

Speaker 1: You are listening to the HR Bartender Show, a casual place to talk about all things work. Here's where you get practical advice about how to be a better employee, manager and leader in today's workplace. So grab your favorite beverage, pull up a stool, and join us in the conversation. The bar is always open. Now, here's your host, Sharlyn Lauby.

Speaker 2: Hi everyone, and thanks for being here. I'm your host, Sharlyn Lauby, author of the blog, HR Bartender. Before I introduce today's guest, I'd like to take a moment to thank this season sponsor, Case IQ.

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Speaker 2: Season three of the HR Bartender Show is focused on ethics, and I am so excited to speak with today's guest. Heather Bussing is an California employment attorney with over 30 years of experience providing sensible and strategic advice to employers. Her deep experience with business, humans, technology, and work gives her a unique perspective focused on preventing and solving problems rather than finding about them. Heather has been interviewed and quoted in the New York Times, the Wall Street Journal, CNN, Business Insider, and NPR. She also teaches legal writing and internet law.

I am so fortunate that whenever I have a question that a reader asks and I send a note to Heather and say, "Will you help me answer it?" That she always says yes, and I'll be sure to drop some of my favorites in the show notes when we get done. Heather lives in Sonoma County, California with her partner and her dog. Before we get started on today's conversation though, I do need to say just a little disclaimer because Heather is a lawyer, please do not misinterpret Heather's comments as legal advice or pertaining to any factual legal situation. If you do have a detailed specific question, you should address those with your friendly neighborhood labor and employment attorney. And on that note, Heather, welcome to the HR Bartender Show.

Speaker 4: Thank you so much. It's so good to see you.

Speaker 2: It's so good to see you too. It's been too long. So today we're going to talk about ethics. And while you don't have to provide me any specific situations, I would love to know one thing that you think about or that you do when you're faced with an ethical dilemma.

Speaker 4: Well, I mean, one of the biggest ones is the idea of lying because lawyers have to tell the truth. We're officers of the court, but we're also really bound by rules of confidentiality. So there are times when we have really important information and we cannot say anything. So is that a lie or not? Well, sometimes it is. If you are in a partnership or a marriage and you have important information that would matter to the other person, you have a duty to disclose it, but lawyers can't. And that duty to keep our client secrets goes with us to the grave. So it's one of those situations where often people think, if

you're not telling me the whole story, you're lying to me. But we have a special situation where sometimes we cannot tell the whole story.

Speaker 2: It's interesting that you're bringing up that dilemma of, do I disclose something or do I not disclose something? Because I could see from a workplace perspective, one of the ethical dilemmas that employees often have is that should I report something to human resources? Even though it's the right thing to do, but should I or shouldn't I? Should I say something? Should I not say something? Is there something that organizations can do, that HR departments can do to encourage employees to speak up when there's something bothering them?

Speaker 4: Yeah, you have to make it safe. The dilemma for an employee who sees something askew, and hopefully it's not clothing, but someone who sees something or knows something about misconduct, it's a scary thing to think about reporting it because then there's going to be an investigation and people will be blaming you or questioning your credibility, or you could get labeled as a troublemaker. And so you're risking your job and your reputation internally by stepping forward. And so you have to consider really who you owe duties to. And again, this is another legal framework, and legal frameworks are always much narrower than a bigger ethical framework. So ethics are, what should I do under the circumstances? Legal framework is, who do I have a duty to here? Well, you have a duty of loyalty to your employer, but you also have a duty of loyalty to yourself.

And so it's important to weigh that and get some advice before you as an employee go forward. Now if you're hr, you are going to want the information, probably. And there are some cultures where it's like, we don't want to know, don't bother us with this, and there are other cultures that are very supportive. But the best thing you can do is try to help the employees feel safe. Let them know that you're grateful for the information, that you will keep their information as confidential as possible, and if needed, bring in somebody else to handle the interviews and the investigations so that the employer doesn't have a conflict of interest in digging up dirt on itself. They don't want to do that.

Speaker 2: No, you're right. I want to talk about investigations, but before we do that, you brought up the idea of making the workplace safe for people to bring those concerns forward. And I've always, as a human resources professional, wanted people to feel like they could come into my office and they could say whatever it is that they need to say. And sometimes in doing that, what ends up happening is an employee comes in and says, blah, blah, blah, blah, blah, oh, I'm just venting. And you have to go, oh, wait. Or da, da, da, da, da, but I don't want anybody to know it's me.

