

The Employment Law Counselor hosted by Jeff Stewart

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, and today we'll be covering the interesting topic of What to Do When You've Been Sued. 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, Nancy Conrad, who practices out of our firm's Lehigh Valley [00:01:00] office.

How are you doing today, Nancy?

Nancy Conrad: Just great. Looking forward to our conversation.

Jeff Stewart: Great. So, when a company is sued, it's a stressful and hectic time, and different people have different approaches to what happens next. So, we thought we would examine what those first steps should look like for several different people.

The business, the attorneys, and the insurance company. So first off, when we talk about the business, which is what we're going to talk about first, that could be the owner, the president, the CFO, in house counsel, et cetera. But Nancy, what do you think the first thing is that the business should be doing?

Nancy Conrad: First and foremost, when a company receives notice of a lawsuit, whether that is a writ of summons or an actual complaint, or even an attorney letter stating that an action has been filed. Take it seriously. Recognize that there must be action taken. First and foremost, I [00:02:00] really stress the

importance of making certain that all documents, data, information that may relate to the lawsuit, even if you haven't done a thorough review of the actual claim.

It is important that all of that, that information, documents, data, whether electronic, hard copy, any information related to the suit must be preserved. That means you have document retention policies or document destruction policies in place. You must put everything on hold and work with your counsel to get a litigation hold out to all of the key individuals.

Jeff Stewart: Now Nancy, you and I have both dealt with clients that say, “Oh, well, this document is really not very good for us. We'd rather not have that.” What do you tell them? [00:03:00]

Nancy Conrad: You must preserve it. The reason is that even if it contains information that may be damaging, may create a risk, the downside of destroying it leads to far greater penalties than dealing with the actual substance of that document. So, preserve it, and work with the attorney to figure out how to deal with it.

Jeff Stewart: That's outstanding advice. The other thing that I think is kind of the initial and perhaps, you know, most people just assume that this is done, but I always tell people it's important to know what the claim is that you're defending.

Because, you know, we're dealing specifically with the world of employment law, and that can be a number of different claims.

Nancy Conrad: And it is important when that lawsuit, that complaint is received to again work with counsel to identify [00:04:00] those claims. It could range from a claim under the Family Medical Leave Act, that is a claim related to whether or not leave was granted or denied.

It may be a claim of disability discrimination or retaliation, that is an employee who was terminated from their position and is claiming that the real reason they were terminated is not because they were late every day to work, but because of a discriminatory reason. It may be a breach of contract action.

It may be a claim of sexual or racial harassment. Alternatively, wage and hour claims are on the rise right now. And another claim that we're seeing a lot of are whistleblower claims. Each of these claims are very technical and have required

elements, so it is important early on to review those claims and those [00:05:00] elements with counsel.

Jeff Stewart: It could also be multiple claims. You know, you could have a disability discrimination as well as a sexual harassment with a wage and hour violation.

Nancy Conrad: Certainly possible, and all need to be assessed, reviewed, and defended.

Jeff Stewart: The other important thing is to really note who is being sued. You know, whether that is one company out of, you know, there may be four or five sister companies, or if there are any individuals.

Nancy Conrad: And in particular, that is where we look at the caption that is contained on the complaint. It will state John Doe versus ABC Company, and it might go on to state and list several individuals. This may be a CEO. It may be a CFO. It may be one of the decision makers in the event an employee was terminated.

And that raises real issues that [00:06:00] need to be explored early in the case. And those issues include whether or not the interests are aligned among the individually named defendants as well as the company. If those interests are not aligned, separate counsel may have to be considered.

Jeff Stewart: Absolutely. The other area that really right off the bat employers and businesses should be looking at is, was this a claim that frankly, we were expecting? We had done some form of investigation ahead of time, or perhaps we've dealt with the EEOC previously, and have we already gathered documents and a file on this, or is this a claim that frankly, surprised us?

We weren't expecting this. We, we haven't done anything there.

Nancy Conrad: And we see it both ways. There are times that employment [00:07:00] decisions are made by the employer, and they are, they have not consulted with counsel in terms of assessing risks and best practices. There are other times that a company, whether with the assistance of counsel or through their own human resources department has conducted a thorough investigation, has considered various forms of information from various stakeholders. And if that's the case, it is very critical that that information is gathered, that information is reviewed with counsel, because we want to be certain that we're

being consistent in our defense and our responses to the allegations contained in the lawsuit.

