Employment Law Counselor hosted by Jeff Stewart Episode 16

**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 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 talking about issues surrounding workplace violence. 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 here at White and Williams, Tanya Salgado, who practices out of our firm's Philadelphia office.

How are you doing today, Tanya?

**Tanya Salgado:** I'm doing great. How are you doing, Jeff?

**Jeff Stewart:** I'm [00:01:00] doing great. And thanks for coming back to the podcast. This is, I believe, your third episode.

**Tanya Salgado:** I believe that's right. Yes. Thank you for having me once again.

**Jeff Stewart:** Absolutely. Well, you always give our listeners plenty of good and useful information, so I'm happy to have you back and talking about an issue that really pops up, and when it does, it is a five-alarm fire in many ways. I thought you would be a great guest to talk about this issue today, so thank you.

**Tanya Salgado:** Sure. Thanks again. Workplace violence certainly is a five-alarm issue. We talk a lot about prevention, but I would say of all the areas where prevention is key, this is one that's at the top of the list.

**Jeff Stewart:** We could spend. Literally, days talking about ways employers could try to prevent workplace violence incidents.Today, what I really wanted to talk about is some of the claims that can come out of a workplace violence incident and what kind of liability an employer may be [00:02:00] facing. What kind of claims are we discussing here today, Tonya?

**Tanya Salgado:** There really are a variety of types of legal claims that can arise out of a workplace violence incident. What type of claim you're looking at is going to depend on a number of factors. It's going to depend on the nature of the incident, who the perpetrator of the act of violence is, and who is the victim.

It's very context specific. One thing I just kind of want to rule out of the way, up front, is workers compensation. When the employee is the victim of workplace violence and the incident is directly related to the employment, this scenario will likely be covered by workers compensation, not always, but often.

An example of that might be a health care setting where a health care worker is injured in the course of performing their job by a patient. Now Jeff, you and I aren't workers comp attorneys. We have workers comp attorneys at White and Williams, but that's not [00:03:00] us. Instead, what we'll be talking about are the types of claims that arise out of negligence, typically. This is the type of claim that arises where the employee is the perpetrator of the violence.

Really there are three types of claims, again, all under the heading of negligence. They would be negligent hiring, negligent supervision, and negligent retention.

**Jeff Stewart:** All right. Well, let's kind of break those down for our listeners a little bit and let's start with negligent hiring. What does a plaintiff need to show in a negligent hiring kind of a case?

**Tanya Salgado:** These are going to vary depending on your jurisdiction. These tend to be common law claims, but as a general principle, most states recognize certain factors to establish a negligent hiring case. That would be that the employee in question had a propensity for violence, the employer knew or should have known of that propensity for violence, [00:04:00] and the employment position itself.

There was something about the employment that created a harmful situation for a third party. These are really kind of based on this idea that the employer has a duty to reasonably and accurately assess an applicant's background to determine if they pose a perceivable safety risk to other people, whether that be coworkers, customers, or anyone else that they're going to be interacting with in the course of doing their job.

**Jeff Stewart:** Now that term you use, propensity for violence, obviously sometimes things happen that you can't predict. Then sometimes hindsight is 20/ 20 and you think, “should we have seen this coming?” But from a legal standpoint, this propensity for violence, does that require some form of criminal conviction for an employer to be aware that there would be something like that?

**Tanya Salgado:** There's no requirement for a criminal conviction, although certainly a criminal [00:05:00] conviction for a violent crime such as assault and battery could very well give rise to a negligent hiring claim. But any prior incident that the employer either knew or should have known of, that involves the applicant, could give rise to a claim.

Context is really important, so it's going to depend on the particular facts in question. Foreseeability is key-- Would this past act reasonably lead someone to believe that this could be repeated in the future? But it doesn't necessarily require a criminal conviction. Certainly, if the employer is aware, perhaps, of a civil lawsuit that involves an act of violence, that could give rise to a claim.

In some contexts, perhaps even a domestic violence situation could give rise to a negligent hiring claim. Criminal background checks are important, criminal convictions are important, but they're not the only issue.

**Jeff Stewart:** Now I'm going to ask you a question that I know the answer to, but I know I've been asked by my clients [00:06:00] at times. I'm sure you have as well.

Can the employer just say, “Hey, you know what? We’re not going to do background checks because I don't want to know. Then you can't say that I knew anything, so I shouldn't face any liability if I just don't do the background check at all.” What do you think of that question?

**Tanya Salgado:** So, never a good idea for employers to bury their head in the sand. It's like the little children do, plug your fingers in your ear and say,” I can't hear you.” [It’s] Not a good idea for employers. Legally, courts recognize this. The legal standard in most jurisdictions is actual or constructive knowledge. Constructive knowledge is just a fancy legal term to mean that a reasonable investigation would have alerted the employer to the dangerous propensities of the employee.

