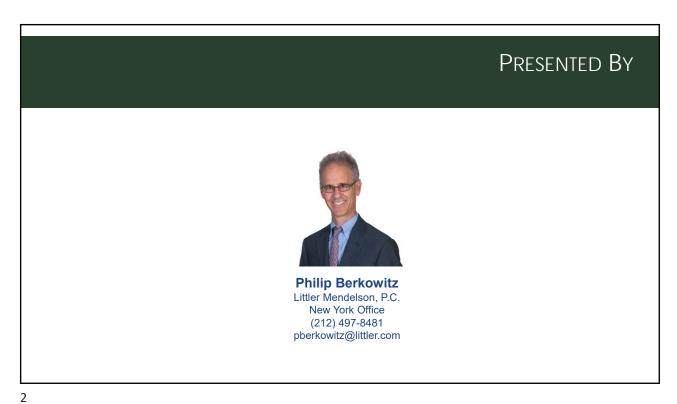


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Littler



### Publicity and Other Risks: U.S. COMPANIES ■ <u>Discrimination Settlements:</u> O Coca-Cola: \$192 million: • \$113 million in cash • \$43.5 million to adjust salaries • \$36 million for oversight of the company's employment practices • \$20 million in attorneys' fees Court-supervised seven-member task force to examine company to ensure fair hiring, pay and other practices over four years; to make recommendations and see that they are carried out. ○ *Texaco*: **\$176 million**: • Tapes containing ethnic slurs used repeatedly by company officers at high-level corporate meetings

### Publicity and Other Risks: Foreign Companies



- Astra Pharmaceuticals: \$10 million: "Astra is sorry for the instances of sexual harassment that took place under previous management," Ivan R. Rowley, president and chief executive of Astra U.S.A., said in a statement. "As a company we are ashamed of the unacceptable behavior that took place. To each person who suffered, I offer our apologies."
  - Mitsubishi Motors of America: \$34 million: At the time, largest sexual harassment settlement in history

### RECENT DEVELOPMENTS: FCPA

- JP Morgan Chase, November 17, 2016: Paid \$264 million to end claims that its Asia Pacific subsidiary created a referral hiring program designed to hire candidates referred by client executives and government officials
- <u>Credit Suisse</u>, July 2018: CSHK and Swiss parent paid \$75 million criminal penalty to US DOJ for its role "in a scheme to corruptly win banking business by awarding employment to friends and family of Chinese officials."
- CSHK admitted that "these 'relationship hires' often lacked necessary technical skills, and offered fewer qualifications and significantly less relevant banking experience than other candidates for the jobs."



### JOB INTERVIEWS: COMPENSATION

- What is your current salary?
- Do you receive a bonus—how much is it?
- How does what we are offering you compare with what you're making?
  - These questions, according to the law, have the potential to discriminate against women and minorities, who may have made less money in the past.
  - O Cannot search online for salary data or ask third parties!
  - o If learn the information, cannot rely on it!!

### JOB INTERVIEWS: HERITAGE

- Are you of Japanese / Chinese / Korean heritage?
- What is your native language?
- Do you have to take off for religious holidays?
  - O Which holidays do you observe? Do you believe in God?
- Where were your parents born? Where are your grandparents from?
- Where were you born? Were you born in the United States?
- Were your children born in the United States? Where is your wife from?

### JOB INTERVIEWS: FAMILY STATUS

- Are you married? Single? Divorced? Separated?
- What is your spouse's name? Do you live with a partner?
- Do you have to take care of children at home?
- How do you care for your children if you have to work late?
- Are you planning to have children?
- Why haven't you and your spouse had children yet?
- Are you gay, lesbian? What is the gender of your partner? Wife? Husband?

## JOB INTERVIEWS: AGE, RETIREMENT PLANNING

- How old are you? What year were you born? What are the ages of your children?
- When do you plan to retire? When does your spouse plan to retire?
- What years did you attend college? What year did you graduate?
- How old were you when you left your last job?

### JOB INTERVIEWS: ILLNESS OR DISABILITY

- Do you have a disability? Do you have any impairments, physical, mental or medical, which would interfere with reasonable job performance?
- Have you ever been treated for any of the following diseases ... ?
- Do you have now or have you had a drug or alcohol problem?
- Is anyone in your family disabled? On unemployment?
- Have you ever received worker's compensation?
- Are there any jobs you should not be considered for because of a disability?

# JOB INTERVIEWS: CRIMES, ARRESTS, CREDIT HISTORY

- Have you ever been arrested?
- Have you ever been convicted of a crime?
- Have you declared bankruptcy?
- May we review your credit history?

