

DURHAM

JONES &

PINEGAR

For further information,
please contact:

Rick Hymas, Chair
DJP Employment Section
801.297.1220
rhymas@djplaw.com

DJP combines the personal service, economy, and energy of a smaller firm with the quality, expertise, and dynamics of a larger firm.

With offices in Salt Lake City, Ogden, St. George, and Las Vegas, DJP covers more of Utah and Southern Nevada than any other law firm.

The firm provides a full scope of legal services to a broad client base, including public companies, start-ups, family businesses, and individuals throughout Utah, the West, and across the country.

The firm also serves a spectrum of industries, including energy, financial, commercial real estate, construction, education, government, industrial, multi-level marketing, non-profit, insurance, restaurants/hospitality, technology, transportation, and others.

SALT LAKE CITY | 801.415.3000

OGDEN | 801.395.2424

ST. GEORGE | 435.674.0400

LAS VEGAS | 702.388.1996

WWW.DJPLAW.COM

EMPLOYMENT LAW CLIENT ALERT

January 2009

ADA Amendments Affect Employers

Last year President Bush signed the Americans with Disabilities Act Amendments Act of 2008 (“ADA Amendments” or “Amendments”). The ADA Amendments became effective on January 1, 2009. The Amendments make several changes to the meaning of the term “disability” under the ADA that have the potential to expand employer liability. The most significant changes are described below:

- Expansion of the term “substantially limits”: The ADA defines disability as “a physical or mental impairment that *substantially limits* one or more major life activities.” Under the pre-amended version of the ADA, courts and the Equal Employment Opportunity Commission (“EEOC”) interpreted “substantially limits” to mean “significantly restricted.” The ADA Amendments direct the EEOC to revise its regulations to expand the meaning of the term “substantially limits.”
- Expansion of the definition of “major life activities”: The ADA Amendments expand the activities that qualify as “major life activities” under the definition of “disability” to include a number of major life activities that were not previously specifically recognized, such as reading, bending, and communicating. In addition, the Amendments expand the definition of major life activities to include “major bodily functions,” including immune, digestive, respiratory, and reproductive functions. Prior to the Amendments, it was unclear whether an employee that suffered from a disease that only affected internal functions would be considered disabled. Such an employee would likely be considered disabled under the ADA Amendments.

- Omission of “mitigating measures” as a consideration in determining disability: Prior to the Amendments, courts considered whether an employee could mitigate the effects of his or her disability, for example through medication, in determining whether the employee was disabled. In contrast, the ADA Amendments instruct that courts should not consider whether the employee can mitigate the effects of the impairment in considering whether the employee is disabled. However, the use of eyeglasses or contact lenses should be considered in determining whether vision impairment rises to the level of a disability.
- Expansion of the effect of being “regarded as” having a disability: Under the Amendments, an employee has an ADA cause of action if the employee can show the employer discriminated against the employee because the employer “regarded” the employee as having a disability, even if the employee did not actually have a disability. However, the ADA Amendments do not require employers to make reasonable accommodations for employees that are only regarded as having a disability, but do not actually suffer from any impairment.

Legal scholars predict that these amendments will expand employer liability and make it easier for an employee to recover under the ADA. In light of these amendments, we encourage you to review your employment policies and practices with regard to hiring and accommodating employees that have disabilities under the ADA.

The Employment Law Section at Durham Jones & Pinegar would be happy to help you review your employment practices. Members of the Employment Law Section have experience drafting and amending employee policy manuals, conducting

(ADA Amendments Affect Employers continued)

internal audits to help employers determine whether their practices are compliant with the ADA and other applicable laws, and advising employers on all legal issues related to employment.

Requirements of WARN and ADEA Acts as Related to Layoffs and Plant Closures

As you are undoubtedly aware, this nation is facing a deep economic recession that is forecasted to be the worst in decades. These are hard times for all of us as we are forced to reevaluate our business strategies and make difficult decisions to help us weather the storm. We recognize that in these difficult times some businesses may find it necessary to implement reductions-in-force, plant closures, or other layoffs. We remind you that if your company finds itself in this situation, federal law may require that certain notices be given prior to implementing these actions. In particular, we want you to be aware of the requirements of the Worker Adjustment & Retraining Notification Act ("WARN Act") and the Age Discrimination in Employment Act ("ADEA") as they relate to layoffs and plant closures.

The WARN Act requires certain employers to provide a 60-day notice to employees and certain state agencies prior to a plant closure, a mass layoff, or a reduction in at least 50% of the hours of at least 50% of the employees. An employer who fails to comply with the WARN Act may be liable to pay back wages and benefits to each employee that did not receive the requisite notice. The employer may also be liable to pay the attorneys' fees of any employee who prevails in litigation arising from the employer's failure to comply with the WARN Act.

The ADEA requires an employer to give certain information to employees over the age of 40 who are being laid off. The requirements vary depending on whether the employment relationship is being severed as part of a mass layoff or as part of a smaller reduction-in-force. For example, in a mass layoff, the employer

must provide an employee over 40 with certain information about other employees who are being laid off and who are retaining their positions, including their ages. The employer must also give any employee over the age of 40 a certain period of time to review and rescind any severance agreement being offered by the employer in exchange for a release of claims. The failure to comply with the ADEA notice requirements may void the effect of any release of ADEA claims procured from the employee in a severance agreement.

The Employment Law Section at Durham Jones & Pinegar can help you comply with the WARN Act, the ADEA, and any other state or federal law that may apply to your reduction-in-force or other employment decisions. Members of the Employment Law Section have experience assisting clients faced with mass layoffs, drafting separation agreements, and advising employers on all employment-related legal issues. A brochure about our Employment Law Section is attached. If you would like additional information about the section, please contact Rick Hymas or any member of the Employment Law Section. We look forward to working with you.

The foregoing has been prepared by members of the Employment Law Section of Durham Jones & Pinegar to highlight, in summary form, current legal concepts and is not intended to provide legal advice.

Pursuant to Rule 7.3 of the Utah Rules of Professional Conduct, this publication may constitute advertising material.