

The Employment Law Counselor hosted by Jeff Stewart Episode 5

PLUS Staff: [00:00:00] Welcome to this PLUS Podcast, The Employment Law Counselor Hosted by Jeff Stewart. Before we get started, we'd like to remind everyone that the information and opinions expressed by our speakers today are their own and do not necessarily represent the views of their employers, or of PLUS. The contents of these materials may not be relied upon as legal advice.

Jeff Stewart: Hello, everyone, and welcome to the Employment Law Counselor Podcast. I'm your host, Jeff Stewart. Today we'll be covering the one thing that can make or break you in an employment related lawsuit, documentation. This podcast is a collaboration between White and Williams LLP and Professional Liability Underwriting Society, commonly referred to as PLUS.

While our podcast is not legal advice, it is a practical discussion between two attorneys that deal with the maze and minefield of labor and employment laws on a daily basis. If you like what you hear, please give us a five-star review and subscribe so you never miss an episode. Today, I'm joined by one of my colleagues, at White and Williams, Laura Corvo, who [00:01:00] practices out of our firm's Newark, New Jersey office.

How are you doing today, Laura?

Laura Corvo: I'm doing great. How are you, Jeff?

Jeff Stewart: I'm doing great. I'm ready for a lively discussion on documentation. How about you?

Laura Corvo: I'm ready as well. Sounds great.

Jeff Stewart: Then let's dive in. You know, Laura, you and I have done a number of talks for clients, for trade groups, et cetera. And lawyers such as us regularly say document, document, document when talking about dealing with employees and employee issues, I guess I'll just tee you up, why?

Laura Corvo: I mean, it's, it's the thing we always say, right? Document, document, document, say it a thousand times a day to clients. And I think the reason why is because with your employees, you're telling a story, right?

You're telling a story to your employees about what you expect from them. You're telling a story if your employee separates from you, as to why they separated from you, if your employee [00:02:00] was disciplined, as to why they were disciplined. And the documents will control that story, right?

If we don't document, then the employee comes in and tells a different story and suddenly you're faced with a case and we get this all the time, Jeff, you know this, where the employer calls you up, tells you they had this employee who was horrible, who did X, who did Y, who did Z, who did this, who did that. And you say, please send me the documentation.

I never saw the documentation. And then you get the complaint saying, "hey, this employee was stellar. They did everything right. They were the best." And now all of a sudden, you've got a dispute and you're stuck with it. If you have those documents, the story is in your control.

Jeff Stewart: Absolutely.

And, you know, I always tell people, while good documents can help your case, bad documents can sink your case in a heartbeat. And in fact, the lack of documents, as you were saying, can absolutely just [00:03:00] send you into the morass of he said, she said that nobody wants to be in.

Laura Corvo: Exactly.

Jeff Stewart: So, one of the things that I don't think people talk about enough is the fact that even before you have a lawsuit or before you have an EEOC charge, that's when you need to be creating the documents as if something is going to end up in litigation.

Would you agree with that?

Laura Corvo: I would agree with that, and I would even take a step back from litigation, right? So, the documents are important because we never want to get to litigation, right? We never want to get there. So, if you never want to get there, you've got to send your employees clear messages.

What do you expect? What did they do wrong? What did they do right? And the documents are a way of saying that and it kind of pins the employee into a spot. You're not allowing that employee to try to wriggle out of anything. You know, [00:04:00] I expect you to show up on time to work every day.

And yesterday you were late. So, I'm going to let you know that in the future, I want you to be on time. It's a very simple message. You don't document that. Then suddenly the employee says, well, you know, "hey, all these other times I came in late. And now all of a sudden after I've done X, Y, or Z, or after I filed a complaint."

You're, you're putting this in writing. So, you know, if you have the documents, you're controlling the story, you're controlling the employee. Certainly helps in litigation, but I think it helps avoid litigation. The clients that I see get into litigation least. Are the ones with the really good HR departments who were documenting everything, who were just buttoning up the whole process from day one.

Jeff Stewart: Absolutely because employees should never be blindsided when they're going to be terminated for, I'll say for cause, not necessarily, but it's not a layoff situation, but they did [00:05:00] something. It shouldn't be a surprise to them, especially if it is a buildup of a number of things, you know, they're not meeting expectations.

