

NTMA LABOR & EMPLOYMENT UPDATE

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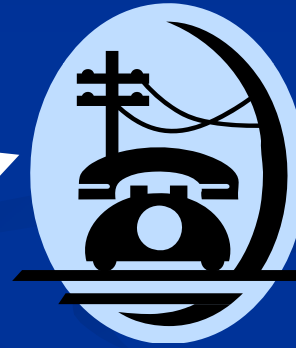
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NTMA "FIRE CALLS"

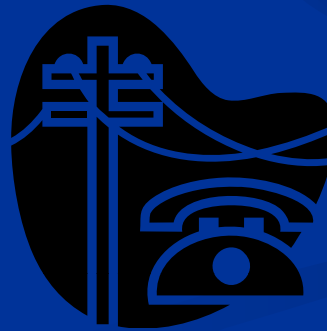
THE COMPANY



MCMAHON BERGER



NTMA



TOP 5 ISSUES

1. Performance/Misconduct
2. Medical Restrictions/Leaves
3. Pay and Benefits
4. Employee Handbooks
5. Harassment/Discrimination

I. THE 90/10 RULE

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

EMPLOYMENT AT WILL IS IT DEAD?



FEDERAL EMPLOYMENT LEGISLATION

- | | |
|--|---|
| 1935 – National Labor Relations Act | 1986 – Consolidated Omnibus Budget Reconciliation Act (“COBRA”) |
| 1938 – Fair Labor Standards Act | |
| 1963 – Equal Pay Act | 1988 – Employee Polygraph Protection Act |
| 1964 – Civil Rights Act (Title VII) | 1990 – Americans with Disabilities Act |
| 1967 – Age Discrimination in Employment Act | 1990 – Older Workers Benefits Protection Act |
| 1970 – Occupational Safety and Health Act | 1991 – Civil Rights Act |
| 1974 – Employee Retirement Income Security Act (ERISA) | 1993 – Family and Medical Leave Act |
| 1974 – Vietnam Era Veterans’ Readjustment Asst. Act | 1996 – Health Insurance Portability and Accountability Act |
| 1986 – Immigration Reform and Control Act | |

State Employment Legislation

- Discrimination
- Harassment
- Retaliation
- Access to Personnel Files
- Pay Due on Termination

STATE CLAIMS FOR WRONGFUL DISCHARGE

- Breach of Implied Contract
(Handbooks and written policy statement)
- Breach of Public Policy
(Constitution, statute, regulation)
- Breach of Implied Covenant of Good Faith and Fair Dealing

