

EPSTEINBECKERGREEN

Successfully Navigating Your Business In The U.S. During Challenging Economic Times

**Epstein Becker & Green, P.C.
Bank of China, and
China Chamber of Commerce in U.S.A
April 13, 2011**

Introduction

Faculty and Topics:

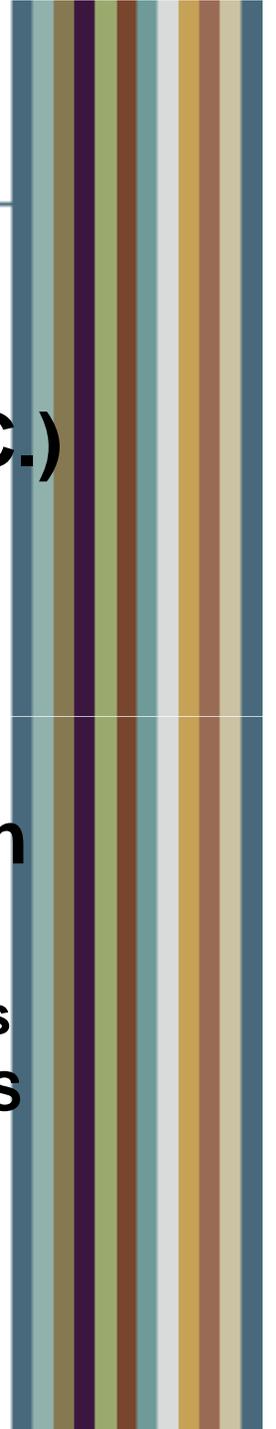
- **Robert S. Groban, Jr., Esq. (New York)**
 - Immigration Developments and Risk Management
- **Allen B. Roberts, Esq. (New York)**
 - Whistleblowing and Corporate Compliance Programs
- **Dean L. Silverberg, Esq. (New York)**
 - Best Hiring Practices and New York Wage and Hour Update
- **Gretchen Harders, Esq. (New York)**
 - Compensation and Employee Benefits

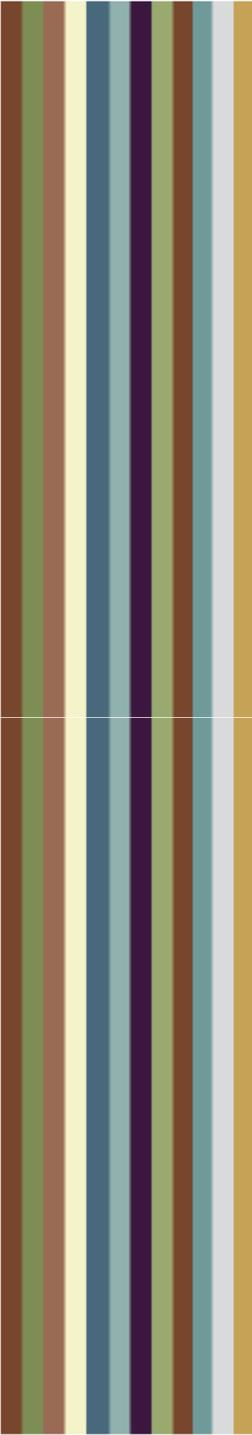


Introduction

Faculty and Topics:

- **Robert D. Reif, Esq. (Washington, D.C.)**
- **Adrian Zuckerman, Esq. (New York)**
- **Steven Fox, Esq. (New York)**
 - Joint presentation on Business Opportunities
- **Frank C. Morris, Jr., Esq. (Washington D.C.)**
 - Non-Competition and Confidentiality Agreements
 - Preventing and Succeeding in Litigation in the US





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Doing Business in the United States: Important Immigration and Related Concerns

Robert S. Groban Jr.

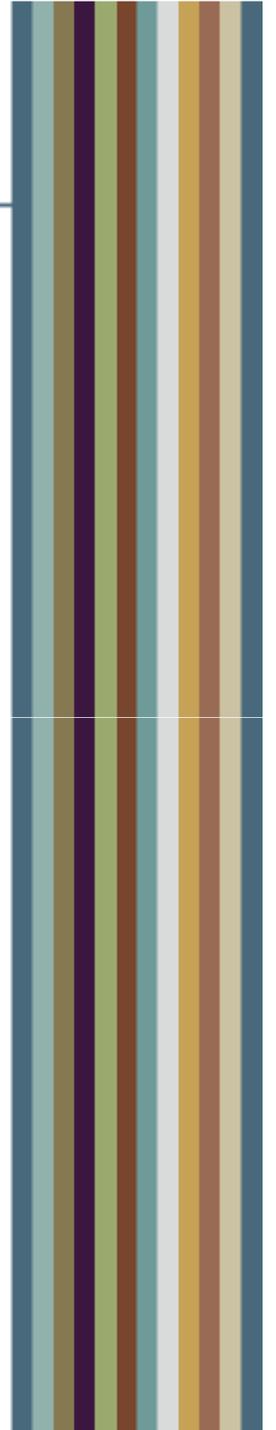
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Presentation Summary

- U.S. Immigration: Developments that Affect Chinese Businesses
- Risk Management Issues in the Employment of Foreign Nationals
- Mergers and Acquisitions
- Obama Administration: A New Compliance Environment
- State Immigration Legislation

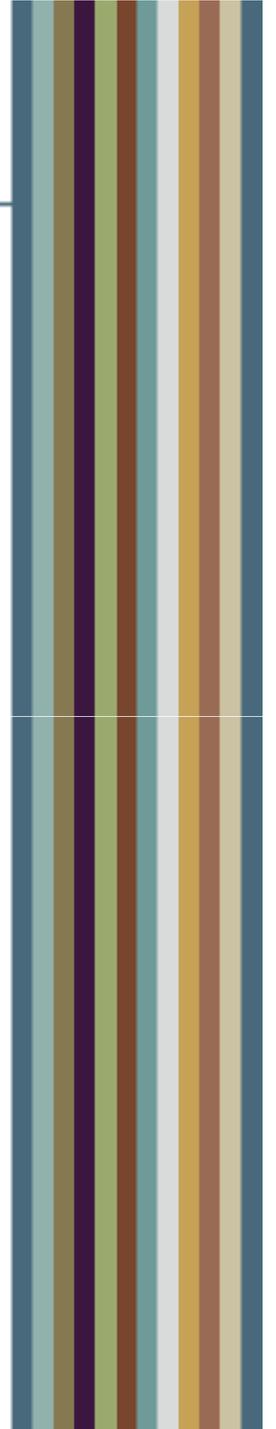


U.S. Immigration: Developments that Affect Chinese Businesses

U.S. Immigration Scheme

- A. Immigrants: Those residing permanently in the U.S.

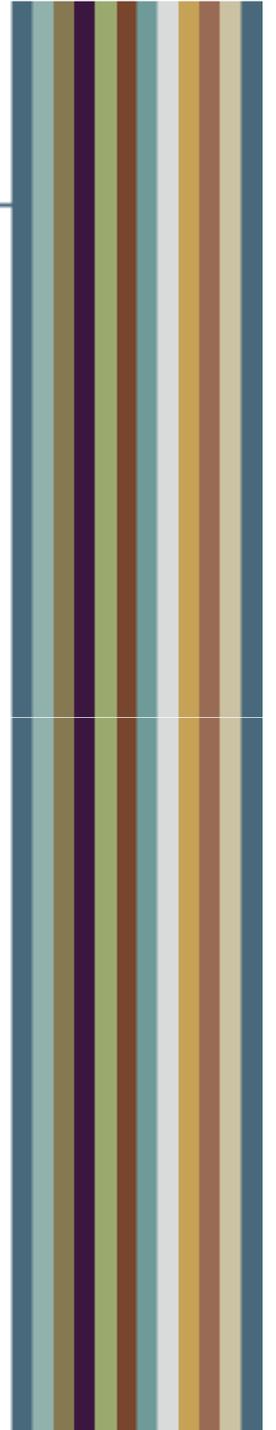
- B. Nonimmigrants: Everyone else!



U.S. Immigration: Developments that Affect Chinese Businesses

Visa application process

- A. Evidentiary burdens
- B. Export Control Certifications in From I-129, Part 6: “Deemed” Export rules
- C. Technology Alert (“TAL”) and other security reviews for all visa applicants
- D. Business visa coordination; anticipate delays



U.S. Immigration: Developments that Affect Chinese Businesses

Business Visitors (B-1)

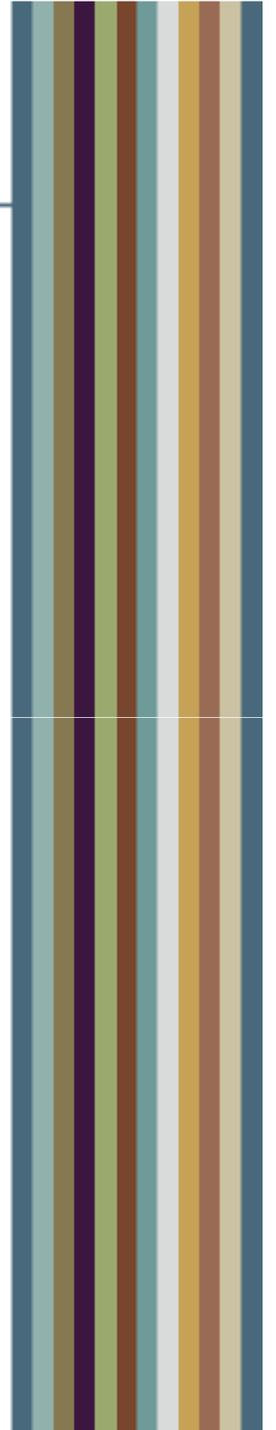
- A. Permissible purpose
- B. Security/Fraud concerns
- C. Deemed export issues
- D. Documents all aspects of the application
 - Intention to remain in the U.S. “temporarily”
 - “Compelling” ties to business sponsor
 - Financial ability to pay for the trip/support visitor on the trip
 - No compensation from U.S. source (expenses ok)



U.S. Immigration: Developments that Affect Chinese Businesses

H-1B Professionals:

- A. Quota: 65,000; Six-year maximum
- B. Labor Condition Applications (LCAs)
- C. Deemed export issues
- D. Benching
- E. Public Access Files
- F. “Bona Fide” Termination



U.S. Immigration: Developments that Affect Chinese Businesses

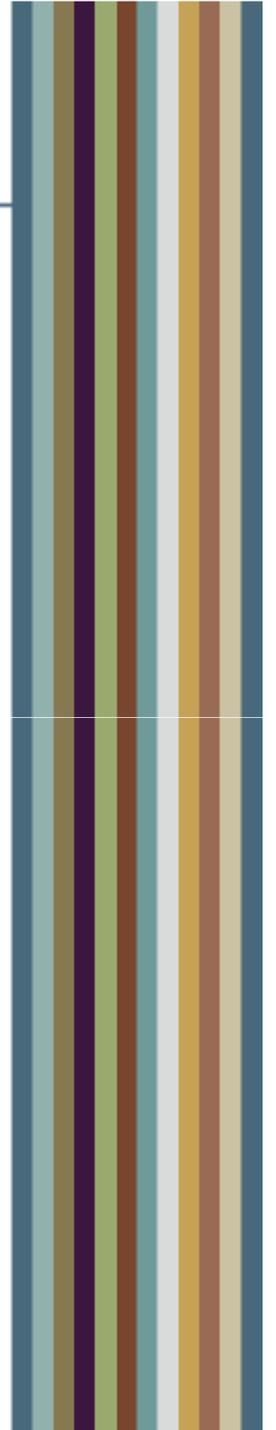
L-1 Intracompany Transferees

A. Process

- Individual applications
- “Blanket” petitions

B. Special issues: One v. three year initial approvals

C. Deemed export issues



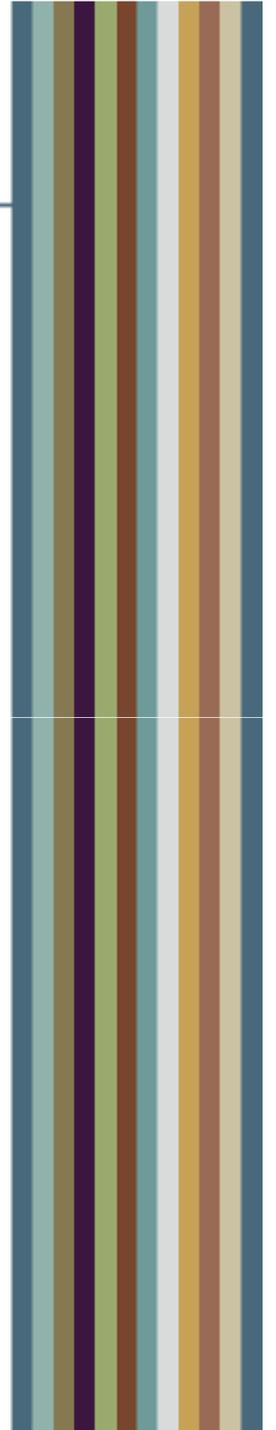
U.S. Immigration: Developments that Affect Chinese Businesses

EB-5 Investors

A. Regression of quota numbers for China renews interest in EB-5 investor program

B. 5,000 visas annually for EB-5 but quota not filled

C. Opportunity for investors to secure U.S. permanent residence more rapidly



Risk Management Issues in the Employment of Foreign Nationals (FN)

A. Recruitment issues:

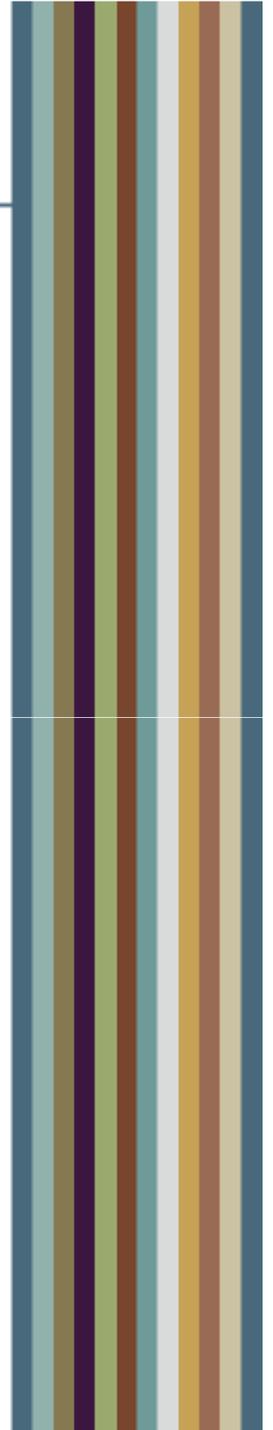
- Design employment applications to assess immigration issues
- Develop procedures that legally allow company to say “no”

B. Corporate immigration policies

- Difficult economic times breed employee lawsuits
- Several recent decisions have found employers liable to FNs for “breaching” promises to sponsor them
- Develop and implement a corporate immigration policy that defines obligations

C. RIFs

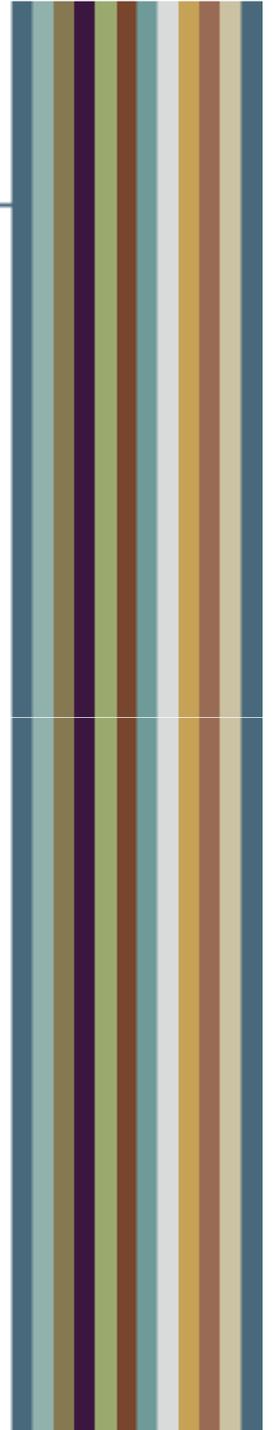
- PERM restrictions
- Assess FN employee status:
 - Permanent resident applicants (i. e. I-485)
 - Nonimmigrant temporary worker classifications (H, TN, E, L, O)
- H-1B employees:
 - Benching
 - “Bona fide” terminations
- Notify the DHS of termination?



U.S. Immigration: Mergers and Acquisitions

Mergers/acquisitions: Immigration “due diligence”

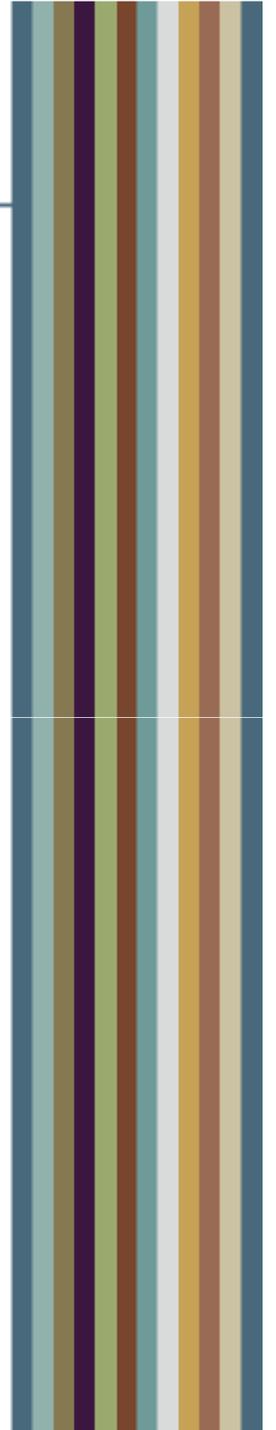
- A. Determine impact of transaction on nonimmigrant/immigrant status
- B. Develop action plan:
 - Address TAL/“Deemed Export” issues
 - Examine Form I-9 records
 - Check PAFs
- C. Plan Ahead



The Obama Administration: A New Compliance Environment

DHS Secretary Napolitano: ICE worksite enforcement:

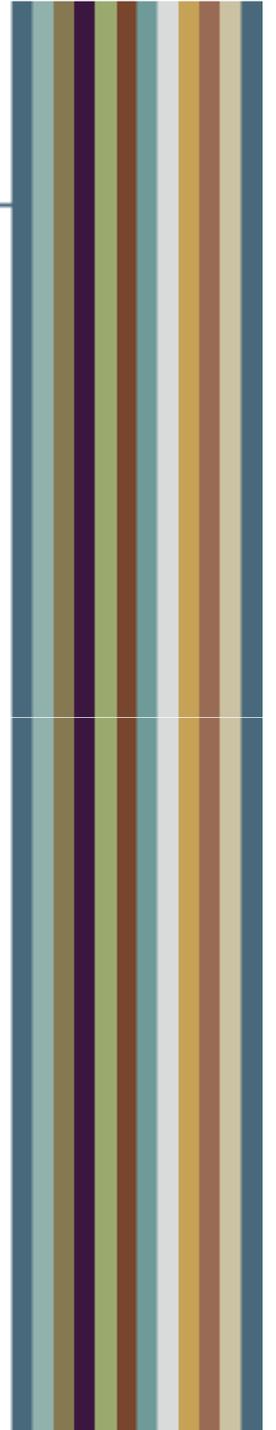
- A. Pre-2006: Critical infrastructure
- B. 2009: Criminal prosecutions, asset forfeitures, increased civil penalties for Form I-9 violations
- C. Upgrade and expand E-Verify program
- D. Focus on Sanctions against employers



The Obama Administration: A New Compliance Environment

Form I-9 Process: U.S. immigration laws require all employers to verify the identity and work authorization of all new employees on Form I-9

