ETHICS IN HR

Ethics and Legal Considerations

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I. Is there a difference between illegal and unethical?

HR is not a licensed regulated profession. Several other professions (law, medicine, social work, nursing, realty, barbering/cosmetology, insurance) require a state licensure, are regulated, and have ethics codes which are in fact part of the state law. People must take annual ethics courses to maintain the license. Each has an Ethics Board which can investigate, punish, fine, or revoke the license for ethics violations. There is oversight, aggressive enforcement, and serious consequences.

HR is not one of these professions. There is a SHRM Code of Ethics. However, there is no legal enforcement mechanism. It is actually a set of Guidelines to which professionals are encouraged to give attention.

The HR practitioner can give serious attention or may choose to treat the code as a set of "platitudes," to be selectively interpreted.

So, why is the Coe of Ethics important?

Is the SHRM Code of Ethics really the ethics standard one should follow? Or is there a "higher duty?" Are there more ethics issues? Why would an HR professional find it important to follow ethics? What other motivators and liabilities exist?

Who does one owe the ethical duties to? The corporation? The employees? The public? Oneself? And which takes priority in conflicting instances?

How far does one go in exercising their interpretation of an ethical duty?

II. Does an HR person have an obligation to advise an employee of their legal rights?

How best to discuss an illegal or unethical situation with the appropriate personnel. What are some things you should NOT do?

There is a duty in many cases to make sure employees are aware of their rights. One cannot "hide" rights or allow a person unsophistication or ignorance to prevent them from using rights for which they are eligible:

Bait And Switch. An Administrative Assistant in a care facility informed Human Resources that she needed a hip operation and had scheduled it for January 31st, after her January 25th one-year anniversary, when she would have FMLA eligibility. She did this due to the company policy requiring 30 days' notice of any planned FMLA leave. On January 9th HR told the employee to take immediate leave, so she would not subject herself to any further injury (even though the employee had no medical restrictions and was in an office job). Then HR urged her to "move up" her operation to January 17th if she could and guaranteed that FMLA leave would be granted, and her job preserved. So, the employee did so. However, on January 22nd she received a letter denying FMLA due to "not yet being eligible." On January 24th she was informed her position was being replaced, and her employment terminated. She filed a complaint for FMLA interference. The court found solid grounds for the suit. Had the employee unilaterally left for surgery there would be no FMLA issue. However, Human Resources baited her into leaving early, and promised that she would receive FMLA protection. The employer could not then switch and spring a trap of its own design and take unfair advantage. The action was a denial of FMLA rights, and interference with leave. Further, an employer should not be able to take advantage of the FMLA's advance notice requirements, and its own policy by asking for such notice, then terminating those who complied. This would turn the advance notice requirements "into a trap for newer employees" and violate the protection purpose of the law. *Reif v. Assisted Living by Hillcrest LLC* (7th Cir., 2018).

Employer Cannot Be Passive – Must Actively Ask For Clarifying Information. This case is yet another reminder that the employer has a duty greater than just putting out an FMLA policy; there is more of an "interactive process" required. In *Coutard v. Municipal Credit Union* (2nd Cir., 2017), an employee requested FMLA to care for his grandfather. The employer simply rejected the request, stating that care of grandparents is not covered by FMLA. The employee, who had been raised by his grandfather, took leave anyway, and was fired for unauthorized absence. The employee later found out that FMLA can also apply for *in loco parentis* relationships (stepparents, foster parents and relatives who raised you like a parent). He then sued the credit union for improper denial of FMLA. The employer defended by claiming that the employee never mentioned *in loco parentis* and these words were in its policy; it was not obligated to inform employees of any details once it gave out the policy and the federal forms. The court disagreed. The employer should have asked about the nature of the grandparent relationship before simply rejecting the leave. Once the employee applies "it is up to the employer to request additional information." Extended families are now common, and grandparents or others often raise children in the place of parents. Further, most employees do not speak Latin, and have no clue what obscure legalistic Latin term such as *in loco parentis* may mean in a policy. The employer is the more sophisticated party, and is expected to provide help

and guidance, rather than be passive and expect the less aware worker to figure it all out. The FMLA regulations state "the employee need not expressly assert rights under the FMLA, nor even mention the FMLA . . . the employer will be expected to obtain any additional required information . . ." by interacting with and asking the employee (29 CFR §825.303).