OUR LITIGIOUS SOCIETY



1000 POLICE



575 FIREMEN



3,500 LAWYERS*

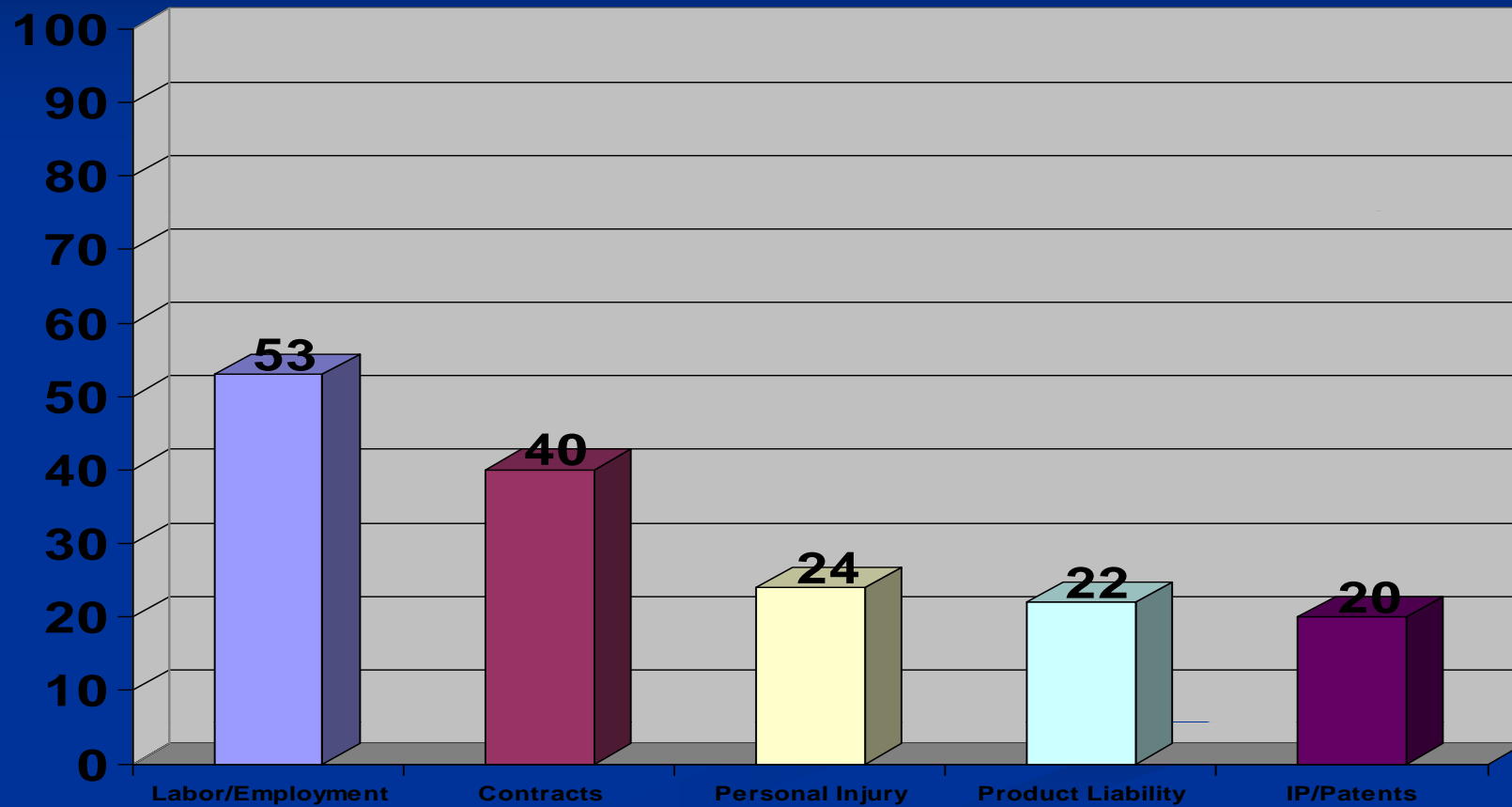
* Source: Hillsborough County Bar Ass'n

THE EMPLOYMENT LITIGATION LOTTERY



CORPORATE COUNSEL RANK EMPLOYMENT CASES AS TOP LITIGATION CONCERN*

FIVE LITIGATION AREAS TOPPED THE LIST



* Source: 2007 Litigation Trends Survey, Fulbright & Jaworski L.L.P.

Compensatory Jury-Award Medians by Type of Discrimination Case (2000-2006)*



*Source: Jury Verdict Research® Horsham, Pa.

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

- a. Employee Handbooks.
- b. Plant rules.

HOW TO AVOID LITIGATION
BY THE DISGRUNTLED
EMPLOYEE

SEVEN QUESTIONS TO ASK?

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 to an employee, 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 “Company” 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?