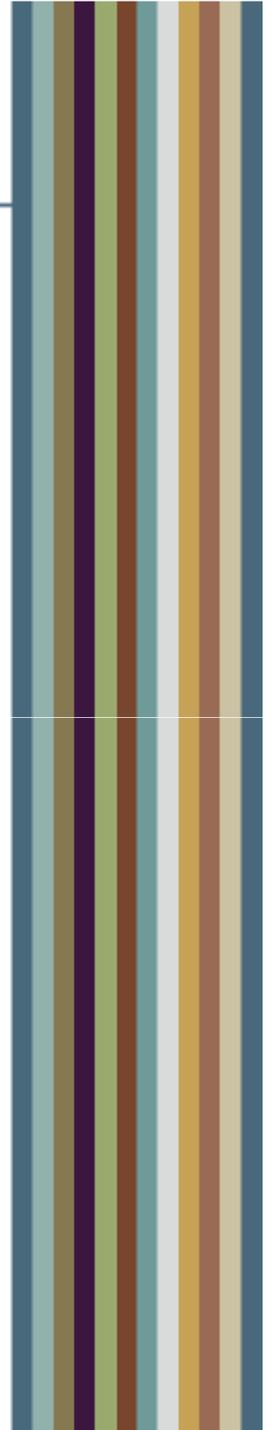
- A. Revised Form I-9 available at: www.uscis.gov/i-9
- B. USCIS Fact Sheet available at:
www.uscis.gov/pressrelease/FormI9FS110707.pdf
- C. Employer's Handbook:
www.uscis.gov/files/nativedocuments/m-274.pdf
- D. Guide to Selected U.S. Travel and Identity Documents, M-396:
Available from-CBP National Distribution Center, P.O. Box 68912, Indianapolis, IN 46268



The Obama Administration: A New Compliance Environment

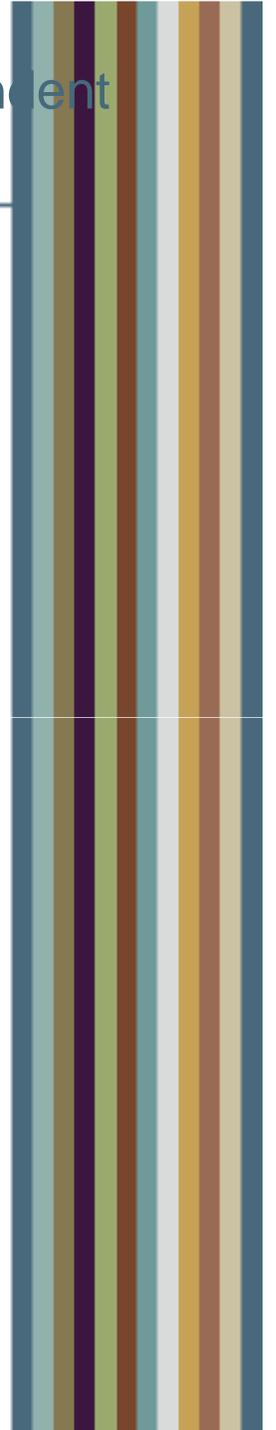
Organizations must:

- A. Assess legal exposure
- B. Educate management on legal risks
- C. Develop and enforce consistent, robust internal policies
- D. Adopt HR practices that identify and/or prevent fraud
- E. Use proper Form I-9
- F. Prepare a Crisis Management Plan
- G. Implement DHS “Best Practices”



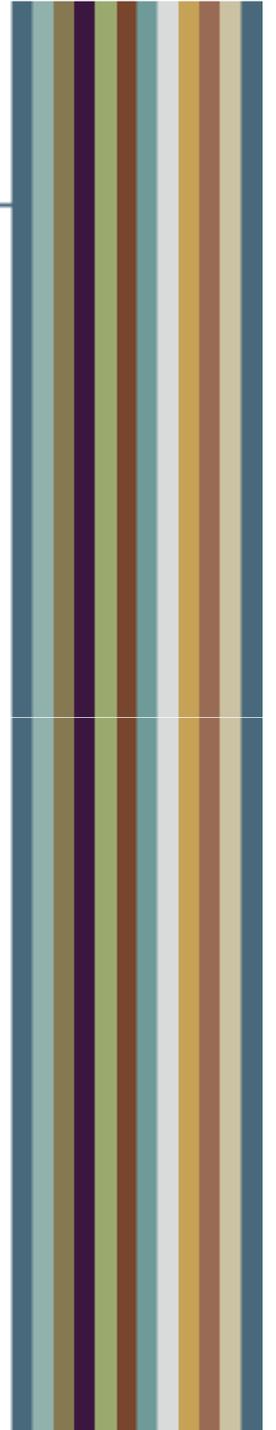
The Obama Administration: A New Compliance Environment-Independent Contractors

- A. DHS “Best Practices” require employer vigilance for contractors/subcontractors
- B. Wal-Mart: \$11 million fine due to cleaning contractors
- C. Protocols that protects the company:
 - Contractual provisions requiring immigration compliance by contractors/sub-contractors
 - Mandatory use of E-Verify
 - Audit procedures
 - Warranties and indemnities
 - Enforcement: Penalties and damages



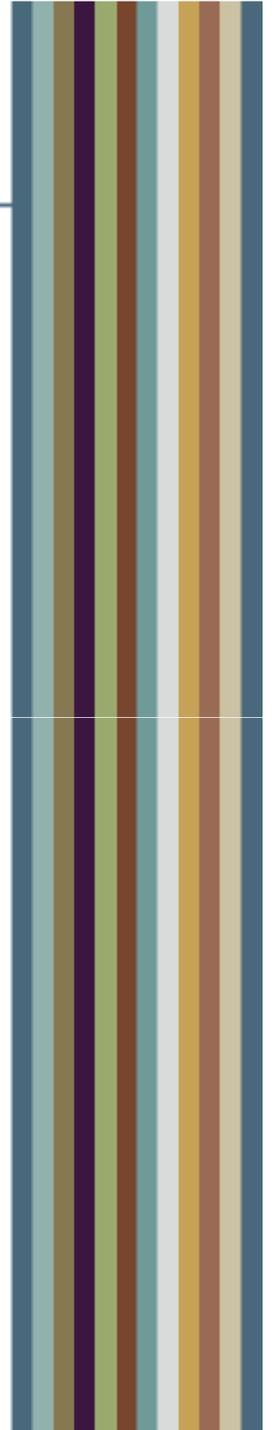
The Obama Administration: A New Compliance Environment

- A. It can be your problem!
- B. Executives, managers, supervisors, HR staff and contractors can be convicted for various crimes related to hiring unauthorized employees
- C. Criminal charges: unauthorized hiring, harboring, transporting, conspiracy, fraud, money laundering, identity theft and document fraud
- D. Civil fines, asset forfeitures



State Immigration Legislation

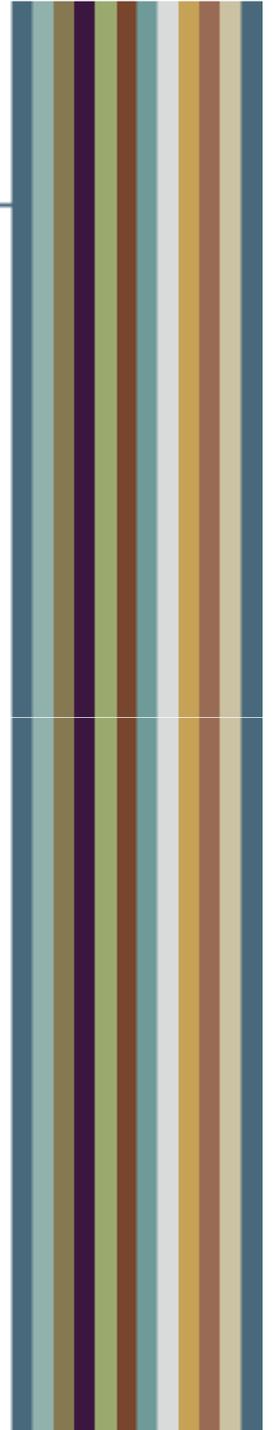
- A. Many states require employers and/or government contractors to enroll in E-Verify or perform additional employment verification than the Form I-9 process
- B. Since 2005: 31 states enacted legislation or issued executive orders that deal with the employment of undocumented workers
- C. Employers now must check state law where they have employees or contract with that state or any political subdivision

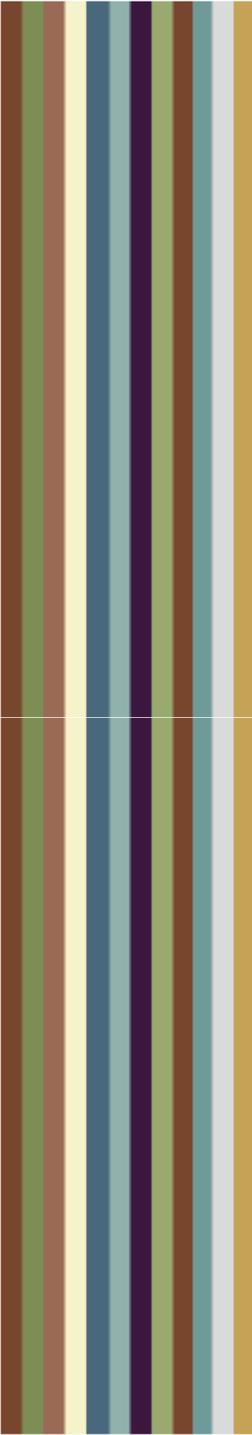


State Immigration Legislation

State law requirements:

- A. E-Verify mandatory for employers: AZ, MI, OK, GA, NE, UT and SC (laws implemented in stages)
- B. E-Verify required for state contractors: CO, NE, GA, MN, MO, RI and UT
- C. States requiring contractor certifications: AR, ID, MA, TN and VA
- D. States imposing additional penalties on employers: FL, LA, NV, NH, OR, PA, TN, VA and WV





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Whistleblowing: Reducing Risks Through Corporate Compliance Programs

ALLEN B. ROBERTS

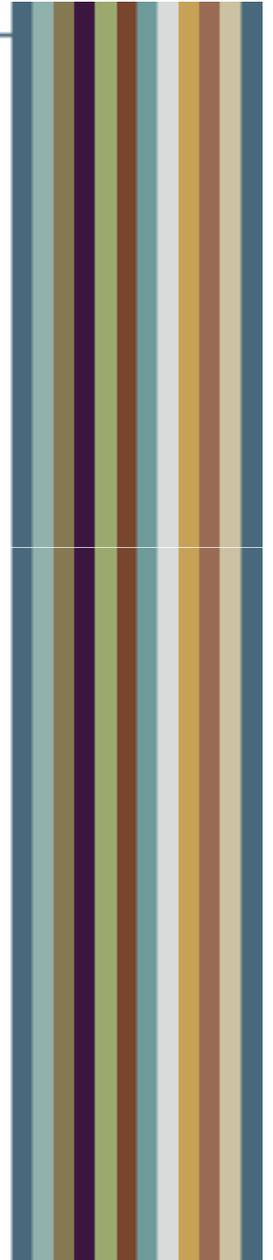
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Why Whistleblowing Matters

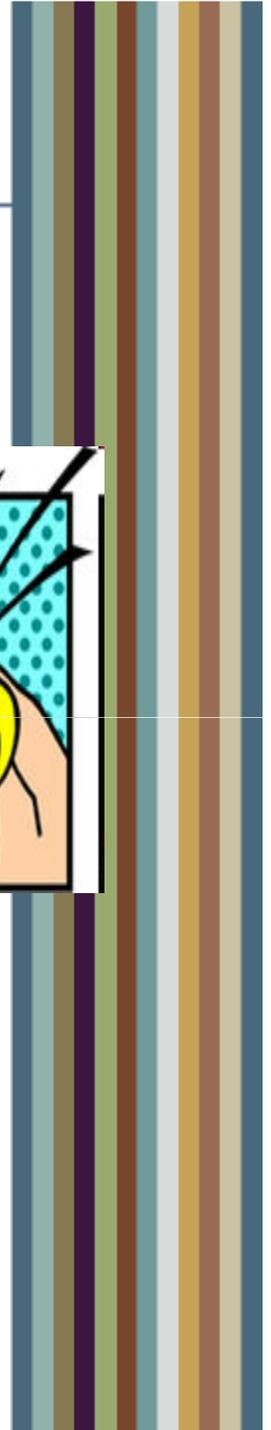
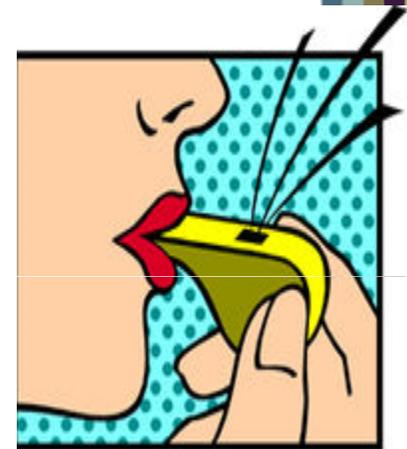


- New populist and regulatory climate
 - More than ever, regulators and enforcement agencies are watching
- Compliance program hallmarks
 - Best practices
 - Transparency
 - Accountability
- Legislative Mandate
 - Whistleblowers have a role to play



Profile of a Whistleblower

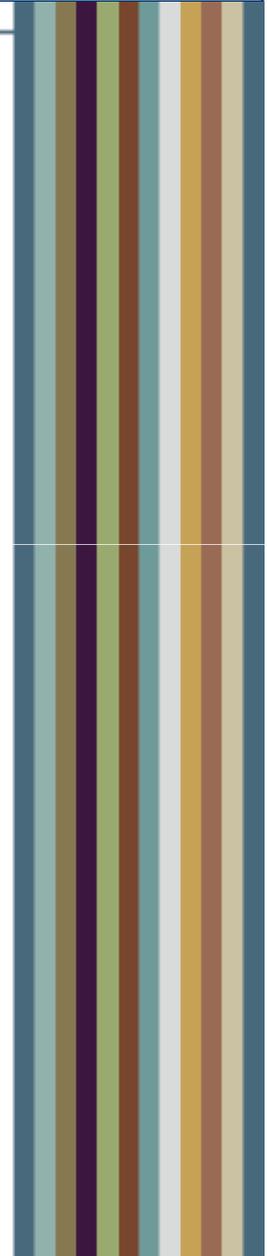
- Tension between theory and reality
 - The altruistic whistleblower
 - The whistleblower with an agenda
 - Endangered employee
 - *Qui tam* opportunist
- Not your average complainant
 - Has internal, non-public information
 - Has access to controls and processes
 - Participates in investigation or proceeding
 - Invokes corporate or external code



General Prohibitions

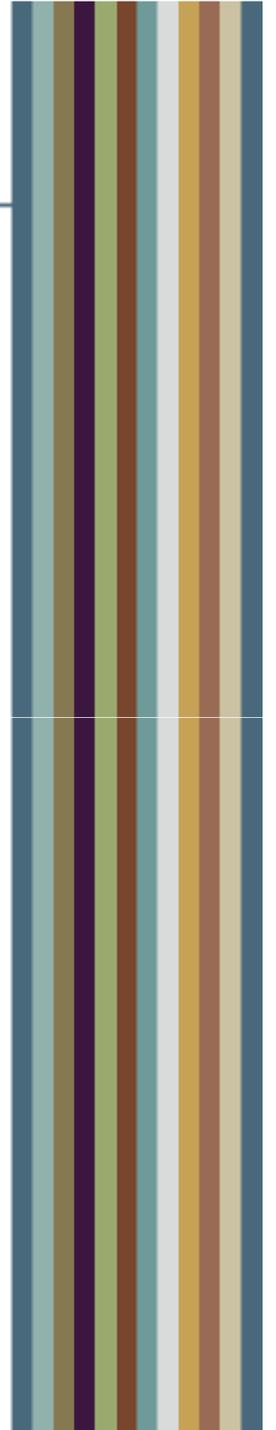


- discipline and discharge
- other adverse employment actions
- action that would dissuade a reasonable person from engaging in protected activity, even where there are no tangible economic consequences



Managing for Compliance

- Intake
 - Hotline and reporting channels
- Investigation
 - Participants
 - Exclusions
- Decision making
 - Participants
 - Exclusions
- Controlling communications



**BEST HIRING PRACTICES AND SPECIAL NEW
YORK WAGE AND HOUR UPDATE**

April 13, 2011

Presented By:

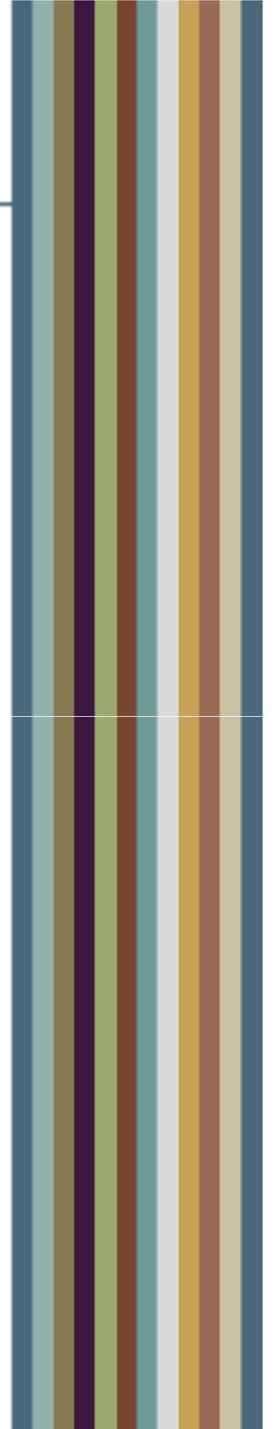
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HIRING PRACTICES

- Employment Application
- Background checks
- Interview process
- Offer Letter/Employment Agreement
- References
- Other Best HR Practices



EMPLOYMENT APPLICATION

Employment Application should include:

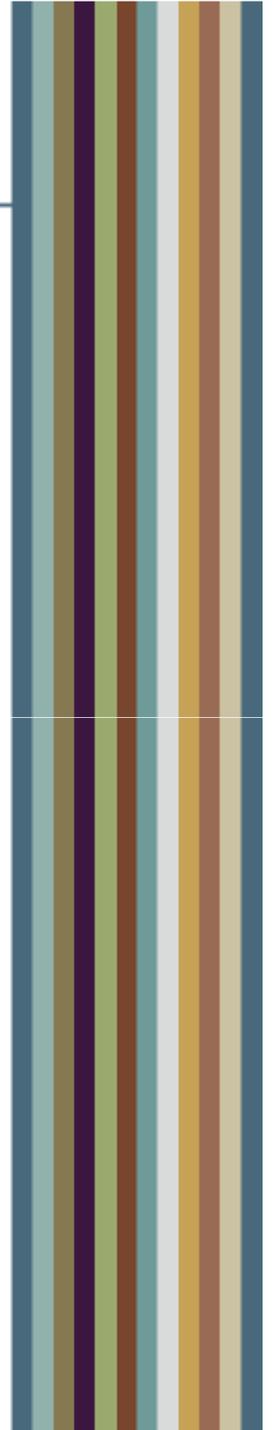
- Criminal Convictions (Always Review)
- Ability to Work in U.S.
- Educational Background
- Employment-at-will Disclaimer
- References
- Signature



BACKGROUND CHECKS

Federal Fair Credit and Reporting Act Considerations

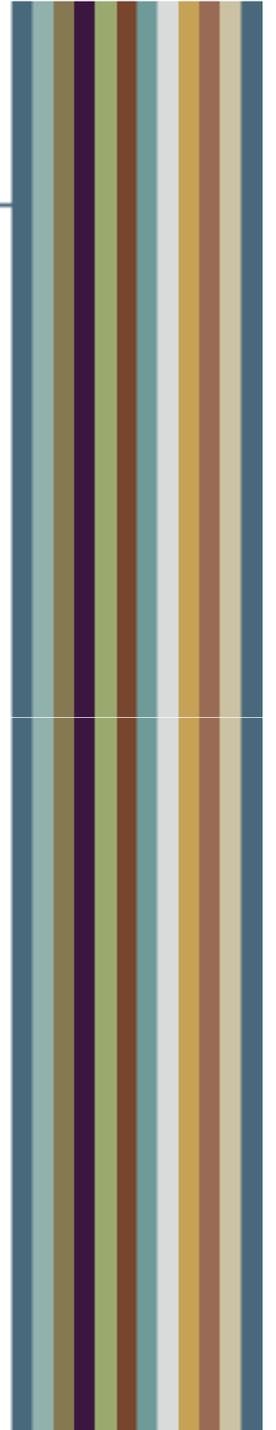
- Always Review State Requirements
- Third Party Checks
- Authorization – In Writing
- Negative Information: What To Do?
- Process to Follow
 - Consider the Information
 - Notification to Applicant
 - Action By Employer



