

Preserving Human Capital In A Legal Crisis

Law360, New York (July 16, 2012, 5:32 PM ET) -- Every organization, sooner or later, confronts a legal crisis — a hotline allegation of serious misconduct, a grand jury subpoena, perhaps an arrest or search warrant executed on its premises. In-house and external counsel will quickly assemble to confront legal issues. What about employees who have no direct involvement? Who will address the inevitable distraction and ensuing loss of productivity? Who will ensure that employees stay motivated? How will the organization recruit and retain top performers? How do you communicate to employees who may feel trapped in the metaphorical company elevator, hanging by a thread?

Why Counsel?

Who takes charge of human capital issues in a legal crisis? Nobody, at least within our 60 years of collective experience. Time and again, we observe organizational paralysis as the workforce speculates on the investigation, gossips about the latest rumors and anxiety about the future.

In-house and external counsel, of course, must focus attention on resolving legal issues. Serving simultaneously as business advisor adds value, differentiates counsel and, arguably, is a “must have” skill in today’s business environment.

Pivotal Role Before, During & After

Pre-crisis planning is essential. Imagine that FBI agents arrive to execute a search warrant. Is it realistic to devise a strategic company response plan as employees observe armed, swat jacket-clad law enforcement agents carting away documents, computers and even employees?

Imagine instead that counsel had helped the organization to anticipate and plan for the legal crisis, including designing a legal crisis “playbook” designed to preserve corporate culture, reduce distraction and talent flight, re-establish and create higher morale and employee trust, gain efficiencies and eliminate, or at least mitigate legal risk if the crisis involves wrongdoing by the organization.

When crisis hits, in-house and external counsel must quarterback or, at a minimum, make sure that the organization creates a work stream dedicated to preserving human capital assets. Working with senior management, counsel can help the organization develop and implement a strategic plan that anticipates and responds to employee reactions, ensures proper internal and external messaging and executes damage controls as facts emerge and circumstances change. Counsel can also work with senior management to arrange coaching for leaders inexperienced in navigating the “soft side” of legal crises and perhaps themselves needing a sounding board to voice job security and other concerns.

Human capital crisis outlasts legal crisis. Glaring talent management issues remain at the forefront and need to be addressed by an emotionally and physically exhausted leadership, eager for “closure”. Counsel can and should serve a vital role in helping the organization recuperate and, ultimately, grow stronger.

Pre-Crisis Planning: Predict & Prepare

Illustration: Anticipating a Federal search warrant, a Fortune 50 tobacco manufacturer developed a playbook including a communications plan to calm employee fear and speculation.

Being prepared enables the organization to function at its best in time of crisis, instead of trying to invent a response on the fly, while in the midst of understanding what happened and responding to government, press and third party inquiries. Counsel is best positioned to predict and anticipate legal crises before they emerge.

Arrange a planning session to consider how the existing organizational leadership structure, including formal and informal networks, should respond. By reaching out to the key individuals who would likely be in leadership positions if legal crisis strikes, counsel will help to establish the correct “tone at the top” which will trickle down within the organization. Counsel likely will require assistance from an internal or external human capital crisis consultant (“HCCC”) with a deep understanding of the psychology of human behavior in organizations and extensive experience working with organizations in legal crisis.

Below are some exercises to perform at the planning session to create a better prepared organization:

- **Examine Organizational Culture** — Use the planning session to analyze the organizational culture with regard to current patterns and norms around communication. Determine the characteristics of the culture by determining the who, what, where, when and how of information dissemination. Gather data about the cultural norms around transparency, ethics, integrity, retention and work satisfaction. Self-introspection from this new angle, apart from planning for a crisis, yields immediate benefits as the planning session will shed light on existing culture, leadership and patterns of communication.
- **Walk Through “What If” Scenarios** — Envisaging a legal crisis can be very difficult, particularly for non-lawyers. Walking planning session participants through potential scenarios and the organization’s response will give the opportunity to discuss consequences of misconduct, identify any existing gaps in organizational responses and codify team expectations.

- Prepare a “Playbook” — The output of the planning session is a playbook focusing specifically on preserving human capital or as a component of a broader crisis response plan. A playbook should identify roles, responsibilities and behaviors for the various leaders and include illustrative response scenarios to provide the framework for leadership actions.

Crisis: Anticipate & Respond

Illustration: A professional services firm suffered a high-profile embezzlement of customer funds. Focusing exclusively on legal liability, senior management ignored the embarrassment of high-producing partners, who were uninvolved in the incident. They departed, taking clients and staff.