For example, if a criminal background check would have revealed that the applicant had been convicted of an aggravated assault, [and] the employer did not conduct the criminal background check, [00:07:00] that applicant is hired and they go on to commit a similar act while employed, it's not going to be sufficient to say, “Well, we didn't know.” If you had done your homework and done the criminal background check, you would have known. Therefore, there is certainly a chance for liability for negligent hiring under those circumstances.

**Jeff Stewart:** I think it's important to note that it is a standard background check is what is required. It's what would be reasonable. So, if you have an employee who went on vacation and was involved in a bar fight in Australia, that would never show up on a background check conducted here in the U. S. and then you don't know about this. If something would happen, you may not be liable because you did what a reasonable employer would do, which is you did a background check here in the United States where the person lives or where your operations are. You did not do something that would detect a bar fight in Australia.

**Tanya Salgado:** That's right. Another [00:08:00] thing to keep in mind as we're talking about background checks [is] don't discount other forms of learning about potential propensity for violence. You might be surprised. A thorough interview could give rise to potential indicators and reference checks.

I know that we often hear about employers just getting what we call name, rank and serial number reference checks. That’s certainly advisable for a variety of reasons, but sometimes you can get an off-the-cuff response that's actually quite helpful. For example, an employer actually let someone go because of an incident of violence in the workplace. That's very helpful information.

**Jeff Stewart:** Absolutely. Now, when you said the elements of the claim were a propensity for violence by the employee, the employer having knowledge or should have known of that propensity, and then a potentially harmful situation for a third party was the last part.

[00:09:00] I think it's important to note that depending on the position that you're hiring for some prior offenses may be problematic for one position, but not for another, depending on supervision, depending on where you are, what interaction you have with the public, etc. The example that I use is a person who has had assault and battery convictions would likely be okay for a truck driving position, but not okay as a home health care aid where they're working unsupervised and working with third parties. Would you agree with that?

**Tanya Salgado:** Yes, absolutely. The real key here is to be able to connect the job duties of the position that the employer is hiring for with the information that the employer received on the background check report. Now, some jobs are necessarily much more safety sensitive than others. One area to [00:10:00] consider would be the access that the position provides the employee to members of the public. If the employee is going to be working with children, disabled people, elderly individuals, the stakes are much higher.

Again, situations involving an employee whose job duties involve going into people's homes would be another example of a heightened situation where you're going to want to look at the job duties and be able to connect them with the particular past conviction or past prior act.

**Jeff Stewart:** I think we would both agree that a thorough criminal background check is, I'll say the best way for an employer to at least start to limit their liability. But there are issues there as well as not everything is as simple as it may seem.

Tanya, can you just go into some of the issues around the background checks? Frankly, there are some municipalities and states that don't even allow background checks to be as [00:11:00] frequently done as employers may like.

**Tanya Salgado:** Yes, absolutely. More and more jurisdiction are passing laws often referred to as ban the box laws. The policy interest behind these laws is that people who have paid their debt to society need to be able to go on and live productive, self-sufficient lives. They need to be able to continue to, to work and support themselves.

These ban the box laws are intended to give people a foot in the door. Now again, these vary in terms of what jurisdiction that you happen to be located in. Some of these laws make it unlawful to include a question on the job application, asking the applicant whether they have a conviction. In fact, most of the ban the box laws, that's a key component of the law.

**Jeff Stewart:** That's where the name ban the box comes from in that you can't have the simple check the box, “have you ever been convicted of a crime?” where employers would look at that box and [00:12:00] throw away or discard that application if it was checked.

**Tanya Salgado:** Exactly. Now, most of these laws do permit criminal background checks to be conducted at some point in the process but the question is, “when?” Some laws say that you can't have the criminal background check until after the first interview. Some laws go even further and to say that you can't run the criminal background check until after a conditional job offer has been made. You got to know the law of your jurisdiction.

In addition to laws that regulate when you can ask about a criminal conviction, some laws go even further. The state of Pennsylvania has a law that governs the use of criminal background checks and hiring. Under Pennsylvania law, a policy that prohibits hiring anyone with a criminal conviction, just as a blanket policy statement, would be considered unlawful.

Instead, Pennsylvania law requires that an employer consider whether the criminal [00:13:00] conviction makes the applicant unsuitable for the particular job in question. Again, you got to have that link between the nature of the conviction and the particular job duties. While that's a specific requirement of Pennsylvania law, I would certainly recommend that as a best practice to employers in any jurisdiction.

**Jeff Stewart:** Absolutely. There are also limits on how recent a conviction can be or really how far away it can be and still be considered.