However, how far can you go without violating the duty to the organization?

HR Managers' Duty of Professionalism - *HR Manager Fired for Advising Employee to Sue Company.* In *Gogel v. Kia Motors Mfg., Inc.* (11th Cir, 2020), the court ruled that the company could validly fire a Human Resources Manager when it found out she had secretly advised an employee to file discrimination cases and had helped that employee contact and obtain an attorney to do so. In dismissing the former HR Manager's Title VII retaliation case, the court held that a manager's "right to oppose discrimination does not give license to engage in acts that so interfere with the performance of the job that it renders the employee ineffective in the position for which they were employed." The HR Manager breached the employer's trust and the duty of professionalism in a way that Title VII "was not intended to immunize." An HR professional is supposed to implement internal policies and practices to address discrimination and other issues and not do a behind the scenes end-run which undermines that process and/or the company' s decisions as to what actions to take – whether the manager agrees with them or not. Doing otherwise destroys the organization' s faith that the manager can be professionally trusted to implement policies and be trusted to participate in the often sensitive, confidential and often "privileged" communications and discussions about legally fraught issues. An HR Manager is supposed to work with the company, not against it. However, this does not remove HR Managers from the law' s anti-retaliation coverage. HR staff and other managers have every right to raise concerns about discrimination; every right to object to company policies or decisions and every right to advocate for changes when they believe practices or decisions are wrong, and especially contrary to the laws. It should be done internally, using the authority and scope of the manager' s position and the internal process. Any retaliation for this activity is protected under the law. The manager may also file their own legal actions regarding discrimination or ethics or other "whistleblower" matters and be protected from retaliation. The problem in this case was departing from the professional duty and doing a secret, end-run which undermined the company process, and the company' s trust.

Duty of Professionalism and Trust to the Organization

As stated above, the HR Manager has a duty of professionalism and must be trusted by the organization – even when the HR Manager (as with any other Manager) does not always agree with the organization's decisions. The organization must trust them not to undermine or end-run or reveal the details of their disagreement.

Most decisions one may disagree with are not illegal

Managers advise the organization, providing expertise as to decisions regarding the policies, process and people. There is latitude for difference of opinion, and decisions are made contrary to one's best advice, one can argue and raise concern, these are outside the scope of illegality, even when the organization is taking a "calculated risk," but within the realm of the legal limits.

In recommending policies, BE CAREFUL in pushing too hard. Pushing too hard for a no fraternization policy was alleged to have caused harm to one in-house legal counsel's career. She sued and lost. *Carpenter v. Federal National Mortgage Assoc.,* 165 F.3d 67 (D., D.D. 1999). "Espousal views for or against fraternization is not a surrogate for male or female," and is not a stand against discriminatory practice since the policy prohibits not just "unwelcome" discriminatory romantic associations, but all romantic associations. "A position on either side of this issue is in no way a proxy of gender bias."

Not every technical glitch is a tangible violation of law

De minimis flaws which pose no tangible or significant harm are generally not in the realm which would result in any personal or organizational liability. They do not require "taking a stand" and going outside the organization. They are probably not within the scope of protected activity laws.

However,

III. There can be organizational and personal liability for engaging in or complicity with illegal acts and decisions.

Going along with or keeping quiet about illegality may in some cases result in personal liability – even criminal charges – for the "complicit" HR Manager.

- Can an HR person be held personally liability for participating in an illegal process?
- Can an HR person be held personally liable for participating in an unethical process?