You should be sharing expectations with them and documenting that and, you know, they should be a part of it and they know that it's been documented so that, you know, you are much less likely to have litigation on the back end.

Laura Corvo: Absolutely. And it should be all along, not just at the performance review stage.

I had actually a friend who had worked in a law firm and, you know, come the year review, got a terrible review. And he rightfully said to his supervisor, you know, this is coming as a shock to me. Why did you wait so long? If I was working at McDonald's, you know, would you wait until I burn the fries to tell me I was doing it wrong.

Like I wanted to know earlier that this was happening so I could correct my performance.

Jeff Stewart: Absolutely. Let's segue [00:06:00] into what are some properties of good documents?

Laura Corvo: Well, I think the first is contemporaneous. We just kind of alluded to this earlier which is, you know, you want to do this all along and you want to do it while the employee is performing either well or badly.

So, you know, you don't want to wait six months to say, “oh, by the way, do you remember back in January when you did X, Y, and Z? Well, now I'm going to write it up.” That doesn't look right. You want to write, if somebody performs poorly on January 1st, by January 15th, you want to get that right up to the employee.

It's got to be pretty quick, uh, close in time to when the employee made the performance error.

Jeff Stewart: I could not agree more. Unfortunately, I've seen many times where, you know, things are documented a month later or, you know, “oh, the person has now been late three times.” Okay. Well, have you written them up? “Well, I'm going to just include it all in the last write up.

So, we have one from December, one from March, and then one from May. [00:07:00] And we're going to give this to them in May.” Well, you can't be talking about somebody being late back in December, in May for the first time. You know, it needed to be addressed in December. You know, it needed to be addressed when it happened.

Or again, as you said, within a couple of weeks, absolutely.

Laura Corvo: Absolutely. And I think in addition to it being contemporaneous and, and done near the time it occurs, you also have to be specific in what you're telling the employee and describe not just what the employee did, but what the consequence of that employee's error was.

So, you know, I recently had a case where a client said, you know, one of my employees completely screwed up the inventory system. They weren't following the procedures, the whole inventory of the client systems was out of whack. And as a result, you know, all this inventory got lost, there was, you know, financial [00:08:00] consequences to it.

They had to go back and reconfigure the whole inventory. And they're like, we wrote the employee up. I'm like, great. And I said, send me the write up. And the write up was not performing up to expectations, didn't follow inventory procedures. And I'm like, but that write up doesn't tell me the story you just told me, you know, the consequences aren't there.

So yes, the employee wasn't following the procedures. Yes. She wasn't meeting their expectations, but what does that mean? Explain why what she did was wrong. And what the consequences were, both to tell her and then to tell a

potential jury, court, EEOC, whoever down the road, that that's what the consequence was.

Jeff Stewart: Absolutely. I couldn't agree more. And in addition to that, we want specifics. You know, again, I'm going to use the lateness. If you showed up at 8:01, it's a little bit different than it [00:09:00] showed up at 8:38, you know, when, you know, 38 minutes late versus one minute late. Those are very different things. The other thing that I like to see in a good piece of documentation is not only what's the consequences here, but what's the consequences if this happens again?

You know, if this happens again, will it be immediate termination? Well, in the inventory example you just used, I imagine it would be. But if someone shows up late again, is that going to be, you know, will it be now escalating to a written warning or escalating to a suspension, something to that effect? Potentially depending on what their history is.

So, I'd like to see that in a good piece of documentation.

Laura Corvo: Absolutely. I, I think that is crucial to you know, again, having that information because lateness, for example, is one where you know, eh, you're five minutes late, what does that mean? But when it [00:10:00] builds up and when there's five lateness, 10 weaknesses, and, and then the latenesses cause other people to have to pick up your slack.

That's the story you need to build. And, and, and a lot of times employers miss that. And, and I think it's, it's an important lesson.

Jeff Stewart: Absolutely. And then, another piece of effective documentation, I think you need to be able to show that if there is a policy, you know, you should be referencing that policy.

You know, our handbook says that you need to do X, or your schedule is specifically 8 a.m. to 5 p.m. and you're showing up late, you know. And you didn't follow any, the proper call off procedure. If we can reference a company policy, we should absolutely do it. So, it's not just supervisor policy, or, you know, it's not seen as subjective. It's much more of an objective issue.

