

The Employment Law Counselor hosted by Jeff Stewart Episode 15

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 talking about issues surrounding remote work. This podcast is a collaboration between White and Williams, LLP and the 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 practices out of our firm's Newark, New Jersey office. How are you doing today, Laura?

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

Jeff Stewart: I'm doing great. Thank you [00:01:00] so much for coming back. You know, you are one of our most popular guests. Every time you're on an episode, we seem to get a ton of downloads so thank you.

Laura Corvo: I would love to take the credit for it, but I think it's the issues that we talk about that really drive the ratings. [I'm] glad to be here.

Jeff Stewart: It probably is, but if you've missed any of Laura's past episodes on things like employee handbooks or artificial intelligence, please go back into our archives and find them and listen because they are fascinating.

Laura Corvo: Thanks, Jeff.

Jeff Stewart: So, Laura, I'm glad to have you here with me today for our discussion on issues surrounding remote work. Are you ready to dive right in?

Laura Corvo: Sure. Let's go for it.

Jeff Stewart: Okay. Well, what used to be a rarity has, frankly, become the norm since 2020. Many employers started utilizing remote work without ever planning for it. Over the past four years, I know you and I have both seen a number of issues with remote work that we thought would be helpful to discuss today.

We've also developed some strategies for how employers can reap the [00:02:00] rewards that come with flexibility of a remote workforce while limiting their risks. So, why don't you give our listeners just a little bit of what remote work was like, I'll say pre pandemic, pre-2020.

Laura Corvo: Yeah, so pre-2020, remote work was kind of the exception. It was getting more popular. There were a handful of employees in companies who were working remotely, but typically they were higher level employees. For the most part, remote work was not considered a reasonable accommodation for disabled employees. It was something that was the exception, that employers would make on a case-by-case basis for high level employees who they really wanted to retain and wanted to give flexibility to.

Jeff Stewart: I want to spend a little bit of time on the accommodation piece that you mentioned because I know I would get calls that, you know, such and such employee they're not able to work due to a particular disability. They have asked [00:03:00] to work remotely or work from home.

Often the response pre-2020 was, "that's not a reasonable accommodation" because we didn't have the infrastructure; no other employees have worked remotely; we didn't have supervision. Basically, for the employer, it wasn't deemed reasonable. The EEOC frankly agreed that it was not, in most cases, reasonable. That, in a way, gave employers an out that they no longer have.

Would you agree with that?

Laura Corvo: Yeah, absolutely. It is extremely difficult, if not impossible in most cases, to say to the EEOC with a straight face that a remote work accommodation is not reasonable.

Jeff Stewart: Today, in 2024.

Laura Corvo: Today in 2024. In 2019, we made that argument all the time. [In] 2024, it's, you know, a real uphill battle.

I mean, there are certain positions [00:04:00] that require in person presence, like a retail operation. Other than that, a lot of jobs, the EEOC is going to look very carefully to say, “Hey, how can you not give this person the opportunity to work remotely when everybody was doing it during the pandemic? Why can't we allow them to work via zoom or via a virtual platform?”

Jeff Stewart: Absolutely. We talked a little bit about 2019. Then [the] pandemic happens and, frankly, many offices go remote for the first time, not just one or two people, but a hundred percent remote for quite a while. And frankly, [they] figured it out.

Laura Corvo: Jeff, I think you and I both remember those days in late March of 2020 very well. All of a sudden, the doors were shut and employers had to very quickly figure out how to make this happen, and they did. The technology was there. People learned how to work remotely and [00:05:00] employees liked it. They liked the ability to have the flexibility to work from home, to pick their kids up from school, to do whatever else they needed to do to avoid that commute.

A lot of employers liked it too because they were able to avoid overhead costs that an office required. They could attract talent from beyond the geographic reach of their offices. It became commonplace for many companies.

Jeff Stewart: I don't see it going away. While there has been a movement to bring people back to the office, and in some cases we want everybody five days a week, in many places that's still the exception. It is three-in two-outs, two and three, sometimes it's four and one, but there is some level of remote work at, I will say, a majority of employers. Would you agree with that?

