

ETHICS IN HUMAN RESOURCES
ETHICS AND LEGAL
CONSIDERATIONS

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Presented by

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What are Ethics?

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**Who are your Ethical
Obligations to?**

- The Profession?
- The Organization/Company?
- The Employees?
- The Regulatory Agencies?
- The Corporation Shareholder?
- Yourself?

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Is there a difference between
Illegal and Unethical?

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AGENDA

1. The SHRM HR Code of Ethics
2. What are the legal foundations for HR Ethics
3. Duty to the Employee
4. Duty of loyalty to Employer
5. Illegality and liability
6. What to do if you believe a practice or decision is unethical or illegal
7. Protecting yourself

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Is there a difference between
Illegal and Unethical?

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The SHRM Code of Ethics (Are they a set of “rules”?)

- HR is not a licensed profession
- Licenses have state laws and Regulations
 - An Ethics Board
 - Enforcement mechanisms
 - Loss of license/shut down with loss of business

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HR is an Unregulated Profession

- No enforcement mechanisms
- Guidelines
- Recommendations

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Are there legal foundations for “ethics” which are compelling and go beyond the SHRM Code of Guidelines?

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Example # 1

- Leadership wants to terminate a manager for a policy violation. The manager is not always well liked by Leadership but has decent performance evals. You feel that termination is too strong of a response to this policy violation and that a warning would resolve the issue and it would not happen again. There has been no resulting bad publicity, no other person has violated this policy, it was a mistake, and there is no past precedence. You feel strongly about your position. You express your concern and are told “if you don’t fire him, we will get someone who will.”

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What do you do?

Are any laws being violated?

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Generally

- Employment at will.
- Management has a lot of discretion—right or wrong.
- The Courts are not a Superboard of Ethics or Board of Directors
- If not illegal—then up to company

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Example # 2

- A senior leader in your organization is having an extramarital affair with an employee in a lower position, but in a different department. There are no company rules on this. Both are married.
- Are there any laws being violated?
- What do you do? What are your options?

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There is a difference between Professional Ethics and Personal morality-beliefs — “sense ethics”

If not illegal, then the organization has discretion to do what it wants.

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- Variety of options to allow or forbid
 - HR should advise
 - May have harmful effects on organization regardless of any legal issues.
 - Duty to assure effective operations.

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- Are there potential legal issues?
 - Potential harassment claims?
 - Re: top manager's relationships with lower-level employees?
- HR should advise about potential and recommend
- How far do you go?

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Who is Your Obligation To?

- Do you have a duty to advise the employee?

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Is There a Legal Issue Involved?

- An HR person has an obligation to advise an employee of their rights
 - Bait and Switch
 - Duty to Employee
 - Employer Cannot be Passive

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Example # 3

An employee raised concerns about discrimination on her pay and promotion. You looked into the situation and concluded there was evidence of sex discrimination on promotion and unequal pay. You made a recommendation that the pay be corrected, and she receive a promotion as soon as practical. However, the CFO and her Department head disagree, and no action will be taken. In meetings on this you strongly disagreed and argued for the corrections, but you lost. You must now inform the employee that no action will be taken
What do you do?

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How Far do You Go?

- **HR Manager's Duty of Professionalism**

- HR Manager Fired for Advising employee to Sue Company
Gogel v. Kia Motors Mfg., Inc. (11th Cir. 2020)

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Example # 4

You have been directed to adopt a Timekeeping payroll policy that you believe will result in underreporting of overtime hours worked and no pay for those hours. You informed the CFO and CEO that you believe this violates the FLSA and should not be done. However, they believe it is done by other companies: "Everyone else is doing it!" and "we need to cut expenses and save a much money as we can right now." They told you to proceed with the new process.

What if the situation can actually implicate you in a violation of employment laws?

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

- Can an HR person be held personally liable?
– Yes

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Personal Liability

- The individual Manager, CEO, CFO, etc. pay the damages from personal assets

Worse yet Criminal Prosecution

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Abrogating the Duty of Care for Employee Safety

(wanton, reckless, intentional conduct)

- Tyson Managers Betting Pool
- Duty to Employees of Successor Purchasers – *Trujillo v. Omni Baking Co.*
- Criminal fines and all the managers get fired— putting profits and reporting pressures ahead of people – *USA v. Signal Peak Energy*

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Criminal Prosecution for Abrogation of Safety

- 15 to 20 Years in Rail Car Case – *U.S. v. Brasthwait, et al.*
- Owner sentenced to jail for OT pay violations *N.Y. v. Byon Foods*

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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?

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- Be professional
- Lay out facts as you understand them
- Lay out legal concerns/exposure for organization.
- Put it in writing:
 - Allows you to layout your thought process clearly and logically
 - Documentation of your efforts
 - Can be provided to Attorneys

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PROTECT YOURSELF

- Document your specific concerns.
 - Be clear! Don't assume others are as knowledgeable as you on the potential ramifications.
- Document your actions. Have you done an investigation if needed?
 - Facts, date, research, witnesses, people interviewed
- Document your efforts to correct issue.

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- If you are directed to do the illegal acts.
 - 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 "in-your-face" diatribe) establish that you raised the concern

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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 if there can be personal liability.
- Your attorney.
 - Private, confidential advice.
 - (The company will not pay for this, and you should keep it between you and your attorney)

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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.)

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Refuse and Get Fired

- Wisconsin law allows suit for wrongful discharge for a refusal to violate public policy
 - It must be violation of a law or regulation
 - Document your refusal and state the legal foundation and what you have been told to do and you respectfully decline
 - Should be a tangible serious violation (not every glitch constitutes illegality)

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Quit and Find a More Ethical Organization

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