Jeff Stewart: Absolutely. Now, one of the other areas that I tell employers to look is not just have we responded to an [00:08:00] EEOC charge or something like that, but if this is someone who no longer works with us, have we responded to unemployment or was there a workers comp claim where, again, there's a separate issue there?

Anything that we have submitted, whether it is to the EEOC, to unemployment, to workers comp, even if it's a different form than what this lawsuit is, we need to make sure that we are consistent from day one.

Nancy Conrad: And Jeff, you bring up a very important consideration. With most employment claims, the employment law statutes require that the employee first exhaust their claim with an administrative agency, whether that's the EEOC, the Equal Employment Opportunity Commission, the Pennsylvania Human Relations Commission, or a local agency. Very important that we review whatever was submitted to that [00:09:00] agency, especially if it was done without assistance of counsel, along with all of those other agencies that you reference, unemployment compensation, workers comp. Again, we want to be certain that we are being consistent in our responses and that we have a theme, a defense approach that captures all of the filings, all of the agency proceedings to date.

Jeff Stewart: And I think the other thing for an employer when they are looking at this is identifying who the decision makers were and let's know right away, do they still work for the company? Because going through that EEOC process, as you know, Nancy, usually takes approximately a year. So, there are many opportunities for those decision makers to no longer be with the company.

And then the question becomes, did they leave on good terms? Did [00:10:00] they leave on bad terms? What are we dealing with? Because all of these things that are, I'll say, ancillary to the lawsuit itself are certainly going to come into play when dealing with this lawsuit going forward.

Nancy Conrad: And with respect to those employees that may no longer be employed at the company, especially if they're decision makers, or if they're fact witnesses to the events underlying the claim, are we, do we have contact information for them?

In all likelihood, their depositions will be sought, and if we cannot provide that information, opposing counsel may issue a subpoena and proceed with them without our having the ability to meet with them, review the critical facts, and make certain that they're in a position to testify accurately.

Jeff Stewart: Absolutely. And then I think the, [00:11:00] the last big topic for that, again, this is initially when the employer receives the lawsuit, not three months later, but initially, the question always is, do we have insurance coverage for this claim?

Nancy Conrad: A critical question that must be addressed early, if there is insurance coverage, typically there is a notice requirement and there is a specific amount of time that the company must notify their insurer.

Failing to do so may lead to denial of coverage. So right from the start, it is important to reach out to either your EPLI coverage, or if there's some other form of coverage to simply provide notice of the suit. Most carriers request that you forward a copy of the complaint. Following that, the carrier typically then will issue [00:12:00] a letter with respect to coverage.

That letter will address assignment of counsel. I encourage our clients to, when they are obtaining coverage, to include the option that they can select counsel. Because if the company has counsel working with them on a regular basis, it's more cost effective, it's better for the company to have an attorney that knows your business, knows your operations, and can work with you.

Jeff Stewart: And there are some instances, and I know you know this as well, where I'm written right into the policy. That, you know, client X, if they get sued, will utilize attorney Jeffrey Stewart at White and Williams LLP for defense of any claims. And that's something that the client has negotiated because I've worked with them for [00:13:00] many years.

And I've worked with that insurance company for many years. Both know me and they are comfortable with that so that there's no questions.

Nancy Conrad: And many of the larger carriers, we at White and Williams, we have relationships with them and are on their lists of select panel counsel. So, while in a perfect world, the company has included us in that selection of counsel in the event they have not, they ought to inquire about what counsel is available to select from. Hopefully we are on that panel list. And I've even had circumstances where clients have said, I see that White and Williams is not on that list. I see Nancy Conrad is not on that list, but that is who we prefer to work

with, and we want to make arrangements to keep our attorney involved in this [00:14:00] case.

And we can have those discussions and negotiations.

Jeff Stewart: Absolutely, but those discussions need to be held literally within the first week to 10 days after getting this claim and notifying the insurance carrier because there are many things that need to happen.

Nancy Conrad: Agreed. And I also want to note that in the event the carrier insists on different counsel, I have, like you, continue to work with the client to help coordinate the litigation defense, recognizing that insurance counsel is going to be taking the lead on it.

Jeff Stewart: Absolutely. So, let's shift gears to, you know, what is it that the insurance company is normally doing when they first receive that notice of a claim?