Laura Corvo: [00:06:00] Absolutely. It's very difficult to put the genie back in the bottle now that it's been out. Employers have switched to hybrid. They've tried to bring everybody back to the office, but there's been resistance.

Some employers have found that remote work just works. It works for their company, and they've completely moved to fully remote environments. I don't think we're ever going back to 2019. We're in a different world and remote work is here to stay.

Jeff Stewart: I would a hundred percent agree with that. With that kind of background, let's talk a little bit about some of the issues that arise with remote work. Obviously, we've been seeing these for years, but because remote work

wasn't necessarily planned, not all employers have thought through every possible scenario when it comes to remote work.

For example, if I'm able to recruit somebody who's in [00:07:00] Montana for my company in Pennsylvania, what laws apply to that employee? If they're working remotely and they've never stepped foot in Pennsylvania, but I've never do[ne] business in Montana. I just happen to have this one person doing one thing for me there. What law should apply?

Laura Corvo: In most situations, it's going to be the law of Montana. [It will be] the law of where the individual, the employee, works that's going to apply.

What happened post pandemic is a lot of employers were managing employees in just one state or maybe a handful of states. You had an employer in New Jersey who had most employees in New Jersey, maybe a few in Pennsylvania, maybe a few in New York, and they were aware of the New York, New Jersey and Pennsylvania laws that were in play.

Post pandemic, suddenly recruiting happened all over the country. Now that employer has employees in 25, 30, 35 states. Well, all of [00:08:00] those state laws are in play. It's what I call this "multi-state conundrum." Because remote work happened so fast, employers didn't have a chance to sit back and say, "Well, what are those laws? How do I comply with them? What do I need to do if I have workers in all these different places?"

Those laws vary from state to state. There's very few exceptions where there is a national employment law that applies without a state variation. Sick laws, family medical leave laws, wage and hour laws all vary from state to state. And employers, if they're not on top of it, can get hit with potential penalties lawsuits, things of that nature.

Jeff Stewart: Absolutely. Some of those may only come into play once.

For example, certain states have laws that say when you terminate an employee, you must hand them their final paycheck right there on the spot as you terminate them. Others say, [00:09:00] just your next payday. Well, if you're terminating somebody who's in a state like that, you've never done that, and you just assumed, "We'll pay them on payday." Well, guess what? You've just violated the law of whatever state they are in that has such a requirement. You've probably never thought of it and never had to worry about it before.

Laura Corvo: Right. What it does, like your wage and hour policies [and] like your final paycheck law, which you're alluding to Jeff. You had one policy, [a] "one company size fits all" policy that said, "Oh, if you're terminated, you get paid on the pay period following your termination." Well, that doesn't work in a handful of states. Or [a policy that said], "We're going to pay you on a bi-weekly basis." Well, there may be a handful of states where you're required to pay employees on a weekly basis. Suddenly your wage and hour policies, where they were once a "one size fits all" simple statement in a handbook, become something that may have to have five or six variations to it.

Jeff Stewart: Absolutely. That becomes an issue for the [00:10:00] employer, not only trying to know what the rules are today, but keeping on top of the rules in potentially all 50 states. [It] is a full-time job.

Laura Corvo: I think what happened post pandemic is a lot of smaller companies went fully remote. [They] suddenly had this "multi-state conundrum" that we're talking about where they have employees in 25, 30 states but don't necessarily have the internal HR processes that a larger corporation may have with thousands of employees. That small company with 20, 30, 50 employees suddenly has to know 50 different state laws, and it's a challenge.

Jeff Stewart: I'll give an example. When the pandemic happened, my nephew was working outside Philadelphia, in Pennsylvania. [He] ended up moving to [00:11:00] Maine and got married up there, stayed up there. It was the first time his employer ever had an employee in Maine. It's an 8-hour, 9-hour drive from where his employer was. Pre-pandemic, that would have just been, "Okay, he needs to find a new job in his new place," but now he can keep the job that he had had for a while and simply work remotely. That works for everybody.

