



One Firm Worldwide<sup>SM</sup>



## LABOR AND EMPLOYMENT

Employment-related litigation continues to increase at a dramatic rate. More than 40,000 employment lawsuits are filed each year, and well over half of these are employment discrimination complaints, as compared to the 8,500 complaints filed in 1990. These suits often involve class or other multiplaintiff claims. As part of this increase in employment litigation, administrative charges of disability, race, national origin, sex, and other forms of discrimination and harassment are filed with the Equal Employment Opportunity Commission (EEOC) at a rate of more than 82,000 per year. Additionally, the population is aging, with implications for growth in the number of age discrimination claims. In 1998, the median age of the workforce was 35.9. In 2008, that number jumped to 41. Individual and class claims involving pension and welfare benefits are also being filed at an unprecedented rate.

In addition to lawsuits, governmental activity in the labor and employment arena has been on the increase. In a recent year, the U.S. Department of Labor closed nearly 3,300 civil investigations involving alleged violations of the Employee Retirement Income Security Act (ERISA), in addition to more than 180 criminal investigations. According to the Occupational Safety and Health Administration (OSHA), there are approximately 4.1 million occupational injuries and illnesses and close to 6,000 work-related deaths per year. This has resulted, in part, in active administrative enforcement by OSHA, such as increased workplace inspections, and increased pressure from unions for the agency to be even more aggressive. Due in part to renewed organizing efforts and other activity by labor unions and employer responses to economic conditions, a substantial number of unfair labor



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practice charges (approximately 35,000 per year) are filed with the National Labor Relations Board (NLRB). In addition, unions are making effective use of so-called corporate campaigns designed to embroil shareholders, directors, banks, customers, and suppliers in labor disputes. Union leaders have pledged additional resources for these and other even more aggressive tactics in light of statistics that show union membership near an all-time low.

Not only is the number of claims and charges being filed on the rise, but damages awarded in employment-related verdicts also have increased dramatically in recent years as juries have become more inclined to award damages for emotional distress and punitive damages. Verdicts in wrongful-discharge cases continue to escalate. The chance of a plaintiff succeeding on employment claims has increased as well; the percentage of plaintiff victories in wrongful-discharge cases has increased almost 20 percent in recent years. This potential for increased damages has in turn attracted a new and more aggressive breed of plaintiffs' lawyers, including a number of high-profile personal injury lawyers who have little or no background in employment matters but are fully familiar with strategies typically employed in high-profile tort claims, such as extensive use of public relations firms to bring pressure on employer defendants.

## **NATIONWIDE EXPERIENCE AND RESOURCES IN THE REPRESENTATION OF MANAGEMENT**

Against this backdrop, Jones Day's Labor & Employment Practice offers corporate clients experienced, sophisticated, and cost-effective nationwide representation concerning all aspects of personnel-related legal matters. Our labor and employment lawyers are nationally recognized in their field. Many have had substantial service in state and federal regulatory agencies. The practice ranges from preventive counseling to arguing cases before the United States Supreme Court. In order to meet client needs most efficiently, our lawyers also draw on the experience of other lawyers Firmwide through a tradition of close collaboration and cooperation. These ties are facilitated by integrated worldwide electronic communication systems and computer networks, through which our lawyers have full desktop access to a host of resources, including briefs, research, memoranda, and other written work product of practice

lawyers; external legal and business research services; a variety of internal databases; and the internet. In addition, we have established multioffice lawyer teams to efficiently staff multiple matters involving clients the Firm represents on a regional or national basis. Our lawyers also receive Firmwide updates on key legal developments and collaborate on new strategies and developments at regularly scheduled conferences and training sessions.

## EMPLOYMENT DISCRIMINATION LITIGATION

Our labor and employment lawyers represent employers before state and federal trial and appellate courts and state and federal administrative agencies in every type of employment discrimination litigation, including:

- Age discrimination, including claims arising out of reductions-in-force, early-retirement incentive and severance programs, and modifications to employee benefit programs.
- Race and national origin discrimination, including disparate-impact claims.
- Sex discrimination, including sexual harassment and pay-disparity claims.
- Disability discrimination claims under the Americans with Disabilities Act.
- Religious discrimination.

These cases involve individual claims, private-plaintiff class actions, and government-initiated multiplaintiff and class cases. Many focus on complex statistical and demographic evidence. Our lawyers are regularly asked to represent employers in cases presenting novel questions of law.

Jones Day's labor and employment lawyers are actively involved in judicial, legislative, and administrative developments concerning employment discrimination. Our lawyers testify before congressional committees on proposed new legislation, serve on national task forces, and regularly coordinate with employer coalitions and associations to submit comments to federal and state administrative agencies

that articulate our clients' interests on proposed regulations. Our lawyers are also regularly asked to file *amicus curiae* briefs before federal and state appellate courts, including the United States Supreme Court, on significant employment discrimination cases.

