



# **2014 NTMA FLORIDA CHAPTER**

**Labor & Employment Update**

**THE GOOD, THE BAD & THE UGLY OF  
EMPLOYMENT LAW**

**MARCH 13, 2014**



# THE NATIONAL LABOR RELATIONS BOARD'S EXPANDING AGENDA

# Social Media

- NLRB found the employer could not discipline its employees for criticizing their supervisor on Facebook.
- NLRB determined the postings about the supervisor constituted protected, concerted activity for purposes of the NLRA.
- NLRB also found the employer violated the NLRA by maintaining a rule forbidding employees from disclosing wages and compensation to each other or to any third party. Bettie Page Clothing (NLRB 2013)

# “Confidential” Internal Investigation

- NLRB ruled employer violated NLRA by instructing witnesses not to discuss with other employees the subject matter of an internal investigation while investigation was pending.
- Broad confidentiality policies pertaining to workplace investigations, such as harassment investigations, are not permissible based on NLRB’s current interpretation of NLRA.
- Employer must have “legitimate business need for confidentiality” as to a particular investigation.  
Banner Health System (NLRB 2012)

# Micro Bargaining Units

- NLRB notes that where the non-petitioning party asserts additional employees should be included in the bargaining unit for purposes of an election, the non-petitioning party has the burden of demonstrating an “overwhelming” community of interest between the included and excluded employees.
- NLRB recently emphasized it only needs to find the petitioned-for unit to be an appropriate unit, not the most appropriate unit.
- New NLRB position helps unions in efforts to narrowly define units that are known to have a lot of pro-union sentiment to get their foot in the door of a company.

# Ambush Elections

- On February 5, 2014, the NLRB re-proposed new rules regarding NLRB Elections
  - Same as those proposed in 2011
- Voter Eligibility Lists (Excelsior Lists)
  - Employers would be required to produce a voter eligibility list within 2 days after the direction of the election (currently 7 days)
  - The list also would include substantially more information, including employees' telephone numbers, position and email addresses

# Ambush Elections

- Pre-Election Hearings
  - Employers could obtain a pre-election hearing only upon a showing of substantial evidence (by submitting a statement of position)
  - Even upon a showing of substantial evidence, a hearing would only be granted at the discretion of the Regional Director
- Post-Election Objections
  - The time period to file post-election objections would decrease from 14 days to 7 days

# Ambush Elections

- Timing of Elections
  - Based on the NLRB timetable, an election could be held less than 20 days after a representation petition is filed (pre-election hearing 7 days after petition is filed, 2 days to provide voter eligibility list and election held within 10 days)
  - This substantially limits an employer's ability to prepare an informational campaign for its employees about the pros and cons of unionization

# THE NEW AMBULANCE CHASERS

## WAGE & HOUR LAWYERS



# Overtime Pay

- Covered, non-exempt employees must receive one and one-half times the regular rate of pay for all hours worked over forty in a workweek

# Recordkeeping

- The FLSA requires that all employers subject to any provision of the Act to make, keep and preserve certain records

# COMMON ERRORS TO AVOID

# Common Errors to Avoid

- Assuming that all employees paid a salary are not due overtime
- Improperly applying an exemption
- Failing to pay for all hours an employee is “suffered or permitted” to work
- Limiting the number of hours employees are allowed to record

# Common Errors to Avoid

- Failing to include all pay required to be included in calculating the regular rate for overtime
- Failing to add all hours worked in separate establishments for the same employer when calculating overtime due

# Common Errors to Avoid

- Making improper deductions from wages that cut into the required minimum wage or overtime. Examples: shortages, drive-offs, damage, tools, and uniforms
- Treating an employee as an independent contractor
- Confusing federal law and state law

# THE NEW LOTTERY TICKET

## EMPLOYMENT LITIGATION



# THE 90/10 RULE

90% of an organization's Human Resource problems are caused by 10% of the organization's employees.

# Employment At-Will

- As an employer, I can take whatever action I want against an employee because employment is at will, right?

