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by Ted Banks and Sharon Ray

# What is the role of a Human Resources department?

- » HR departments should be available for help in all compliance concerns and should be the first line of defense when it comes to cases of alleged sexual harassment.
- » The evidence from media reports indicates that HR departments at numerous companies failed to protect either the company or the employee due to incompetence, active collusion with managers who behaved improperly, or by engaging in willful blindness.
- » Like Compliance departments, HR departments need to get management buy-in to a set of standards that the company stands for—and the HR department will enforce.
- » HR employees need to receive training in how to deal with allegations of improper conduct.
- » HR departments can provide a positive benefit not only to the morale but also to the profitability of their company.

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The media coverage over the last several months has highlighted the issues around reporting sexual harassment misconduct. Every company and industry is different, of course, so it may be misleading to try to generalize the factors that allowed this conduct to continue. But there are certainly some questions that should be asked. Were the problems due to a management culture that put profits above all else? Could it be due to the lack of a credible system to report wrongdoing without fear of retaliation? Could it have been due to a pervasive societal bias that has tolerated this conduct? Could it have been due to an HR department that viewed its job as protecting management, no matter what the cost to individuals or the long-term cost to the company? Most likely, some or all of these factors played a part.



Banks



Ray

A common element in most of the reported cases is a failure to act by an organization's HR department. Every experienced compliance officer knows that one of the key determinants of whether you have a successful compliance and ethics program is whether you have a good working relationship with the company's HR department. Your HR colleagues can support a number of the processes, such as hiring employees who have no propensity to violate the law, communicating the importance of compliance and ethics as a key company value at new employee orientation, making certain that compliance training is delivered to the appropriate employees based on their roles, enforcing a system of incentives and punishments for compliance violations, and making certain that allegations of wrongdoing are fairly investigated without fear of (or actual) retaliation. The growing number of women coming forward with reports of sexual abuse in the workplace made it fairly obvious that in the companies where this conduct was allowed to persist, the HR department was not at the forefront of trying to protect employees from abuse.

### Why have the HR department?

Traditionally, once a company reached a certain number of employees, it made sense to create an HR department to manage some of the personnel functions, such as job interviews, coordination of employee benefits, training, and compensation. If a company became large enough, responsibilities might be transferred to another department, such as payroll. Additional responsibilities might be added, such as records management, which many HR departments undertook as an outgrowth of HIPAA and other privacy responsibilities.

But HR had a unique role in the relationship with employees, because it was often the first interface that a new employee would have with the company. It would also be the last place they might interact, because the HR department usually handled terminations and exit interviews. Along the way, the HR department would also get involved in managing relationships between employees and the management staff. It would work with managers to administer disciplinary actions based on reports of misconduct. This would often require investigations of claims, and well-run departments would make certain that they had the expertise to investigate allegations and determine the proper way a company should respond to an allegation.

Unfortunately, in many companies, the resources devoted to HR were also frequently cut as managers sought ways to save money. Training courses, or the entire training function, disappeared. Specialists

in various HR functions were replaced by generalists, and the process of manually reviewing the qualifications of applicants and personal interviews were replaced by online résumé submission and the online interview. Generalists were often assigned responsibility for multiple locations, and combined with doing more functions via computer—algorithms replaced people wherever possible in many companies—building personal relationships with employees became a thing of the past. In some cases, HR departments were eliminated altogether.

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And what about support for the compliance and ethics program? An effective compliance and ethics program really depends on a good relationship and shared responsibilities with HR. Unfortunately, as HR resources are reduced, the ability to support compliance and ethics might well

be sacrificed so that other, closer-in traditional HR functions could be supported.

So, what happens when an employee has a problem? Many departments seem to have tried to avoid getting involved if it would reflect badly on the company or on certain officers. The net result was a continuation of bad behavior of varying degrees, with the victimized employee (usually, but not always, female) paying the price.

### What is the purpose of the modern HR department?

It would seem that the very name of “Human Resources” fully explains an important role to protect valuable—usually the most valuable

assets of the company: its employees. But this title can also be very limiting. Most people think of HR as a series of mechanical or clerical functions related to working with people. Management interactions with the HR department typically involve things like asking for help with recruiting for open positions, benefits management, and pay administration. Through the years, HR departments have attempted to change their names to represent the true work in the department, which includes activities such as talent acquisition and development, workforce planning, benefits administration, pay administration, diversity management, and building a culture—to name a few. Unfortunately, in many cases it seems that no matter how HR is positioned in the organization or how it tries to describe its value, people still see it how they want to see it, which is to use HR for certain mechanical functions and otherwise not think about it.

But HR's role is to protect the organization. By protecting the company's human assets, it is also protecting the company, since loss of human assets can be severely damaging to the company, just like loss of a manufacturing machine due to poor maintenance or loss of a trade secret by failing to protect confidentiality. HR and senior management must accept this wider role: not just making sure that paychecks are generated but that the human assets are protected.

Additionally, there may be a certain degree of conflict in the HR role, sort of like the conflict with regard to the role of the Legal department of a company in handling compliance matters. Is the role of the Legal department that of corporate gladiator or corporate conscience? Does it protect the company at all costs or ensure that the company does the right thing? Part of HR's role in protecting the human assets of the company is to recognize that it must stand

up for the rights of the individual as part of its professional functions. It should recognize this role in making certain that the company follows legal and ethical principles, and does not operate with the idea that its function is to defend the company at all costs. It should be remembered, as with compliance and ethics in general, that doing the right thing always pays off in the end. Trying to cover up wrongdoing never succeeds for long. And the cover-up is often worse than the original problem. In the long-term, doing the right thing is best for the company, for its shareholders, and for its employees.

