A foreign manager’s introduction to discrimination:
What one may not say and should not think

Throughout American history, some workers have been the victims of discrimination and abuse. Today, however, a victim of workplace discrimination, real or perceived, can use it to affect change and to gain substantial financial compensation. Certainly many times the abuse is real. Legal actions against major US corporations have become quite common. A search of the New York Times over the last year discloses discrimination cases against Boeing, Maytag, Morgan Stanley, Wal-Mart, US Pipe, Merrill Lynch, Lowe’s, Coca-Cola, Halliburton and Delta Airlines. When perpetrated by a foreign manager, unaware of American history, context and social expectations, the results may be unintended, but nevertheless a dramatic and painful introduction to the US legal system. Ignorance of the law is no excuse and a foreign manager should not rely on the sympathy of a jury.

The foreign manager transferred to the US without an experienced human resources staff walks through a minefield, often setting off mines, many with delayed fuses. The law suits may not begin until months or years later, when the manager has finally figured out the rules, but by then it is too late. This brief article cannot cover all the subtleties of this area of the law, but it can begin the process of adjustment and sensitization. Not to adjust quickly can be very, very expensive. This summary is intended for foreign managers without large US human resources departments and legal staffs. It is a somewhat
personal perspective and in no way a substitute for formal legal counsel.

Generally under current US law, employee protections are based on abuse of the historically disadvantaged. These groups include racial and ethnic minorities, religious minorities, women, gays and lesbians, handicapped and the aged (which actually includes anyone over 40 years old). The goal is to make people in these classes feel comfortable in the work place and to give them a fair opportunity to progress in their careers. Americans really do put emphasis on merit.

Probably the most seriously disadvantaged group in American history is made up of African-Americans. America’s tradition of institutional – indeed constitutional – slavery is the worst kind of discrimination. Although slavery ended officially during the Civil War, less formal economic, political and social discrimination continued in the form of lynchings, intimidation, voting requirements, and housing and job restrictions. Crosses are still burned on lawns in some cities as a vivid reminder of the worst discrimination. The problem is reduced but not eliminated, and it is not limited to the South. Therefore, any kind of workplace comment about race is ill advised. Certain words, seen as innocent in a relatively homogeneous European or Asian society, are “loaded” in the US with centuries of content and cause very negative reactions. Phrases that in years past were not viewed as derogatory but are now questionable at best include “Negro” and “colored.” “Black” is more acceptable, but “African-American” is now the safest description.

Descriptive terms which are not racial but come from the racist tradition are also viewed very negatively. “Boy” is one of these. “Son” is not as dangerous but should be avoided. Any kind of paternalism, however well intended, will be seen as demeaning.

Branching out from this core discrimination are words used to describe almost any ethnic group that was or is disadvantaged. The list of derogatory words to describe these groups is too long and too distasteful to list. Practically every new group of immigrants to the United States has been the subject of discrimination and abuse. The foreigner who has to make a reference to someone’s ethnicity should stick with phrases such as “Italian-American,” “Greek-American,” etc.

Besides names for these groups, generalizations about ethnic groups are also dangerous. This is true regardless of whether the generalizations can be supported by scientific studies. It is best to avoid any sort of phrase that begins, “The Italians are...” or “the Irish are...”

Religious groups may be somewhat less sensitive than ethnic groups, but using terms other than the official name of a church or religious group is a bad idea. Probably because of the use of the term in Germany in the 1930’s and 40’s, it is uncommon for Americans to refer to Jews as Jews, except in standard phrases such as “Christians and Jews.” There is no simple alternative to “Jew” and the term one hears is “Jewish people.” The same rules about ethnic generalizations, whether or not flattering, apply to religious groups.

Ethnic and religious holidays also require respect. Even a US manager should get a calendar with the complete set of holidays listed to avoid scheduling insensitivity. Traditionally this has meant respecting Jewish holidays, but it has been expanded to cover African American holidays such as Martin Luther King Jr.’s birthday and Quanza. A senior Texaco executive got himself and his company in major legal trouble by referring to Quanza...
with less than due respect in a secretly taped internal meeting. As Muslims play a bigger role in some US communities, their holidays should also be kept in mind.

Although a majority of the population, women have traditionally been disadvantaged in the political and economic marketplace. For example, US women got the vote long after African American men. However women in the United States now generally play a bigger role in the professions than in many other countries. A foreign manager is quite likely to deal with a lawyer, banker or accountant who is a woman. These professionals should be treated first as professionals and secondarily, if at all, as women. The less said about their being women, the better. More importantly, compared with European countries, American women are sensitive about advances. As a general rule, looking at a woman in the business setting as something other than a colleague or commenting on her appearance is dangerous. Touching, flirting, suggesting drinks after work, and asking questions about personal life constitute high risk behavior. This is true even if the woman welcomes the advances. While it is unlikely that a manager would himself do so, tolerating “pin up” pictures of unclothed women in the workplace is dangerous. Posters seen on the street in Europe would be a problem in the American workplace and would be viewed as promoting a hostile work environment if posted there, even in private clothes lockers.

As with African American males and the term “boy,” referring to females past puberty as “girls” is very dangerous and is often perceived as demeaning. When in doubt, use “women.” Avoid saying “female” anything, such as “female plumber” or “female accountant.” “Lady” as a prefix is worse. At least some attempt to avoid old “sexist” nouns should be made. “Fireman” has been replaced by “firefighter.” “Postman” is now “letter carrier.” “Chairman” is better described as “chairperson” or simply the “chair.” These changes may be especially difficult for a manager whose first language is not English.