Laura Corvo: Absolutely. And I think that's extremely important because [00:11:00] oftentimes, you know, at a deposition, you'll get, we'll "where was the policy that they were supposed to do this?" And if it's right in that write up, there's just, it's so buttoned up that there's no question.

And suddenly you're able to more easily defend a claim. The other thing, I think, with, with documentation is, that's really important, is consistency amongst your employees. What you never want to do is, you know, write up one employee for being five minutes late, but not do it to another employee. If your policy is you got to show up at eight o'clock and you're going to ding people for not showing up at eight o'clock, then everybody who comes in at 8:05 should get the write up, even though maybe they're performing well otherwise, you know, it doesn't mean everyone's going to be fired as a result of it, but they should at least get the notice to say, "hey, that this is what our, this is what our expectation is."

Again, these documents are a [00:12:00] communication to both your employees and the world that this is what our expectation is. I mean, this is what we're hoping--this is the fire that we're holding your feet to.

Jeff Stewart: Yeah. And that actually is a nice transition into, you know, some properties of bad documentation. And, you know, as we were preparing for this, I kind of wrote down a few pieces of, or a few traits of bad documentation. We've kind of hit on a couple of them already. You just referenced, uh, being inconsistent as, you know, one supervisor writing up for five minutes late, another one not.

Another piece that I will throw out there is documentation that is never shared with the employee. "Oh yeah, you were late. We, we noted it. We never talked to you. We never did anything. But you know, it's noted in our, in our supervisor notes."

Laura Corvo: notes. Yeah, it goes back to my friend saying, "well, you know, if I'm burning the fries, why didn't you tell me about it?"

You want to, you know, and I guess there's a lot of people saying, you [00:13:00] know, should you have employees sign off that they received the documentation? I don't necessarily know that you have to have them say they agreed to it because that's going to invite a dispute. But I do think that the supervisor or whosoever is showing the counseling should document that they met with the employee, explained it, the date that they did it, and you know, that it was delivered to the employee so that at least you're, again, on notice, you put the employee on notice, but you're, you're remaining in control of that story.

Jeff Stewart: Absolutely. And then one of the other pieces of bad documentation that I have seen is when the document is internally inconsistent or internally is not supporting the stated reason. And I'll give you an example.

I had one [00:14:00] matter a few years ago where the company was disciplining an employee for leaving work early without permission. The person left at, let's say, 3 o'clock. They were supposed to be there until 5. The documentation that they put together said that the person showed up late that day and did not work a full shift.

Well, showing up late is very different than leaving early. So, the documentation that they had for that date in question didn't match what they ultimately were disciplining her for. And that's problematic.

Laura Corvo: Yeah, I often think, and I don't know what it is, but employers are able to orally tell a story, and then they get the computer or the piece of paper in front of them, and suddenly they freeze and don't [00:15:00] tell that story.

Just put the same story that you're telling me into the paperwork. Like it's, there's no magic trick to how to document other than to you know, be specific and state the facts. I, I like to use the old Columbo, "just the facts, ma'am." You're going to state the facts. Tell me what happened. On this date, at this time, this person was 10 minutes late.

This person left early. As a result of that person leaving early, you know, that we were short staffed and you know, people had to scramble, or we weren't able to service the customers the way we normally were able to. Whatever it was, just write it down and write it down, you know, just like that. There's, it doesn't have to be, you know, War and Peace or great novel.

It just has to be facts. The exact facts that you would tell conversationally, you want to put in, into the documentation.

Jeff Stewart: Absolutely. So, let's shift gears here a little bit. You know, we've kind of referenced a few [00:16:00] places that documents will be utilized. Obviously, if there's an EEOC claim, if there's a lawsuit, those get, you know, you'll be utilizing your documentation there.

Some other common places, unemployment. I mean, the first thing that unemployment referees will look to, or even, you know, just the unemployment system before you even get to a hearing that they will ask for is, all right, if this person was let go, why, and what documentation do you have? And that's, I'll say one of the most common areas that you see documentation being necessary.