Legal crises threaten employees’ sense of safety, well-being and control. Just as when human beings face immediate physical danger, organizations should anticipate their employees will react with a sense of self protection. Expect them to maximize opportunities to regain a sense of safety and control, including withdrawing their support from within the current environment or seeking alternative employment.

Counsel adds value not just by addressing legal issues, but by steering the organization through the crisis at-hand. Critical leadership responses, such as the actions listed below, will mitigate negative outcomes and encourage re-engagement and empowerment of the existing workforce.

- Arrange Coaching & Counseling — Just as schools bring in grief counselors when tragedy befalls the students, counsel may need to arrange coaching for employees most impacted by the legal crisis. Counsel can work with senior management to arrange coaching for those assigned to retain and recruit new resources as well as leaders who would benefit from an outside sounding board to think through how to respond effectively to what is often a highly emotional environment.
- Identify Vulnerabilities — Help the organization keep “ears to the ground” and effectively use social media to understand how the workforce really feels. Identify and assist employees with their expected and unexpected responses and concerns. While direct feedback is best, also consider employing internal feedback systems and an external consultant that will allow for anonymous expressions of concerns around the crisis.
- Communicate Honestly and Quickly — Use leader communications that are clear as to the situational variables and demonstrate an understanding of workforce concerns. A natural tension exists between information that can be shared with the workforce and information which must be kept private due to the nature of the legal issues. What is the impact of withholding or providing deceptive information on the long-term recovery of workforce morale? There is no easy answer. Counsel is uniquely positioned to ensure that the organization addresses these considerations without hampering legal issues. In general, it is better to acknowledge the limitations of transparency than to act as if there is transparency when there is not. Social media outlets can also be used to deliver messages, to the extent that information can be shared widely.

- Respond to Rumor and Innuendo — Counsel can help to address employee concerns quickly and efficiently. Expect the “rumor mill” to churn at full speed and employees to feel anxious and nervous about the situation and their future with the company. Given the pure volume of people that a company employs it can often be a challenge to quell these concerns, but addressing them directly will help mitigate rumors and reduce fears. Do not expect a “don’t worry” response to re-assure employees and avoid distraction, lack of productivity, injured morale and turnover. The organization can lean on counsel to engage in candid communication to reduce employees’ fears.

Post-Crisis: Turn a Negative into a Positive

Illustration: In the wake of its corruption scandal, Siemens sought to revitalize its culture and regain the confidence of its 400,000 person workforce. The Dow Jones Sustainability Index, which focuses on ethical corporate behavior, ranked Siemens No. 1 in the Diversified Industrials category in 2008, up from the bottom of the list the previous year. The company has been first every year since then.

Counsel’s role does not end when the crisis ends. A first step is for the organization to re-affirm its vision and mission. Use the crisis as a springboard to establish a work stream that identifies past gaps and future priorities. Again, as in the pre-crisis phase, convene a planning session for remaining leaders to gather input from their stakeholders and use this to develop a vision, mission and subsequent operational plan that will address the organizational concerns, restore the corporate culture, fill the existing gaps and motivate the post-crisis troops to rally and survive.

Just as an elevator has certain fail-safe devices in order to avoid catastrophe and minimize harm, a company should have a plan in place of how to address human capital management when facing legal crisis.

Legal crisis threatens the alignment of people working toward a common goal with common interests. Loss of organizational value is a predictable consequence of unpredictable legal crises. People react strongly to instability at their workplace and will respond in ways that reduce productivity, increase turnover, and hamper innovation and creativity at work. Mitigating organizational value loss is a strategic process that begins with pre-crisis planning, continues in the midst of the crisis with clear communication and ends with a post-crisis renewal of cultural integrity.

--By Jonny Frank, StoneTurn Group, and Dr. Alan Hack, Manhattan Management Consultants

Jonny Frank, a partner in the New York office of the StoneTurn Group, served as a federal prosecutor for 12 years and as a PwC partner for 14 years, where he founded and led Fraud Risks & Controls. Mr. Frank also taught Fraud Management, Criminal Investigations, and International Criminal Law at the Yale School of Management, Fordham University, and Brooklyn Law School.

Alan Hack, PhD, founder and director of Manhattan Management Consultants, provides organizational development, executive coaching, and strategic talent management consulting services. The authors acknowledge the research and assistance of StoneTurn manager, Michael Feeley, CPA, in the preparation of this article.

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