

The Role of Human Resources in FCPA Compliance-Part II

In our most recent post, we discussed that one sign of a mature Foreign Corrupt Practices Act (FCPA) compliance and ethics program is the extent to which a company's Human Resources (HR) Department is involved in implementing a compliance solution. In the past-prior posting we discussed training, employee evaluation, succession planning and hotlines and investigations. In the post, we will discuss background screening, ~~and~~ finally, doing 'more with less' and finally what to do when the government comes calling.

Background Screening

A key role for HR in any company is background screening not only employees at their time of hire but also of employees who may be promoted to senior leadership positions within the company. HR is usually on the front lines of such activities, although it may in conjunction with the Legal Department or Compliance Department. This requirement is discussed in three parts of the Federal Sentencing Guidelines for Organizations (FSGO) ~~US Sentencing Guidelines by the requirements with the language of~~ *"The organization shall use reasonable efforts not to include within the substantial authority personnel of the organization any individual whom the organization knew, or should have known through the exercise of due diligence, has engaged in illegal activities or other conduct inconsistent with an effective compliance and ethics program."*

What type of background checks should HR utilize in the FCPA compliance and ethics arena? The consensus seems to be that HR should perform at least routine civil, criminal and credit background checks. Care should be noted in any such request made in countries outside the United States as such information may be protected by privacy laws or where the quality of such information is different in substance from that of the United States. For instance in the United Kingdom, the request of a credit check can negatively impact a prospective employee's credit score so such a background check may not provide useful information to a prospective employer.

Additionally, although it may be difficult in the United States to do so, a thorough check of references should be made. I say that it may be difficult because many companies will only confirm that the employee worked at the company and only give out the additional information of a former employee's dates of employment. In this situation, it may be that a prospective employer should utilize a current employee to contact former associates at other companies to get a sense of the prospective employee business ethics. However it should be noted that such contacts should only be made after a thorough briefing by HR of the current employee who might be asked to perform such duty.

A company can also use HR to perform internal background checks on employees who may be ~~labeled-targeted~~ for promotions. These types of internal background checks can include a detailed review of employee performance; a review of disciplinary actions, if

any; a review of any achievements, both internal and external, while employed by the company and confirmation of both ethics and compliance training and that the employee has completed the annual compliance certification. An ~~important~~ internal function which HR can be an important lead on is to ~~also emphasize that an employee not penalize an employee,~~ who has been investigated but cleared of any alleged ethics and compliance violations, ~~should not be penalized where such report is in the employee's personnel file.~~

When the Government Comes Calling

While it is true that a company's Legal and/or Compliance Department will lead a response to a government investigation, the HR Department can fulfill an important support role to the lead group ~~within the company.~~ HR ~~will usually should~~ maintain, ~~as part of its routine function~~ a hard copy of many of the records which will be required ~~to be produced~~ in such an investigation ~~as part of its routine function.~~ This would include all pre-employment screening ~~ing~~ documents, including back-ground investigations, all post-employment documents, including any additional screening documents, compliance training and testing thereon and annual compliance certifications. HR ~~can assist in the identification and is key can be critical~~ in identifying and tracking down former employees. HR ~~can will~~ work with Legal and/or Compliance to establish protocols for ~~how to the~~ conduct ~~investigationsof investigations~~ and who should be involved.

Lastly another role for HR can be in the establishment and management of an (1) Amnesty Program or (2) Leniency Program for current or former employees. Such programs were put in place by Siemens during its internal investigation of bribery and corruption. The Amnesty Program allowed appropriate current or former employees, who fully cooperated and provided truthful information, to be relieved from the prospective of civil damage claims or termination. The Leniency Program allowed Siemens employees who had provided untrue information in the investigation to correct this information for certain specific discipline. ~~Whatever of such programs that is put in place, Whichever of theses programs, or any variations that are implemented;~~ HR can perform a valuable support role to Legal and/or Compliance.

Doing More with Less

~~As we stated in Part I of this two part series, one sign of a mature Foreign Corrupt Practices Act (FCPA) compliance and ethics program is the extent to which a company's HR Department is involved in implementing the solution.~~ While many practitioners do not immediately consider HR as a key component of a FCPA compliance solution, it can be one of the lynch-pins in spreading a company's commitment to compliance throughout the employee base. HR can also be used to 'connect the dots' in many divergent elements in a company of a FCPA compliance and ethics program. The roles we have listed for HR in this series are functions that HR currently performs for almost any US company with international operations. By asking HR to expand their traditional function to include a FCPA compliance and ethics function, a US company can move towards a goal of a more complete compliance program, while not significantly increasing costs. Additionally by

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asking HR to include these roles it will drive home the message of compliance to all levels and functions within a company; from senior management, to middle management to those on the shop floor. Just as safety is usually message Number 1, compliance can be message 1A. HR focuses on behaviors and by asking this department to include a compliance and ethics message, such behavior will become a part of a company's DNA.

The author will discuss this topic in greater depth in an upcoming webinar on the role of HR in FCPA compliance, Tuesday, May 18th at 2 PM CDT. For information and registration details go to <https://secure.confertel.net/tsregister.asp?course=509107>.