BACKGROUND CHECKS:

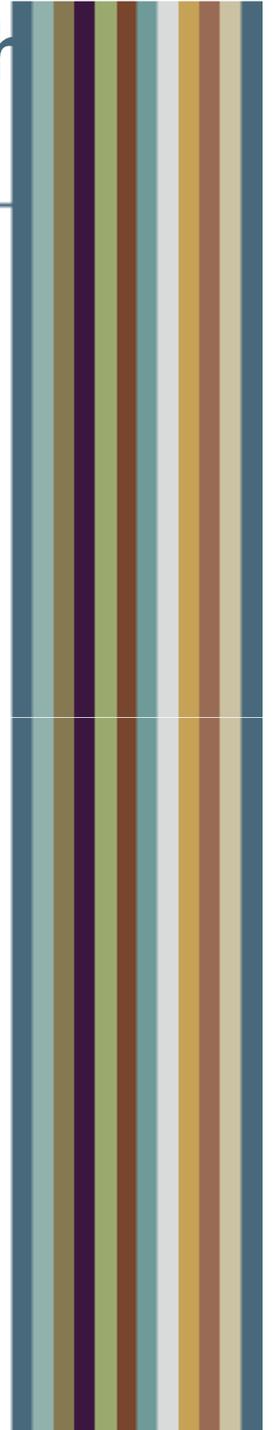
Arrest Record

- Employer cannot generally refuse to hire because of arrest or conviction.
- Review state laws to ensure compliance.
- Legal Balancing Tests (continues)



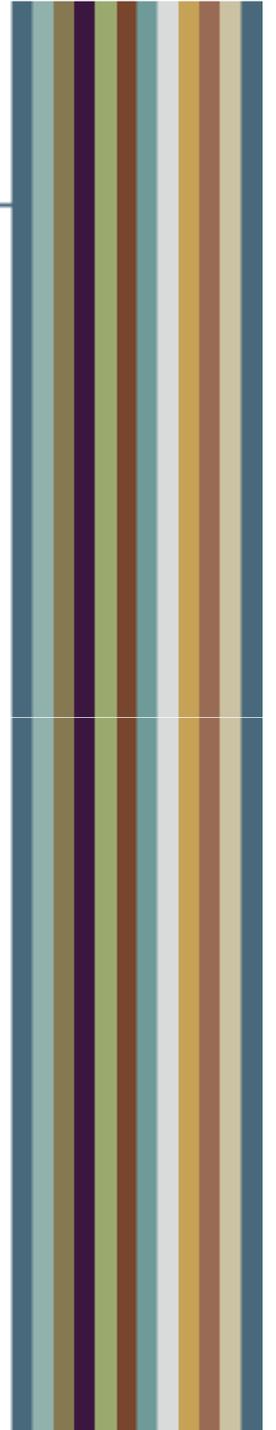
Factors to Consider in Connection with Criminal Convictions

- Is it job related -- is there a direct relationship between offense and employment?
- Would there be unreasonable risk?
- Public policy to employ convicted individuals.
- Duties and responsibilities, and bearing of offense on ability to perform.
- Time elapsed and age at time of offense.
- Seriousness of offense.
- Information provided in regard to rehabilitation or good conduct.
- Other relevant factors



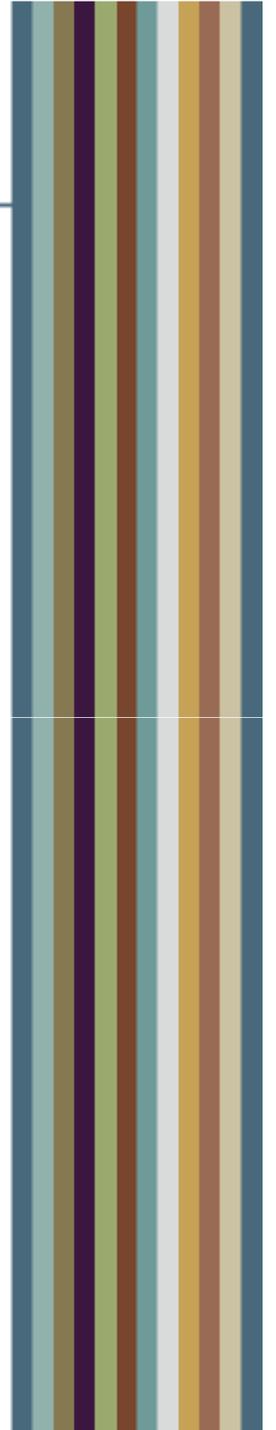
CONDUCTING AN INTERVIEW

- Job-Related Questions
- Careful Regarding “Ice Breakers”
- Avoid Questions Directly or Indirectly Pertaining to Protected Classifications
- Note Taking During Interview



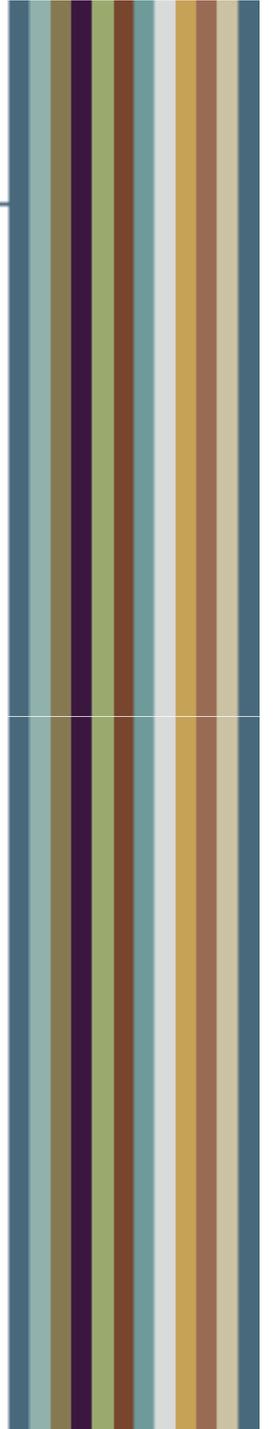
OFFERS OF EMPLOYMENT

- Avoid language that conveys that the offer is for any guaranteed period of time
- Include employment-at-will disclaimer
- Condition offer on completion of references and any background checks
- Confidentiality
- Representations by prospective employee regarding prior job (e.g., employment restrictions or covenants)



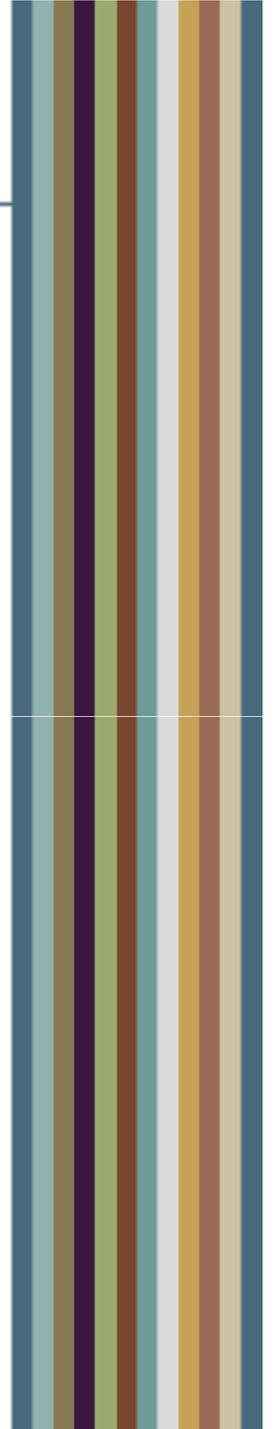
REFERENCE CHECKS

- Provides employer with insight to ensure that the applicant is capable of performing the job
- Can shield employer from claims of negligent hiring.
- Be thorough and persistent



Other Best HR Practices

1. EEO / Non-Harassment Policies
2. Employee and Manager Training
3. Progressive Discipline
4. Evaluation Process
5. Termination Matters



Special Note for New York Employers: New Wage and Hour Laws

NY WAGE THEFT PREVENTION ACT: OVERHAULS NY LABOR LAW

- Expands notice requirements on pay rates and days
- Amends statutory payroll and wage statement (pay stub) requirements
- Increases liquidated damages for violations
- Provides statutory damages and private right of action for various notice violations
- Facilitates the collection of wages
- Prohibits threats of retaliation
- Increases available damages
- Authorizes criminal penalties for notice violations
- Provides Commissioner of Labor with broader investigatory and enforcement powers



CHANGES TO NY LABOR LAW § 195.1: NOTICE OF PAY RATES AND PAY DATES

- **Written notice of pay rate/date must be provided:**
 - At the time of hire to new hires
 - Annually, starting in 2012, (between Jan. 1 and Feb 1) to all employees
 - In English and in “primary language” identified by employee
- **Employer must obtain acknowledgment of receipt and “primary language”**
- **Must keep records for at least six years**



§ 195.1: NOTICE OF PAY RATES AND PAY DATES MUST CONTAIN:

- Rate or rates of pay and basis (e.g., paid by hour, shift, day, week, salary, piece, commission)
- Regular rate and overtime rate (for non-exempt employees)
- Any allowances claimed as part of minimum wage (e.g., tips, meal/lodging allowances)
- Regular payday
- Employer's name (including any "doing business as" names used)
- Employer's physical address (main office or physical place of business, and mailing address, if different)
- Employer's telephone number
- Any other information Commissioner deems material and necessary (e.g., applicable exemption for exempt employees)

**WAGE THEFT HOTLINE:
1-800-905-9644**

www.workersrightsny.org

§ 195.3: WAGE STATEMENTS (PAY STUBS) MUST INCLUDE:

- Dates of work covered by the applicable payment of wages
- Employee's name
- Employer's name
- Employer's address and phone number
- Rate or rates of pay and basis of pay
- Gross wages
- Deductions
- Any allowances claimed
- Net wages

Additionally, for non-exempt employees:

- Number of regular hours worked
- Number of overtime hours worked
- The regularly hourly rate(s) of pay and overtime rate(s) of pay



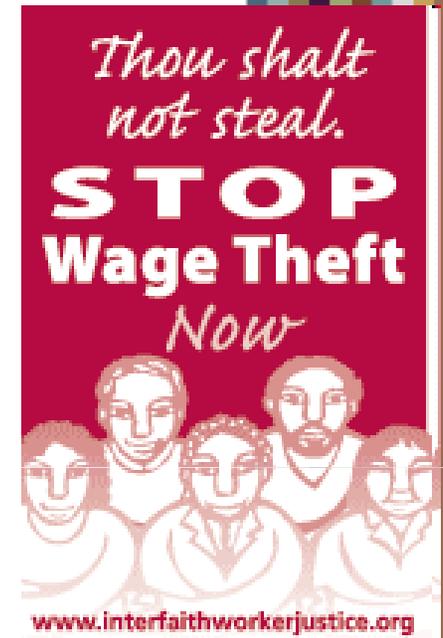
PENALTIES/DAMAGES FOR § 195.1 NOTICE VIOLATIONS

- **New hire** may bring civil action
- Employer may be liable for:
 - \$50 per workweek of noncompliance, up to \$2,500
 - Costs & attorneys' fees
 - Other relief (e.g., injunctive and declaratory relief)
- On behalf of any employee, **Commissioner** may bring any legal action
- Available remedies include:
 - \$50 per workweek of noncompliance (without limitation)
 - Costs & attorneys' fees
 - Other relief (e.g., injunctive and declaratory relief)

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PENALTIES/DAMAGES FOR § 195.3 VIOLATIONS

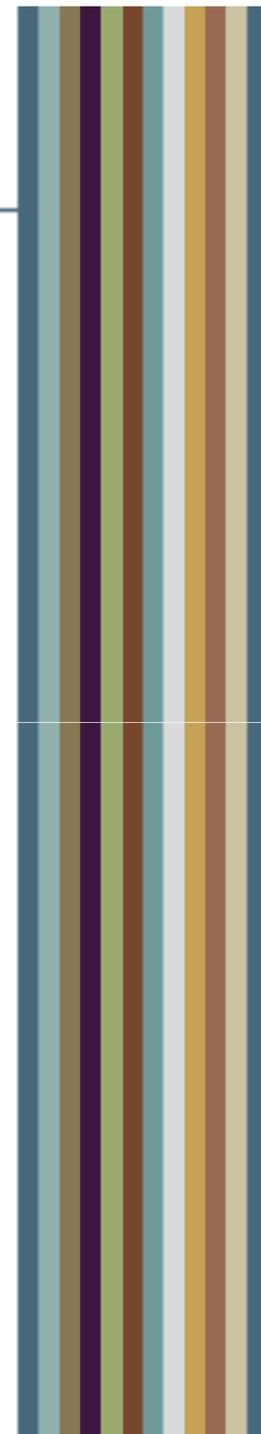
- Employees may bring civil action to recover damages:
 - \$100 for each workweek that violations occur or continue to occur, up to \$2,500
 - Costs & attorneys' fees
 - Injunctive and declaratory relief available
- Commissioner may bring claim as well
 - No limit on penalty; other relief same
- Defense available to employer that timely pays all wages owed to the employee

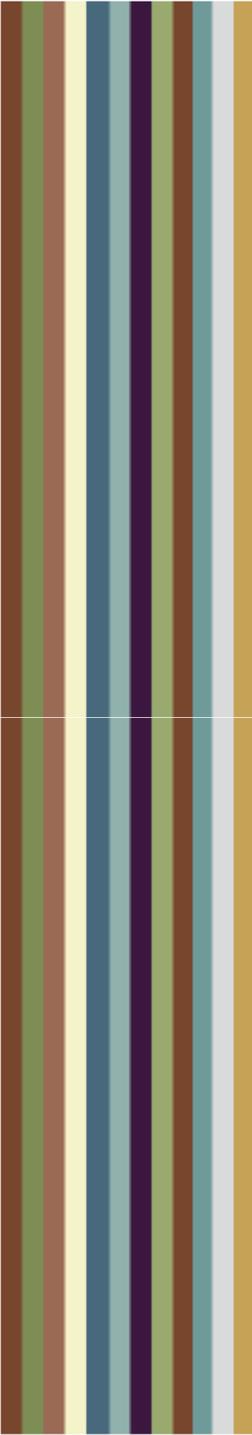


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WHAT DOES IT ALL MEAN FOR EMPLOYERS?

- Review Hiring Practices
- Update Employee Handbooks and Forms
- Prepare Appropriate Wage & Hour Notices to New Employees (and others every January)
- Ensure the Pay Stub / Record is in Compliance
- Now - Breathe Easy!





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CHANGES IN The UNITED STATES COMPENSATION AND EMPLOYEE BENEFITS

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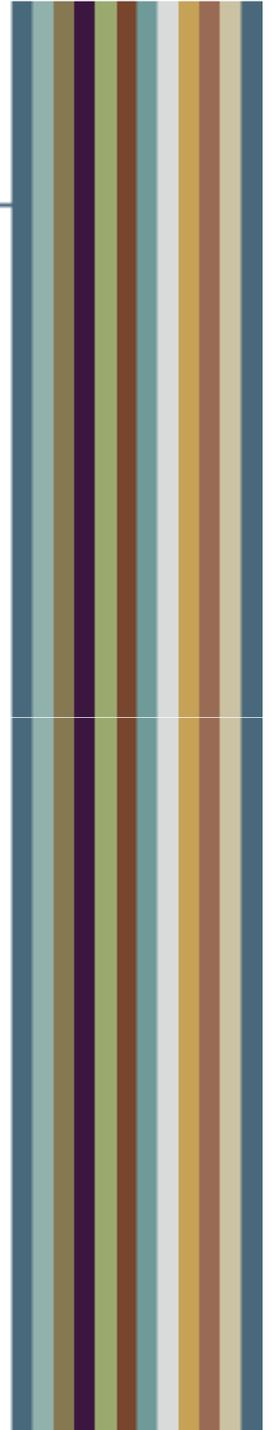
US Employee Benefits Today

- Recent healthcare reform and increased government regulation of companies' compensation practices require employers to carefully examine their compensation and benefits arrangements
- This discussion will highlight the various types of US employee benefit plans and the issues that US employers face



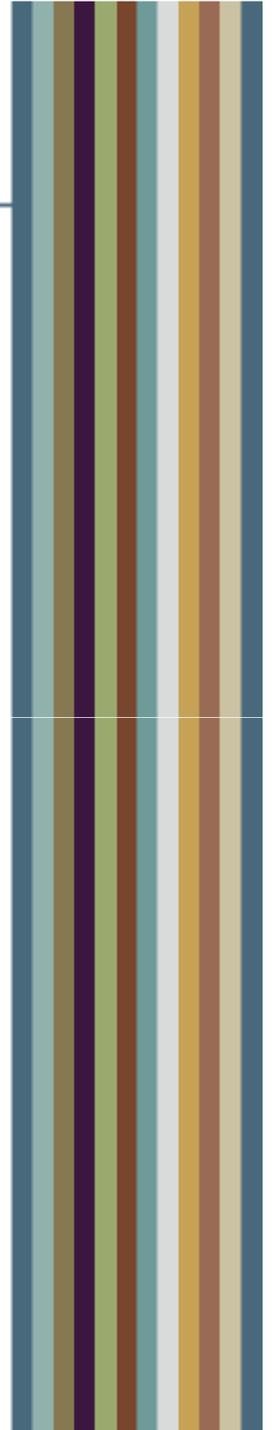
US Incentive-Based Compensation Practices

- Annual bonuses – generally discretionary bonuses based on company and individual performance
- Long-term incentive compensation
- Equity-based compensation
- Competitive bonuses to recruit and retain talent



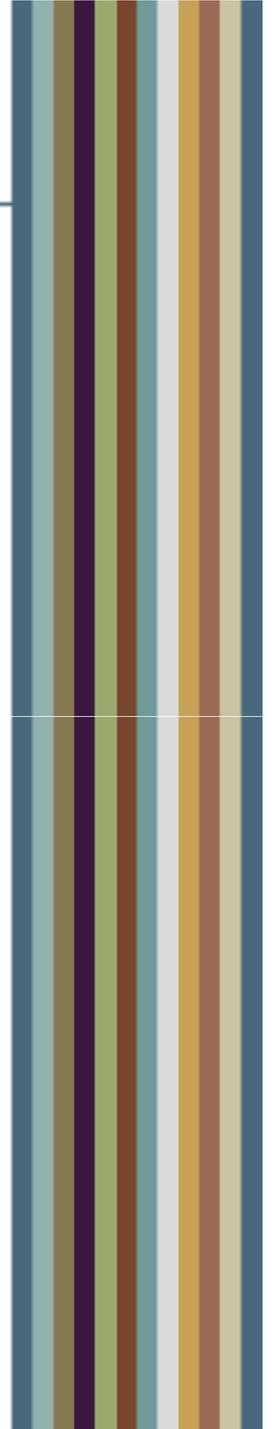
US Incentive-Based Compensation Practices

- The Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) prohibits incentive-based pay arrangements at certain large financial institutions (\$1 bil or more in consolidated assets) that encourage inappropriate risks by providing excessive compensation or that could lead to a material financial loss