Nancy Conrad: Well, the company is going to look at the lawsuit. It's then going to look at the policy, determine if there [00:15:00] is coverage, assuming there is coverage, then the insurance company is going to ask assigned counsel to complete a written initial assessment. In that assessment, there needs to be a discussion about potential liability, the defenses, what are the potential range of damages, and what is the litigation budget?

What is it going to cost to defend this action? In preparing that assessment, we work very closely with our client and develop a plan that fits within the mission and operations of the company, along with the budget of the company in order to develop the best defense, but in a way that is consistent with company operation and expenses.

Jeff Stewart: And I think the other piece of [00:16:00] that is many times the insurance company will ask, all right, is there opportunities to resolve the matter early? Because obviously they're looking at this, you know, in a dollars and cents version. Whereas the employer is looking at this saying this is very personal in many ways to them.

The insurance company is looking at this as a business issue. So, there are many questions I get are, all right, is there an opportunity to resolve this early? Or is there even a demand? And many times, many times there is. There are times that there is not, but a lot of what we will be offering is to say, all right, this is when the initial discussions will happen.

Is this something that is ripe for an early settlement conference?

Nancy Conrad: And you are so right. All of this is happening at once. We as attorneys are really looking closely [00:17:00] at the complaint, the allegations. We are assessing risk. We're considering best defense to go proceed. And at the same time, the insurance carriers' primary issue early on is can we resolve this quickly and for a number to get rid of it and minimize the cost of litigation? Another important The point in looking at that policy is who has the right to control settlement? Does that lie with the carrier or does the company retain the ultimate decision about whether to litigate or settle?

We encourage all of our clients to consider making good business decisions. And as we all know that litigation not only is expensive, but it's disruptive. So, if there is that opportunity. to explore an [00:18:00] early resolution, we certainly want to consider it. At the same time, as you noted, there are certain decisions that must be upheld for the integrity of the company, for the integrity of the process, in order to send a message that we're not going to pay out on every claim.

And we work closely with our clients to determine what direction they want to take with the particular claim with respect to resolution or litigation.

Jeff Stewart: And one of the things we looked at that we didn't mention earlier, but I think now is the perfect time is, we have to look at what is the retention level in the insurance policy.

You know, because the settlement discussions may be very different if the retention level is \$25,000 versus \$75,000.

Nancy Conrad: And that therein lies, you know, an internal question and that is for the [00:19:00] company and the carrier to address because even though it may be on the company's dime early on to settle the case, it benefits the carrier to resolve a case early on.

So, we encourage again our clients to view this as a three party discussion that is the carrier, the company, and to the attorney to really assess what is the best path forward in terms of litigation or settlement.

Jeff Stewart: Now normally, Nancy, when we do, when we have assigned a matter that is for an insurance company or where there's insurance involved, the insurance company is going to seek that initial assessment and as part of that initial assessment, you know, they're going to say, can you value this case?

Now, you and I both know that valuing a case is, a bit of an art form, it's a bit of a skill, it's a lot of experience, and [00:20:00] there are a lot of things to take into account there. How do you value a case? What do you look at specifically? And are there times when, frankly, it's too early? You can't value a case as of that initial assessment.

Nancy Conrad: And that is a very good point because the real value of a case arises when we're consulting with experts and get this outside objective viewpoint from a skilled practitioner. So, knowing we're not at that stage early on, when we approach valuing a case, we really look at the strengths of the defense that is are we able to establish with documents, data, witness testimony, objective, legitimate reasons for the business decision that was made?

So, if [00:21:00] for example, it's the termination of an employee, what does the file look like in terms of the reasons for that termination? If we're looking at a file where the last three performance reviews all rate that employee as outstanding and there's nothing in that file supports the decision to terminate for performance reasons.

We're looking at a real risk there, and as a result, we're looking at recommending to the client that this may be a case, depending on salary, lost wages, future wages, that there is potential liability and exposure. On the other hand, if we're working with a client where we have the data, the documents, the witness testimony to firmly establish those legitimate reasons for the employment action, we're valuing [00:22:00] that the case at a far smaller number and one that if we're looking at a potential early resolution, we're looking at what we typically say a nuisance value. That is a number to get rid of the case, shut it down and not go through the expense of litigation.

Jeff Stewart: Yeah. When I, when I do this, I'm always using my math brain and I'm looking at, all right, what did this person earn?