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### **So why didn't HR protect employees?**

In the cases that have been reported recently, there seem to be a number of reasons why HR did not—or could not—do more to protect the victims. Each of the possible reasons throws into question whether the company had a completely ineffective HR department when it came to anything that went beyond the typical HR processes, such as onboarding new employees.

It is possible that the HR department didn't know about the misconduct. This suggests that the department was out of touch with its employees or was so mistrusted by them that nobody was willing to go to HR to discuss the problem. Perhaps there was no system for anonymous reporting (i.e., a hotline), but that seems unlikely with companies of any size today. So, were there reports that were actively suppressed?

Perhaps the HR department knew about the allegations but chose not to act. In some cases, the knowledge available to the HR department was not confidential, but perhaps indirect. Some things have no good explanation, and the only explanation for failing to take action is willful blindness. If something seems suspicious, HR needs to investigate.

It is also possible that, in some companies, the HR department actively worked with lawyers to negotiate confidential settlements, but those settlements had the effect of concealing the misconduct and did nothing to change the circumstances that resulted in the harassment. Resolving a complaint with a confidential settlement is not, in itself, a bad thing. But it is only part of the resolution of the problem. When victims see that the perpetrators are not punished and remain in their positions, it reinforces the impression that the company does not care about the incident that took place, and this discourages employees from reporting incidents of harassment.

HR departments may have been part of the “frat boy” culture that pervaded companies like Uber, where nothing mattered other than profits. For all the talk about corporate ethics and social responsibility, capital still readily flows to enterprises that are making money without careful examination of whether they have a functioning compliance or corporate governance system. At Uber, the culture was set by the former CEO, Travis Kalanick, who “openly disregarded many rules and norms, backing down only when caught or cornered.”<sup>1</sup> Incidents that were reported to HR, such as a manager throwing a coffee cup at a subordinate or an employee outing to an escort bar, resulted in no action.

### **What could have been done?**

The HR department needs to work to gain the trust of employees. This requires management support and recognition that a certain degree of independence may be required. The board of directors should insist, as part of its compliance oversight, that a robust set of HR policies make it clear that the company will treat its employees with respect, will follow all applicable laws, and will not tolerate offensive behavior within the company.

HR and Compliance should be connected and share the responsibility of developing training and policies that set standards and educate employees on ethical behavior in their workplace. This includes the process of reporting an incident as a witness or victim. The policy should make it clear to employees that the company will conduct a formal investigation, and the process should be explained. Discipline should be administered that is proportional to the violation—not to the rank of the violator.

Mandatory training on sexual harassment for employees, managers, and senior managers should be delivered once a year, allowing time for questions and answers. The training should consist of how the lack of reporting an incident and/or the mishandling of information can affect the individual and the company. Employees should know that once they reveal this information to a manager or a friend, they have an obligation to report the incident to HR or to the compliance hotline. The training information should be given not only at the beginning of employment but also periodically throughout the year.

Hopefully, the HR department will have some expertise in adult learning so it can assist in delivering training that is effective. The training should not serve just the “check the box” purpose, but should also communicate the policy of non-harassment

and non-retaliation without castigating all men as harassers or all women as victims. The focus should be on civility in the workplace and how observers can play an important role in reducing harassment by reporting what is going on around them.

If there is a report of harassment, the HR department should actively and promptly investigate allegations of wrongdoing (assuming, of course, that there are trained investigators in the HR department). The investigation may be done in conjunction with company lawyers, but there should be quick decisions as to who will manage the overall investigation. The purpose of the investigation should be clearly defined, and a list of questions for all employees involved in the process should be established. Interviews should be scheduled, where answers are documented and the investigators ask clarifying questions as needed. In many cases, it may be appropriate to have two people conduct the questioning, with at least one being a female. A report of the facts uncovered in the course of the investigation should be reviewed with an employment lawyer.

The investigators should make a recommendation to management as to the proper resolution of the matter. Termination is not always required, but the discipline should reflect the seriousness (or frequency) of the violation, and not the rank of the violator or whether that person was considered “high potential.” In other words: no double standards. Once a resolution has been decided, it is very important to communicate to the individuals affected and the organization. This takes time and significant thought around what is to be shared among which groups of people and the ramifications

of the information being shared. The subject of this type of investigation is very sensitive, of course, and the identity of the victims should be protected to the extent possible.

However, if a company is serious about creating an environment where sexual harassment is not tolerated and victims will not be scared to come forward, it must demonstrate that it actively enforces its policies. Therefore, it is a good idea to release some details about the allegations and the punishment, even if the names of the parties are not revealed. Often company scuttlebutt fills in the details, but in any case, employees are reassured when they see that discipline has been imposed.

### Conclusion

Recent news about the apparent prevalence of sexual harassment in many organizations may perhaps accomplish something positive as awareness of the problem has increased. But the common factor of the failure of the Human Resources staff to provide a check on unconscionable behavior must be recognized. A fair amount has been written about the conflicting roles of corporate Legal departments when it comes to compliance, but we would submit that such a conflict should not exist with regard to the HR department.

The HR department exists to protect the company by protecting its human assets. That means that it must be willing to stand up for principles of human rights and dignity, even if that means disciplining or terminating senior executives or high-potential/high-performance employees. HR cannot stand idly by or assist in concealing the misconduct. \*

1. Mike Isaac: “Uber’s C.E.O. Plays With Fire” *The New York Times*, April 23, 2017. Available at <http://nyti.ms/2oidfkk>.