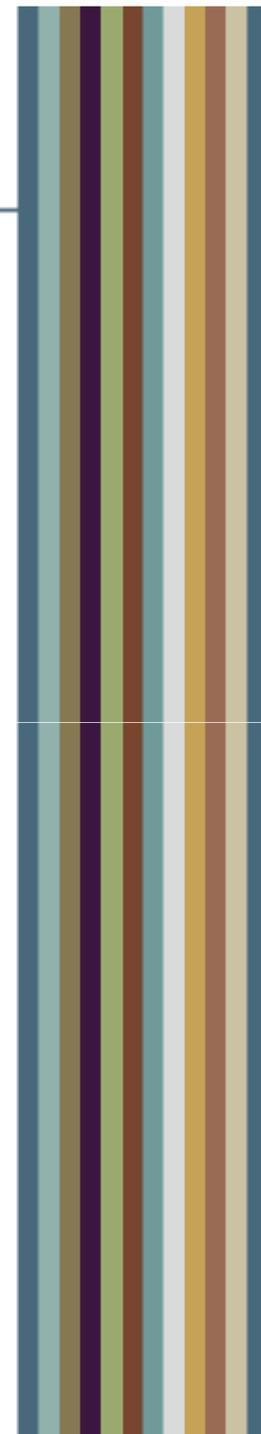
US Incentive-Based Compensation Practices

- Dodd-Frank for Foreign Banking Organizations (“FBOs”)
 - US operations of FBOs will be required to maintain policies and procedures for US operations
 - Should focus on individuals who may expose the organization to material financial loss
 - Should be commensurate with complexity of the incentive-based compensation
 - Must meet requirements outlined under Dodd-Frank (*i.e.*, involve risk-management personnel, independent monitoring protocol, etc.)
 - Dodd-Frank is generally consistent with European standards that went into effect in early 2011



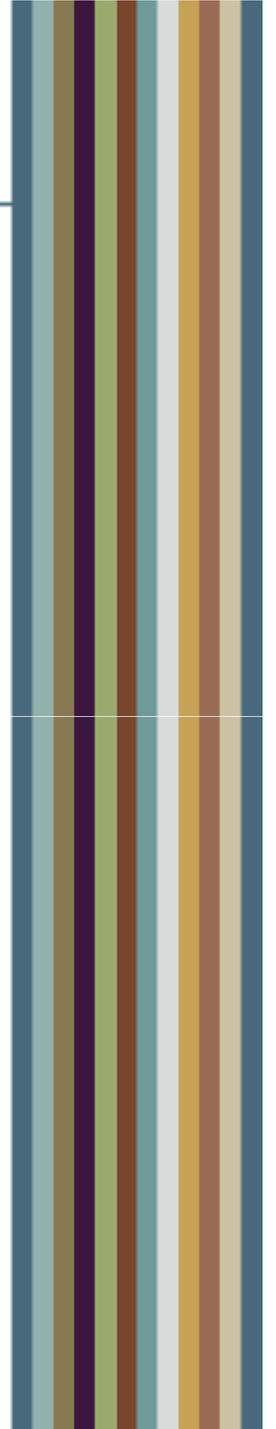
US Incentive-Based Compensation Practices

- Dodd-Frank for FBOs (continued)
 - It is not yet clear that the US operations of FBOs will be completely excepted from the Dodd-Frank requirements
 - More guidance on how Dodd-Frank will apply to FBOs will be forthcoming in 2011



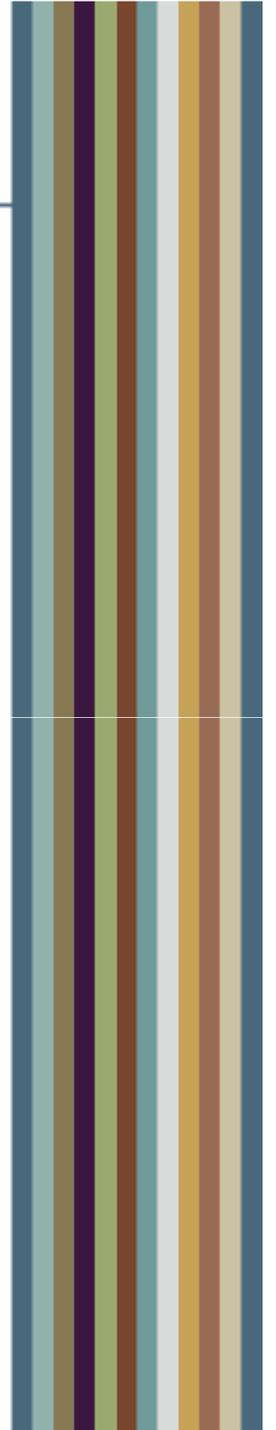
US Incentive-Based Compensation Practices

- Key issues in US compensation practices
 - Clawback or reimbursement of incentive pay
 - Say-on-pay (non-binding advisory votes by shareholders on the company's compensation practices)
 - Increased disclosure of executive compensation arrangements
 - Deferral of both cash and equity-based incentive pay



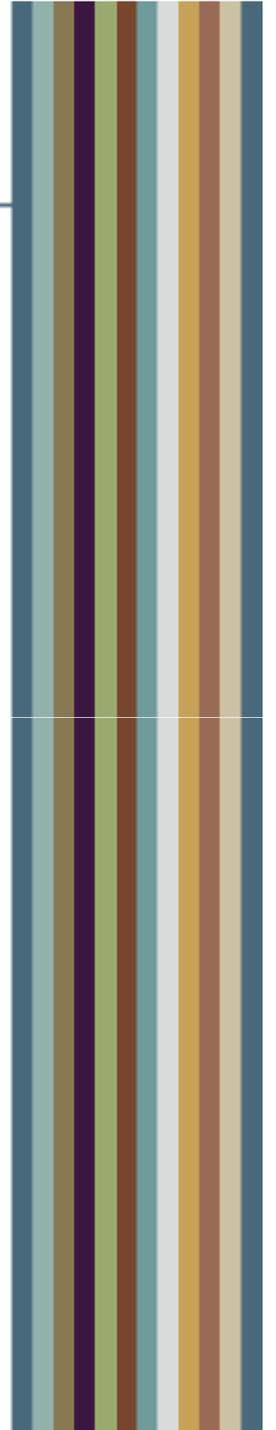
Types of US Employee Benefits

- Retirement or Pension Plans
(Including Section 401(k) Plans)
- Health/Welfare Benefit Plans
 - Medical Plans
 - Life Insurance
 - Disability Insurance
 - Severance
 - Workers Compensation
 - Cafeteria/Flexible Spending Plans
 - Fringe Benefits



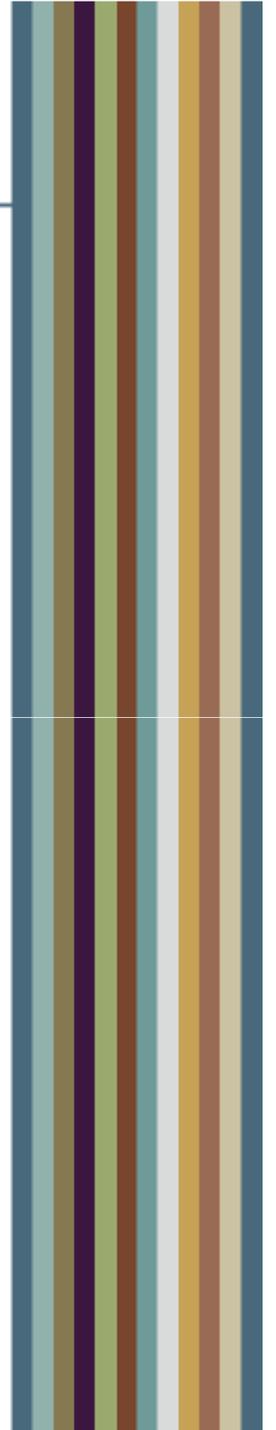
US Retirement/Pension Plans

- Three Pillar System of Retirement Benefits
 - Social Security
 - Private savings
 - Employer sponsored retirement plans
 - Voluntary on the part of employers (not required)
- US Legal Requirements
 - Employee Retirement Income Security Act (ERISA)
 - Internal Revenue Code (Tax Rules)
 - Other Considerations



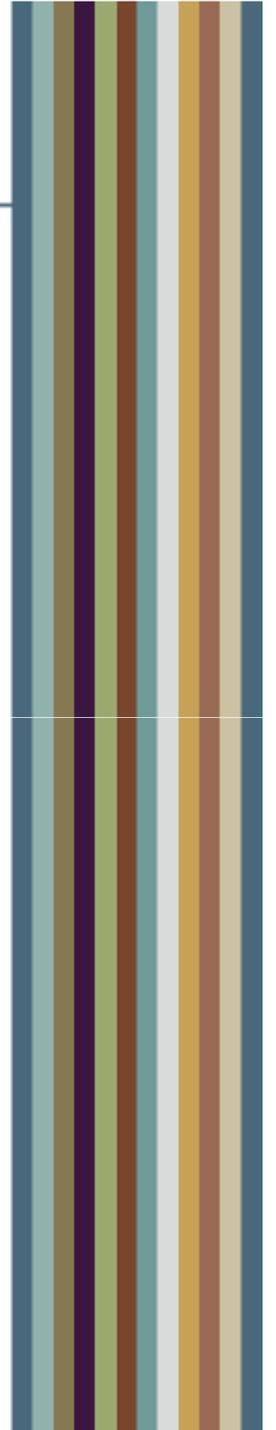
US Retirement/Pension Plans

- ERISA Rules
 - Applies to retirement/pension plans and health/welfare plans
 - Fiduciary structure and standards
 - Participation
 - Minimum funding standards
 - Required filing of annual reports (e.g., Form 5500)
 - Required disclosure of plan information
 - Establishes the Pension Benefit Guaranty Corporation insuring retirement benefits



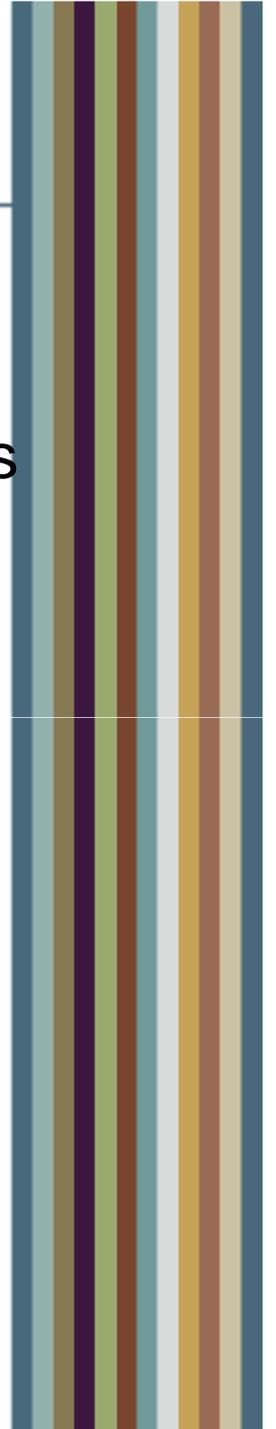
US Retirement/Pension Plans

- Internal Revenue Code
 - Taxes all types of employee benefits
 - Retirement/pension plans must meet numerous operational rules intended to insure nondiscrimination
 - Tax incentives to employers who sponsor qualified retirement plans
 - Employer is allowed a current deduction for contributions to qualified plans
 - Employee pays no income tax when amounts are contributed – benefits are taxed when distributed



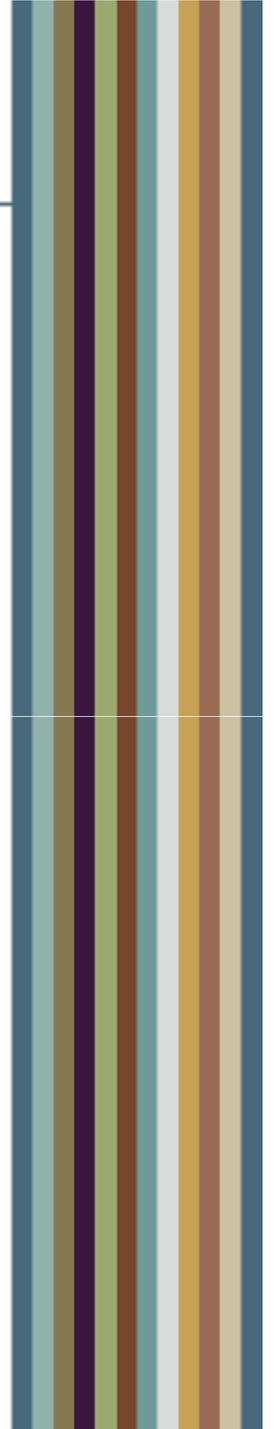
US – Retirement/Pension Plans

- Internal Revenue Code (continued)
 - Section 401(k) plans - employee contributions made on a pre-tax basis
 - Earnings from investments accumulate tax-free
 - Distributions from plans may be afforded favorable income tax treatment (direct rollovers)
 - Small employer plans
 - Individual retirement accounts (IRA's)
 - SEP-IRAs
 - Simple 401(k)
 - Keogh plans



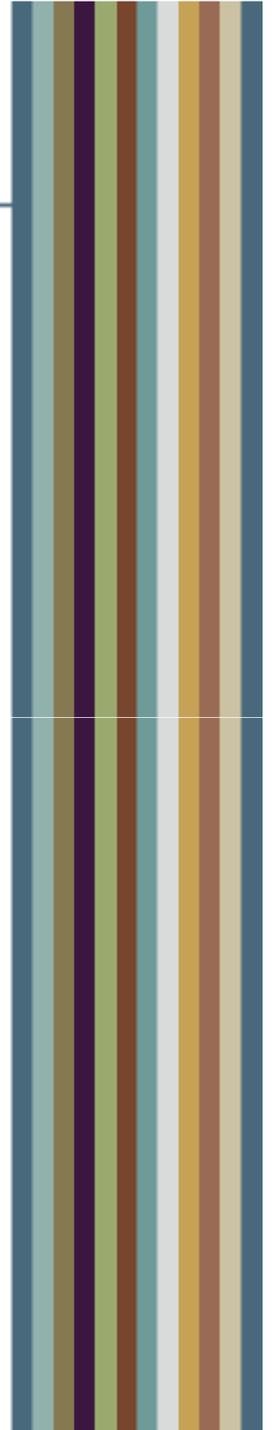
US Retirement/Pension Plans

- Other Rules and Considerations
 - Jurisdiction of Federal Courts – preemption of state laws
 - Agency enforcement:
 - Department of Labor
 - Internal Revenue Service
 - Pension Benefit Guaranty Corporation
 - Other non-tax incentives to sponsor a retirement/pension plan are:
 - Attracting and retaining employees
 - Reducing employee turnover
 - Accumulating funds for retirement



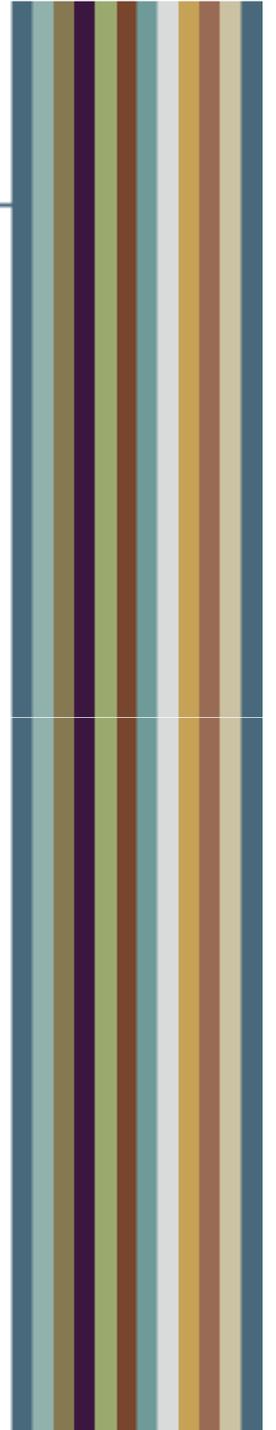
US Health/Welfare Benefit Plans

- Health Care Reform
 - Patient Protection and Affordable Care Act (“PPACA”)
 - Signed into law in March 2010, focuses on reform of private health insurance market
 - The law requires numerous healthcare provisions that employers must implement between 2010 and 2014
 - Each state will be required to establish health insurance exchanges where individuals and small employers can buy insurance (waivers may be permitted)



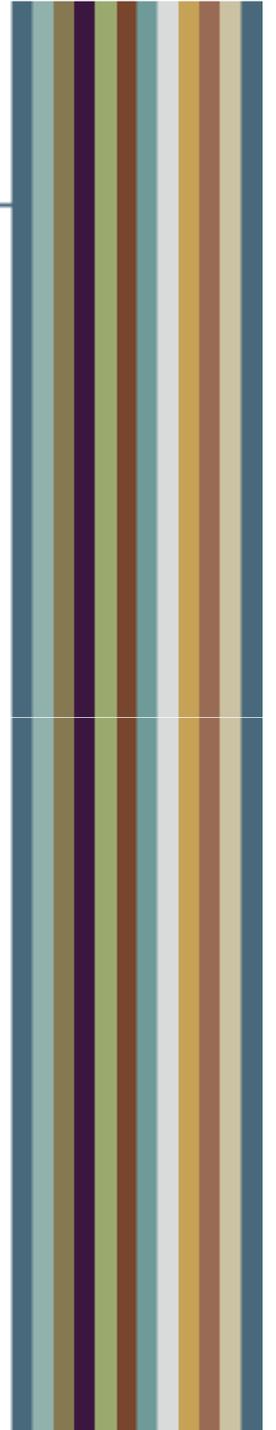
US Health/Welfare Benefit Plans

- Health Care Reform (continued)
 - “Pay or play” penalties will be imposed on employers who choose not to comply with the PPACA
 - Full-time vs. part-time employees
 - Small employer exceptions
 - Automatic enrollment
 - Non-discrimination



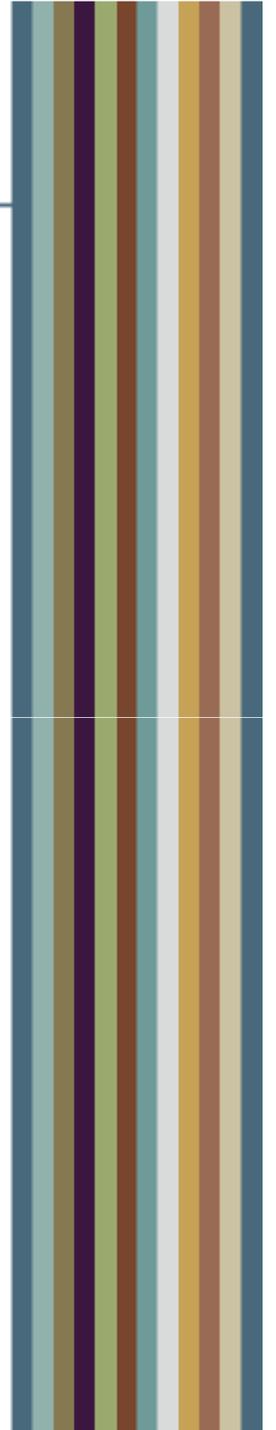
US Health/Welfare Benefit Plans

- Medical Benefit Plans
 - Employer may contract with third-party insurance provider (e.g., Blue Cross/Blue Shield)
 - Employer may self insure benefits (with stop loss policy)
 - Benefits and employer costs generally not taxable
 - Premiums may be paid on a pre-tax basis



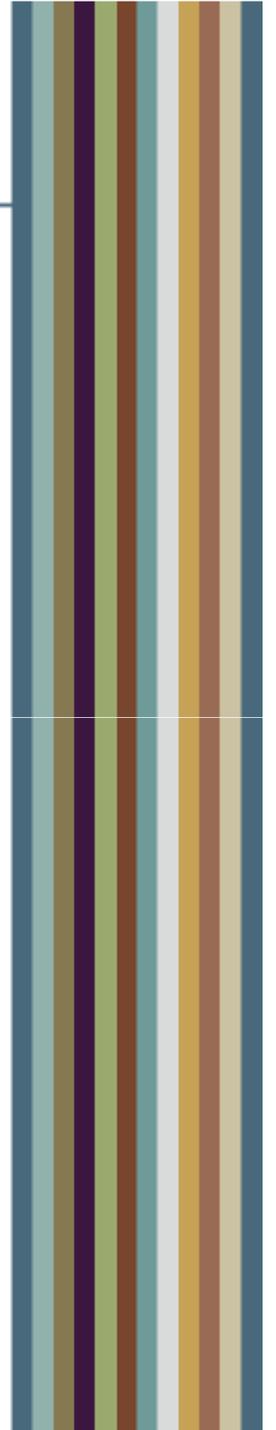
US Health/Welfare Benefit Plans

- Medical Benefit Plans (continued)
 - HIPAA privacy of protected health information
 - COBRA continuation coverage at employee cost for 18 months following termination (36 months for policies issued in New York)
 - State laws govern insurance contracts, health benefits and eligibility
 - Dental and optical benefits