What is it that they have in potential lost wages? Because frankly, you alluded to it, but somebody who's making \$250,000 a year and somebody who's making \$25,000 a year, we're going to value those cases very differently in many ways because their potential damages are going to be much different if they've both been out of work for, let's say, six months.

Nancy Conrad: I agree. And, and I also am looking at in my mind, my jury brain, [00:23:00] that is, how is a judge and a jury going to assess the circumstances leading to this action, the reasons for this action, and whatever

else that former employee may throw in in terms of attempting to garner jury sympathy and identity. So, all of those factors go into valuing a case.

Jeff Stewart: Yeah. And the other part of that initial assessment that we do for insurance companies is a litigation budget. And as you and I both know, having done this for many years, this is an initial budget. Budgets change as things go because if we're doing a deposition of one person and they identify eight other people who were involved in the decision that we weren't expecting to depose, we may have to depose eight [00:24:00] additional people and obviously that increases costs quite a bit.

So, that piece is, I find, very fluid over the course of litigation. Would you agree with that?

Nancy Conrad: I agree, 100 percent. And again, focusing on employment related litigation, a part of the prima facie case that the plaintiff, the former employee has to establish is that others outside of the protected category, we're treated more favorably.

So, we get into a lot of disputes related to who are comparators. And those disputes lead to motions. Those disputes lead to depositions. Those disputes lead to additional discovery. Those disputes lead to a revised budget because it has expanded beyond the limits that we as defense attorneys try to put on a case.

Jeff Stewart: Absolutely. And I find that [00:25:00] one of the most important things when dealing with budgets, or changes in budgets, is communications between the attorney and the insurance adjuster, because no one likes surprises in these areas. And normally, a quick phone call, an email, et cetera. "Let me talk you through why this is happening, or we need to make an adjustment here and let me make sure you, you're on board with it and, and the reasoning and the strategy."

Nancy Conrad: Communication is critical. You are so right. And what I typically do at the start of the case, especially if I'm working with a new client, is to establish from the start what the client's expectations are with respect to communication. What the carrier's expectations are with respect to communication.

Some clients like to know everything, including the scheduling date [00:26:00] of a court conference that is for attorneys only. Other clients want to know the big picture items, want to be kept up to date about changes in strategy, in

budget, in disputes that arise. So, it's very important early on to identify the best way to communicate and the expectations with respect to communications.

Jeff Stewart: Absolutely. So, let's shift gears to our third group, which is the one that we are obviously the part of, which is how do attorneys deal with that lawsuit when they first get it? So, when you get a lawsuit for the first time, what is it you're looking at?

Nancy Conrad: The first thing that we do is identify the claims.

We talked early on about, is it an FMLA claim? Is it a claim under Title VII of the Civil Rights Act of 1964? Are there more than one claim? We dive [00:27:00] into whether the complaint itself lays out, identifies those required elements, because if those required elements are not contained in the four corners of the complaint, there's the potential to file a motion to dismiss.

Now we also look very closely at what court are we in? Claims can be filed in state or federal court. Most of the time, as defense attorneys, we prefer to be in federal court, so if there is a filing in state court, we look very closely to determine whether there is an option to remove the complaint from state court and take it into federal court.

Naturally, we do all of this assessment in conjunction with our client to make certain that we are making a collective decision about how to proceed with this [00:28:00] complaint.

Jeff Stewart: Absolutely. And literally the first thing I do after reading the complaint is I immediately calendar all deadlines that we know of.

So, when is that answer due? Or if we're going to do a motion to dismiss, when is that due? Because those are hard and fast deadlines. These are not, well, you know, it's around that. No, no, when we're dealing with court deadlines, those are hard and fast deadlines. And frankly, I work off of those. So, I'm going to need to be talking to the client, interviewing them, and I will probably want to have a draft answer for them to review a week before it's actually due.

So, if there's any back and forth needed, we can have plenty of time to do that. And we're not rushed.

Nancy Conrad: Agreed, and we have a limited time period to not only obtain those critical facts that are needed to respond to the allegations, but as you said, to then draft whether it's the motion to [00:29:00] dismiss or the answer.

As you also said, we need review and verification from our clients that the factual statements we are asserting are true and accurate. And all of that needs to be in conjunction with that deadline that is set by our court rules.

