ADAMS JONES LAW FIRM, P.A.

Legal Insight

September 2011

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Save the Date! Annual Employment Law Seminar

Legal and Effective Human Resource Management

Date: Thurs., Oct. 20, 2011
Time: 9:00 am to 3:00 pm
Place: Wichita Airport Hilton
Cost: $75

Topics will include:
Key Federal and State Law Updates (including new ADAAA Regulations, Unlawful Discrimination, New Wage and Hour Regulations, Family and Medical Leave, OSHA and NLRB Initiatives)

How to Conduct a Wage and Hour Self Audit

New Workers' Compensation Law

Please call Sharon Tillery at (316) 265-8591 or e-mail her at stillery@adamsjones.com to request a flyer and registration form for this seminar.

Common Employer Mistakes

Donald E. Hill

If an employer can avoid common legal mistakes, it can save the time and expense of defending costly legal claims. These mistakes include:

1. **Not Taking the Time to Hire the Most Qualified Employees**. It is harder to terminate a poor employee than to take the time to hire a qualified employee. Proper procedures include a legal application for employment, defining the essential functions of the job, asking appropriate interview questions, obtaining employment references, and using legal pre-employment tests.

2. **Not Properly Completing Form I-9**. Immigration laws require proper completion of the Form I-9. This requires completing every part of the form and obtaining and reviewing proper employee documentation. The government is aggressively auditing Form I-9 compliance.

3. **Not Documenting and Following Employment at Will Policies**. Employment "at will" means an employee can resign at any time and be terminated by the employer at any time. Employment at will needs to be documented carefully in employee handbooks, applications for employment, and other documents. Employers need to understand statutory exceptions to employment at will, such as prohibiting terminations for filing for bankruptcy, serving on a jury, or wage garnishment. Judicial exceptions include prohibiting termination for filing a workers' compensation claim or whistleblowing. An employer can also negate employment at will based on what is stated by supervision or written in employee handbooks, performance evaluations, and other documents.

4. **Not Taking Unlawful Discrimination Laws Seriously**. Unlawful discrimination claims pose significant legal risks for employers. Employers need to understand which groups are protected by the laws and the importance of training supervisors, consistent treatment of employees, use of progressive discipline, and good documentation.

5. **Not Taking Steps to Prevent, Recognize and Respond to Sexual and Other Harassment Claims**. Employers need to develop good policies, train supervisors, and encourage employees to report alleged sexual and other types of harassment. Employers should investigate allegations carefully and respond promptly and appropriately to correct and prevent harassment.

6. **Poor Front-Line Supervision**. The number one reason employees seek the outside help of a union, governmental agency, or an attorney is because of poor front-line supervision, including favoritism, intimidation, and incompetence. Employers need to train supervisors in proper employee relations practices, including positive supervision, appropriate affirmation, active listening to employees, and being alert to correct poor working conditions.

7. **Not Evaluating Employees Regularly and Honestly**. Conducting appropriate, timely, and accurate performance appraisals of employees is critical. This gives the opportunity for communication between an employer and its employees

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and allows interaction about job performance as well as career development goals. Inaccurate and late performance evaluations can expose an employer to significant legal risks.

8. **Not Following Proper Procedures Including Progressive Discipline**. Except for serious infractions, employers should implement progressive discipline, which can include verbal coaching, written counselings, suspensions, and termination.

9. **Not Designating Eligible Leaves as Family and Medical Leaves**. If an employer has more than 50 employees, and an eligible employee has a serious health condition, has a family member with a serious health condition, gives birth to or adopts a child, or for certain military-related leaves, proper Family and Medical Leave procedures should be implemented.

10. **Not Properly Classifying Salaried Exempt Employees Under the Wage and Hour Law**. All employees are entitled to be paid minimum wage and overtime for all hours worked over 40 in a workweek, unless the employee meets the detailed requirements to be exempt as an executive, administrative, or professional employee, outside salesperson, or another exemption. The burden is on the employer to prove an employee is exempt.

11. **Not Understanding the Interplay Between the Family and Medical Leave Act, Americans with Disabilities Act, and Workers' Compensation Act**. The interplay of these laws is critical in determining when employees take leave, reinstatement after leave ends, discipline, and termination.

12. **Making Improper Deductions from the Paychecks of Employees**. Kansas law prohibits many deductions employers make from employee paychecks, such as for cash shortages, negligence, certain uniforms and tools, and debts owed the employer.

13. **Not Following Employer's Own Policies and Procedures**. Although sometimes exceptions to an employer's policies and procedures can be made, in order to avoid claims, an employer should follow its own policies and procedures.

14. **Not Showing the Year on Employment Documents**. Employment documents should show the full month, day, and year in order to avoid later confusion about when the document was written.

15. **Telling Your Attorney Only the Good Facts**. Don't be embarrassed to tell your attorney everything so you can get the best legal advice.

We would be glad to assist you in avoiding these common employer legal mistakes.

Adams Jones Recently Launched Its Redesigned Web Site

The new site can be viewed at www.adamsjones.com

Adams Jones Law Firm, P.A. provides high-quality legal services focused on reaching positive results and client satisfaction. We concentrate in the areas of real estate, business and employment, litigation, estates, and family law.

