

January 2012

Addressing Human Rights Is More Than Having A Policy

By Stefan Marculewicz

No employer wants to be branded a human rights abuser. Yet increasingly companies are accused of violating human rights even in situations where their activities are in compliance with applicable law or were consistent with the manner in which they have historically conducted business. Human rights as they relate to business are here to stay, and every multinational enterprise will eventually have to address them. It is just a matter of when – and under what circumstances – that will happen. It is therefore critical that an employer understand the risks that human rights issues present to the enterprise, and the need for a careful and circumspect approach to them.

In June of 2011, to much fanfare, the United Nations Human Rights Council adopted U.N. Special Representative Professor John Ruggie's Guiding Principles on Business and Human Rights. This instrument is the most significant development in recent years regarding global efforts to standardize corporate social responsibility practices. The U.N. Guiding Principles do not define human rights – they leave that to other international instruments including the International Bill of Human Rights (consisting of a number of other documents, such as the Universal Declaration of Human Rights) and the International Labour Organizations' (ILO) 1998 Declaration on Fundamental Principles and Rights at Work. Instead, they establish a framework within which governments protect, businesses respect and both governments and business remedy human rights in the ultimate quest to "do no harm." Although subject to some criticism, principally among advocacy organizations that believe the framework does not go far enough, these Guiding Principles have taken center stage in many recent forums and discussions on corporate social responsibility.

Employers, particularly those in brand-oriented industries such as apparel and consumer products, have been eager to embrace these U.N. Guiding Principles at the insistence of stakeholders. Yet in their efforts to embrace them, companies can lose sight of the fact that the framework laid out in the U.N. Guiding Principles is extremely comprehensive, and requires corporations to adjust not only their internal structures, but their way of thinking. No doubt this was intended by the United Nations Human Rights Council when it first charged Professor Ruggie to develop the Principles and then later adopted his recommended text. Ultimately, for an enterprise to adopt the framework contemplated by the U.N. Guiding Principles, that enterprise must recognize it will be forced to embark on a long, comprehensive and difficult journey. Such a journey involves nearly every facet of an enterprise, and has the potential to expose it to substantial and damaging risk of harm to its public image and brand identity if not carefully managed.

Many companies begin their human rights journey with the development of a human rights statement or policy. The U.N. Guiding Principles expect enterprises to have a human rights statement, but do not dictate the form or language such a statement should take or use. Yet, this statement is usually the first thing stakeholders wish to see. The development of a statement or policy, which may be no more than a single page of text, should never be taken lightly as its ramifications can be overwhelming. For example, multinational companies often adopt or incorporate international instruments into their policies, and there are many that include statements about a company's commitment to standards like the Organisation for Economic Co-operation and Development's (OECD) Guidelines for Multinational Enterprises or the ILO conventions. Although such statements may be well-intended, they often are the result of a misinformed and over-broad effort to convey the message that the company strives to "do the right thing." This approach, while common, is haphazard and dangerous. Statements in these policies are routinely used by advocacy groups to support their campaigns to effectuate corporate change. It is easy to find examples of public relations campaigns where an advocacy group uses a company's own policies against it. Careful and thoughtful drafting of such policies can avoid such risks, and remember that an over-broad statement will be difficult to live up to in real life.

Certain foundational aspects of the U.N. Guiding Principles may also prove problematic for an enterprise. First and foremost is defining the scope of "human rights." The U.N. Guiding Principles reference the International Bill of Human Rights,¹ coupled with the principles concerning fundamental rights in the eight ILO core conventions.² Although this broad reference makes sense, when considered at the micro level, it quickly becomes obvious that such a broad reference creates problems. "Human rights" mean different things to different people. It is now common for advocacy groups or labor unions to employ the term loosely in furtherance of their own interests. For example, labor unions engaged in disputes with employers over a collective bargaining agreement or organizing rights readily lodge accusations of "human rights abuses" to further their cause when in fact the employer's actions are entirely consistent with its rights and obligations under applicable law. Unfortunately, the ability to brand a corporation as a "human rights abuser" sends a powerful message through social media and otherwise, and one that can resonate well beyond the microcosm of the dispute itself.