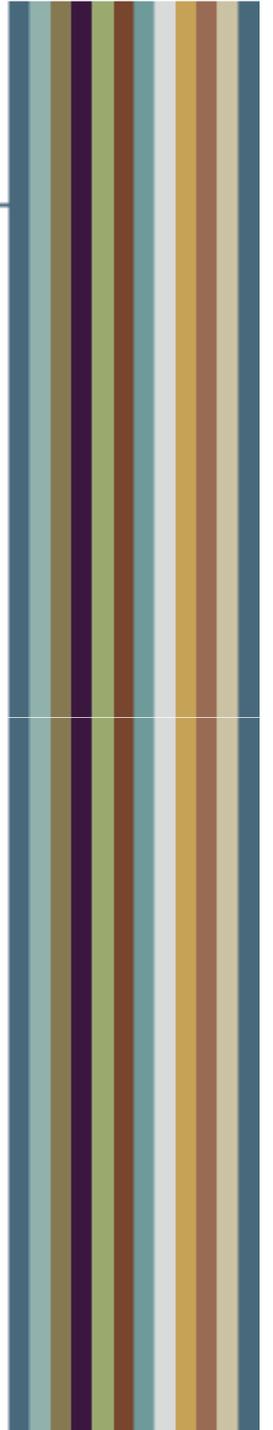
US Health/Welfare Benefit Plans

- Life Insurance
 - Group life insurance policy
 - Employee premiums
- Disability Insurance
 - Short term disability usually self funded
 - Long term disability insurance policy
- Workers Compensation
 - Governed under state laws



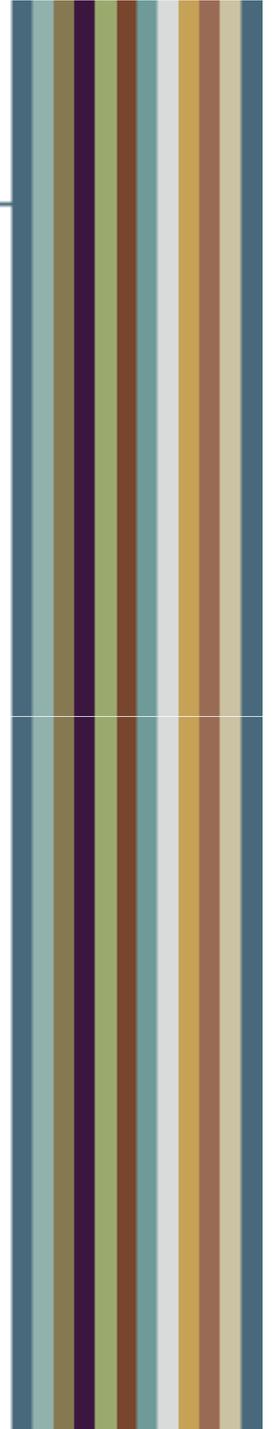
US Health/Welfare Benefit Plans

- Severance benefits
 - Not required by US law or statute
 - Typically offered under a severance pay plan for a limited period of time following termination
 - Ad hoc severance may be provided



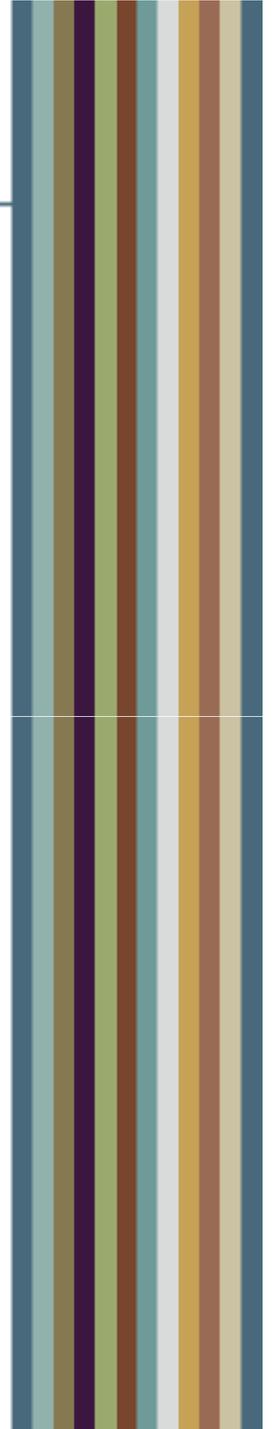
US Health/Welfare Benefit Plans

- Flexible spending plans/cafeteria plans
 - Allows employees to contribute on a pre-tax basis for certain health and welfare benefits
 - Special US tax rules apply
- Fringe benefit programs
 - Gym membership, employee discounts, tax planning services
- Wellness benefits



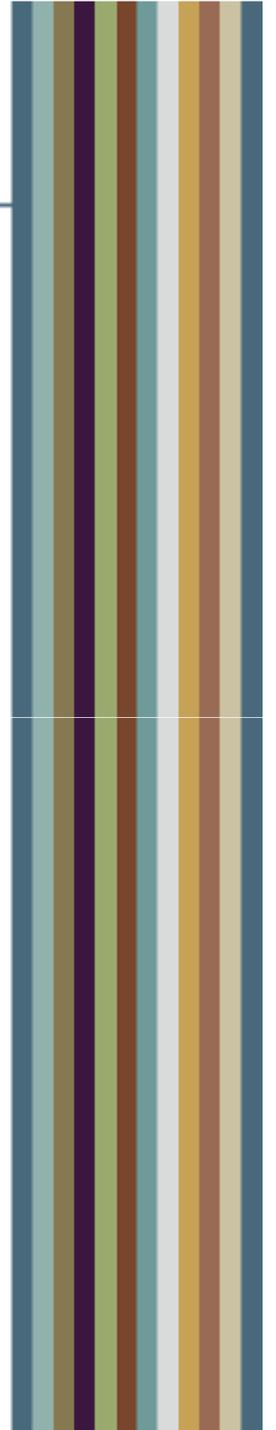
US Health/Welfare Benefit Plans

- Economic challenges affecting health/welfare benefit plans
 - Health Care Reform
 - Increasing costs of health benefits and insuring employees
 - Employer/employee premiums and cost sharing
 - Wellness programs
 - Retiree medical
 - Outsourcing administration
 - Limits on termination of plans



US Benefits – Final Thoughts

- Health care reform
- Economic challenges
- Internal audits
- Restructuring of US employee benefit plans
- Compliance with complex US legal and regulatory requirements

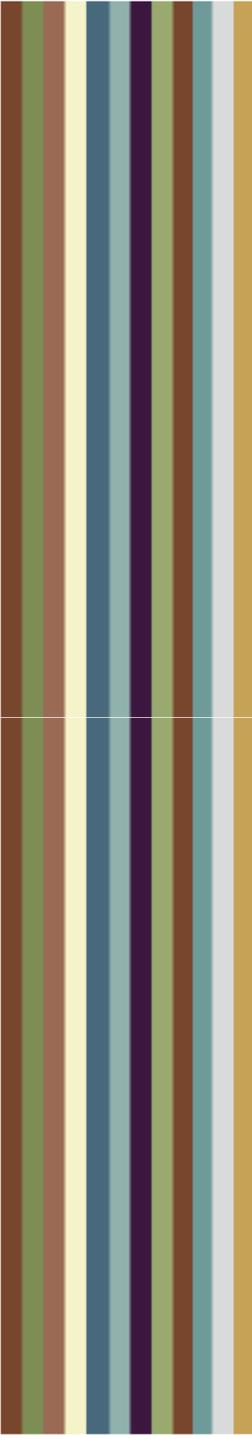


Taking Advantage of Business Opportunities in the U.S.

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STRUCTURING FOREIGN INVESTMENTS INTO THE UNITED STATES

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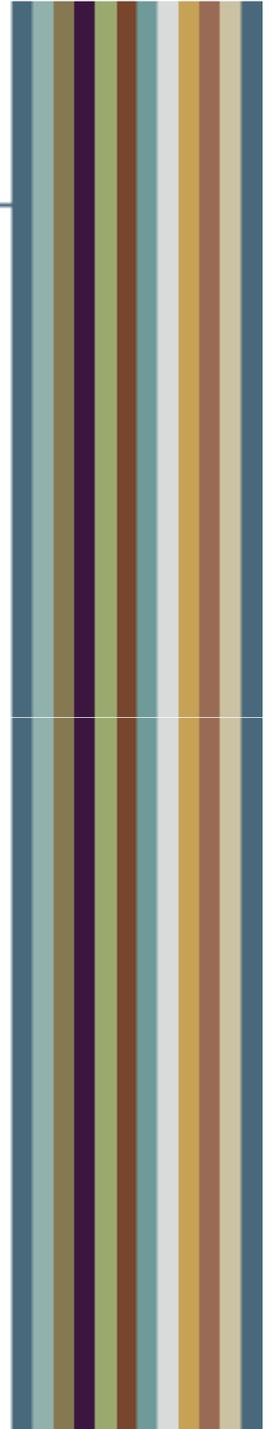
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STRUCTURING FOREIGN INVESTMENTS INTO THE UNITED STATES

- **Common U.S. Entities - FORM**

- **Corporation**

- Provides limited liability for its shareholders
 - Managed by Board of Directors which appoints officers to run day to day operations of company
 - Subject to double taxation
 - Profits of corporation are taxed at corporate level and dividends are subject to taxation at shareholder level
 - Formed by filing Articles of Incorporation with applicable state agency (usually Secretary of State or Department of State)
 - Bylaws govern the management and operation of a corporation
 - Shareholders can enter into a shareholder's agreement to cover such items as appointment of directors and buy-sell restrictions

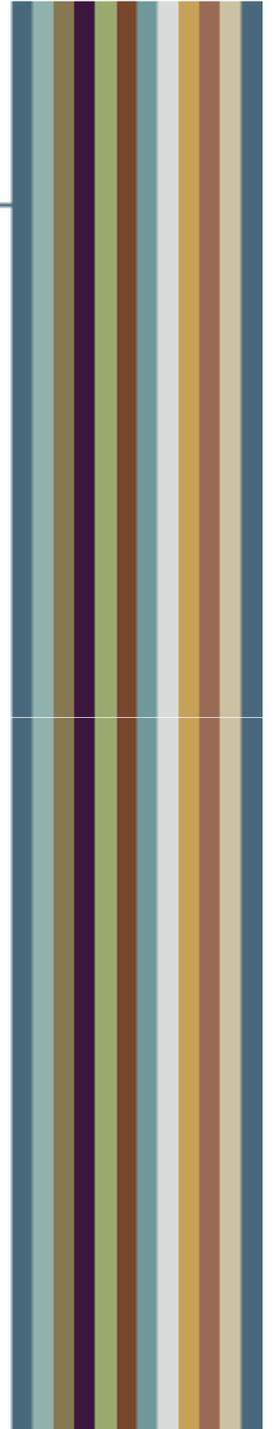


STRUCTURING FOREIGN INVESTMENTS INTO THE UNITED STATES

- **Common U.S. Entities**

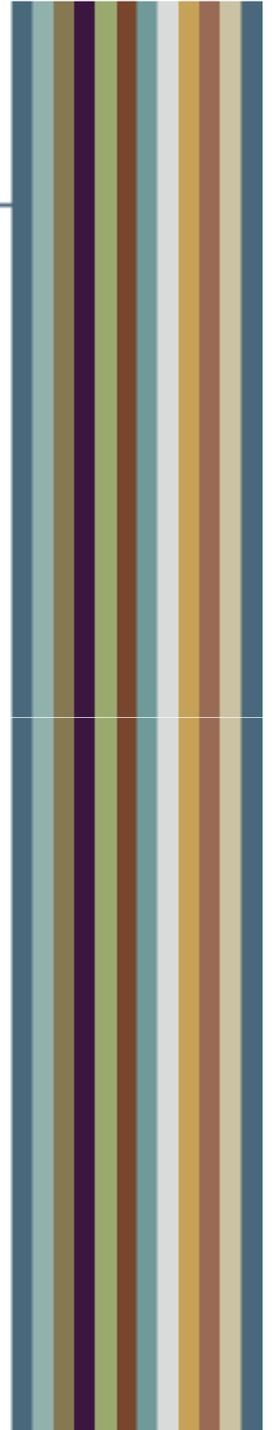
- **Limited Liability Companies (LLC)**

- Provides limited liability for its members (equity owners of an LLC are called members)
 - Can be taxed either as a partnership (if at least 2 members and no “check the box” election is made), corporation (if such election is made) or disregarded (if only one member and no election is made)
 - Can be managed by its members or appointed managers
 - If taxed as a partnership, its members are currently subject to a single level of taxation on their allocable share of LLC income (whether or not such income is distributed)
 - Formed by filing Articles of Organization with applicable state agency (usually Secretary of State or Department of State)
 - Typically an operating agreement governs the management and operation of the LLC as well as the allocation of LLC profits, distributions and buy-sell provisions amongst members
 - Formation and notice requirements may make formation expensive



STRUCTURING FOREIGN INVESTMENTS INTO THE UNITED STATES

- “Build” versus “Buy”
 - Build is the start of a new business
 - Buy may provide faster entry into the marketplace, offset by the time necessary to complete the acquisition
 - Acquisition of a “shell” publicly registered company may provide faster entry into the U.S. stock markets.



STRUCTURING FOREIGN INVESTMENTS INTO THE UNITED STATES

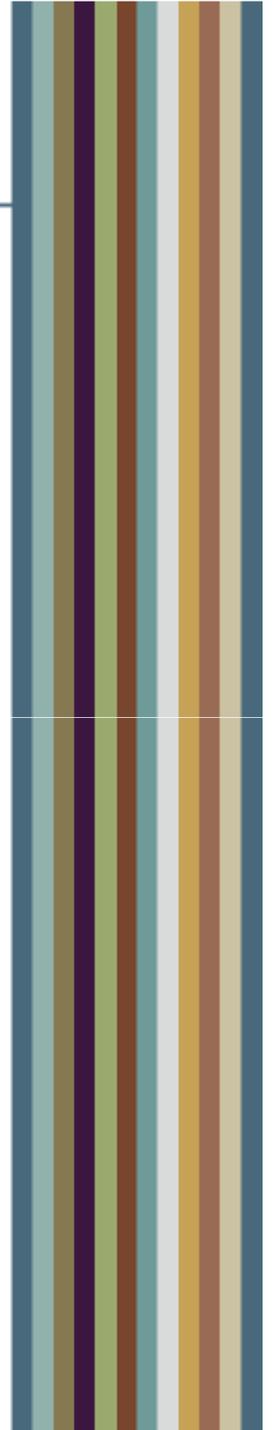
- **Residency**

- **U.S. Corporations and Partnerships**

- Residency of a corporation or partnership is determined by place of organization, not where the partnership is managed or controlled
 - Domestic corporations and partnerships are ones which are organized under the laws of any U.S. state

- **Foreign Corporations and Partnerships**

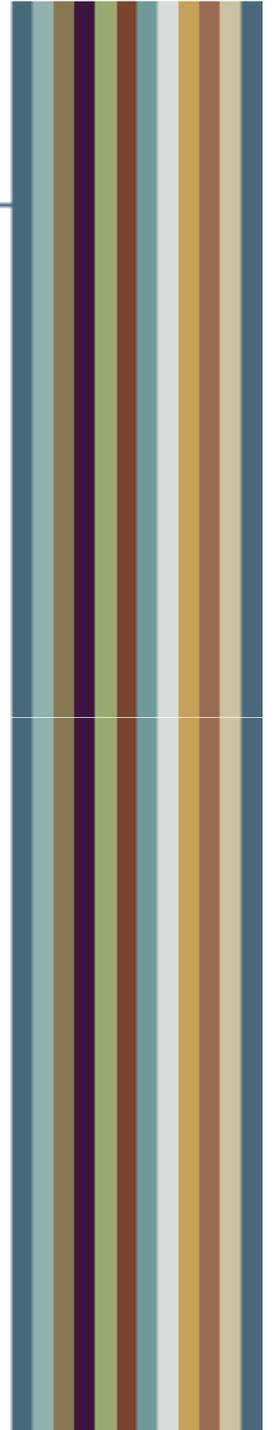
- Foreign corporations and partnerships are defined by Sec. 7701(a)(5) to be one which is not domestic, *i.e.*, one that is not created or organized under the laws of the United States



STRUCTURING FOREIGN INVESTMENTS INTO THE UNITED STATES

- **FDAP Income**

- Nonresident aliens and foreign corporations are subject to a 30% tax (or lower treaty rate) on several types of non-business income from sources within the United States
- The tax applies to interest, dividends, rents, royalties, and other “fixed or determinable annual or periodical” income (“FDAP” income) if the income is:
 - from U.S. sources; and
 - not effectively connected with the conduct of a U.S. trade or business

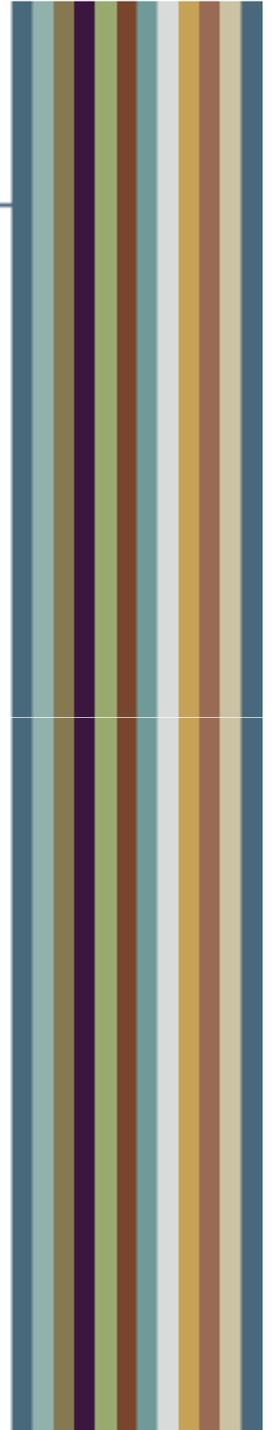


STRUCTURING FOREIGN INVESTMENTS INTO THE UNITED STATES

- **FDAP Income**

- Exceptions to taxation of FDAP income:

- Interest on U.S. bank deposits not effectively connected to a U.S. trade or business
- Dividends paid by a U.S. resident or corporation, when more than 80% of the payer's gross income (during preceding 3 years) was derived from active foreign business income
- Interest received from “portfolio debt obligations”
- Capital gains income (generally, U.S. capital gains income of a foreign person are not subject to U.S. tax unless income is effectively connected to a U.S. trade or business)