Jeff Stewart: Absolutely. And the other thing that I'm going to do, which is something we, we mentioned earlier that the employer is doing, but as an attorney, I'm absolutely doing this.

If I was not involved in an EEOC or PHRC or, or New Jersey, the New Jersey division of civil rights, if I wasn't involved in that matter or that aspect, but there was one, I'm going to ask to see the response because no matter where, again, no matter what the forum was that some official response was given about this person and their employment, whether that's unemployment, EEOC, wherever, we need to know what that is because we want [00:30:00] to be consistent.

Because if we are inconsistent, we are handing a gift to the plaintiff. Would you agree with that?

Nancy Conrad: We're handing the gift to develop the claim of pretext or otherwise. So, I'm going to add to those statements the importance of if the company receives the EEOC charge or the charge from the Pennsylvania Human Relations Commission.

It is really in the company's best interest to consult with counsel before submitting a response because once that response is submitted, we are locked into the statements that are made within that response. And if we later find that they're not 100 percent accurate, we have a new problem to deal with.

Jeff Stewart: Absolutely. The other thing that I am going to look at very carefully is if an employee was terminated for some form of [00:31:00] policy violation, I am going to say I need to see that policy, number one. Number two, has this policy changed at any point from the time that this person was terminated to today? And if so, why?

And then third, have other people been terminated for that same policy violation?

Nancy Conrad: To me, that third element is most critical. Because my first question is, was the policy followed with the employee who brought this lawsuit? And as you've suggested, was it followed in every other similar circumstance?

Because again, if there's an inconsistency there, we may have another issue that we need to deal with and I'm not suggesting that any of these issues are fatal to our defense. What I'm suggesting is that the assessment of these issues is [00:32:00] critical early on so that we prepare the best defense going forward.

Jeff Stewart: Absolutely. And I think the other thing that we get asked an awful lot is why can't we just dismiss this? Why can't we just dismiss this immediately? And I don't think that employers understand the standard for a motion to dismiss, which is a fairly high standard. And it is not every case that a motion to dismiss should even be filed.

Would you agree?

Nancy Conrad: Absolutely. The standard is that the court has to assume that all facts pled in the complaint are true. And those allegations are typically not 100 percent accurate. They are allegations that have been twisted, turned, exaggerated, embellished but we're stuck with them at the [00:33:00] motion to dismiss stage.

So, what we really seek to do is during the discovery phase, which follows the answer, it includes written discovery as well as depositions, that is where we establish the record to establish that these allegations are not true. We create the accurate record. And then we're in a position to file what is called a motion for summary judgment, which then is our opportunity to say, here are the real facts, here is the real record. Based on this record, the court should dismiss the complaint.

Jeff Stewart: Absolutely. Well, as listeners to this podcast know, I like to give some key takeaways at the end of each episode. So, Nancy, do you have a key takeaway for today?

Nancy Conrad: Assessment and early assessment to me is critical. And that assessment is [00:34:00] a joint effort among the client, the company that has been sued, the insurance carrier to the extent there is one, the decision makers who made the underlying decisions at issue and the attorney who will be defending the case.

That assessment, that partnership among all of those key stakeholders is critical and one that we form very early in a case and approach the defense as a team, and we rely on each of those stakeholders in making the decisions as we move forward in the defense.

Jeff Stewart: Absolutely. And if I would give a key takeaway for today, it is that when litigation is commenced, it's important to take a fresh look at everything involved.

Make sure that the position that the [00:35:00] employer took at the time was documented and defensible. We're not going to create documents after the fact, we're going to deal with the documents we have, but it's important to look at every single piece of evidence that we have with a fresh set of eyes and make sure that everything that was done was defensible.

Nancy Conrad: We're here to assist and we look forward to the opportunity to work with our listeners, our continued opportunities with our clients to assert the best practices that we can offer in defending claims of these nature.

Jeff Stewart: Okay. With that, I want to thank everyone for joining us 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 Nancy Conrad, 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. For more information on this and many other topics, please visit the White and Williams website [00:36:00] at www.whiteandwilliams.com where you can visit our blog and learn more about the firm. Until next time, stay safe and stay compliant.

PLUS Staff: Thank you for listening to this episode of the employment law counselor. If you haven't checked out the previous episodes, make sure to give those a listen and check back in the next few weeks for the newest episode.

If you have an idea for a future PLUS Podcast, you can visit the PLUS website and complete the Content Idea Form.