March 13, 2012
FOR IMMEDIATE RELEASE
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NELA APPLAUDS BIPARTISAN SENATE BILL TO OVERTURN *GROSS v. FBL FINANCIAL SERVICES, INC.* IMPOSING HIGHER PROOF STANDARDS IN AGE BIAS CASES

(Washington, DC) – The National Employment Lawyers Association (NELA) declared its enthusiastic support for legislation introduced today in the U.S. Senate to restore significant protections of the Age Discrimination in Employment Act (ADEA), which the U.S. Supreme Court unduly narrowed in its 2009 decision in *Gross v. FBL Financial Services*, 129 S.Ct. 2343 (2009). The new bill, entitled the "Protecting Older Workers Against Discrimination Act" (POWADA, S 2189), is modeled on a bill of the same name introduced in 2010. The bipartisan legislation is co-sponsored by both Senators from plaintiff Jack Gross' home state of Iowa, Tom Harkin (D) and Charles Grassley (R), as well as Senator Patrick Leahy (D-VT). Senator Harkin is Chairman of the Senate Health, Education, Labor and Pensions (HELP) Committee; Senator Leahy is Chairman of the Senate Judiciary Committee; and Senator Grassley is Ranking Member of the Senate Judiciary Committee.

Before the *Gross* decision, it was well established that older workers had the option of showing discrimination by proving that their age was simply one factor motivating their employer's adverse action against them. If the employee could meet this burden of proof, then it shifted to the employer to show it would have taken the same action regardless of the employee's age. The Court ruled in *Gross*, however, that the "motivating factor" standard of proof does not apply to the ADEA. Thus, the only way for older workers to establish discrimination under the ADEA is to prove that "but for" the discriminatory motive, the employer would not have taken the adverse action, a much higher burden of proof for employees. Moreover, many lower courts have interpreted *Gross* to require proof that age was the *only* factor that caused the employer to discriminate – in other words, the "sole cause."

In addition to its impact on age discrimination, the *Gross* decision has created uncertainty in other employment and civil rights laws. The reasoning of the *Gross* decision logically can be applied not only to the ADEA, but also to any law that requires proof of motivation, unless it explicitly provides a different causation standard. For example, courts have held that the tough new *Gross* causation standard applies to the Americans with Disabilities Act (ADA), the Rehabilitation Act of 1973, the Jury Systems Improvement Act (JSIA), the First Amendment, and even to retaliation claims under Title VII of the Civil Rights Act of 1964.

"The Supreme Court's *Gross* decision unfairly established an unprecedented and substantially higher bar for older workers in proving workplace discrimination than for those who challenge discrimination on the basis of race, gender, religion or ethnic origin. In this tough economic climate, it is particularly important that *all* working people be treated fairly. NELA applauds Senators Harkin and Grassley for introducing POWADA in the 112th Congress, and Senator Leahy for his leadership in pushing for its swift passage," stated Patricia A. Barasch, NELA President.

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The National Employment Lawyers Association (NELA) advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA provides assistance and support to lawyers in protecting the rights of employees against the greater resources of their employers and the defense bar. It is the country's largest professional organization exclusively comprised of lawyers who represent individual employees in cases involving employment discrimination and other employment-related matters. NELA and its 68 state and local affiliates have more than 3,000 members around the country.

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