically an informed consent agreement under which co-workers acknowledge that their relationship is consensual and not in violation of the employer's anti-harassment policy (which both parties are typically asked to (re)read). Such agreements may also include an acknowledgment that either party may end the relationship without adversely affecting their employment, an agreement to use the employer's complaint procedure if job-related problems arise, and an agreed upon mechanism for resolving any related disputes. Love contracts are particularly useful when a supervisor is involved in a relationship with a subordinate in the chain of command, whether or not the other person is a direct or indirect report.

Prohibitions on relationships with non-employees are also troublesome. While employers may have legitimate concerns about employees leaking confidential information to someone with whom they have a romantic relationship (*e.g.*, where one employee has access to confidential information or where the employee's spouse or partner works for a competitor), firing an employee for simply dating a non-employee is risky. For example, in *Rulon-Miller v. International Business Machines*,[57] an employee who was fired for dating the employee of a competitor prevailed against the employer on claims for wrongful discharge (based on the implied covenant of good faith and fair dealing [58]) and intentional infliction of emotional distress. It is better to address concerns about sharing company secrets through confidentiality agreements, assignment of rights agreements, and restrictions on competition and solicitation.

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[56] *See, e.g., Todes v. DeClue*, 1989 WL 81311 (Tex App 1989) (employees liable for invasion of privacy where they independently conducted surveillance on a co-worker at social events to confirm rumors of fraternization); *Stiver v. Olsten Kimberly Quality Care*, 2001 US App LEXIS 23807 (9th Cir 2001) (unpublished opinion) (employee who claimed he was fired for his extramarital romantic relationship with a coworker sued for invasion of privacy and wrongful termination).
[57] 208 Cal Rptr 524 (Cal 1984).
[58] The fact that the employer had a written policy promising to protect its employees' right to privacy clearly affected the outcome in the case. *Compare, Foley v. Interactive Data Corp.*, 47 Cal3d 654, 765 P2d 373 (Cal 1988) (rejecting tort cause of action for breach of implied covenant of good faith and fair dealing).

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