## WRONGFUL DISCHARGE AND OTHER STATE LAW LITIGATION

Over the years, various exceptions to the termination-at-will doctrine have been established by many state courts and legislatures. A number of states have permitted common-law claims alleging violation of public policy, breach of the covenant of good faith and fair dealing, breach of implied-in-fact or implied-in-law contracts, and promissory estoppel, often arising out of written statements made in employee handbooks or policy manuals or from oral statements made by managers. There has also been an explosion in tort claims asserted by current and former employees. Employment litigation now involves nearly the entire gamut of state law tort claims, including defamation, assault and battery, intentional and negligent infliction of emotional distress, fraud, tortious interference, invasion of privacy, whistleblower claims, and negligent hiring and/or supervision. Many states have adopted a statutory claim for workers' compensation retaliation.

These claims have generated large verdicts in many jurisdictions, even in cases involving only a single plaintiff. Our lawyers regularly litigate these types of cases, whether filed separately or as an adjunct to an employment discrimination lawsuit.

## LABOR-MANAGEMENT RELATIONS

The Firm's traditional labor law practice encompasses nearly every industry in all regions of the country. Our attorneys advise employers concerning legal issues that arise in union representation campaigns and practice extensively before NLRB regional offices throughout the country, before the NLRB in Washington, and in courts representing employers in unfair labor practice and union representation proceedings and appeals.



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We also represent some of the nation's largest employers in collective bargaining, in both multiplant and single-plant negotiations, with virtually every major international union. We advise employers with respect to strategic issues, as well as strike-related issues, including pre-strike planning and operating during strikes. Our attorneys also provide advice, and litigate matters, concerning union corporate campaigns and secondary boycott issues.

Our labor-management relations practice includes experience in a number of industries, such as health care, tire and auto manufacturing, chemicals, construction, oil and gas, shipbuilding, property management, trucking, broadcasting, newspapers, telecommunications, and technology and information providers. In conjunction with the Firm's Health Care Practice, Jones Day has developed a nationally recognized Labor & Employment/Health Care Practice that represents some of the country's largest health care institutions in complex and novel issues in the ever-evolving area of health care labor relations.

## ERISA LITIGATION

Firm labor and employment attorneys regularly represent employers in complex, high-exposure litigation concerning employee benefit plans regulated by ERISA. Matters involving hundreds of millions of dollars, and covering tens of thousands of participants, are not uncommon.

Our lawyers have represented employers in virtually every type of ERISA litigation, including nationwide class actions and enforcement actions by the Department of Labor and the Pension Benefit Guaranty Corporation. The subject matter of these cases has been varied: modification or termination of retiree health or life benefits; severance benefit claims, including claims arising from the sale of a business or facility and offsets to pension benefits; partial termination of pension plans; claims under the Multiemployer Pension Plan Amendments Act; use of Social Security offsets in pension plans; prohibited fiduciary transactions; denial of medical benefits, including claims relating to experimental treatment; efforts by states to regulate self-funded medical plans; COBRA benefit obligations; alleged failure to provide plan information to participants; and other issues involving both the tax and procedural aspects of ERISA.

In defending clients in ERISA litigation matters, our lawyers draw heavily upon the experience of attorneys in the Firm's Employee Benefits & Executive Compensation Practice. This multidisciplinary approach enables Jones Day to provide clients with sophisticated, cost-effective representation in ERISA litigation matters.

## **WAGE-HOUR LAWS AND LABOR STANDARDS**

Our labor and employment attorneys regularly advise clients concerning compliance with the Fair Labor Standards Act, related state laws, and state and local laws and regulations governing pay practices and work-hours restrictions. We regularly represent clients in multiplaintiff and class-action enforcement proceedings conducted by the Department of Labor, state agencies, and individuals.

## **OCCUPATIONAL SAFETY AND HEALTH**

Our labor and employment lawyers, along with members of our Environmental, Health & Safety Practice, offer experience and representation in a broad range of matters involving employee health and safety. Attorneys from both practices represent clients in complex OSHA enforcement actions covering the entire spectrum of issues that arise under the Occupational Safety and Health Act. Our attorneys are experienced, nationally recognized advisors and litigators with knowledge in ergonomics, chemical process safety, record keeping, lockout/tagout, AIDS, and "imminent danger" proceedings under the statute. We also represent clients in rule-making proceedings and counsel them on compliance with all aspects of federal, state, and local right-to-know laws.

## **CONTRACT COMPLIANCE AND AFFIRMATIVE ACTION**

Jones Day lawyers represent government contractors and subcontractors in complying with federal, state, and local rules concerning affirmative action and contract compliance, including the U.S. Department of Labor's Glass Ceiling Initiative. We regularly conduct affirmative action compliance

audits and assist clients in the preparation of written affirmative action plans. We also represent clients in compliance proceedings, including Department of Labor enforcement proceedings. Our lawyers have particular experience in joint-employer issues and have successfully defended a number of clients in Department of Labor proceedings premised upon joint-employer liability theories.