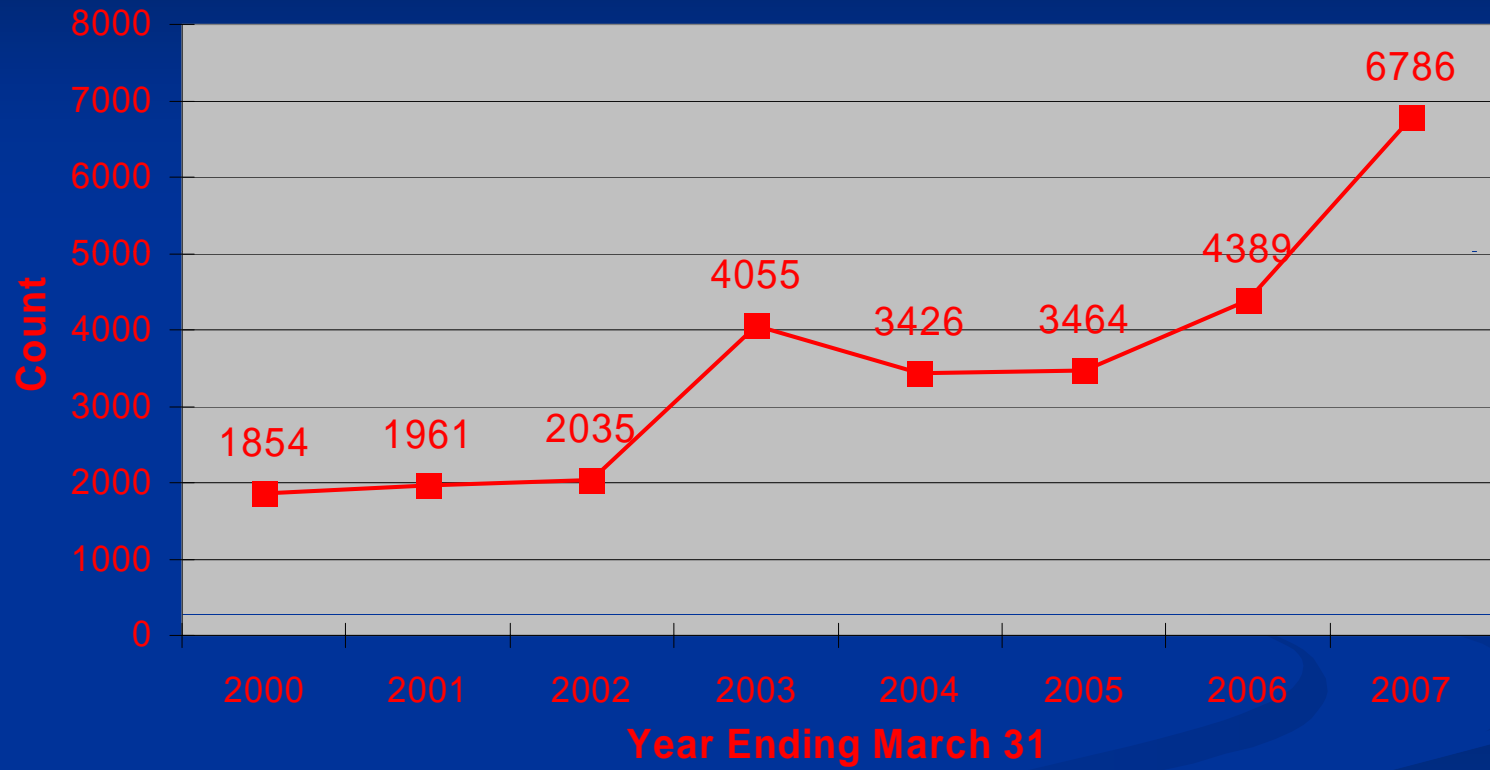
- a. Discrimination is the antithesis of just cause.
- b. Employee cannot be singled out for discipline based on a rule that is not enforced against any other employees.

7. Was the degree of discipline administered by the employer reasonably related to (a) the seriousness of the employer's proven offense and (b) 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?