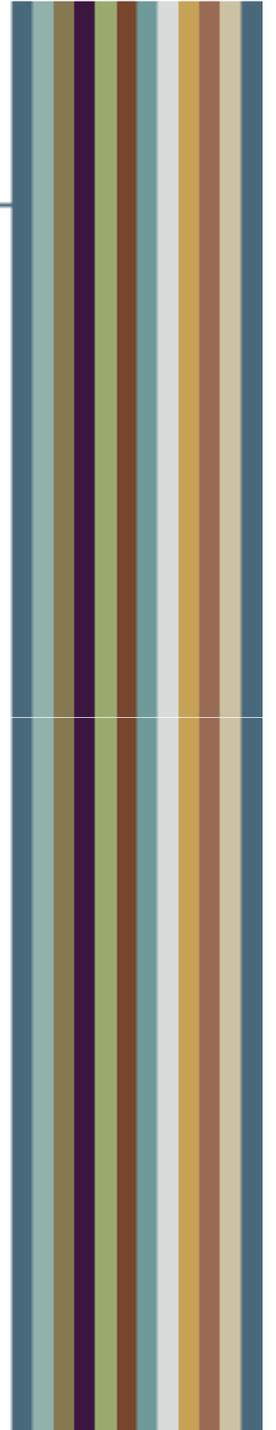


STRUCTURING FOREIGN INVESTMENTS INTO THE UNITED STATES

- **FDAP Income**

- **Withholding tax on FDAP income:**

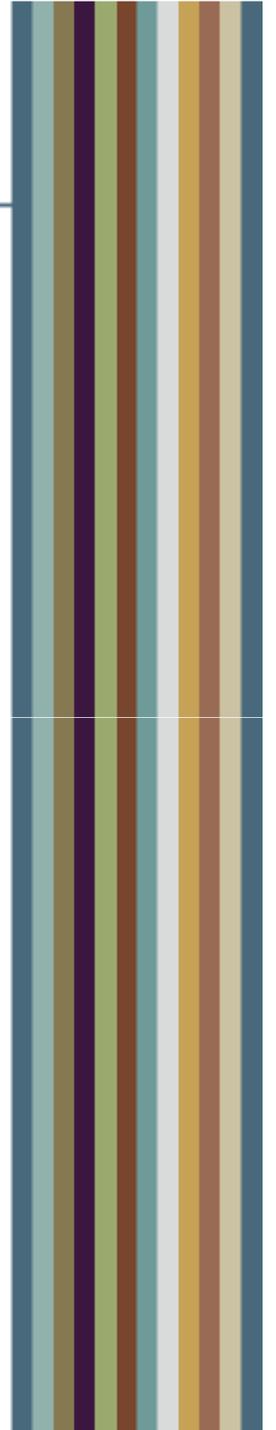
- FDAP income subject to flat 30% withholding tax
- The U.S. payor of the FDAP income must withhold the appropriate U.S. tax and remit it to the IRS
- Foreign person seeking a reduced withholding rate provided for in a tax treaty should deliver a W-8BEN to the U.S. payor of the income



STRUCTURING FOREIGN INVESTMENTS INTO THE UNITED STATES

- **ECI of a U.S. Trade or Business**

- A foreign person engaged in a USTB, is subject to tax on its income effectively connected (“effectively connected income or “ECI”) to its U.S. trade or business
- ECI subject to U.S. tax on a net basis at the corporate graduated rates (top rate currently 35%)
- Capital gain or FDAPI will be ECI if:
 - Income is derived from assets used in the U.S. business (asset-use test); or
 - The activities of the USTB were a material factor in the realization of the gain or income (business-activities test)
- ECI also includes foreign source income attributable to a U.S. office that is a material factor in producing the income



STRUCTURING FOREIGN INVESTMENTS INTO THE UNITED STATES

- **ECI of a U.S. Trade or Business - Branch Profits Tax**
 - The Branch Profits Tax (“BPT”): eliminate the disparity between earnings repatriated to a foreign corporation from a U.S. branch (single level tax on ECI) and a U.S. subsidiary (corporate tax on U.S. subsidiary’s income and FDAP withholding tax on dividend)
 - The BPT is imposed on any foreign corporation engaged, or deemed engaged, in a USTB
 - BPT is equal to 30% of the “dividend equivalent amount”
 - BPT imposed on annual basis even if no dividend repatriated back to foreign corporation
 - Treaty may provide BPT is not applicable or to lower tax rate

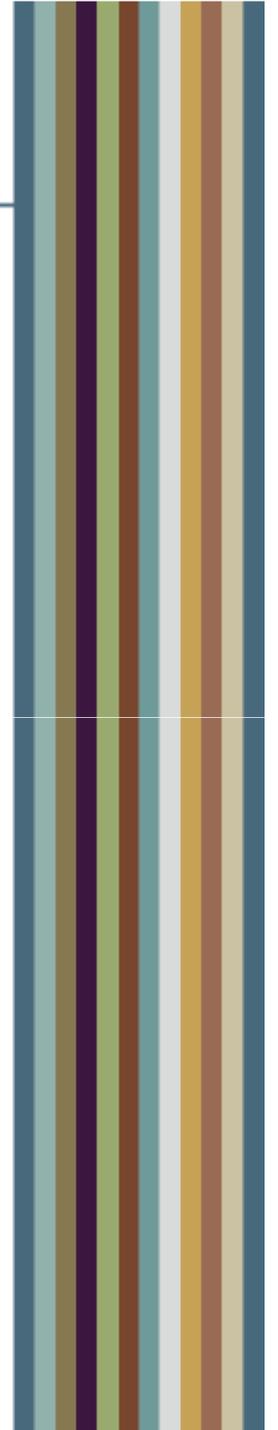


STRUCTURING FOREIGN INVESTMENTS INTO THE UNITED STATES

- **ECI of a U.S. Trade or Business**

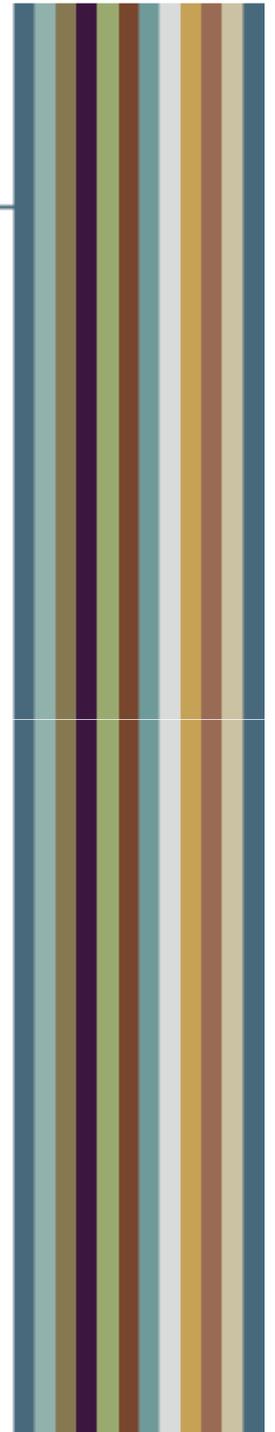
- Neither the IRC nor Treasury Regulations provide a comprehensive definition of USTB

- The determination is made based on the facts and circumstances of each case
- Standard adopted by courts: the activity must be considerable, continuous and regular
- Mere passive collection of income is generally not sufficient
- USTB activities conducted through a partnership, trust or an agent would constitute a USTB of the foreign person



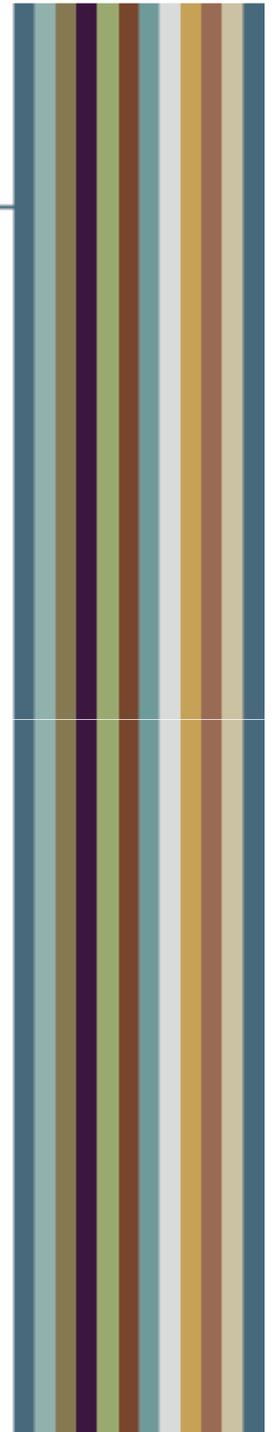
STRUCTURING FOREIGN INVESTMENTS INTO THE UNITED STATES

- **U.S. Permanent Establishment**
 - If a treaty applies, a foreign person's U.S. business profits will be subject to U.S. tax only if the foreign person carries on such business through a U.S. permanent establishment ("PE")
 - Business profits means income derived from any trade or business
 - Business profits must be attributable to the PE
 - A foreign person may be engaged in USTB but not have a U.S. PE



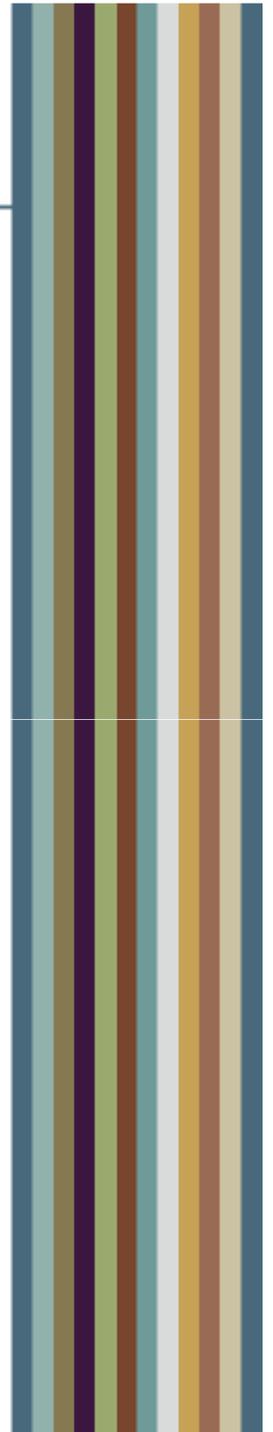
STRUCTURING FOREIGN INVESTMENTS INTO THE UNITED STATES

- **Business Profits of a Permanent Establishment (“PE”)**
 - **Permanent Establishment:** a permanent establishment is a fixed place through which the business of an enterprise is carried on, including:
 - a place of management, a branch, an office, a factory, or a workshop
 - You need both a fixed place of business (regularly available to it) and a level of permanence
 - Dependent agents may also qualify as a U.S. PE



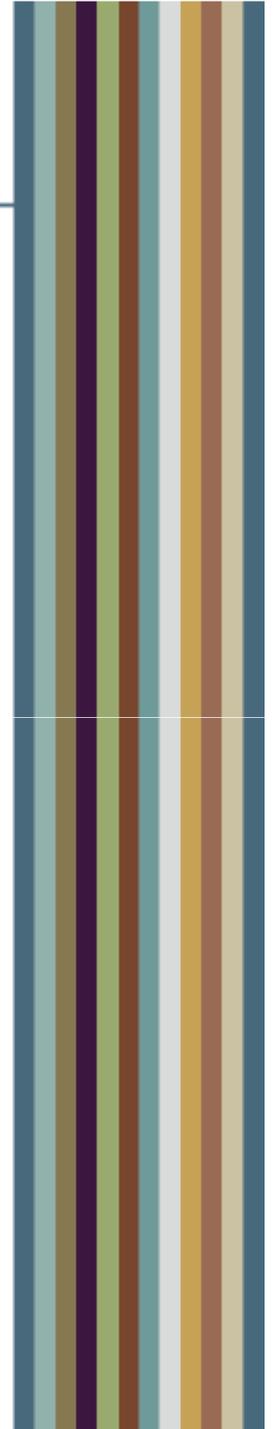
STRUCTURING FOREIGN INVESTMENTS INTO THE UNITED STATES

- **Structuring Investments and Business Operations in the U.S.**
 - Common Goal: Avoid filing U.S. tax returns and paying U.S. tax
 - No treaty available
 - Investing/operating through U.S. partnership or trust will result in ECI and BPT
 - Using U.S. “blocker corporation” avoids ECI/BPT
 - Avoid using commission agent
 - Use Back-to-back sales
 - Intercompany pricing
 - Intercompany debt



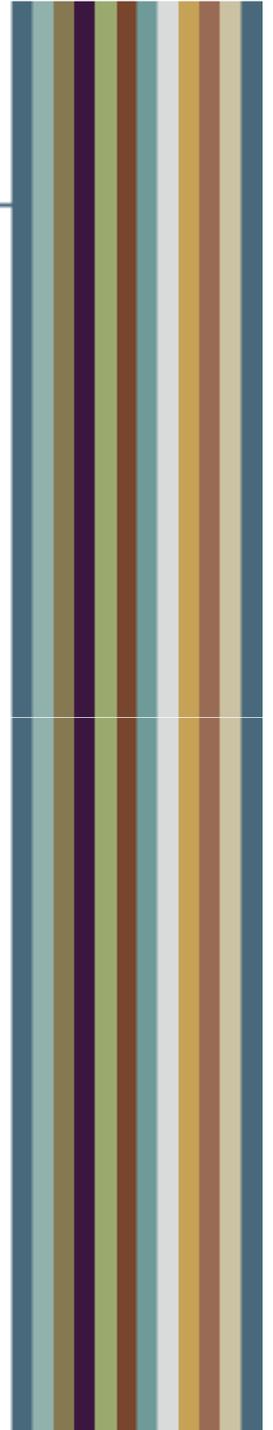
STRUCTURING FOREIGN INVESTMENTS INTO THE UNITED STATES

- **Structuring Investments and Business Operations in the U.S.**
 - Treaty available
 - A partnership's U.S. PE will be U.S. PE for foreign partners
 - U.S. subsidiary will not automatically cause foreign parent to have U.S. PE
 - U.S. subsidiary can be commission agent
 - U.S. subsidiary cannot legally bind foreign parent
 - Structured correctly only commission earned by U.S. subsidiary (not overall profit on sale of inventory) subject to U.S. tax
 - U.S. subsidiary files U.S. tax return and pays tax on commission
 - U.S. withholding on dividends to foreign parent at reduced rate (possibly zero)



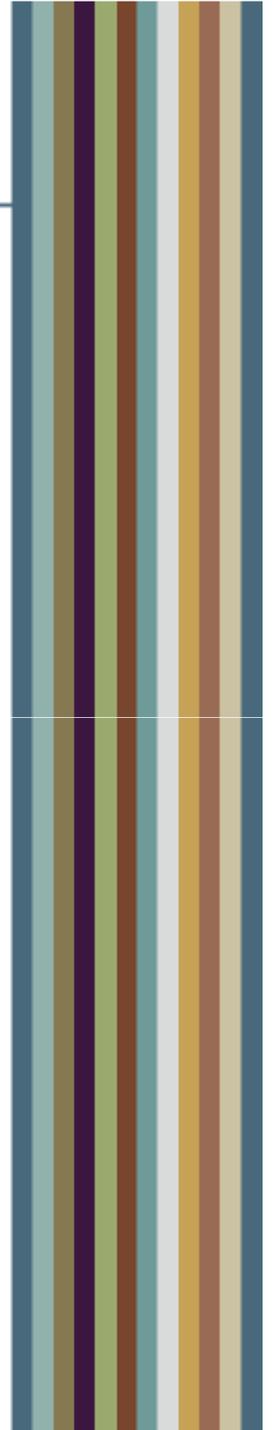
STRUCTURING FOREIGN INVESTMENTS INTO THE UNITED STATES

- **Structuring Investment/Business Operations in the U.S.**
 - Filing considerations
 - Failure to file U.S. tax returns prevents foreign person from claiming deductions on audit
 - File protective tax return with attached statement:
 - “Statement pursuant to Regulation section 1.882-4(a)(2): The attached return is filed solely to protect taxpayer’s rights to receive the benefit of deductions and credits attributable to gross income pursuant to section 1.882-4(a)(2). However, taxpayer believes Section 882 is inapplicable because it was not engaged in a U.S. trade or business or, if it was, because it had no U.S. permanent establishment. ”



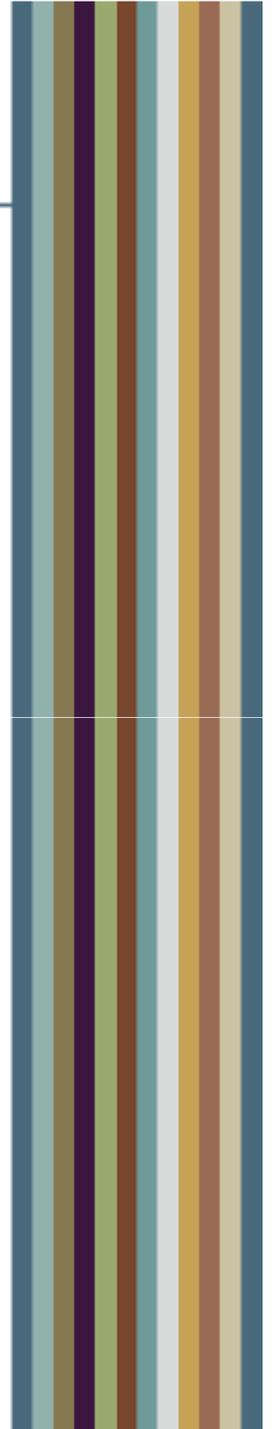
National Real Estate Practice

- EBG's national real estate practice represents owners, users and managers of Real Estate throughout the country
- We have 11 offices throughout the country and may be of assistance wherever your business or real estate needs exist



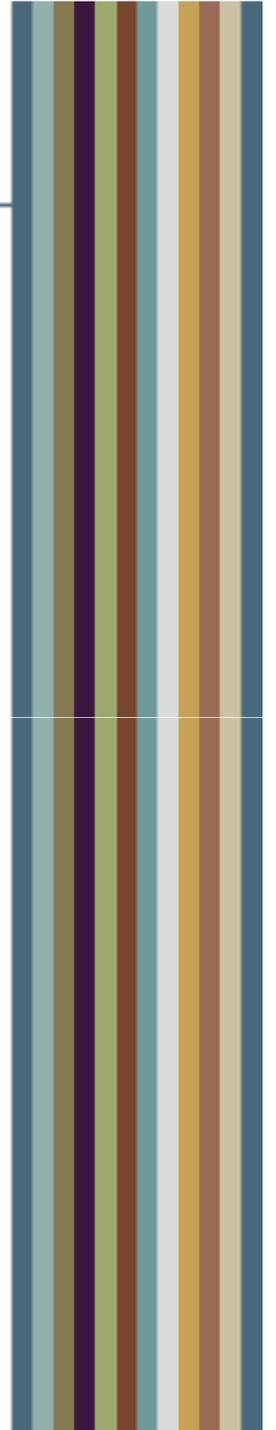
Real Estate (cont'd)

1. Identify Need
2. Use A Reputable Broker
 - (a) licensed broker by the State property is located in
 - (b) brokers typically specialize by type of property use
 - (i) brokerage agreement term and commission amount payable only if transaction closes
 - (ii) commission usually paid by seller or landlord
 - (iii) agreement to include indemnity against claims by other finders or brokers
 - (iv) brokerage agreement to provide that no obligation for buyer or renter/lessee
 - (v) conflict of interest issues when broker represents both owner and tenant or seller and buyer, common with large brokerage houses
 - (vi) commission amount will affect deal cost even if paid by seller or landlord
 - (vii) no authority for broker to act or make representations on your behalf unless specifically authorized



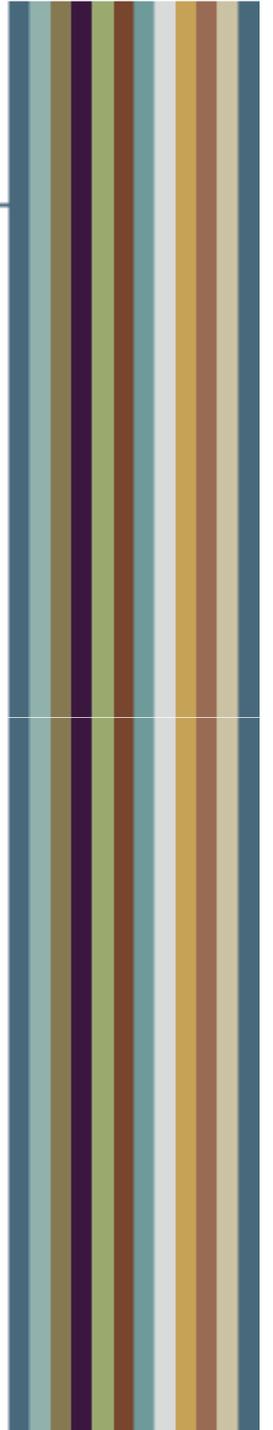
Real Estate (cont'd)