## **EMPLOYEE SUBSTANCE ABUSE POLICIES**

Our lawyers are among the nation's leading authorities in alcohol and drug abuse policies. We advise clients in all aspects of compliance with the Drug-Free Workplace Act and state statutes governing employee substance abuse policies, as well as the regulations of various federal agencies, including the Departments of Defense and Transportation and the Nuclear Regulatory Commission. Our attorneys advise on substance abuse policy development, drug testing, and employee assistance programs. We also actively defend challenges to client policies in arbitration and federal- and state-court litigation.

## **EMPLOYMENT ISSUES IN CORPORATE TRANSACTIONS**

In conjunction with lawyers in the Firm's various business practice areas and Employee Benefits & Executive Compensation Practice, labor and employment attorneys advise clients on the myriad labor, employment, and employee benefits issues that arise in mergers, acquisitions, joint ventures, bankruptcies, and other changes in corporate ownership. These issues include successorship under the National Labor Relations Act, WARN Act compliance, severance pay and other workforce reduction issues, and collective bargaining and retiree benefit issues under chapters 7 and 11 of the Bankruptcy Code. Our lawyers draft and review contract language on employment issues, including indemnification provisions; assist in employment-related due diligence; and work with clients to structure transactions so as to achieve their business objectives while minimizing exposure for employment-related claims.



Together with lawyers in our general litigation and Intellectual Property practices, our attorneys represent companies nationwide in disputes involving the enforcement of covenants not to compete, alleged misappropriation of trade secrets, and efforts by competitors to hire their employees.

## **COVENANT NOT TO COMPETE, TRADE SECRET, AND EMPLOYEE RAIDING LITIGATION**

Together with lawyers in our general litigation and Intellectual Property practices, our attorneys represent companies nationwide in disputes involving the enforcement of covenants not to compete, alleged misappropriation of trade secrets, and efforts by competitors to hire their employees. Given the expedited and labor-intensive nature of this type of litigation, which typically involves claims for injunctive relief, Jones Day's multidisciplinary approach ensures that clients have at their disposal the necessary resources to litigate these matters effectively.

## **ALTERNATIVE DISPUTE RESOLUTION AND RISK ASSESSMENT PROGRAMS**

Our attorneys have long been involved in the development of arbitration, mediation, peer review, "open door," and other alternative dispute resolution (ADR) programs designed to resolve disputes with current and former employees cost-effectively. Our lawyers work with clients to make initial and ongoing litigation risk assessments to aid in the development of ADR and other settlement strategies. In many instances, we are able to assist clients in obtaining an early resolution of an employment dispute, often even before the filing of a lawsuit, through a candid and thorough assessment of litigation risks, benefits, and outcomes. We are also active proponents of the use of private mediators to resolve employment litigation, and we have successfully mediated cases throughout the country, including class actions, for many sizes and types of business.

## **INTERNATIONAL LABOR AND EMPLOYMENT LAW**

In addition to our U.S. capabilities, Jones Day has labor and employment lawyers working in London, Paris, Brussels, Frankfurt, Milan, Munich, and Madrid. These lawyers provide a full range of services to U.S. and other non-European companies with operations in Europe, including advice in

connection with mergers and acquisitions, works councils, union-related issues, and compliance with the social directives of the European Union. Our European labor and employment lawyers are also experienced in litigation matters, since U.S.-style litigation, especially discrimination and harassment claims and litigation over dismissals, has become increasingly common in Europe.

## PREVENTIVE PLANNING, COUNSELING, AND TRAINING

The experience of our labor and employment lawyers is perhaps most effectively used by clients to avoid or minimize the risk of litigation. The role of our lawyers as employment law counselors is extensive and includes:

- Assessment of risks and options attendant upon terminations and other types of individual employment decisions.
- Implementation of nondiscriminatory reductions-in-force and plant closings.
- Investigation of sexual harassment, theft, and other types of employee misconduct.
- Compliance with complex new employment laws, often before regulatory or case law guidance is available.
- Development of employment policies and procedures designed to minimize potential litigation exposure.
- Supervisory training, including sexual harassment and other EEO issues, labor relations and contract administration, and union-free status.
- Audit of personnel practices, including statistical analyses.

## ADDITIONAL INFORMATION

For additional information regarding our Labor & Employment Practice, please contact your principal Firm representative or one of the lawyers listed in this publication. General email messages may be sent using our “Contact Us” form, which can be found at [www.jonesday.com](http://www.jonesday.com).



These lawyers provide a full range of services to U.S. and other non-European companies with operations in Europe, including advice in connection with mergers and acquisitions, works councils, union-related issues, and compliance with the social directives of the European Union.

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