Our attorneys work with each client to identify objectives, then diligently pursue those goals in a cost-effective, timely manner.

Adams Jones attorneys have diverse areas of experience allowing us to draw on the strengths of various individuals in the firm when confronting our clients' complex legal problems. Adams Jones has built a highly-regarded reputation among its clients, peers and the courts of hard work, expertise, professionalism and integrity.

Financial Powers of Attorney

Michael P. Cannady

There may come a time in your life that you can no longer handle your own financial affairs due to disability or incapacity. This may be something that happens gradually, or it may happen all at once. In either event, if you have planned ahead, you will have named someone to handle your financial affairs for you. If you don't have a financial power of attorney and you become incapacitated, someone will likely end up having to ask the court to appoint a conservator for you. Conservatorship proceedings can be expensive and embarrassing. Your loved ones must ask the court to rule that you cannot take care of your own affairs, and court proceedings are matters of public record. Your relatives may fight over who is to be named as your conservator, which will cause the expenses to be even greater. Then, after someone is appointed as your conservator, that person will likely have to be bonded (which is an additional expense), and will be required to account to the court every year in relation to all of your assets, income and expenses.

Naming someone to handle your financial affairs for you is accomplished with a financial power of attorney. The person you name, who is referred to as your attorney-in-fact (although he or she is generally not an attorney), can act on your behalf to pay bills, write checks, make investment decisions, buy or sell real estate, file taxes, and handle your other financial affairs. You may also want to appoint an alternate who would be authorized to act if the first attorney-in-fact died, resigned or became incompetent.

It is very important that you have complete trust in the person you are appointing, as you are giving them a great deal of power. Although the person you appoint does have a duty under the law to act in your best interests, and can be held legally accountable for failing to do so, recovering funds from someone who has misused them may be difficult, if not impossible. If you do not have complete faith in the person you are appointing, you are probably better off allowing the court to appoint a conservator for you.

Durable vs. Nondurable. Financial powers of attorney can be durable or nondurable. A durable financial power of attorney allows your attorney-in-fact to act on your behalf even if you later become incompetent. Of course, this is the main purpose of most financial powers of attorney, so most financial powers of attorney are drafted so they are "durable." Drafting a financial power of attorney to be "durable" is simply a matter of including language that basically states the financial power of attorney becomes effective, or remains in effect, upon incompetency or disability. A nondurable financial power of attorney becomes void if you become incompetent or disabled.

Springing vs. Effective Immediately. Financial powers of attorney can also be springing or effective immediately. A springing power of attorney "springs" into effect when you become incompetent or disabled. Your attorney-in-fact has no authority until that occurs, and generally a certificate from a doctor stating you are incompetent or disabled must be attached to the power of attorney before it becomes effective. A financial power of attorney that is effective immediately, in contrast, gives your attorney-in-fact the authority to act anytime after the power of attorney is signed.

Some financial powers of attorney are both springing and effective immediately. Many people will name their spouse as their attorney-in-fact, and make that appointment effective immediately, and then name someone else (possibly a child) as the alternate attorney-in-fact, and make that appointment effective only upon incapacity. That way one spouse can handle the other spouse's financial affairs without having to obtain a doctor's certificate, while the alternate attorney-in-fact would only be allowed to act after getting that certificate.

Joint Tenancy and Trusts. Some people will assume they do not need a financial power of attorney because all of their property is held in joint tenancy or in a trust. This is not true. First of all, if you hold your property in joint tenancy with your spouse, and you are incompetent and your spouse dies before you do, there is no one else authorized to sign in relation to that property. Also, there are many things that have to be signed that are not tied to a specific asset. So while all of your bank accounts and real estate may be held in joint tenancy or living trust, that does not authorize your co-tenant or your trustee to sign tax returns, forms relating to insurance or social security, or a whole host of other things, on your behalf. Finally, there is a common misconception that just because you are married to someone, you have the right to sign for your spouse and otherwise handle his or her financial affairs. This is not true. Each spouse has his or her own legal identity and the only way one spouse can act on the other's behalf is if the authority for such has been given, either through a financial power of attorney, or by a Court through a conservatorship proceeding.

Although you can have a financial power of attorney drafted as a single document, generally it is part of a complete estate plan which includes a trust and/or a will, financial power of attorney, health care power of attorney and a living will. These documents are very important and if you do not currently have them in place, you should take immediate steps to have them prepared by a qualified estate planning attorney. I would be happy to discuss your estate planning needs with you at any time.

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Overview of Changes to Kansas Real Estate Law Presented at Adams Jones Seminar

The **Adams Jones Real Estate Group** presented its annual seminar on "Recent Changes in Real Estate Law in Kansas" on June 22 to over 120 business professionals from the real estate industry at the Courtyard by Marriott Wichita at Old Town. Attendees included real estate brokers, developers, lenders, contractors, title insurance agents, government officials, architects and others in the local real estate profession.

Speakers at the seminar were **Mert Buckley, Mike Cannady, Pat Hughes**, **Sabrina Standifer**, **Brad Stout** and **Monte Vines**. They discussed 2011 legislation affecting real estate in Kansas and real estate cases from the past year.

A booklet summarizing recent legislation, regulations and cases was provided to all attendees of the seminar. It can be found under the "Publications" section on the firm's web site—www.adamsjones.com.