3. Type of Property
 - (a) Retail
 - (i) office building
 - (ii) mall
 - (iii) shopping center
 - (iv) stand alone
 - (b) warehouse/light manufacturing
 - (c) industrial
 - (d) Resort
 - (e) Buy or Lease
 - (f) residential, coop and condos



Real Estate (cont'd)

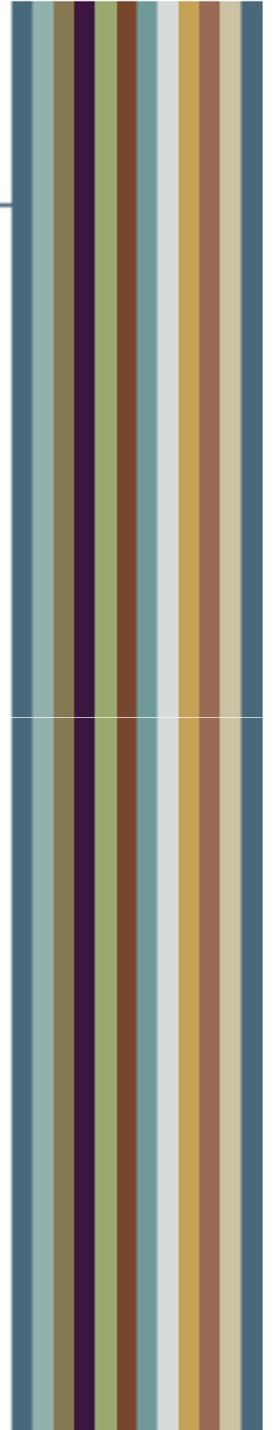
4. Buying Space or Buildings
 - (a) building or commercial Condo/Coop
 - (b) appreciation in value
 - (c) tax benefits, depreciation, building and improvements
 - (d) foreign exchange benefits to purchase



Real Estate (cont'd)

5. Leasing Spaces or a Building

- (a) base rent
- (b) additional rent escalators
 - i. percentage rent increases
 - ii. cost of living increase
 - iii. common area charges
 - iv. operating expense
 - v. real estate tax pass through

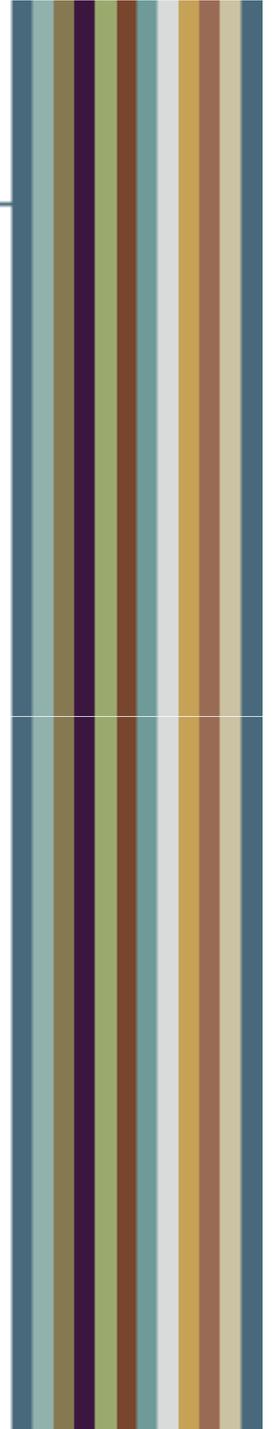


Real Estate (cont'd)

6. Types of Leases

(a) ground or net leases generally longer term usually triple net: Tenant maintains buildings, pays real estate taxes and all operating costs

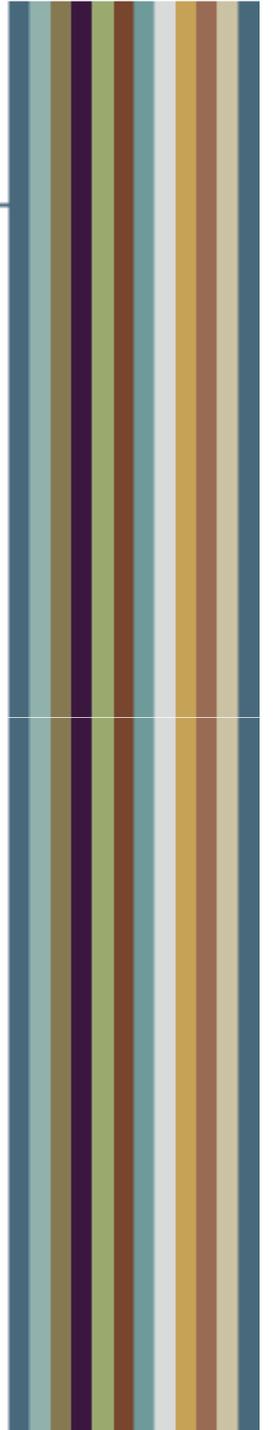
(b) use clause: limitation on use of leased space



Real Estate (cont'd)

7. Insurance

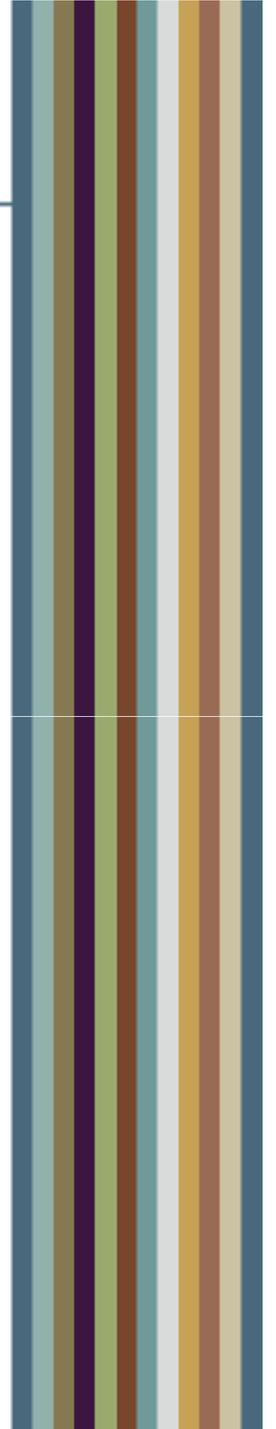
- (a) liability insurance
- (b) property insurance
- (c) service interruption insurance
- (d) make sure it matches with lease insurance requirements



Real Estate (cont'd)

8. Construction

- (a) properties usually sold or leased “as is”
- (b) inspect building or space before buying or leasing, use licensed architect, engineer, construction manager
- (c) build out of space
- (d) acquisition or lease
- (e) cost of building
- (f) removal of hazardous materials
- (g) compliance with laws State and Federal laws regarding access such as ADA
- (h) compliance building codes, zoning and land use laws



Real Estate (cont'd)

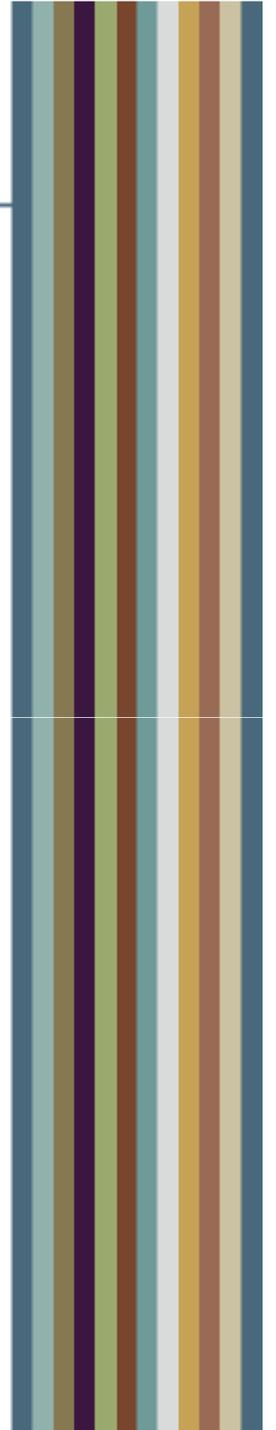
9. Environmental Issues

(a) Phase I search

(b) Phase II search

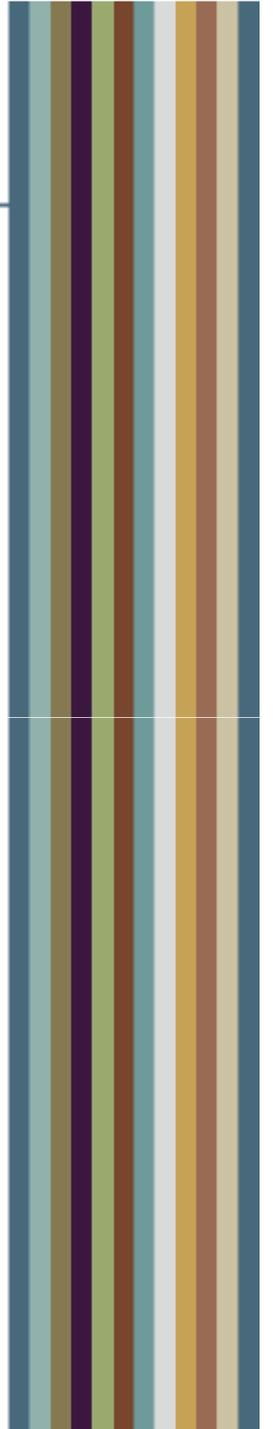
(c) If you are an owner and sometimes lessee you may become responsible for some all environmental issues on property owned or leased whether or not created by you

(d) Costs of compliance with law and abatement



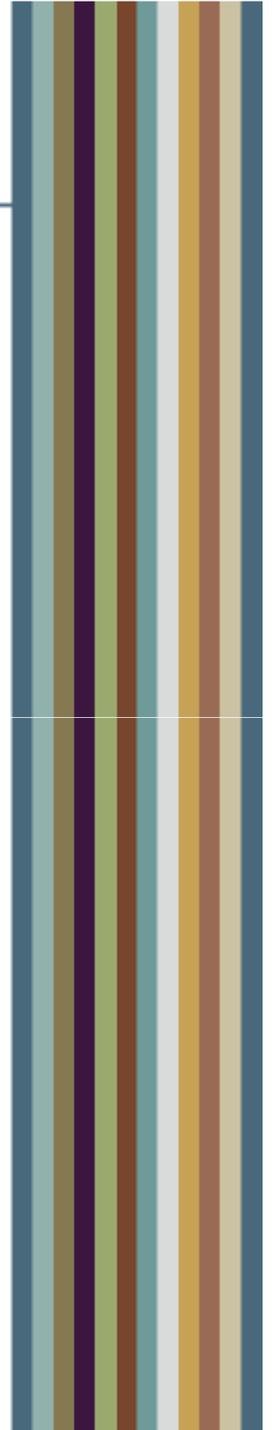
Real Estate (cont'd)

10. Financing
 - (a) Mortgage, Fee or Leasehold
 - (b) Acquisition financing
 - (c) Construction financing



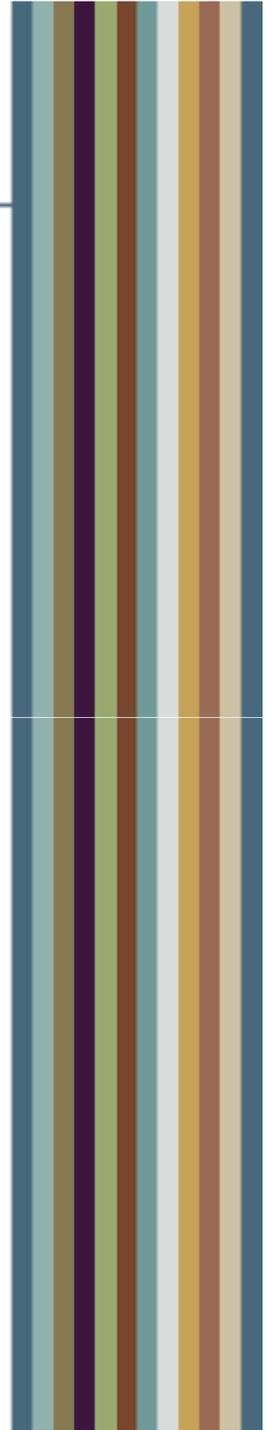
Bankruptcy Proceedings (Chapter 7 and Chapter 11)

- Chapter 7 under Title 11 of the United States Code (the “Bankruptcy Code”) – Company typically ceases operations immediately, and the liquidation and wind-down of the “estate” is handled by an independent Chapter 7 Trustee, under the supervision of the United States Bankruptcy Court.
- Chapter 11 of the Bankruptcy Code – Company continues to operate its business and control its assets as a “debtor-in-possession” under the supervision of the United States Bankruptcy Court. While operating in Chapter 11 the Company would evaluate whether it needs to sell assets, and in that context the Company (and its advisors) would handle/control the asset sale.



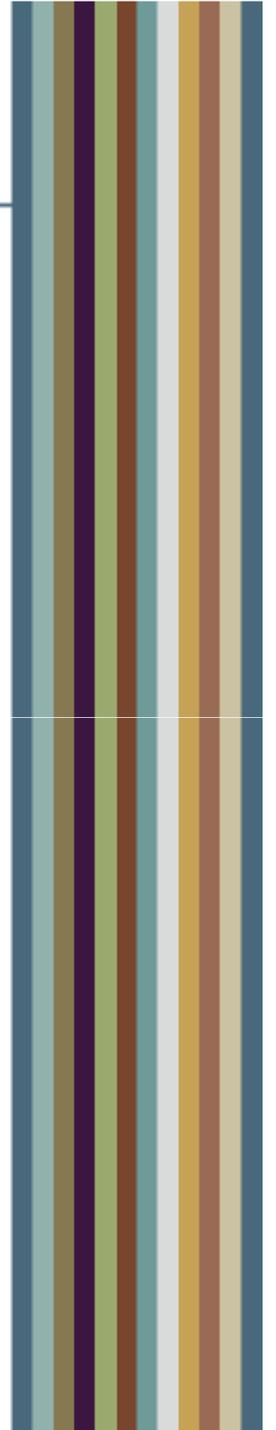
Asset Sale Process in Bankruptcy Proceeding

- Whether in Chapter 7 or Chapter 11, the asset sale process is often the same.
- Statutory Authority: Under §363 of the Bankruptcy Code, the Chapter 7 Trustee/Chapter 11 Debtor has the authority to sell the Debtor's assets (either in whole or in part) subject to the approval of the Bankruptcy Court.



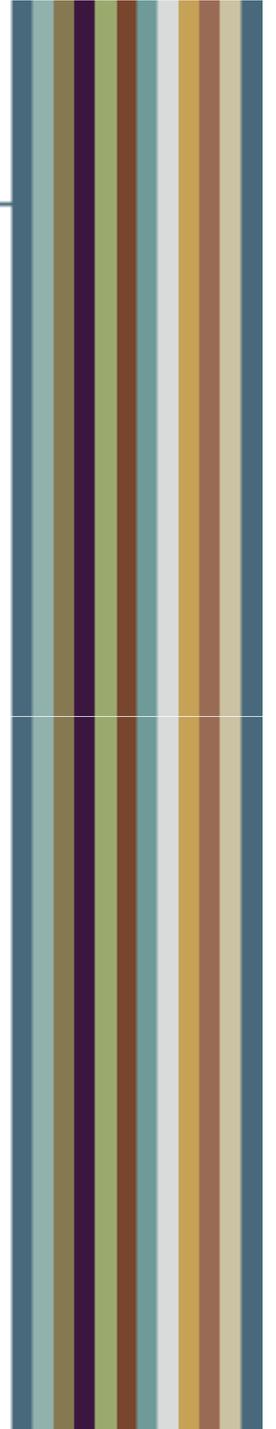
Components of a §363 Sale Process

- Procedural – Bankruptcy Court Approval of:
 - Solicitation
 - Due diligence
 - Initial bid
 - Selection of a “stalking horse”,
 - Negotiation of bid protection for the “stalking horse”
 - Competitive bidding process
 - Bankruptcy Court approval of the final successful transaction



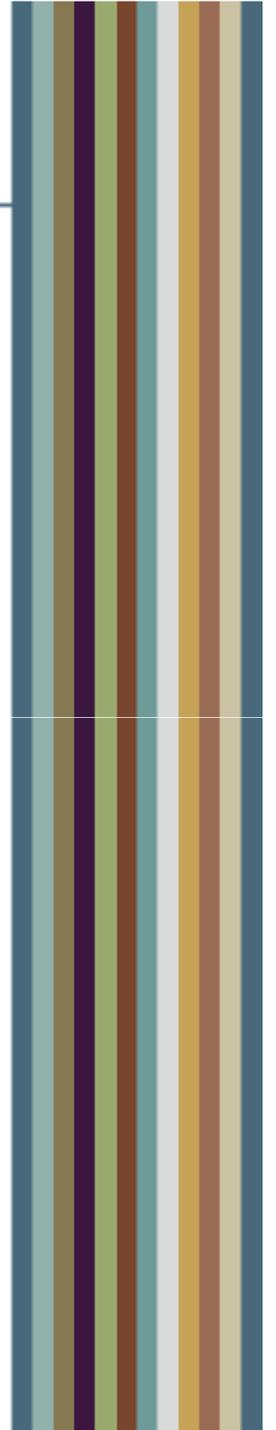
Pros and Cons of a §363 Sale

- **Benefits of a §363 Sale Process**
 - Expedited Sale Process
 - Court Order approving the sale of the acquired assets free and clear of all liens, claims and interests
 - Ability to “cherry pick” the assets acquired
 - Assumption and assignment of leases over landlord’s objection
 - Adequate assurance of future performance under the lease
 - Ability to acquire assets liquidation value or less
 - Acquiring entity starts with a “clean slate” with debt and undesirable assets left behind in the bankruptcy estate



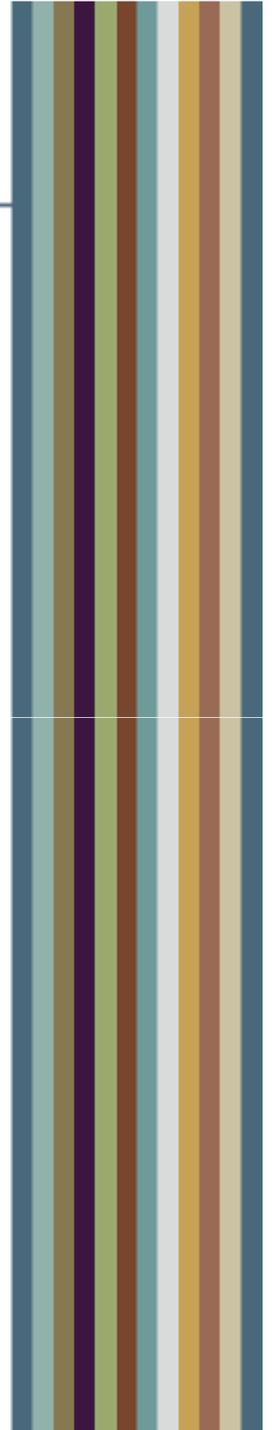
Pros and Cons (cont'd)

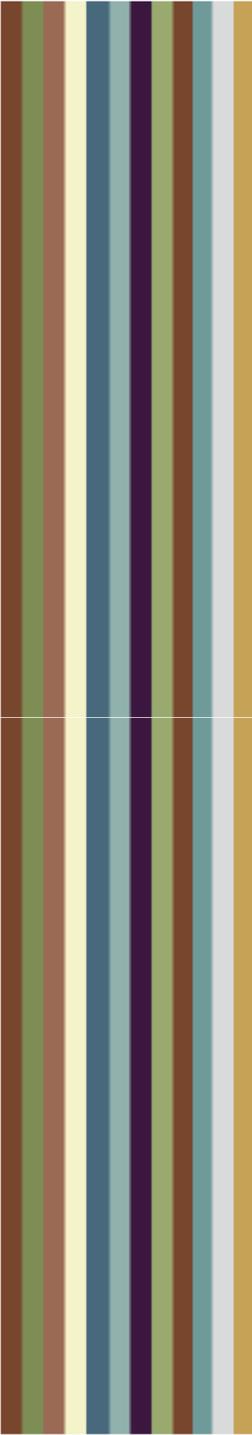
- **Drawbacks Associated with §363 Sale Process**
 - Expedited Sale Process (Buyers struggle to raise capital)
 - Stalking Horse need to have additional funds to bid at an auction
 - Need to balance the speed under which transactions occur under a §363 Sale against the mandatory waiting/approval periods imposed by other regulatory bodies (Example HSR approval process)
 - Bid Deposits
 - Offers typically not subject to long due diligence periods
 - Offers are typically subject to higher and better bids at an open auction process
 - Competing bids at an auction are binding and typically remain open until the closing of the first transaction
 - Major constituencies play an active role in the negotiation of the transaction
 - Inexperienced counsel on either the buyer's or the seller's side can make an already cumbersome process, more cumbersome, overly complicated and get lost in the process