Jokes, however funny, about any of these subjects, race, ethnicity, religion or gender, are likewise ill-advised. Many Americans still tell jokes about Jewish mothers, the German, Frenchman and Italian or the Rabbi, Priest and Minister, but these jokes may be offensive to some. Mimicking accents can also be dangerous. Engaging in any of this activity in the workplace is unnecessary and involves a real legal risk of creating a “hostile work environment.”

Sexual preference, i.e. homosexuality, is another dangerous topic. Here, too, if the subject has to be addressed, the manager should stick with clinical terms and avoid casual references. “Gay” and “lesbian” are acceptable. Making employment decisions based on sexual preference may be a basis for legal action in some jurisdictions.

The rights of the handicapped in the workplace have been expanded dramatically in the last 15-20 years. Physical and mental disabilities fall into protected groups. The subjects of weight and drug and alcohol abuse should be
approached warily. It is hard to imagine a manager who would make an intentionally disparaging remark about an employee with a handicap such as a lost limb or lost sight. Mental illnesses should also be taken seriously. This also applies to remarks which may apply to the spouses, children or other relatives of an employee. As with some ethnic groups, the preferred nomenclature for use with these groups changes over time. So terms that were acceptable 20 years ago may be viewed as unenlightened or derogatory today. Here the internet may be helpful in determining the proper words to us. Most diseases and impediments have interest groups. A visit to their websites may be worth while in learning the prevailing view on these subjects.

In the United States, anyone over the age of 40 is protected against age discrimination under federal law. Local laws may provide protection for even younger employees. Phrases such as “bringing new blood into the organization” or “invigorating the firm” may be heard as code for replacing older workers with younger ones. The Maytag suit mentioned above involves reducing the number of regional sales managers. Managers over 50 were disproportionately affected. Hence the action. Both men and women are protected. As a general rule, companies should not have mandatory retirement policies. Exceptions can be made, but they are dangerous if instituted without thoughtful legal advice.

The problems described above are only compounded when a foreign manager gives a speech. Examples of insensitivity by well-meaning, intelligent Europeans abound. For example, a top German politician standing next to an American Jew at a German-American conference referred to the participants as all having the same Christian roots or Jacque Chirac refers to French Moslems, Jews and “normal” French. The speaker must simply assume that someone in the audience is or is related to a person who is in a group that suffers from discrimination.

Managers from countries with laws restricting employee firing often think of the United States as the land of “hire and fire.” While it is true that it is generally easier to dismiss workers here without much direct cost, this rule does not apply when the reason for the dismissal or even failure to retain is improper. Firing an employee by reason of any of the groups mentioned above – race, religion, gender, sexual preference, disability or age – can result in an expensive lawsuit or settlement. In hiring employees in an asset transaction, failure to offer employment to the selling company’s minority workers, for example, can be the basis for a suit. The same is true when “downsizing.” The appearance of improper discrimination may be as problematic as actual discrimination.

What the manager says or does is one thing; what he or she tolerates as acceptable action by American subordinates may be more difficult. The manager can avoid being a defendant by being conservative. To keep his or her company out of court requires the manager to judge and regulate the actions of co-workers. They may not be willing to be so conservative. How much can be safely tolerated by co-workers is beyond the scope of this article but is a subject that should not be ignored. In the abstract, it is
difficult to judge when the cost of getting legal advice outweighs the danger. Certainly when the cost can be spread over several managers and many employees, the cost-benefit analysis becomes simpler. Besides obtaining advice from an attorney, consulting firms offer courses and seminars which can both train managers and employees and provide evidence that management takes these issues seriously.

Procedural aspects of US law may play a key role in discrimination cases, especially if the financial claim of each employee is not too large. The US legal system will almost never require the plaintiff employee to pay the employer’s legal fees. The employee can therefore commence an action with an administrative proceeding and with few if any legal fees. Or the employee may engage a lawyer willing to take the case on a contingent fee basis, hoping to be paid out of an award against the employer. The lawyer is paid only if the client wins an award. The employer, on the other hand, has to begin paying its lawyers immediately. If it has a large legal department, the additional expense may be small. But

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Foreign employers are not large enough to have legal departments with trial lawyers. If they are, they are likely to have human resources departments to help managers avoid the problems in the first place. Another procedural consideration is the plaintiff’s chance of getting past “summary judgment.” In a jury trial, the plaintiff will present his or her case to the jury. Before the jury decides whether it believes the plaintiff, the defendant may ask the judge to keep the question away from the jury. The defendant asks the judge to decide that the plaintiff’s proof is not adequate to support a judgment, even if it is all true. If the judge agrees with the defendant, the judge dismisses the case. If the judge decides not to dismiss the case, it goes to the jury and the defendant’s risk of a significant judgment goes up substantially. Pressure to settle before the jury decides can become intense. Therefore an employer must avoid giving the plaintiff enough “material” that its case that will survive such a motion.

Most businessmen have heard of class actions. General employment policies, tolerance for discrimination, patterns of behavior, etc., can all help many employees and ex-employees with small claims join together into class action groups. The chances of significant damage awards and the award of legal fees go up when a class can be formed. Similarly, American law allows for punitive damages, which can dramatically increase awards.

In short, foreign managers may initially find US laws protecting workers against discrimination silly, but there is a thoughtful, historical and legal basis for these laws and the manager ignores them at his or her peril.