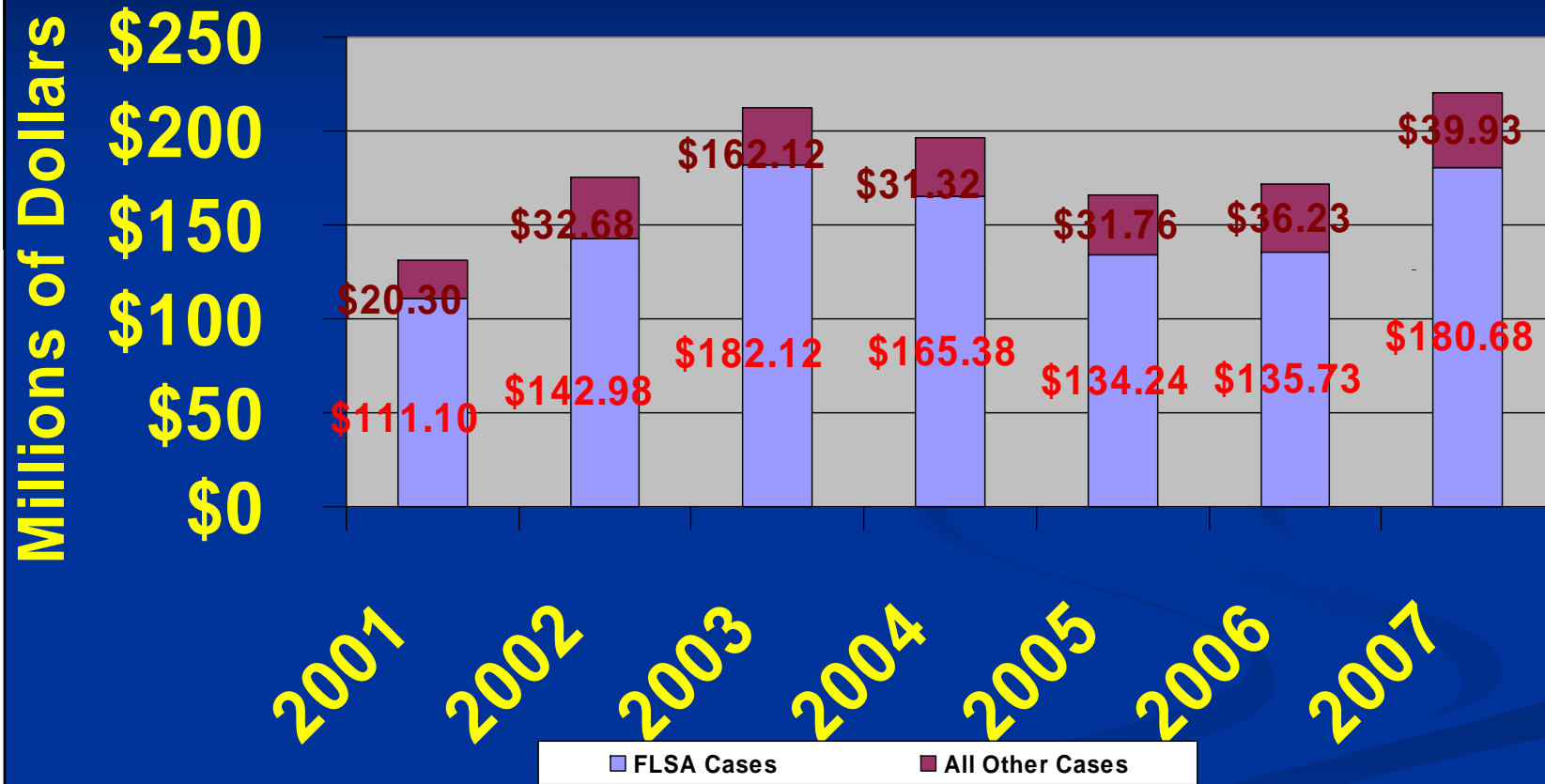
Fair Labor Standards Act (FLSA)

Federal Fair Labor Standards Act Case Filings (2000-2007)



Source: Federal Judiciary Caseload Statistics (www.uscourts.gov)

U.S. Department of Labor Back-Wage Collections 2001-2007



Source: U.S. Department of Labor, Wage and Hour Division, Statistics Fact Sheets 2002-2007.

SIGNIFICANT CHANGES IN FLSA

FLSA REGULATIONS TOOK EFFECT
AUGUST 23, 2004

WHAT'S NEW: FLSA WHITE COLLAR EXEMPTIONS

1. The Executive Employee Exemption

An employee will be considered an “executive” if:

1. The employee is compensated at a rate of not less than \$455.00 per week on a salary basis, exclusive of board, lodgings, and other facilities;
2. The employee’s primary duty consists of the management of the enterprise in which the employee is employed or of one of its customarily recognized departments or subdivisions;
3. The employee’s work includes the customary and regular direction of the work of two or more other employees; and
4. The employee has the authority to hire or fire other employees or his/her suggestions and recommendations as to hiring, firing, promotion, etc. of employees are given particular weight.

2. The Administrative Employee Exemption

1. The employee is compensated on a salary or fee basis of not less than \$455 per week; and
2. His or her primary duty consists of performance of office or non-manual work directly related to management policies or general business operations of his/her employer or his/her employer's customers; and
3. His or her primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

3. The Professional Employee Exemption

1. Employee is compensated at a rate of not less than \$455 per week on a salary or fee basis (exclusive of board, lodging, or other facilities); and
2. Employee's primary duty consists of:
 - a. (1) work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship and training in the performance of routine mental, manual, or physical process; or
 - b. The performance work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