**Tanya Salgado:** Yes. Again, I practice in Pennsylvania and New Jersey. I'm in Philadelphia. Philadelphia has a particularly robust ban the box law. In addition to limits on the point in time in the hiring process in which an employer can conduct the criminal background check, the Philadelphia law goes further and limits employers to considering convictions that occurred less than seven years from the date of the application. In addition, [00:14:00] Philadelphia's law also requires employers to consider various factors in making the decision, such as again, how the conviction is connected to the job, among other things.

**Jeff Stewart:** I always think it's very important for employers prior to conducting a background check to have a policy in place as to what they consider to be “disqualifying offenses” versus what offenses require more investigation. A lot of times it's a matrix that includes how recent it was.

For example, DUIs are only considered if it's a driving position and then there's specific rules. This is when it's disqualified. This is [when] we look into it further, depending on how close in time it was. Do you advise your clients also to have that kind of policy before conducting background checks?

**Tanya Salgado:** As a general principle, [00:15:00] policies are always a good thing. The key will be to make sure that the policy is well drafted and suitable for the particular nature of the employment.

Again, employers who are involved in providing services to vulnerable populations, whether it be disabled, child care, et cetera, these types of employers certainly are going to want to have a robust policy that addresses how they're going to look at convictions [and] what are the factors that they're going to consider.

Even [for] employers outside of those heightened safety sensitive context, it's a good idea to have a policy. Again, make sure it's legally compliant. Any type of policy that provides a blanket prohibition on employing people with convictions is not going to be found compliant, even if you're not in a location where you've got a ban the box law or a criminal history law.

Keep in mind that Title VII can apply as well. The Equal Employment [00:16:00] Opportunity Commission takes the position that Title VII is violated by blanket policies that prohibit employment of anyone who has a conviction. I believe they've actually filed some class actions against employers with those kinds of policies.

So again, good idea to have a policy, make sure that it's legally compliant.

**Jeff Stewart:** Absolutely. That's one where if there is a conviction of this level, it requires further investigation where we will go and ask the prospective employee, “What happened? Can you explain this to us, etc. so we can make a determination?”

 Now DUI is a little bit easier when there's a driving position because perhaps our insurance company does not insure people with multiple DUIs, something to that effect. We can show we did not create this policy just for you. This policy has been in place for quite a while, and it is job [00:17:00] related because we need to have our people insured and it only applies to driver positions.

I agree with you. You need to make sure it is tailored to the job, particularly, and need to make sure it's not just blanket prohibitions left and right, but really it is let's look into things more before we make a final determination.

**Tanya Salgado:** Yeah, the key here is considering all the relevant facts and circumstances and making that individualized determination. Once the employer's reached that conclusion, documenting it and making sure you've got the facts to back up that decision.

**Jeff Stewart:** While we're on the subject of policies, do you suggest employers have a policy specifically on workplace violence?

**Tanya Salgado:** Absolutely, to be sure. That policy against workplace violence should include some key elements. Number one, first and foremost, the policy should prohibit any form of workplace violence. Here you can take [00:18:00] a really strong approach and say zero tolerance to any form of workplace violence. The policy should prohibit threats of any kind. Very good idea to include a prohibition of possession of weapons on company property. Distribution of company property should also be prohibited. Another element to consider would be requiring employees to report all incidents of workplace violence and provide clear instructions on that reporting mechanism.

Now, depending on the workplace, it may also be a very good idea to establish a plan. This doesn't have to be part of your policy, but it should be a documented plan for responding to workplace violence. This could include a system for documenting workplace violence incidents, defining areas of responsibility among the team, putting together a threat assessment team.This could include representatives from human resources [and] security.

 If this is unionized [00:19:00] workplace, include a representative from the union. You'll also want to have public relations involved as well as legal. As you're considering the response to workplace violence, if you've got an employee assistance program, keep them involved. That could be very important in dealing with the aftermath of an incident.

You'll also want to have a plan in place for debriefing sessions with employees and potentially outreach to families.

**Jeff Stewart:** I think those are all excellent points. Let's shift gears a little bit. We were talking negligent hiring, but there were two other claims that we said could be an issue here being negligent retention and negligent supervision.

Can you, for our listeners, describe the difference between negligent hiring and negligent retention?

**Tanya Salgado:** Sure. Negligent hiring goes into the types of things we were talking about: background checks, your interview, your reference checks and what did you know or should you have known about this applicant before you hired them.

On the other hand, [00:20:00] when we're talking about negligent retention and negligent supervision, what we're talking about is what the employer learned or should have learned during the course of employment. Again, foreseeability is an issue here. Did the employer know that there were complaints about this particular employee who then goes on to commit a violent act in the workplace? Did the supervisor witness a prior act by the employee that should have resulted in either disciplinary action, termination, or perhaps just a higher level of supervision?

**Jeff Stewart:** This is an area where if two employees get in a fight at work, many times our recommendation is fire both of them. If either remains and then would get into another fight at work and injure somebody or get into a fight with a customer and injure that person, this is where that [00:21:00] negligent retention claim comes about because we obviously knew that they were prone to fighting.