### JOB LISTING

- Wanted: Female receptionist, prefer under age 30. Must be trim, attractive, unmarried. No Indians.
- Wanted: Engineer with no more than five years' experience. Must be native Korean speaker. Must be committed Christian church member.
- Wanted: Computer programmer. Must be between ages of 30-50. Must be non-smoker. Requires travel—male only.

## Age Discrimination



- Mandatory retirement not permitted
- U.S.: protects older workers
- Evidence?
- Disparate treatment (or) "kidding around"
  - Grandpa, Old Man
  - Over the hill
  - Dinosaurs
  - New blood
  - Encouraging retirement

## WORKPLACE HARASSMENT

- Quid pro quo
- Hostile environment: unwanted conduct, "so severe or pervasive as to alter conditions of employment and create an abusive working environment."
- New York City: much easier: "zero tolerance for conduct demeaning to a worker because of protected class status." Conduct is unlawful unless "petty slights and trivial inconveniences."
- Based on any "protected category"



## Quid Pro Quo

- Taking any tangible employment action based on an agreement or refusal to engage in sex, dating, etc.
- Strict Liability for the harassing conduct of managers and supervisors, regardless of whether the employer had a policy or did not know of the harassment
- Supervisors getting "involved" with people who report directly to them = risky business ... a lawsuit waiting to happen.

## HOSTILE ENVIRONMENT HARASSMENT

- Unwelcome conduct based on someone's membership in a protected category that unreasonably:
  - o Interferes with an employee's job performance, or
  - $\circ$  Creates an intimidating, hostile, or offensive work environment.
  - o"No" means no
  - o"Maybe" means no

### RETALIATION

- What's unlawful: retaliating against an employee because he or she engaged in protected activity, e.g., complained about alleged discrimination or harassment.
- What does retaliation look like?
  - Demotion
  - Denial of opportunities
  - O Refusal to bring to client meetings or to work with the person
- Human nature: easy to believe that boss, or even another member of management, would retaliate!
- Can result in significant penalties even if the employee fails to prove the underlying discrimination or harassment.

## SIMILAR: WHISTLEBLOWER CASES

- What is protected activity?
  - OUsually a communication / complaint about:
    - Financial or banking fraud
    - Tax fraud
    - False internal reports
    - Bribery of foreign officials
    - Violations of securities laws
    - Violations of health and safety laws

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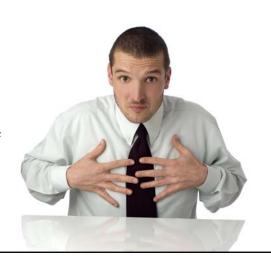
# Whistleblower complaints

### The complaint is:

- O I told Human Resources that my boss is cheating a customer; or
- o I told my boss that his business practices are not honest; or
- I told my boss that I hired a lawyer because I think I am a victim of harassment;
- $\circ$  AND
- As a result, I was denied an opportunity.
- O How to prove: temporal proximity; I was doing OK before; there are no written criticisms of my job performance.
- O How to defend: documentation of performance problems, remoteness in time.

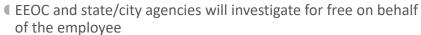
### WHEN PERSONALLY ACCUSED

- Remain professional, take seriously
- Cooperate with HR.
- Do not argue with the person who has made the accusation.
- Do not discuss with colleagues "I am not going to discuss this."
- Do not retaliate against the accuser!
- Do not engage in conduct that could be interpreted as retaliation—e.g., denial of opportunities, silent treatment, false accusations.
- Tell your story in a professional way—try to avoid emotion.



### HOW U.S. EMPLOYEES MAY BRING A CLAIM

- Equal Employment Opportunity Commission (EEOC)
- State/City Division of Human Rights
  - O New York State Division of Human Rights
  - New York City Commission on Human Rights
  - O New Jersey Commission on Civil Rights
  - California Fair Employment and Housing Commission



Direct lawsuit: Lawyer will take the case for free in exchange for a "contingency fee."

free on behalf

# POTENTIAL REPERCUSSIONS I Jury trials—no qualifications to serve Compensatory Damages Back pay Benefits Attorneys' Fees Punitive Damages Corporate and Individual Liability Individual / Class / Collective Actions

### WHAT IS "DISCOVERY"?

- Court rules require disclosure:
  - o "regarding any non-privileged matter that is relevant to any party's claim or defense"
  - O Depositions: right to interview employees / supervisors under oath
  - The Company must provide employees with all relevant documents.
  - This includes email and text messages, and drafts of Word documents: "metadata".
  - O How much thought do you give to emails and texts? Critical evidence!!
  - Duty to preserve: sanctions for failure to preserve/produce/destruction/loss, even if inadvertent.
  - No such thing as a "confidential" communication, unless it is directed to counsel, for the purpose of seeking legal advice.