And this is where you have to, as a human resources professional, you kind of have to draw these lines and say, okay, it's one thing if you just want to come in and say, oh, that customer made me really frustrated, and then you can leave. That's fine. It's another thing when you say that there's something inappropriate happening in the workplace, and I have to halt you in the middle of the conversation and say, oh no, we can't keep this secret anymore. So let's talk a little bit about what happens to the people who just want to vent.

Speaker 4: Yeah, I think if someone comes into my office and says, "I just need to tell you this story." You'd stop them right there and explain, "I want you to be able to tell me this story, but if you are going to bring it to my attention that there is some misconduct going on, I may have to investigate and I may not be able to keep it secret, so please, no." And I have to do that with witnesses as well. It's like, I will keep this as confidential as possible. I will not reveal your name, but if this ends up in court, you may be called as a witness, and there's nothing I can do to prevent that.

Speaker 2: You were talking earlier about disclosing information and not disclosing. It's like when we say that things are confidential, they're confidential to a point, which kind of leads into the whole investigation conversation you were talking about. A lot of times when employees come to human resources, then there'll be an investigation. In your role as an attorney, what are some things that HR needs to keep in mind when they're thinking about conducting an investigation? I mean, one of them you mentioned is like, who should do it?

Speaker 4: Who should do it? It's always better to bring in a third party to interview witnesses, always. Because one, there's a conflict of interest that I spoke about before because HR will have its primary duty to protect the company while it is also trying to protect either the person who's brought it to their attention or sometimes it's also the victim of harassment or discrimination or something like that. And it's tricky territory to walk because there's big risk and valuable humans involved in it who are probably dealing with trauma. So you've got an employee who's traumatized and expecting fairness and justice, and you've got the organization that is trying to mitigate its risk and handle things as well as possible. But have you noticed that it's always the victim that gets transferred?

Speaker 2: It's so difficult when you have some sort of investigation where people are involved and they're not getting along. And you probably have better statistics than I do on this, but even if you take this out of, there's discrimination, harassment arena, when you are investigating something involving people who don't get along, I rarely see there being a moment where all of a sudden they start getting along.

Speaker 4: No.

Speaker 2: When that happens, this is a moment where people need to think about before you get to that point where you are so mad and so angry at someone, is there something that you can do to make sure that it doesn't escalate to that point? Especially if you like your job and you like your other colleagues and that kind of thing. But a lot of times when you get to that point where you're so frustrated, it's really hard to come back and go, okay, I see all that clearly now, we're good.

Speaker 4: No, I mean, by the time it gets to HR it's usually too late. So this is where good management comes in and good managers checking in and don't be afraid to ask, what's in your way? What are their obstacles? Are you getting along with everyone? Are there problems? Because it's the manager who has the employee's trust and who knows them, who is in the best position to sort of mediate the issue or to suggest possible

fixes. And maybe these people just don't work well on the same team, and maybe that's okay. Maybe there's a place for both of them to do their best work. But it's a case by case basis because human beings are involved in the situations are so unique, and you just really have to get in there and insist that people talk to each other and try to work it out and then go to HR.

Speaker 2: I'm glad you're bringing up the role of the manager in this because one of the things that, in several of the organizations I've worked in in the past, managers found out about something that was going on. Maybe it was a process that wasn't being followed or a procedure or something on somebody's expense report or a safety violation or something like that, and managers would then start digging to figure out what was going on. So they would start this investigatory process. And one of the things that they think is so important is not only that HR has a good relationship with employees, but that HR has good relationships with managers so that if managers start these investigations and they get to a place where they're stuck, then they can come to HR and say, "Okay, here's what happened. Here's what I've been doing on my own, and can you help me in a department process or something like that?" Maybe HR can be that third party to ask some questions and get some answers.

Speaker 4: If it's a small issue and it's not going to end up in court, absolutely. There's lots of things that HR can handle, but if it's any issue that requires an investigation like discrimination and harassment, then you want somebody outside and neutral.

Speaker 2: It's one of the things about using an outside investigator that's so important is notes. When you do something internally, whether you're a supervisor, manager, whether you're human resources, you're an outside consultant or contractor that you're brought in to do an investigation on behalf of the organization, the notes are such an important part. Being able to go back and explain what happened and why it happened and what decisions were made along the way. How can HR people, how can people who are responsible for documentation, how can they take good notes? How can you learn how to take good notes?