FREQUENTLY ASKED QUESTIONS AND OVERTIME IMPLICATIONS

1. DO I HAVE TO GIVE MY EMPLOYEES COFFEE BREAKS?
2. DO I HAVE TO GIVE MY EMPLOYEES 30 MINUTES FOR LUNCH?
3. CAN I FORCE MY EMPLOYEES TO WORK OVER 8 HOURS PER DAY?
4. DO I HAVE TO PAY VACATION PAY?
5. DO I HAVE TO PAY HOLIDAY PAY?
6. DO I HAVE TO PAY SEVERANCE PAY?
7. DO I HAVE TO HAVE A TIME CLOCK?
8. DO EMPLOYEES HAVE TO SIGN THEIR TIME CARDS?
9. DO I HAVE TO PAY FOR ALL TIME ON THE TIME CARD?
10. DO I HAVE TO PAY AN EMPLOYEE OVERTIME FOR WORKING ON A HOLIDAY, SATURDAY OR SUNDAY?
11. IF AN EMPLOYEE WORKS 40 HOURS AND GETS 8 HOURS HOLIDAY PAY = 48 DO I HAVE TO PAY OVERTIME FOR THE HOURS OVER 40?
12. DO I HAVE TO PAY OVERTIME FOR WORK OVER 8 HOURS PER DAY?
13. IF AN EMPLOYEE WANTS TO WORK OVERTIME AND WILL ACCEPT STRAIGHT TIME, CAN HE WAIVE HIS RIGHT TO OVERTIME PAY?
14. CAN I GIVE COMPENSATORY TIME OFF RATHER THAN PAY OVERTIME?
15. DO I HAVE TO PAY FOR WORK I DID NOT REQUEST?

WHAT'S NEW WITH UNIONS?

REPRESENTATION ELECTIONS

1999 – 2006*

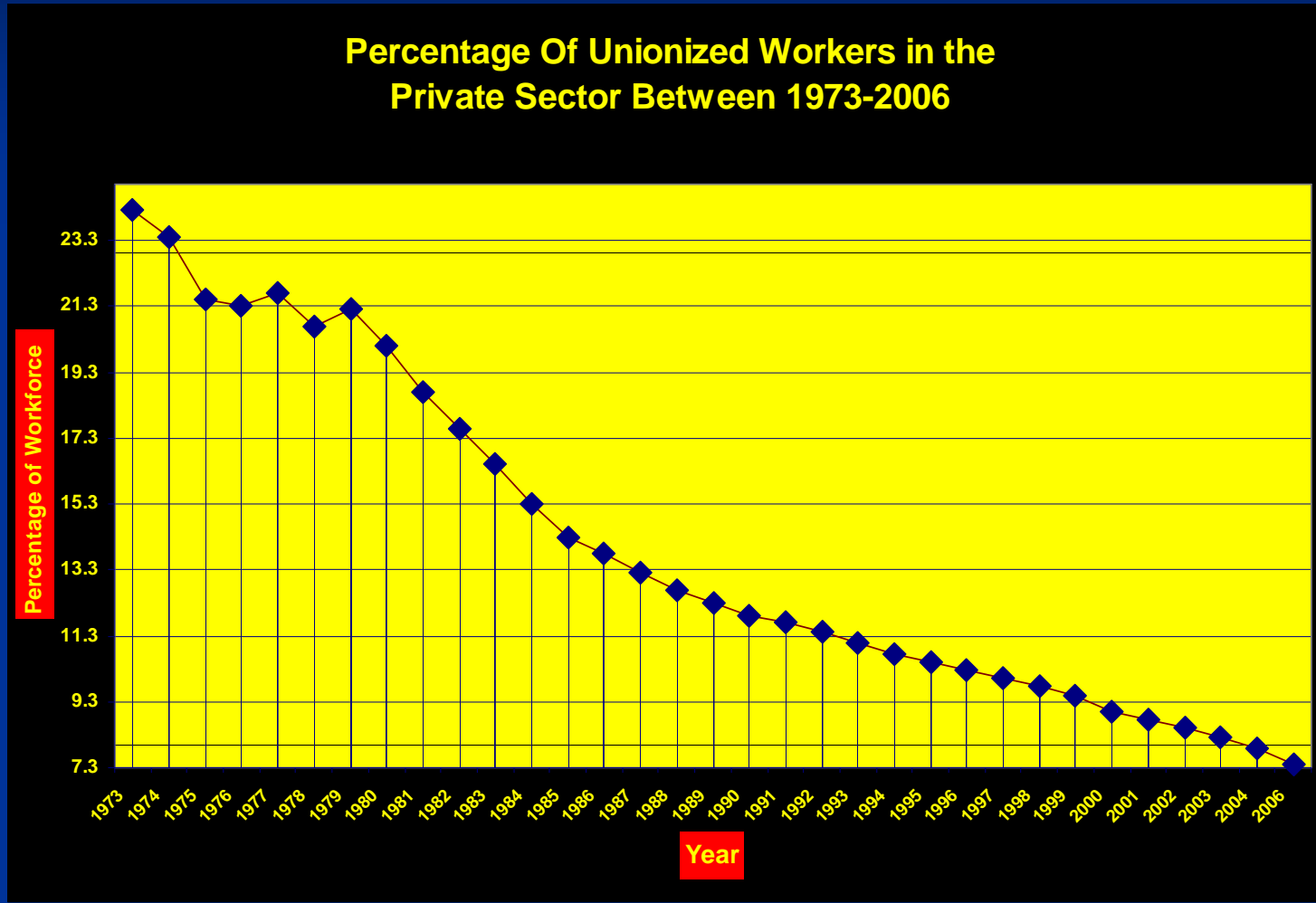
NUMBER OF ELECTIONS CERTIFIED		TOTAL CERTIFIED	WON BY UNION	UNION NOT CHOSEN	PERCENT OF ELECTIONS WON BY UNION	NUMBER OF EMPLOYEES OF ELIGIBLE TO VOTE	
						IN ALL ELECTIONS	IN ELECTIONS WON BY UNION
TOTAL ELECTIONS	1999	3,086	1,621	1,465	52.5%	241,208	116,204
	2000	2,906	1,554	1,352	53.5%	207,189	86,015
	2001	2,531	1,380	1,150	54.5%	197,648	76,084
	2002	2,690	1,532	1,158	57.0%	174,692	72,739
	2003	2,358	1,364	994	57.8%	154,620	67,319
	2004	2,267	1,323	943	58.4%	153,020	65,049
	2005	2,126	1,293	832	60.8%	130,621	57,118
	2006	1,674	1,027	647	61.4%	112,970	49,765
	2007	1,329	815	513	61.3%	82,286	36,034