**Tanya Salgado:** That's right. Excellent example.

**Jeff Stewart:** I always say, whenever you as an employer learn about some kind of propensity for violence or potential there, that's your opportunity to speak with your attorney and really get into a deep dive as to what kind of potential liability are we facing. What kind of safeguards do we have in place to make sure nothing happens? What kind of risk is there?

I really think this is when a conversation needs to be had so that everyone understands what level of risk we're talking about here.

**Tanya Salgado:** And while we're on that point of discussing these issues with your attorney, I think this would be a good point to mention the issues surrounding the Americans with Disabilities Act.

When we're talking about supervising an employee and we're concerned about a propensity for violence, this raises some red flags under the ADA. The ADA [00:22:00] has a prohibition on regarding someone as disabled. If someone comes forward and requests an accommodation connected to a mental health diagnosis, maybe they've provided some information about that diagnosis, some employers may legitimately have concerns about whether or not that person may pose a threat of violence in the workplace, depending on the information provided. This is going to be a very delicate needle to thread. This is definitely a conversation that warrants a discussion with your attorney so that you make sure that you are fulfilling your duty of care to employees in the workplace while at the same time not jumping to unwarranted conclusions that might violate the Americans with Disabilities Act.

**Jeff Stewart:** I echo that sentiment completely. Now the last of the three claims we were talking about was negligent supervision. Can you kind of explain the difference between the negligent hiring, negligent retention, and a negligent [00:23:00] supervision claim?

**Tanya Salgado:** Negligent supervision is closely related to negligent retention. Again, it really goes to whether or not the employer failed to provide appropriate training and direction to its managers, thus giving rise to claim. Perhaps there was some information they wouldn't have warranted termination, but there's information that indicates that an employee should be more closely supervised.

**Jeff Stewart:** Many times you'll see both negligent retention and negligent supervisions in the same lawsuit, both close claim.

**Tanya Salgado:** That's right. They're very closely related.

**Jeff Stewart:** Absolutely. Now, Tanya, workplace violence is one of those, I'll say, buzzwords or buzz phrases that we've heard for years. Of course the government has an occupational safety and hazard administration known as OSHA.

Are workplace violence issues in OSHA's purview?

**Tanya Salgado:** [00:24:00] Many people may not be aware of this, but OSHA takes the position that its General Duty Clause requires employers to protect employees from incidents of workplace violence. The General Duty Clause of OSHA, that's the provision that states that employers are required to furnish employees a workplace that's free from recognized hazards that are causing or likely to cause death or serious physical harm.

Workplace violence per OSHA does trigger the general duty clause. If you're a healthcare employer, you should be aware that OSHA is moving forward in creating a workplace violence prevention standard that will strengthen protections for healthcare workers. Certainly this is an area of increasing concern in the healthcare workplace.

**Jeff Stewart:** The other area that is a potential liability for employers is if an employee, rather than coming to their supervisor, goes to OSHA and says, [00:25:00] “Hey, I'm afraid for workplace violence issues because Joe Smith is bullying me” and the employer has potential for retaliation issues against the employee who made the complaint. As you and I both know, employers are not permitted to retaliate against an employee for making a complaint to OSHA. So even though they didn't follow the company's procedure of reporting it to the company, there are protections there.

**Tanya Salgado:** That's right. OSHA does contain an anti-retaliation provision, and that protects employees who engage in protected activity. That includes raising a concern of workplace violence to OSHA, important to keep in mind.

**Jeff Stewart:** Absolutely. As you know, Tanya, you've been a guest here a number of times. I’d like to give our listeners some key takeaways from our discussion.

Do you have a key takeaway for our listeners?

**Tanya Salgado:** Sure. The key [00:26:00] takeaway that I would put forward is thorough background checks. Very, very important. Employer does need to know where the risks are, and the best way to do that is to conduct a background check.

**Jeff Stewart:** I think I would add on to that, when there are signs of potential workplace violence, even if they haven't actually become violent at that point, talk about those with your attorney. Discuss the risk, and then make an informed decision based on the specific facts at hand.

That may be, you know, you got a background check that's a little bit wonky. There may have been an issue of two employees. They didn't get into a fight, but there was some pushing or some loud arguing and you're not sure what to do. Have that conversation with your attorney so that you can decide what action to be taken to reduce your potential liability.

**Tanya Salgado:** Yes. Excellent advice.

**Jeff Stewart:** All right. With that, thank you, Tanya. I appreciate you joining us and I would thank all of our listeners for joining us here on The [00:27:00] Employment Law Counselor Podcast, where we try to make sense of the world of labor and employment law. On behalf of myself and Tanya Salgado, we thank you for listening.

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