

## **“Punitive damages: What are the risks to Oregon businesses?”**

*By Susan Marmaduke and Bob Steringer*

Big punitive-damages awards make headlines, such as the recent Oregon Court of Appeals decision upholding a \$79 million punitive damages award against a tobacco company. In reality, large punitive damages are not frequently awarded. However, punitive damages cases against businesses are on the rise, and even a single award can be devastating. In many cases, a business’s exposure can be minimized by understanding the risk and taking steps to avoid it.

### **What are punitive damages?**

Punitive damages, unlike compensatory damages, are intended to deter improper conduct and provide retribution. They serve the same purposes as criminal penalties.

Punitive damages are no longer awarded primarily for physical injury. Cases involving financial injury, business contracts, sexual harassment and wrongful termination are resulting in larger and more frequent punitive damages awards. For example, in 2001, the purchaser of a used 1983 Chevrolet Suburban suffered only \$11,496 in actual damages due to the car dealer’s violation of the Oregon’s Unlawful Trade Practices Act, but was awarded \$1 million in punitive damages.

### **How is the amount determined?**

The most significant factor in evaluating whether an award of punitive damages passes constitutional muster is the reprehensibility of the misconduct. Courts consider such factors as whether:

- the harm was physical or purely economic;
- the defendant was indifferent to the health or safety of others; and
- the conduct involved repeated actions, or was an isolated incident.

### **How can a business manage the risk of employee claims for punitive damages?**

Employees are a common source of punitive damages claims against businesses. Some litigation risks can be managed by knowing and carefully following

employment regulations, including wage and hour laws. Other risks are more difficult to control, such as offensive conduct by one co-worker against another. At a minimum, businesses with employees should take the following steps:

- Adopt and publish an employee handbook. An employee handbook should detail conduct that will not be tolerated, such as unwanted physical conduct or sexually explicit communications. The handbook should also identify a clear procedure for employees to report inappropriate activities.

- Train managers to recognize inappropriate conduct. Cases involving physical and emotional violence are most likely to be found “reprehensible” and, therefore, deserving of punitive damages. Discrimination based on gender or disability and retaliation against whistleblowers are other common sources of liability for punitive damages.

- Act on employee complaints. Employers most often find themselves at risk of large punitive-damages awards to employees because they did not take action to stop inappropriate behavior after it was brought to their attention.

- Use your legal budget wisely. An employment lawyer’s advice is most valuable the moment an employer learns of a potential problem. By the time a lawsuit is filed, the business has lost the opportunity to take steps to protect itself from exposure to a punitive damages claim.

Punitive damages awards present a serious risk to businesses not because they are common, but because even a single award can be devastating. A business can manage that risk by taking steps now to limit its exposure, and then acting swiftly and wisely when a potential claim arises.