Now the company needs to learn, "What are the rules in Maine?" For example, Maine has paid family leave, which Pennsylvania doesn't have, so he may be the only employee in the entire company that has that benefit. And the company needs to be aware of that.

Laura Corvo: Exactly. It's paid family leave. It's your vacation and sick leave policies. You have a companywide vacation policy that says you get 10 vacation days a year and you don't carry them over. You lose them if you don't use them works in a lot of states, but in California and several other States, those use it [00:12:00] or lose it policies are not permissible. Now you have to change how your vacation works for one or two or a handful of employees who are in those specific states, same thing with sick leave.

Jeff Stewart: Or you have to change your policy and be more generous for everybody, which a lot of employers don't want to do.

Laura Corvo: Exactly. It comes down to you either have to manage the variations or go that extra step and give everybody the most. But it's even hard to keep on top of what is the most. Sick leave policies, for example. They keep moving the bar on how much sick leave is available in certain states. Minnesota just passed a very generous sick leave policy a year ago. It used to be California had the most generous [policy]. It's very hard to say, okay, we'll give the most because you have to stay atop of what that most is. That's a challenge for employers as well.

Jeff Stewart: Absolutely and in addition to the laws that we're talking about, there are also supervision issues. There are a number of issues that come [00:13:00] with remote work. I'll say supervision, I think, is number one which kind of that combined with communication, I think they really go hand in hand. If you're not supervising your remote workers, you're going to run into issues. Would you agree?

Laura Corvo: Absolutely. It comes down to what is good old-fashioned management, right? You have to tell your workers what you expect of them, hold them to that expectation and then check in on them. The employers that I've seen that have been successful with remote work are those that are constantly reaching out to the employees on the virtual calls saying, "Hey, what's up? What's going on? What are you working on today? What are you doing?"

[This is] the same way [it would be] if we were in the office and you knocked on the door and said, "Hey, what's going on?", overseeing what's happening with that employee and providing that employee instruction so that they don't feel that they're on an island sitting in their home without any [00:14:00] guidance. The manager or supervisor should be just a chat away or a call away to be involved with what that employee is doing.

Jeff Stewart: Absolutely. Another area that I know I've taken a lot of questions on over the last few years, I don't know if you have as well, is in the area of confidentiality and security. If an employee is entrusted with confidential information of the company, the company needs to make sure that that information is remaining confidential when it essentially is outside of the walls of their building, [whether] it's being held in the person's home office or something to that effect. What security measures are being required?

For example, under the Uniform Trade Secrets Act, that I know Pennsylvania and a number of other states utilize, one of the first [00:15:00] tests for whether information is confidential or a trade secret is, “Have you taken the steps to secure it that's actually more than just a policy that's actually securing it?” If you can't answer that question in a positive manner, with regard to your remote employees, frankly it may lose certain protections.

Laura Corvo: Absolutely. This is where HR needs to kind of team up with IT and understand when people are working in a virtual environment or a remote environment, how is information being exchanged? Are people able to download things to a personal computer, or are you working off of a platform where the information can only be obtained from your network?

I'm not an IT person, but it is an important thing for HR people to understand that they need to engage the IT experts to understand how that information is getting to those [00:16:00] employees who are working remotely so that you can, as you said Jeff, make sure that that confidential information is being secured.

Jeff Stewart: Yeah. The other area where I've had some questions over the last few years is, frankly, in the area of workers compensation where an employee is doing work at home and injures themselves, either they were lifting something or they were moving something. Frankly, they fell off their chair. That, even though it is at home, is still a workplace injury if the home is now their workplace.

You as the employer are going to have to deal with a workman's compensation claim and have very little in the way of being able to refute it because no one's there to see it other than maybe one of the members of the claimant's household. What do you do? Frankly, there's not a lot that you [00:17:00] can do.