Yes

Tyson Suspends Managers Who Organized Betting Pool on How Many Plant Employees Would Catch COVID. Tyson Foods has suspended several managers in charge of an Iowa meat or chicken processing plant for allowing unsafe conditions and for organizing a management betting pool on how many workers would contract COVID-19 as it spread through the plant because they knew the plant was unsafe. Management ignored pleas from the local sheriff and health department to close the plant due to unsafe COVID conditions which were spreading the disease into the community. Over 1,000 plant employees became COVID infected and several died. (Plus, numerous secondary infections of family and community members.) The betting pool came to light after suits were filed over the situation. The cases alleged intentional disregard of safety; lying to employees about being in a COVID-free facility even after 12 employees were in ICU and, ordering known exposed and infected employees to continue working on shoulder-to-shoulder processing lines with others. The company retained an independent legal team led by former U.S. Attorney General Eric Holder to come in and investigate the situation. The suits for gross negligence, intentional disregard and fraudulent representation are continuing. *Buljic, et al. v. Tyson Foods, et al., and Fernandez v. Tyson Foods, et al.* (N.D. Iowa, 2020). The first duty of all managers is the health, welfare, and safety of their employees. Under OSHA it is in the Duty of Care section. However, it is a general duty pervading employment laws and ethics.

- Should ethics be compromised for profits?
- How do you balance short-term profits and long-term ethical responsibility?

Duty to Successors for "Aftermath" Issues - *It May Not Be Over When You Sell The Business.* In *Trujillo v. Omni Baking Co.* (Sup. Ct. NJ, 2021) the court ruled that a company failed to correct defects and ensure the facility was safe before the owners sold it to a successor, and thus, was liable to the new owners and to an employee of the new company who had her right arm amputated by defective equipment. The seller had a Duty of Care to the purchaser and its employees to prevent foreseeable harm. The employee caught her arm in a dough conveyer. The sellers had knowledge the equipment was dangerous and unguarded, had failed inspection, but it was still present and unfixed at the time of sale. It was foreseeable that a worker would at some point suffer injury and the seller should have fixed, replaced the equipment, or given clear warning about the danger.

IV. Personal Liability

Personal liability. Increasingly, HR Managers are named in cases, and the plaintiffs are seeking and collecting damages directly from personal assets.

Criminal liability. A number of Managers have gone to jail for employment issues which also violate state or Federal criminal laws. These involve wages/hours; destruction of employment records; non-compete practices; taking or giving bribes; harassment and bullying, privacy and a number of other employment practice issues.

Criminal Conviction and All Managers Fired for Utter Disregard of Safety – Putting Production Goals Before Employees. A Montana coal mining company has plead guilty, will pay $1 million and have several years of probation for utter and willful disregard of employee safety and for fraud in falsifying safety reports. The company president/CEO and mine managers directed employees to illegally pump toxic waste into unused sections of the mine, and pressured employees not to report injuries. Workers suffered significant injuries, including an amputation, but managers falsified safety reports in order to meet their "reporting standards", production goals and keep equipment operating. In addition to the $1 million fine, all of the involved executives and managers have been fired. *USA v. Signal Peak Energy, LLC* (D.C. Mo, 2022)

How do you inform your organization about potential law violations?

- Know the law and the provisions of concern
- Know the facts as they apply to the law
- What is the level of the people you need to advise and your authority (can you direct them to do or not do? Are they a separate or higher level which you advise but cannot "direct?")
- Consult with organization attorney? What do you do if your advice is not accepted? And/or you are directed to continue the process
- Documentation

(And how do you protect yourself from liability for any ongoing law violations by the organization?)

- How serious is the issue? Reasonable minds can differ? Or flat out illegal?
- Documentation to cover yourself (without being an "in-your-face" diatribe) establish that you raised the concern

V. Should you ever consult an outside attorney if you become aware of unethical processes or procedures?

Yes. If they are tangibly illegal or fraudulent and of a serious nature, especially personal liability.

Your attorney.
Private, confidential advice.
(The company will not pay for this, and you should keep it between you and your attorney)

VI. Report violations to a government agency?

- Not "potential" or "possible" violations
- Seriousness?
- Know your whistleblower and Protected Activities laws

NOT all reports of misdoing are protected activities. It must be protected by the specific scope and provision of the particular law for an HR person to claim any protection from retaliation. (Perhaps consult your private attorney first.)

VII. Be Fired—Wisconsin Public Policy Law

- Document your refusal and state your foundation that what you have been told to do, and that it would be in violation of a law or regulation, so you are respectfully declining.

- Should be a tangible, serious violation.

- Remember, not every glitch constitutes illegality.

VIII. Quit.

- Find an organization with legal responsibility, professional integrity, and ethics more in line with your own.