Laura Corvo: Absolutely. And again, you want that documentation to tell that referee the story. Why was the person let go? If it's just, you know. And oftentimes employers don't tell the true reason why somebody was let go. It's, they kind of twist the words or they go [00:17:00] out of their way to say something.

Just say what, you know, if the person was let go because they've been late five times and they show up, they leave early and they aren't meeting your expectations, then just say that, you know. It doesn't have to be, you know, some magic twist to those words, just say it, and I think, you know, unemployment referees, EEOC investigators, or juries, if we get that far, will understand it.

Jeff Stewart: Absolutely. And I've used, and I know you have as well, documentation to stop a claim before it starts. And I'll give an example. I had a client several years ago. They received a demand letter from a plaintiff's attorney prior to any kind of lawsuit or anything saying that they had terminated this employee while they were on a medical leave.

And that's a violation of the FMLA, of the ADA. And if they didn't do A, B and C, they were going to be sued. [00:18:00] Client called me up and said, "this is just all wrong. We did everything we're supposed to do." I said, "great, send me the documentation," which they had. And we were able to show that the person Applied for FMLA leave, but they had already exhausted their 12 weeks.

We had informed the employee that we were still going to allow her to utilize her sick time, which she had, I'm going to say four weeks or so. And, you know, she still needed more time off. We could have discussions at that point. So, they allowed her to use all of her sick time. They then reached out to her, and she never responded.

And then we had multiple letters, including a certified letter signed for by her that said, we have not heard--we have allowed you to take this leave. We've extended. You know to allow some unpaid leave. However, we have not heard from you in several weeks, [00:19:00] uh, we need to hear from you within seven days Otherwise, we're going to assume that you've abandoned your job And they never heard from her until they got this letter about a month later from the attorney. So, I shared with the attorney the documentation we had including her signing for the letter saying, you need to contact us.

And when she did not, we let her go and they never filed a lawsuit or an EEOC charge or anything. It just went away because the employer had strong

documentation from beginning to end to show that everything they did was proper.

Laura Corvo: Absolutely. I think more often than not, that the, the best reason to document is to avoid the, you know, the litigation and the EEOC coming, knocking on your door. And like you said, you can often, you know, ward off a plaintiff's attorney who may think when they speak to their client that they [00:20:00] have this great case, but when they see the documentation, suddenly they're shied away from it because they realize, "hey, I'm not going to put time and effort into this because this is not, this is not what I thought it was."

And I think even before that process, the documentation is important to just communicate to the employee. Like, I think most employers don't want employees to fail. They want the employment relationship to succeed. So, if you document, if you communicate to the employee what you expect from them, then, you know, hopefully the document has the effect of having that employee changing their behavior.

"Hey, they're really serious about me coming in on time, so I better show up on time because I've gotten this write up. So now I'm going to come in on time." Like in and that document, you know, helps the employee change their behavior and hopefully avoid not just a lawsuit, but having to, you know, having a successful employee.

Jeff Stewart: Absolutely. So, we've talked [00:21:00] about a lot of areas where documentation is utilized, but there's a couple areas that we haven't talked about that I think it's important for our listeners. One of them is in hiring decisions, because, you know, as you know, in failure to hire cases, interview notes can be key pieces of evidence.

Can you talk about those for a moment?

Laura Corvo: Yeah. So, I mean, oftentimes you're going to have to come up with a decision as to why one employee was hired over another. What were the reasons? What were the factors you were looking for? And you know, you have to be careful in hiring notes. You want to make sure that what you're taking notes on is information about the, you know, the employee's ability to perform the job and not protected characteristics, you know, this person was old, this person was of a particular race, religion, you don't want to take pictures, but you do want to have some [00:22:00] documentation and to show what it is you were looking for in the job and why one person met it over the other.

And I think that goes back to not just your interview notes. But documenting what the job description is, you know, what are you expecting and even putting that out at the onset of the interview process, what are you expecting of the candidates? If you say you have a job and you call in candidates and you say, well, I chose this person because they have a college education and the others don't, the job description doesn't reflect that a college education is required, then, you know, you could have a fact issue.

So just being consistent and having the documentation just from the onset of, what are you expecting from this job? The job description is, I think, the first place you start.