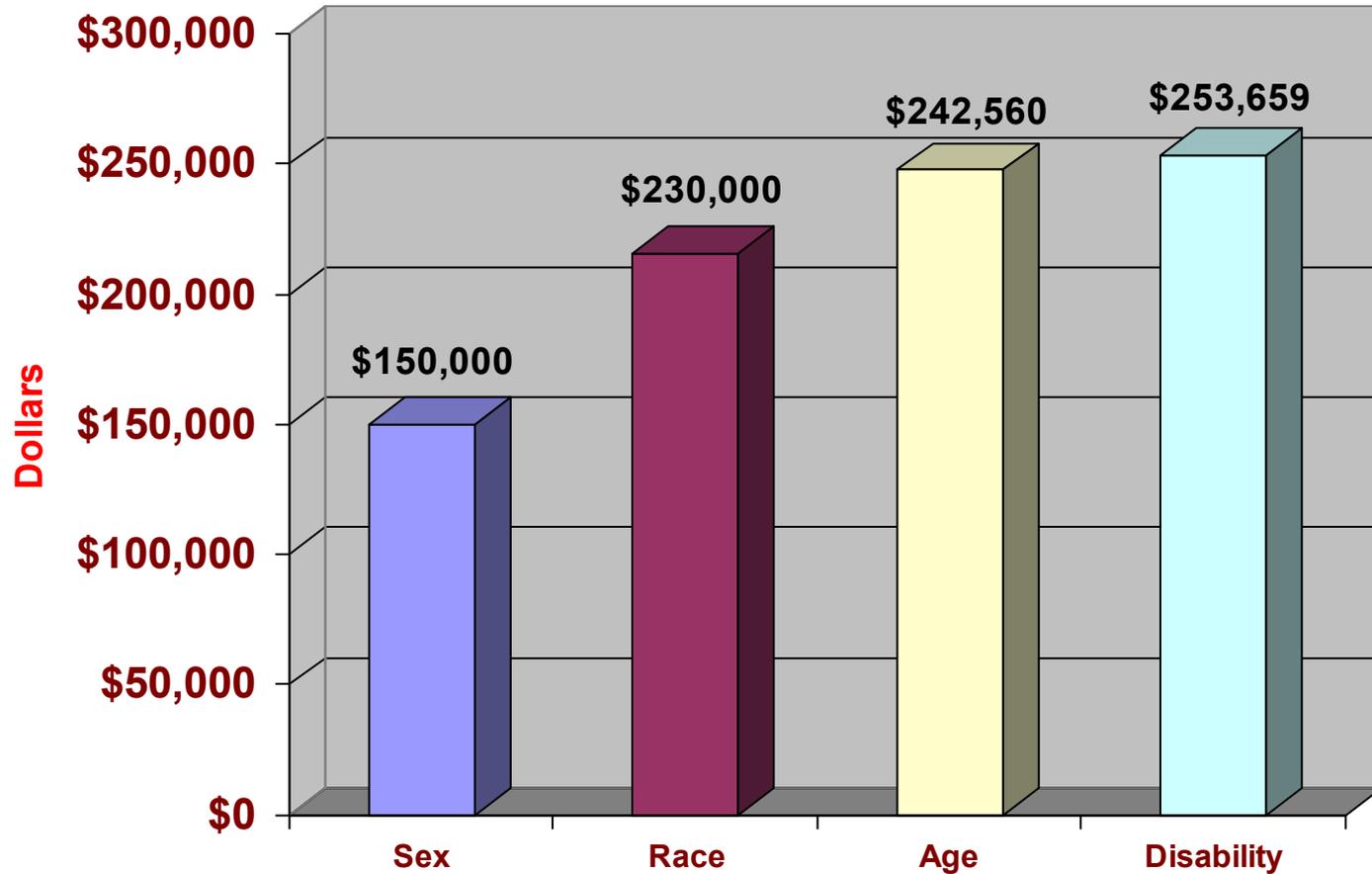
# Erosion of Employment At-Will

- State/Federal statutes
  - Discrimination/Retaliation/Harassment
  - Wage and hour
  - Leave rights
  - Workplace safety