* Does not include decertification elections.

Source: Labor Relations Institute, Inc.

Percentage of Work Force With Union Membership Among U.S. Wage & Salary Workers 1973-2006 In The Private Sector

(Source: Bureau of Labor Statistics)



Employee Free Choice Act

- Would have eliminated secret ballot elections and allowed for union recognition through presentation of authorization cards signed by a majority of bargaining unit members.
- Also, would have imposed deadlines for negotiating a collective bargaining agreement.
- Legislation was rejected by the Senate in June 2007 and appears to be shelved for now.

ADA, FMLA and WORKERS' COMPENSATION

The Bermuda Triangle
Or
The Loch Ness Monster

Introduction

- Workers' Compensation laws typically require compensation to be paid for lost earnings.
- The ADA and the FMLA impose significantly increased burdens, expenses, and limitations on employers.
- The focus of this presentation is on the interplay between the three statutes as they relate to leaves of absence and job restoration.

ADA

The ADA prohibits private employers who employ 15 or more persons from discriminating against a *qualified individual with a disability* because of that person's disability.

ADA

Who Is Disabled?

A qualified individual with a disability is a person who ...

- Has a disability as defined by the ADA
- Satisfies the skill, experience, education, health and safety requirements of the position; and
- Can perform the *essential functions* of the job with or without a reasonable accommodation.

ADA

What Is a Disability?

Under the ADA, a *disability* is . . .

- A physical or mental impairment that *substantially limits* one or more *major life activities* of an individual;
- A record of such impairment; or
- Being regarded as having such impairment.

ADA

What is a Major Life Activity?

Major Life Activities include functions such as

- Caring for oneself;
- Performing manual tasks;
- Walking;
- Seeing, hearing, speaking and breathing;
- Learning;
- Working; and
- Concentrating, interacting with others and sleeping.

ADA

What Does Substantially Limiting Mean?

Factors to consider when evaluating whether a particular impairment is substantially limiting include...

- The nature and severity of the impairment;
- The duration (or expected duration) of the impairment/limitation; and
- The permanent or long-term impact of the impairment/limitation.

Prohibited Actions Under The ADA

The ADA prohibits employers from taking certain actions including, but not necessarily limited to:

1. Making pre-employment medical inquiries, including questions about workers' compensation claim history.
2. Failing to make a reasonable accommodation of a known disability.