Jeff Stewart: Absolutely. And, and beyond that, some other areas where, you know, we need to make sure we document things. Documenting the fact that your employees receive their [00:23:00] employee handbook and, or policy changes.

We need to be able to show that employees were aware of our policies, that they're expected to follow them, and that if we've changed them, we've made employees aware of them. Because anytime we get into unemployment situation, litigation situation, if there's a question of the employee violated a policy, the first question that's going to be asked every time, are you sure the employee was aware of the policy?

And we need to be able to show that yes, they were.

Laura Corvo: And not only that they signed it at the onboarding, so you have a, you know, an employee has been with you for 10 years and signed the employee handbook 10 years ago. That's not going to be helpful to you. That handbook needs to be updated, those policies need to be updated, and I mean when I do handbooks, I have employers not only [00:24:00] sign off on the fact that they received the handbook itself, but the specific policies within the handbook which I think will most likely be challenged.

Things like the harassment and discrimination policy, the confidential nature of work policy, your computer usage policy. Where they're specifically signing off on it and not signing off on it once every, you know, just at the beginning of the employment, but every year or two years so that they're refreshed on it.

And again, when you're sending out the handbook, again, I don't like to just send out, "oh, we've got a new handbook. Here it is." Have a meeting with people, have a, have a zoom call saying, "we've got a new handbook. Here's

what's changed. We have a new vacation policy. Here are some of the highlights and keep documentations of what that communication was about.” And then of course have the employees sign off on it.

It's a, it's a communication role that we're really, we're [00:25:00] really trying to play here. To just again, explain to employees what we're expecting of that.

Jeff Stewart: Absolutely. So, as we start to wind down here, a couple of questions that I get asked by employers with regard to documentation. Should an employee be required to sign?

And I think you said earlier, no. But if you're an employer who does want employees to sign, what should you do if an employee refuses to sign?

Laura Corvo: And that's one of the reasons why I don't like having the employee sign. I almost like to control it from the start where I say, “we gave this to them. We had a meeting on X date.

It was presented to them and, you know.” But yeah, if the employee refuses to sign, I think you have to document that they refused to sign, that you presented the information to them so that everyone is aware that that employee heard the information. The employee may not accept [00:26:00] the information, but you've, you want to make sure you show that you've delivered that information to that employee.

That's really what's important here is the delivery of the information, you know, you as you're, you can never force an employee to accept what you're saying or admit that this is, you know, they've done it wrong, but you can say we had a meeting, we presented you with this, and we told you, and then it's in the employee's hand as to whether or not they want to accept it or not.

Jeff Stewart: Absolutely. I just tell employers, don't get into an argument, just write employee refused to sign, the time and date, and initial it. Move on.

Laura Corvo: Move on and, and just keep records that you showed it to them. That's all. Absolutely.

Jeff Stewart: All right. So, Laura, as you know, I like to give our, our listeners a couple of key takeaways at the end of each episode.

Do you have a key takeaway for our listeners?

Laura Corvo: Just that your documents is your story. Your documents are your story, and you want to be in control of that [00:27:00] story and just tell it, tell the story in the documents, the story you want your employees to, how you want your employees to behave from the onset.

What your job descriptions are, what your employee handbook is, and then as along the way, how to tell them how they're doing. And if you do that, I think your chances of having disputes with your employees really, really, really will be minimized. It's just, it's the document, document, document.

Jeff Stewart: Absolutely.

And I guess my key takeaway would be train, especially your first level supervisors, how to create documents and frankly, how they're used. I did a training for an employer not too long ago where we trained their first level supervisors who had no idea how those documents get used. And we showed them, okay, in an unemployment hearing, this is how they're used in an EEOC charge.

This is, you know, these are the things that are looked for, in litigation. And, you know, they were kind of amazed to [00:28:00] understand their role in the process. So that training is not just how to do it, but why it's so important. And when you get those first level supervisors to buy in, I believe you get much more effective documentation.

Laura Corvo: Absolutely.

Well, I want to thank you, Laura, and I want to thank all of our listeners for joining us here on the Employment Law Counselor Podcast, where we try to make sense of the world of labor and employment law. On behalf of myself and Laura Corvo, we thank you for listening. If you enjoyed this episode, please leave us a five-star review, tell your friends and subscribe to the podcast.

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