Speaker 4: Yeah. Well, pretend you're a reporter. What you want to do is write things down directly after they happen or as quickly in time as they happen before you've had a chance to think about it and filter it and to create your own narrative. What you want is exactly what happened and exactly what people said or did with as much detail as possible, as close to when it happened as possible. And if you want those notes to not be evidence, then you want to call legal and get them involved and get them helping you and advising you and directing the process so that those notes can be protected by the attorney client privilege or the attorney work product privilege. And if you think that the notes will become evidence, clean them up, put them in a format that's easy to read and understand and run it through spell check. There's nothing like being up on a witness stand and having someone show you something that you wrote, and all you can see is the seven typos. It's just brutal.

Speaker 2: One of the things that sticks out to me when it comes to notes is with all of the people with changing jobs right now, I mean, you open up your LinkedIn and you see a half a

dozen of your connections making announcements that they have new positions. And I think that's great, don't get me wrong. But often when you're asked to explain a decision that happened in the company, it's not two weeks after the decision was made, it's months sometimes after the decision-

Speaker 4: Years.

Speaker 2: Yeah, sometimes years somebody comes back and says, why did you do that back in 2019? You might not be the person who made the decision, but you have to explain the decision. And so notes are just such an important part of the process, and I really don't know of any place where you can learn how to take good notes.

Speaker 4: Yeah, I think you just have to imagine that you're a court reporter or a reporter, attorneys learn on the job.

Speaker 2: There you go.

Speaker 4: We learn all sorts of stuff like how to read upside down so you can see what what's on the page for opposing counsel across the table. The key is to make it as close to exactly what happened as you can and leave yourself and your opinions out of it.

Speaker 2: And I think that that's great advice to try to take the emotion, be objective approach. You and I could talk about investigations all day long, but I do have one more question. At the end of an investigation, interviews are had, findings are made, decisions happen in the organization, but I think that one of the aspects of an investigation that just really doesn't get enough attention is sort of closing the loop. And besides notifying maybe the person who made the complaint, the person who was talked about, besides notifying them, what else do companies need to remember when they're wrapping up an investigation? Obviously the notes, obviously you need to tell the people who were impacted by it, but what else? Is there anything else that we need to remember?

Speaker 4: Well, the circumstances will also dictate what you need to do. I mean, if you're dealing with sexual harassment of a senior person and they are suddenly on sabbatical and then disappear, you have to figure out a way that you can communicate to your employees that there was an incident or something that was not okay, and that that person is no longer with us. And you don't want to go into a lot of detail because you don't want to stir things up. You don't want to re-traumatize people who have had to deal with it or have them in the center of discussions, and you can't really reveal any sort of legal discussions or legal issues. The hardest one is when you go back to someone who feels they are a victim of discrimination and you have to tell them that you investigated it, but you didn't find any discrimination, because they're not going to believe you because they experienced what they experienced, and they're going to wonder if you really investigated or whether the investigation itself was biased.

So that's a tricky one, and that's another reason why you want to get outside people involved because we have our filters and we have our ways of looking at things and our ways of understanding people and relationships based on our experience, and that

often is not someone else's experience. So that's the tricky part. And it takes a while to learn to recognize, and it takes a while to be able to talk with people who walk through the world differently. The example that I like to give most often is, there are places that my husband can go anytime night or day because he is a very tall, big booming man and I could not go to those same places, especially at night. We walk through the world differently and what is safe for him is not safe for me because I am a woman and I'm smaller. And so that's a classic, but we all live in multiple competing realities and the way that any individual experiences a situation may be profoundly different from an observer.

Speaker 2: It's a good point. When you talk about starting an investigation, you don't know where that investigation is going to lead you, and it is possible, and this is the whole reason we conduct investigations to get to some resolution, and that resolution might not be what someone expected it to be.

Speaker 4: Yep, and sometimes you really do have to fire the senior person, and that's tricky to navigate as well, and rarely happens even when there is more than enough evidence to warrant it, which is another ethical issue.