Laura Corvo: Right, you have to advise your employees that they should set up their equipment in a safe manner. You should provide instructions and training as to how to do that. Taking it a step further when it comes to workplace injury, you might have to provide certain accommodations to employees who are working from a home office; for example, a posture chair, because their back is becoming injured because they're sitting on a bed or a couch that's not sufficient to help them work in the way that they need to work to avoid an injury. How that home office is set up is something else that employers need to think about.

Jeff Stewart: Absolutely. Laura, I know that one of the things that we both advocate for employers to do is to design an effective policy on remote work

and to incorporate it into their handbooks, et cetera. What kind of things do you [00:18:00] feel must be in such a policy?

Laura Corvo: Well, the absolute first thing that I think that policy has to say is where the employee is working. We have to set what I call a “remote work location.” The employee should agree that they're working from a remote location which is their home address located in New Jersey, Pennsylvania, whatever state you believe it's in, and that that's where the employees expected to work. What happens is that employee moves to California without telling you. California's laws are suddenly applying and you don't even know they're out there.

You need to say to that employee, “You're working from this remote work location and if you want to change it, you've got to get our permission” so that if you don't want an employee in California or you don't want an employee in Florida or you don't want an employee to go overseas, because there's confidentiality concerns or other issues, you know where that employee is working. That's number one, you have to understand and [00:19:00] control the states that are in play because, as we said before, it gets very difficult to manage all these different state laws. You at least want to know which ones you're controlling.

Jeff Stewart: I think another thing that I like to do is that, look, remote work only applies to certain jobs and there are certain jobs that are frankly not eligible for remote work. Depending on what they are, then we would have a reason for some being yes, some being no.

Laura Corvo: Yes and that, I think, is something we want to say both in our policy and in our job description. If a job requires in person presence, we need to say that, even if it's temporary in person presence. I've seen employers say, “We want to have three meetings a year where the whole company gets together, even though we're allowing for remote work.” And then employers say, “Well, I don't want to travel. I can't leave my remote work environment.” The job descriptions should say you're going to be required from time to time to come into the office or come to [00:20:00] an all-employee meeting, so employees realize that they're not going to just work in this bubble of their home office.

Jeff Stewart: Absolutely. I'd like to also include that eligibility for remote work will be reviewed periodically. As you and I both know, jobs change. What the expectations are change. We have to have the ability to change how we design that job, and we may design it so that it needs to be in person now.

Laura Corvo: We've seen a lot of employers who said it was okay for people to do remote work during the pandemic or shortly after, but we do want you back. We want to have that ability to bring you back when we think that, either for collaboration reasons or other reasons, people should be getting together. I think that's absolutely important to say.

Jeff Stewart: Or, you know, clients are expecting us to be in the office and to have meetings there versus remote meetings. We want to have X days a week [00:21:00] that we are going to be in person so that clients know this is when they can have meetings with us.

Laura Corvo: Exactly.

Jeff Stewart: The other thing I think, as I mentioned earlier, we need to have clear policies on confidentiality and security. I think those need to be crystal clear. Frankly, I include the requirements in the job description that they must abide by security and confidentiality portions of our policies in order to work remotely.

Laura Corvo: As I said before, I think there needs to be a conversation with IT to understand how that information is being transmitted to the employees. I think we also need to tie it into where the employees working, right. The employees should be working from their home office located at 125 Main Street in Newark, New Jersey, not from the Starbucks down the street where the public can maybe hear some of the conversations [00:22:00] or see something on the laptop that might be confidential.

Then it also goes to the setup of the home office that we want to keep that home office away from other family members, from guests and visitors so that that information remains confidential.

Jeff Stewart: Right. You don't want to be at the public Wi-Fi at Starbucks either.

Laura Corvo: Absolutely.

Jeff Stewart: With all of that, and I think we mentioned earlier but I think it's worth mentioning again, good old fashioned management of employees [and] regularly checking in I think is the most important thing to do with remote employees.

Laura Corvo: Absolutely. If you have those daily calls, just even if it's a five minute, "Hey, how are you?" The same way you would in an in-person office where you're walking down the hall and you have that water cooler moment where you're just checking in on somebody. That's extremely important.