FMLA

- Generally, the FMLA requires a covered employer to grant *eligible* employees up to 12 weeks of unpaid leave during a 12-month period, with a continuation of group health benefits and the assurance of job restoration in certain instances, for:
 - Birth of placement of a child
 - Employee's serious health condition
 - Serious health condition of child, spouse or parent.

FMLA

WHO IS *ELIGIBLE*?

- The FMLA is more limited in its coverage than the ADA to the extent that it covers only employers employing 50 or more employees working within 75 miles of an employee's worksite.
- In order to be eligible, an employee must have been employed by the employer for at least 12 months (not necessarily consecutive).

AND

- Must have worked at least 1,250 hours during the 12 months immediately preceding the leave.

FMLA

WHAT IS *CONTINUING TREATMENT*?

- Five Types of Continuing Treatment
 - Absence plus treatment
 - Pregnancy
 - Chronic Conditions
 - Permanent/Long-Term Conditions
 - Multiple Treatments

FMLA

“Notice Requirements”

- For foreseeable leaves: 30 days.
- For non-foreseeable leaves: as soon as practicable -- ordinarily not later than 3 working days before leave is to begin.
- An employee is obligated only to tell you enough **facts** which indicate potential FMLA coverage.
- It is UP TO YOU as the employer to properly designate leave as FMLA leave.

Prohibited Actions Under The FMLA

The FMLA prohibits employers from taking certain actions including, but not necessarily limited to:

1. Counting FMLA leave as an absence under an attendance policy against employees who take such leave.
2. Failing to allow FMLA leave under covered circumstances.
3. Retaliating against employees who take FMLA leave, who file FMLA-related complaints, or who assist in FMLA claim actions.

Workers' Compensation

- Injuries “arising out of an in the course of employment”
- Focus on cause of injury
- Obligation to provide medical treatment
- Compensation for disability
- Exclusivity issues
- Retaliation

Prohibited Actions Under Workers' Compensation

Workers' Compensation laws prohibit employers from taking certain actions including, but not necessarily limited to:

1. Interfering with an employee's right to file a workers' compensation claim.
2. Discharging or otherwise discriminating against a person who has filed a workers' compensation claim.

WORKERS' COMPENSATION



WHICH
LAWS APPLY?

FMLA

50 or more employees,
consider the FMLA

ADA

State anti-discrimination laws
may apply to employers with
less than 15 employees.

WORKERS' COMPENSATION

No eligibility or minimum waiting period.



ELIGIBILITY REQUIREMENTS

FMLA

1. 12 months of service (need not be consecutive).
2. Employed >1250 hours in 12 months preceding leave.
3. A facility with 50 or more employees within 75 miles.

ADA

No eligibility or minimum waiting period.

WORKERS' COMPENSATION

No, except to extent of temporary disability benefits.



PAID LEAVE?

FMLA

No, unless an employee requests paid or the employer, upon notice to the employee, mandates paid leave be taken (*i.e.*, vacation time or sick leave time).

ADA

No, but employers cannot discriminate based on impermissible criteria by paying some employees while they are on leave and not paying other employees who are on leave.

WORKERS' COMPENSATION

Anti-retaliation provisions apply.



DURATION OF LEAVE ISSUES

FMLA

12 weeks in 12 months.
Leave is replenished assuming continued eligibility.

ADA

- Indeterminate leave may be a reasonable accommodation.
- Absent undue hardship.
- Lengthy, indefinite leave generally is not reasonable.

WORKERS' COMPENSATION

Anti-retaliation provisions apply.

ATTENDANCE ISSUES

FMLA

Absences while on FMLA leave may not be counted against Employee.

ADA

Satisfactory attendance is usually an essential function of any job:

- Poor attendance may mean employee is not "qualified;"
- Reasonable accommodation requirement.

WORKERS' COMPENSATION

No right to reinstatement. However, be cautious of claims of retaliation.



RETURN TO WORK ISSUES

FMLA

Employee entitled to equivalent job if:

- timely returns from FMLA leave, and
- can perform essential functions

Unless job would otherwise be eliminated.

ADA

Employee entitled to same job if qualified to perform essential functions. Reasonable accommodation required. Must consider reassignment to vacant jobs.

WORKERS' COMPENSATION

Compensatory and punitive. No caps.



DAMAGES

FMLA

Lost wages & benefits.
Liquidated damages.
Attorneys' fees.

ADA

Lost wages and benefits.
Compensatory & punitives (capped).
Attorneys' fees.

QUESTIONS?