Speaker 2: Well, yes, and it kind of takes us back to the beginning of our conversation together. HR pros need to build partnerships and not just in terms of having a great relationship with your employees and having a great relationship with your manager, but you need to have a great relationship with your legal counsel, both internally if you have internal counsel, but also your external counsel so that you are in a position where if you are talking about planning the exit of someone in the organization who has been accused of misconduct, how are you going to deal with that? Whether it's deal with it internally. Depending upon the position, you might have to make a public statement and you might have to assist the organization in doing that in a way that resolves as much as it can possibly resolve, but also in a way that's respectful for everyone involved.

Speaker 4: And if you learn that someone has been discriminated against, figure out what you can do to make them feel safe again, and how to rebuild that trust and get them counseling if they need it, get them the promotion they should have gotten, make sure that they're being treated fairly going forward. And I don't think I attend to that enough either. It's like, oh, investigation's done, bad guy's gone. All right, we're good.

Speaker 2: I think that's a great point. And again, you can speak to your legal counsel. You've mentioned a couple of times during our time together talking about how different types of investigations might create different outcomes. And so you look at that and say, okay, not only is the investigation done, but are there other things I need to do and how can I make that happen inside the company?

Speaker 4: Yeah, if you've got a wage hour issue and it turns out that somebody was miscalculating overtime, you fix it and you fix it for everybody involved and you apologize and you move forward. You don't pretend it didn't happen and just resolve it with the one person.

Speaker 2: Yeah, because they will talk.

Speaker 4: Of course they will.

Speaker 2: Everybody will talk. But that comes back to the ethics. The ethical thing to do, the right thing to do is to fix it for everyone, not just for the one person who spoke up and said something.

Speaker 4: Also, the legal thing to do.

Speaker 2: Exactly, yes.

Speaker 4: This is one of those places where they overlap perfectly

Speaker 2: Well. I can't tell you how wonderful it has been to chat with you about this conversation on investigations. Those of you listening in, I want to extend a big thanks to Heather for sharing her knowledge with us. If you want to connect with her, I'll be sure to put her contact information in the show notes. And again, I will drop some links to our favorite online interviews in the show notes as well. But please don't leave just yet, I'm looking forward to sharing my takeaways with you in just a moment after a quick break.

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Speaker 2: Welcome back, everyone. I hope that you enjoyed this conversation with Heather as much as I did. One of my big takeaways when we were planning this conversation and we were talking about investigations, it didn't occur to me, while we think about investigations from a legal standpoint, we need to have all of our legal processes in place and we need to... And those are things that are really important. We need to write good notes, we need to have good documentation. There's a huge people component to an investigation. In our organizations, we need to have the psychological safety that exists so that individuals will come to their manager or to human resources and say, "I have a concern." And managers and human resources professionals need to be in a position where they can say, "I understand. We need to do an investigation about that." And that the employee's cool with that.

If the conversation starts at a manager, supervisor level, that manager or supervisor feels comfortable coming into human resources and saying, "One of my employees came to me about this particular issue. I need your help." Once that happens and the organization is made aware of a concern, then figuring out who the right person is to conduct that investigation. Maybe it's a supervisor, manager, maybe it's human

resources, maybe it's internal counsel, maybe it's an external contractor, consultant, attorney who can help the organization, interview, talk, make decisions.

And then that piece at the end where we go back to the individuals who were impacted during the investigation and let them know where things stand. These are all tough conversations. These are conversations about trust, and these are conversations that it's important to have good relationships so that you can have these conversations inside the organization. So as we're thinking about, I mean, I don't know, as an HR professional, it's like you don't want to do investigations all the time, but you do have to do investigations because that's how the organization gets better. If you don't know about something that isn't going right or someone has a question about it, they don't understand something, they see something that they don't know whether or not that's the way it's supposed to work, but people should feel comfortable raising the question, and when they raise the question, they should feel confident and comfortable that the organization is going to do the right thing.

And that's where ethics comes in, that the organization and the individuals in the organization are all focused on doing the right thing. So I hope that, again, you've enjoyed this conversation with Heather. We've enjoyed having you listen in and have a great day. And cheers.

Speaker 1: Thanks for listening to the HR Bartender Show. To make sure you don't miss a single episode, subscribe on Apple Podcast, Spotify, Stitcher, or wherever you go for the very best podcast productions. While you're there, we'd love it if you would rate the show and leave us a review. The HR Bartender Show is an ITM group presentation produced by HR Bartender and your host, Sharlyn Lauby. Remember people, work responsibly.