It's important both so you know what your [00:23:00] employee is doing and that the employee knows what he or she or they should be doing. They know what the next job is. They know what the task is. They know what the expectation is. There's communication. There's check in.

Jeff Stewart: Yes, and I think in addition to setting that expectation is holding employees to that expectation. One of the other things we haven't mentioned today that obviously came up with remote work was this idea of quiet quitting where people are technically still employed, but they've just stopped working. They just don't say anything.

Well, if nobody checks in, nobody's checking on the progress of what they were working on, et cetera, they just keep getting paid until somebody realizes, "You know what? They haven't done anything in five weeks. What are we paying for?" You realize that they actually are not doing any work and that they have quietly quit and collected money that they certainly didn't earn.

Laura Corvo: If that check in occurs and that communication [00:24:00] occurs, we can document that that happened and the employee knew they were supposed to do it. That quiet quitter could say, "Well, I didn't know what I was supposed to be doing. You never told me." Then there becomes a challenge to whether the termination was valid or not.

So yeah, absolutely. It's just that, there's no magic way to do this other than just grinding it out with communication.

Jeff Stewart: Absolutely. I think the main thing we've been talking about is doing it deliberately. We no longer are in the position of, "Okay, everybody has to be remote tomorrow. Now, what? Let's figure it out." We've had time.

Now if somebody is in a remote position, I'm going to presume it's because we've decided that that's okay and that we are okay with that position being remote, but let's make sure we have the expectations. Let's make sure we have the infrastructure to check in on people so that that person feels like, frankly, they're a valued [00:25:00] member of the team. They don't feel like they're just on an island by themselves. They feel like a member of the team. And as the

employer, we feel like we're getting what we're paying for, and that they are a valued member.

Laura Corvo: Absolutely. I think the employers who have been successful with remote work are those employers who really took the time to think this thing through.

Even though we kind of did this with a gun to our head because of the pandemic, they took a step back and tried to really figure this out in a way that allows for a very successful work environment. Remote work can be very successful for a number of companies. You still have to manage it and really think about how these things work.

Jeff Stewart: Absolutely. As you know, Laura, I like to give our listeners a couple of key takeaways at the end of every episode.

I'm going to throw my first one out there. I'm just going to piggyback on what you [00:26:00] said. The best remote work arrangements are collaborations. They're not an employee saying, "Well, I'm working remotely and there's nothing you can do about it," or, "I'm just never coming back to the office." It's when there's collaboration. There's check in, and it is mutually supported. Everybody is on the same page. That's the best remote working arrangement.

Laura Corvo: Agreed, Jeff. Completely agreed. I guess I'll throw out there that in addition to that collaboration, there's a clear expectation as to how this is going to work. That's really where the policy comes in. That clear expectation should be where it's going to happen so you know what state laws are in play, and you're not going to get burnt by not giving an employee their final paycheck on the right date or having violated the sick leave law.

You know where it is. You know what you have to do. You've also told the [00:27:00] employee what's expected of them, and you've laid out that expectation.

Jeff Stewart: Absolutely. I think the final key takeaway I'll give is that, we mentioned this early on, from an ADA perspective, remote work will now almost always be considered a reasonable accommodation if it's in a position that can work remotely.

Now, that's where job descriptions and having it set beforehand as to "this job is eligible for remote work; this job is not." That's where those are key, and you should review those. Take a look at them before you run into an issue because

anytime you are reviewing them after an issue, your motivation as an employer is going to be questioned. Whereas, if you've reviewed them when there is nothing going on, when there are no fires burning, those are generally deferred to.

Laura Corvo: Absolutely. Just in general, I think for [00:28:00] employers, remote work is something that can really work for a lot of employers. But it does require some homework and some thinking on the backend. If you do that, it can be extremely successful.

Jeff Stewart: Absolutely. Well, thank you, Laura, for joining me here today. I think this was a really fun discussion that our listeners will get a lot out of. I want to thank you, 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.

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