Alternative Transactions in Bankruptcy to §363 Sale

- Proposing and funding plan of reorganization with a stock purchase agreement
- Assignment of Secured Debt from Senior Secured Creditors and consensual foreclosure on assets





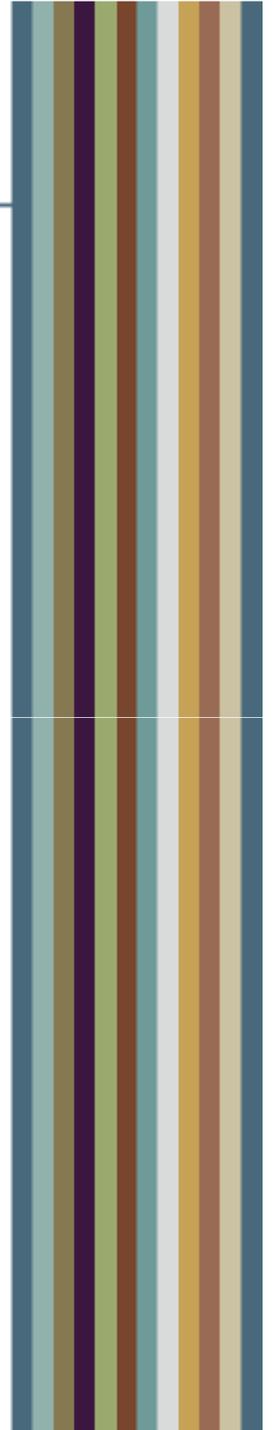
EPSTEINBECKERGREEN

Protecting Your Company's
Confidential Information and Protecting
Against Unfair Competition

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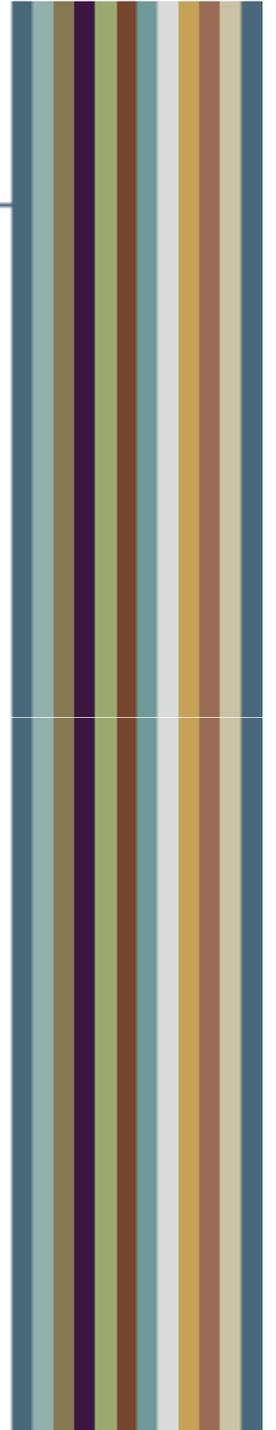
Employers Need to Protect Company Confidential, Trade Secret & Proprietary Information

- Any employee, at any level, could disclose confidential information
- Information to be protected must not be public, left unprotected or be easy to obtain from public sources
- Protecting confidential information and protecting against unfair competition is critical when buying a business in the US (or starting a US operation)



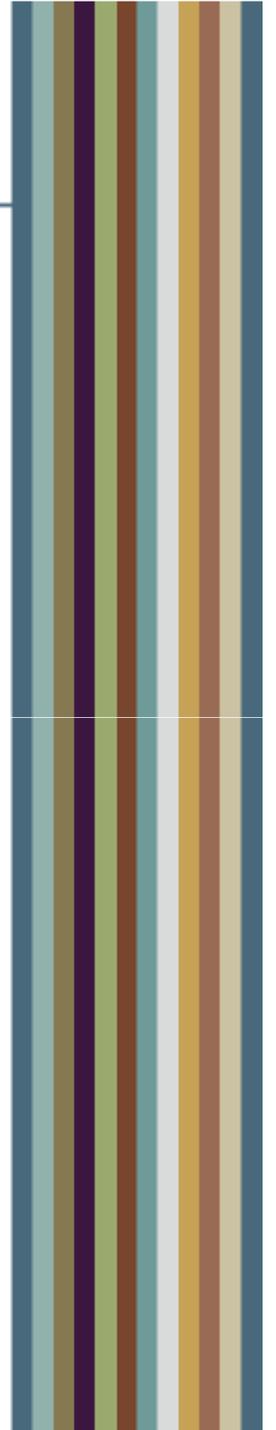
Employers Need to Protect Company Confidential, Trade Secret & Proprietary Information

- No law prevents your employee from leaving and going to a competitor
- No US law generally protects trade secrets.
- Protect your Company information with properly drafted confidentiality agreements which employees sign when they are hired or promoted in the United States or when first assigned to the US operation



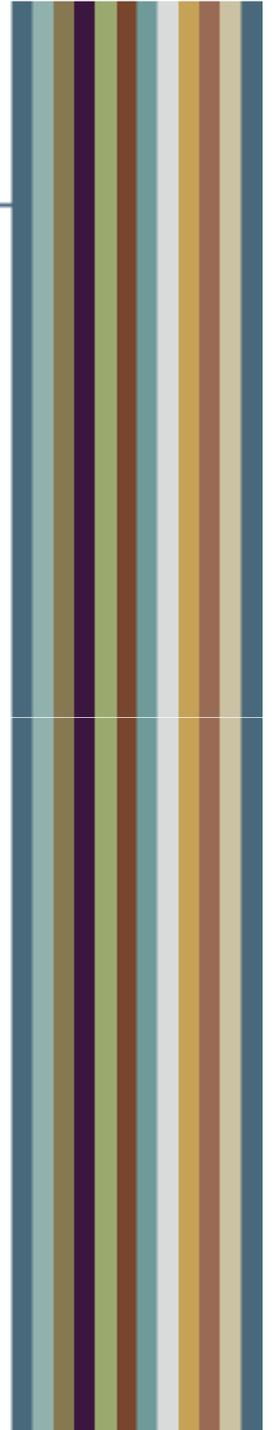
Use Non-Competition Agreements to Protect Against Unfair Competition

- Without a non-competition agreement, your key employees could go to a competitor or form a competing business tomorrow
- Many times in US, the seller of a business takes the money and sets up another company to compete against your company if a proper agreement is not used
- Acquisition agreements – must make clear that when you buy a company, you are buying the company and the key information in that company and held by its key employees



Use Non-Competition Agreements to Protect Against Unfair Competition

- Devote time in negotiations to protecting what you are buying
- Bar the old owner from competing with you
- Non-competition agreements are governed by the law of each of the 50 states and some states do not favor them
- Key is properly drafted agreement for states where you operate



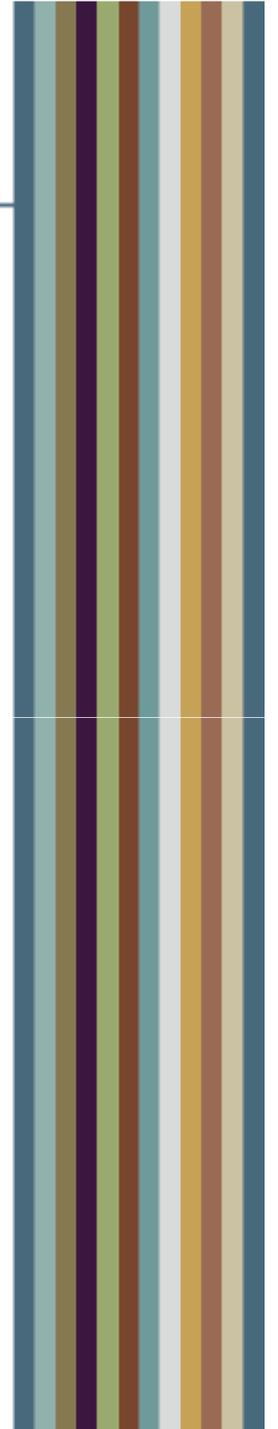
Use Non-Competition Agreements to Protect Against Unfair Competition

- Courts will not
 - Protect a company from all competition
 - Prevent an employee from earning a living
 - Protect a company from competition forever
- Courts make equitable judgment

Right to be free of unfair competition

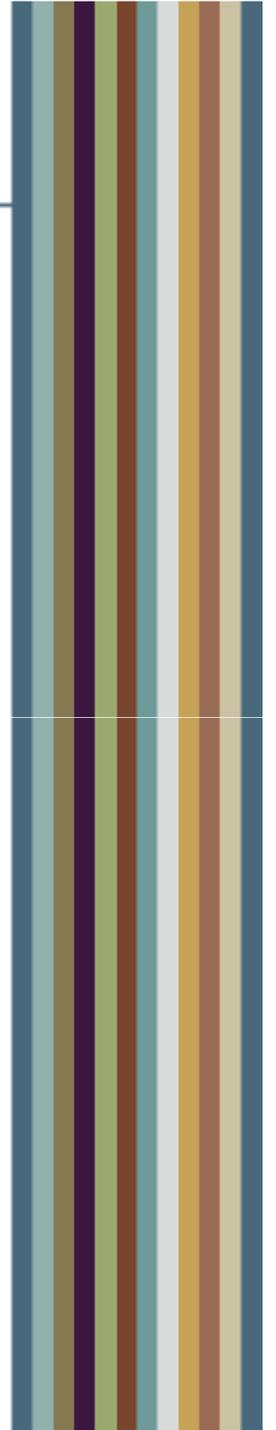
v.

Public interest in marketplace competition in goods and services



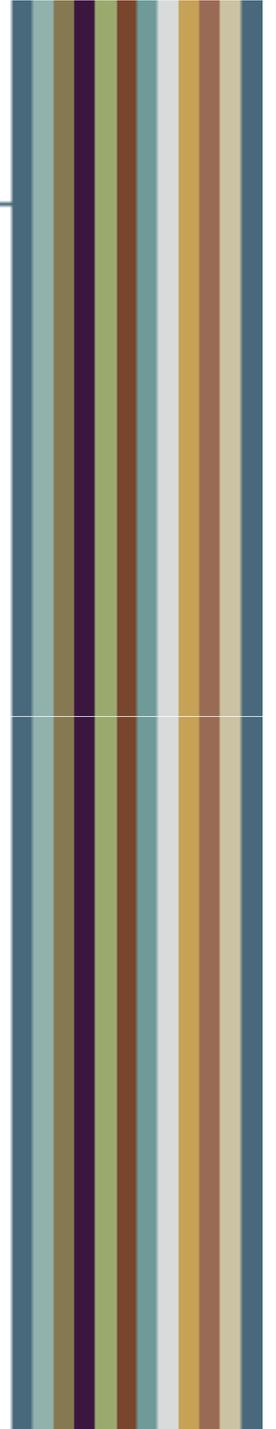
Use Non-Competition Agreements to Protect Against Unfair Competition

- Courts will only enforce properly drafted agreements – they are reviewed in three areas:
 - Time: How long is the employee barred from competing?
 - Geography: In how wide a geographic area is the employee barred from competing?
 - Scope of limitation: In what kind of jobs or from which competing employers is the former employee barred from working?
- Courts will not usually enforce a non-competition agreement against a low-level employee



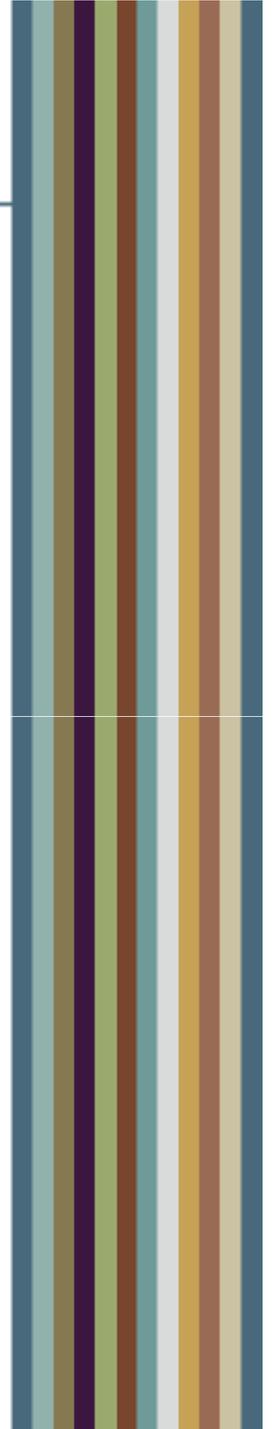
Use Non-Competition Agreements to Protect Against Unfair Competition

- When a non-competition agreement only seeks to impose reasonable time, geographic and scope limitations, the courts in most US states will enforce
[Note: There are exceptions, for example, California, but even there a company can bar the former employee from soliciting or trying to get your employees to leave and join the competitor. California will also protect confidential information if the employer can show it took appropriate steps to protect its confidential information.]



Use Non-Competition Agreements to Protect Against Unfair Competition

- With proper planning and the use of carefully drafted agreements, your company can protect its confidential information and be protected from unfair competition and employee raiding

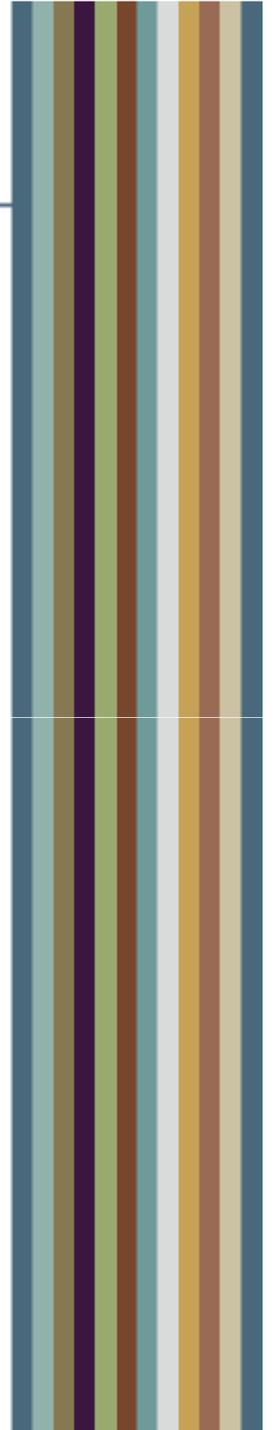


Preventing and Succeeding in Litigation in the US

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Preventing and Succeeding in Litigation in the US

- Employee and other litigation in the US is much more common than in the PRC
- There is no law requiring mediation or arbitration in the US unlike the PRC
- An employee can file an EEOC charge for free – but the Company's defense is not free
- Plan now to avoid this litigation and limit your Company's exposure
- Good HR and Compliance practices as discussed will be important but there are other key actions to take



Preventing and Succeeding in Litigation in the US

- Document Retention Policy
 - Have a policy for document retention including e-mails which states how long you will retain documents (remember, US regulations may require certain records be retained for a specific number of years, e.g., under ERISA, certain benefit documents must be retained for six (6) years)
 - Discovery -- particularly of e-mails -- can be very expensive
 - Data discovery experts are often required

Preventing and Succeeding in Litigation in the US (cont'd)

- Failure to produce documents can be more expensive
 - A large US investment firm lost \$1,400,000,000 in a lawsuit largely because they did not produce all e-mails
 - A large US financial services firm initially lost \$29,000,000 in a sex discrimination case, again largely because of perceived issues about production of e-mails and discovery

Preventing and Succeeding in Litigation in the US

- E-mail discovery in the US could include e-mails to and from the home office in the PRC
 - This discovery can be most burdensome on management's time as well as very costly
 - Thousands of e-mails and attached documents might have to be reviewed by the company's attorneys
 - It could also make more company officials potential witnesses in a lawsuit
 - Even if they are located in the PRC

Preventing and Succeeding in Litigation in the US

- Train employees on e-mail policy
 - Don't send e-mails to individuals who don't need to see them
 - Don't put anything in an e-mail that you wouldn't want a judge or jury to see
 - Remind them that even "deleted" messages can usually be retrieved

Preventing and Succeeding in Litigation in the US

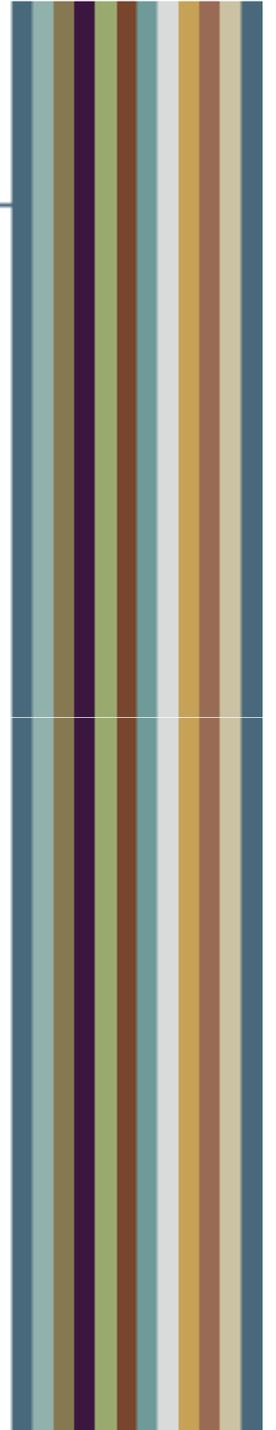
- If ever put on reasonable notice of potential litigation in US, immediately see that all documents, including e-mails that might relate to the claim are preserved until the case is over – including relevant documents and e-mails that may be in the PRC
- Have a written record of your document preservation directive
- US courts can order an adverse inference against a company failing to produce a document it had
 - This means the jury is instructed that if the document had been produced, what it said would have been adverse to the company's position in the litigation

Preventing and Succeeding in Litigation in the US

- Depositions – answering questions asked by the opponent’s attorney where the answers are given under oath and recorded in a typed transcript or video
 - Where possible, try to insulate senior managers in the home office from being the decision-maker and thus possibly potential witnesses
 - In some cases, a senior manager in the PRC might be required to come to the US for a deposition as a corporate representative

Preventing and Succeeding in Litigation in the US

- Jury Trials
 - In the US, most cases are tried to a jury which may not understand business transactions and may be more sympathetic to an employee than the company
 - Jury trials involve considerable expense
 - Jury trials involve more risk of a large verdict
 - Try to create a record so that the judge can decide the case



Preventing and Succeeding in Litigation in the US

- Summary Judgment Motion
 - In US courts, if there are no material issues of disputed fact, the judge can decide the case
 - Judges are usually more favorable for companies
 - Following good HR and Compliance practices, with good documentation makes the possibility of summary judgment far more likely



Preventing and Succeeding in Litigation in the US

- Attorneys Fees Awards
 - Remember, in the US, if an employee brings a successful suit for discrimination, sexual harassment, whistleblowing or retaliation, the court will force the company to pay the employee's reasonable attorneys fees and litigation costs
 - This means company must pay its attorneys and the employee's attorneys if the employee wins
 - Work with experienced counsel to arrange your business activities so you are not a litigation loser

Preventing and Succeeding in Litigation in the US

- Employers can avoid litigation or prevail if an employee should file a discrimination or other charge or lawsuit if proper policies and practices are put in place and
 - Decisions are made for lawful reasons and properly documented
 - Record-keeping requirements are followed
- Careful documentation of business arrangements and contracts helps successful defense of any general business or contract based matters