# State Law Wrongful Discharge Claims

- Florida Whistleblower Law
- Breach of Contract  
(Handbooks and written policy statements)

# Compensatory Jury-Award Medians by Type of Discrimination Case\*



\*Source: Jury Verdict Research® Horsham, Pa. (2013)



# Recent Jury Discrimination Awards

<u>Case Name</u>	<u>Discrimination Type</u>	<u>Award</u>
EEOC v. Four Amigos Travel, et al.	Sexual Harassment/ Retaliation	\$20 million
Bookman v. Balance Med	Pregnancy Discrimination	\$2.3 million
Soliday v. 7-Eleven	Disability Discrimination	\$934,000
EEOC v. It's Just Lunch	Sex Discrimination/ Retaliation	\$900,000
Desisto v. City of Delray Beach	Disability Discrimination	\$762,000
Smith v. City of New Smyrna Beach	Sexual Harassment	\$440,000
Ellis v. Bradshaw	Race Discrimination/ Harassment	\$262,000



# **AVOIDING LITIGATION BY DISGRUNTLED EMPLOYEES**

# Essential Handbook Policies

- Equal Employment Opportunity
- Harassment
  - General policy statement that covers all forms of harassment, not just sex
  - Description/examples of prohibited conduct
  - Reporting procedure
  - Confidential investigation
  - Appropriate remedial action
  - No retaliation
- At-will nature of employment

# Essential Handbook Policies (cont.)

- Employee Classification – avoid “permanent”
- Benefits – reference to summary plan description
- Leaves of Absence
- Workplace Violence
- Code of Conduct
- Substance Abuse Testing
- Open Door
- Employee Acknowledgement



# MAKING THE DECISION TO TERMINATE

## 7 Questions



I. Did the employer give the employee forewarning of the possible or probable disciplinary consequences of the employee's conduct?

- a. Employee handbooks
- b. Plant rules



2. Was the employer's rule or policy reasonably related to the orderly, efficient, and safe operation of the company's business?

- a. Performance and productivity
- b. Safety



3. Did the employer, before administering discipline, make an effort to discover whether the employee violated or disobeyed a rule or policy?

- a. Employee has a right to know the offense he or she is being charged with and must be given an opportunity to defend his or her behavior
- b. Investigation should be made prior to a disciplinary decision
- c. Where management must react immediately to employee's behavior, suspension pending investigation is generally recognized as acceptable



4. Was the employer's investigation conducted fairly and objectively?

- a. Who, what, where, when and how?
- b. Interview relevant witnesses
- c. Do not pre-judge employee



5. At the investigation did the employer obtain substantial evidence or proof that the employee was guilty as charged?

- a. Evidence must be truly substantial and not flimsy
- b. Evidence must be documented



6. Has the employer applied its rules, policies and penalties evenhandedly and without discrimination to all employees?

- a. Discrimination is the antithesis of just cause
- b. Employee cannot be singled out for discipline based on a rule that is not enforced against any other employees

7. Was the degree of discipline administered by the employer reasonably related to the seriousness of the employer's proven offense and the record of the employee's service?

- a. A trivial proven offense does not warrant harsh discipline unless the employee has properly been found guilty of the same or other offenses a number of times in the past
- b. Employee's record of previous offenses may never be used to determine guilt or innocence of the current charge, but may be used in evaluating the severity of discipline for a proven offense
- c. Bottom line: Is it fair?

# Termination Guidelines

- How an employee is treated at the time of termination, and not the termination itself, often gives rise to legal action
  - Protect the employee's privacy and dignity
  - Notify the employee in person in private
  - Have 2 managers present so that one can act as witness
  - Provide the reason for termination and give him/her the opportunity to respond or ask questions
  - Limit communications regarding termination decision on a "need to know" basis



# QUESTIONS