### E MAIL WECHAT RISK

### Zubulake v. UBS

- "Old and ugly", "can't do the job"
- "She may sue"—also, failed to preserve emails
- **◆**\$29.3 million verdict!

#### Other cases:

- "If you sue, you will have to leave the Company!"
- "Clients are like women: You must seduce and take them!"
- Merrill Lynch recommended stocks they called "junk" in internal e-mail—agreed to \$100 million penalty

### FOREIGN COMPANIES AS TARGETS

- US discrimination and harassment laws apply to foreign companies doing business in the U.S.
- **●**Unfamiliar customs
- Scapegoats for down economy
- ◆Failure to include local staff
- ■Language



### FAVORING HOME COUNTRY NATIONALS

- Japanese Company "A" (SDNY 2009)
  - o Asia Business blog: download the complaint
  - 43 pages, 163 paragraphs
  - o "parent requires company to give preeminence to rotating employees
  - Expats: senior management positions, higher pay, more lenient discipline, less responsibility
  - $\circ$  Key meetings in Japanese, business plans and other key documents in Japanese
  - o "secret formula for calculating salary, allowances, and bonuses for rotating staff"
  - o "employees who complain suffer retaliation"

### **EXPATRIATE ISSUES**

### **■** Expatriate Managers

- OMay not speak English fluently
- May not fully understand U.S. sensitivities to discrimination, harassment, and retaliation; roles of women in workplace
- May prefer to work and socialize with other expatriates rather than the U.S. workforce
- OMay say / do things which are 'okay' in the home country but 'offensive' in the U.S.
- May not understand U.S. wage / hour requirements (meal breaks, offthe-clock work, overtime, etc.)

# EXPATRIATES DIFFERENT EMPLOYMENT LAW ENVIRONMENTS

- Different laws and regulations (home country vs. US) concerning:
  - Discrimination
  - Sexual harassment
  - Mandatory retirement age
  - Terms and conditions of employment (e.g., overtime pay, meal periods and other breaks)
  - Unionization and the role of labor organizations
  - Termination and severance

## Cultural and Communication Issues

- Language issues: "Yes" may mean, I understand, not I agree.
- American employees may expect an immediate response to questions
- Criticism of superiors not unusual?
- Different expectations regarding work-life balance may lead to negative comments about work effort, loyalty, teamwork, etc.



# LANGUAGE BARRIER PROBLEMS CASUAL CONVERSATIONS CAN CAUSE PROBLEMS

- Hallway conversations or meetings in Japanese / Chinese / Korean language, in the presence of English-only speakers, can create feelings of exclusion and lead to discrimination claims.
- Same is true of emails.
- Lunches of "expats only" can create feelings of elitism
  - OEven if the intention of the expats is only to speak their native language (it's easier) and to talk about home country topics (they think the local staff may not be interested)

# REASONS EXPATS MAY PRESENT RISKS FAILURE TO ENGAGE

- Expatriates should not permit an inability to speak English very well to cause them to withdraw from active management
  - Creates self-fulfilling prophecy
  - OLeads to reactive management
  - ONon-communication is perceived as disengagement by local staff, and is interpreted in the most negative light

# DEVELOPING YOUR STAFF MOTIVATING EMPLOYEES

- •What Motivates the American Worker?
  - ORecognition of success: Praise publicly
  - ORespect: Reprimand privately
  - OWork-life balance
    - Can enjoy and add value to family while working
    - Recognition by company of family contribution
    - Understanding two-income households

# Performance Management (1) FEEDBACK AND COACHING

Pointing out "improvement points" only:

- In Asia: Efficiently tells employee where to improve
- In US: Employee may think that any positive performance was not so important.
- Employee is uncertain whether performance that they believed was good, is viewed that way by their supervisor, since it is not worthy of comment.

# PERFORMANCE MANAGEMENT (1) FEEDBACK AND COACHING

Employee feedback: Not saying anything

- In Asia: A sign of positive or at least acceptable performance
- In US: Employee is uncertain and assumes something is negative, but not sure what: "If you can't say anything nice, don't say anything at all."

### Rules to Live By Everywhere

- Communicate openly and respectfully.
- Be fair and consistent with your supervisory authority.
- Confront and document performance concerns early to avoid serious problems later.
- Work with Human Resources Department when there is a problem.
- Be factual and honest with evaluations .
- Act consistent with the organization's commitment to quality and fairness.

### FINAL THOUGHTS

- The cause of many workplace lawsuits or loss of productivity from employee leaving is a feeling of perceived unfairness or indignity.
- It is important for both sides to understand each other, and to give each side the benefit of the doubt generally, everyone's intention is good.
- Expatriates need to set a good example to local employees and to be proactive in preventing unfair treatment, discrimination and harassment.
- We are all 24/7, 365 representatives of our employers—and of our countries!