A second foundational aspect of the U.N. Guiding Principles that may prove problematic is the notion that an enterprise should strive to "do no harm." Again, in the abstract this goal is laudable, particularly if viewed in the context of the common notions of what constitutes a human rights abuse, such as forced labor, displacement of indigenous populations, industrial/environmental devastation, etc. Yet this notion presents the enterprise with conflicting directives that are not easily reconciled. There are many ways in which a company might "do harm" that are expected or even encouraged in a free market economy. Certain legitimate efforts to further a company's competitive objectives will undoubtedly cause harm to someone, and certain actions might be perceived as doing good for one stakeholder and doing harm to another. Indeed, it is the perspective of the stakeholder that often dictates whether a multinational's actions do harm or not, rather than some objective measure.

The U.N. Guiding Principles also contain operational components that are troublesome from an implementation perspective. Once it embraces the U.N. Guiding Principles, an enterprise will be expected to establish a process through which it conducts human rights due diligence to determine the human rights impact of its activities. This due diligence applies not only to the enterprise, but to those with which it has business relationships, such as suppliers, service providers and contractors. Moreover, the U.N. Guiding Principles expect the entire due diligence process to be transparent. As is the case with many of the concepts espoused by the U.N. Guiding Principles, in the abstract, due diligence and transparency appear reasonable. However, when placed within the context of increasing efforts by advocacy groups to employ human rights as a tool in their campaigns against corporations, possession and disclosure of such information can be very risky. Indeed, in a world where claimants are looking for any means to bring their claims against a company in U.S. courts or elsewhere, due diligence and transparency can and will have unintended consequences that present substantial risks to a corporation.

Once it has ascertained the human rights impact of an action, under the U.N. Guiding Principles, the enterprise is expected to prevent and mitigate the adverse human rights impact and fund effective means to do so. Application of such a principle as a practical matter is very complex. The meanings of "prevention" and "mitigation" to the company might not, and likely will not, align neatly with the meanings of those terms assigned by the stakeholders, particularly those who believe that they are directly impacted.

Finally, the U.N. Guiding Principles expect employers to establish operational-level grievance mechanisms to effectively provide redress for individuals and communities that may be adversely impacted by an enterprise's activities. The mechanisms they contemplate are far more comprehensive and binding than most employers might think. Arguably, to meet the standards set out in the U.N. Guiding Principles, a

grievance mechanism needs to be enforceable and neutral. In addition, the U.N. Guiding Principles contain an unqualified endorsement of International Framework Agreements (“IFAs”) between employers and global unions federation. These IFAs, many of which ban employers from presenting their views or expressing their opinions to workers during union campaigns and permit union access to workers for purposes of organizing, have long been pursued by global union federations financed by American labor unions. Numerous multinational enterprises have been the subject of aggressive global corporate campaigns by labor unions where the object is to obtain such an agreement. With the endorsement of IFAs by the U.N. Guiding Principles, the case for such agreements has now arguably evolved into one for human rights. This is a dangerous proposition for employers and, while not insurmountable, it is one about which companies should be acutely aware.

In summary, the U.N. Guiding Principles mean more to employers than the mere establishment of a human rights statement or policy. They expect a company to develop comprehensive internal systems to manage the company’s impact on human rights. Not only is the development of such systems a complex and difficult process, and one for which a path is not currently obvious, these systems present tremendous internal challenges with respect to implementation.

It may still be premature for employers to unreservedly embrace the U.N. Guiding Principles, and it may be more prudent for employers to approach implementation slowly. Many aspects of the U.N. Guiding Principles are untested, and present substantial risks to an enterprise if it embraces these principles in an unqualified and unfettered manner without a complete understanding of their meaning. The concept of “human rights” is a loaded one that is fraught with risk for those who implement it without a complete understanding of how it can be used against them. That said, stakeholders of consumer-facing companies worried about their brands will be pressured to move forward quickly. These employers may have to act in a timely manner, but they should exercise caution not to proceed too broadly.

Littler, through its work with U.S. and international employer organizations, is actively monitoring the status of the U.N. Guiding Principles, and how they will affect employers in their operations in the United States and abroad. Assistance is available and appropriate for employers faced with these difficult issues.

Stefan Marculewicz is a Shareholder in Littler Mendelson’s Washington, D.C. office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, or Mr. Marculewicz at smarculewicz@littler.com.

¹ The International Bill of Human Rights consists of the Universal Declaration of Human Rights and the main instruments through which it has been codified: (i) the International Covenant on Civil and Political Rights, and (ii) the International Covenant on Economic, Social and Cultural Rights.

² As set out in the Declaration on Fundamental Principles and Rights at Work.