



Season 3, Episode 5: “Building Bridges: The Art of Employee Onboarding, Part 2”

Speakers: Lee Jacobs and Rosemary Enright, Barclay Damon

[Lee Jacobs]: Hello and welcome to the Labor & Employment Podcast everyone. We’re here in season three, episode five and I’m joined with my very good colleague and friend, Rosemary Enright. Good afternoon, Rosemary.

[Rosemary Enright]: Hey, Lee, how you doing today?

[Lee]: I’m doing well and I’m thrilled to be starting and continuing part two of our last episode “Building Bridges” The Art of Employee Onboarding.” As we now get into the minutia of what actually should be done on onboarding as opposed to our last episode as we talked about the goals and the purposes of onboarding. But before we do that, as is customary, and I think it’s something that regardless, whoever hosts, takes these duties that we have, Rosemary, I think everyone should continue what Ari started. It just start every episode with the fun fact. So, Rosemary, why don’t you take it away? You start today with this episode. What’s your fun fact of the podcast episode.

[Rosemary]: Okay, well, so what I’d say is, for those of you, if you listened to part one of this, you heard me mention that I was out in L.A. and I was lucky enough to be able to go to some parties related to the Oscars. And I made a shoutout to Sterling K. Brown, well. So I just wanted to mention and it’s not... you’re all sitting there thinking, she’s name dropping, but I’m really not. I just for this one, I just have to bring up and I promise this will be the last one. Back in the day, if that’s the right saying. There was a show on television called “Northern Exposure.” And so it was, I don’t know, maybe it was in the late ’90s, Lee. I can’t remember. I should have Googled it before we started. And so it was one of my favorite shows. It was on Monday nights at 10:00, and I’d make the big bowl of popcorn and sit down because I wanted to watch it, you know, live. If you could call a television show “live.” And it takes place in the fictional town of Sicily, Alaska. And there are a bunch of quirky characters, one more lovable than the next. And... a doctor from New York City is transplanted to Sicily, Alaska, to serve as the doctor. And by doing so, all of his student loans will be forgiven. And so the whole story is this doctor, Joel Fleischman, that was the character’s name in Sicily, Alaska, with all these quirky characters. And Joel is played by Rob Morrow. Shout out to Rob Morrow, although I don’t think he’ll be listening to this. But he was at the party and I went up to him and my opening line, Lee, was, “This is a far cry from Sicily, Alaska.” And we stood and talked about favorite shows and the characters... and if any of you I’m sure it’s streaming now, but if you go out and watch it, they’re all wonderful episodes. But one of my favorites and Rob said the same thing was it’s called The Fling, and I won’t take the time now to go into it, but it’s not a fling and as one would think, it actually involves a catapult flinging things. But anyway, he was... it was a lot of fun and it was fun reminiscing about that show. And he remembered... he said to me, I said it was on Monday nights at ten. He said, my gosh, that’s right. I can’t believe you remember that. So it was a lot of fun. And John Corbett was also in was in the in that show. But it was a great show. I highly recommend that. And after having met and chatted with Rob, it’s made it even more wonderful in my mind. So that’s my that’s my fun fact for this week, hanging out with Rob Morrow from “Northern Exposure.”

[Lee]: Well, my fun fact is, while you were hobnobbing with the celebrities, I recently moved and I was hobnobbing and I apologize in advance if I should make any one’s devices turn on. I was hobnobbing

with Alexa, Google, and Siri. And I'm a little bit of a gadget geek. I love gadgets and things to make my home automated. And I finally I got a unifying device which will take all of my different electronic systems in the home. And they all now speak together. So whereas before you'd have to say, Google do this, Alexa do that, because things were the separate ecosystem. Now I have a translator. They all talk together, push a button it does everything that I want it to do. And the project for this upcoming weekend is I'm going to put up some like... they're called human presence sensors. So that way when you walk out the door and they... there's known to be no one in the apartment and in case I forget to turn something off, it will just turn everything off. And I love these little problems because they're easy and manageable, unlike so many of the problems that we have here in labor and employment. Like I find higher powers in building an IKEA dresser because you can sit down. It's just you, the instructions and the tools and nothing else and ...

[Rosemary]: And 5,000 parts!

[Lee]: ...And it's fine because the 5,000 parts are there and you're not going to be looking in file cabinets and people are finding documents years later. It's all there, right? Done and manageable and you can get it done. And that's my fun fact. I don't know if people will call it "fun" or not, but that's just some more of the quirks and idiosyncrasies of me.

[Rosemary]: Right. And what's wonderful and what I love about that is that I didn't know that the device was called a unifying device. I think we need a unifying device for every...

[Lee]: For everybody just like this, just to teach... Like we all want the same thing. We all want good and happiness and prosperity. We all say it in different ways now. That's right.

[Rosemary]: Exactly.

[Lee]: It's what was the like I forget it was a comment back in the Cold War is like we all love our children. Something to that extent, right? Yeah. We all love our kids. Let's unify around that. But I think something we can unify on is onboarding.

[Rosemary]: That's right. Absolutely. And what and the documents that we need and the notices we need to post and all that good stuff.

[Lee]: So the... we were talking in prep for this, Rosemary, you know, we're going to be there's a whole list of documents that you need to give. And we talked about in episode one that you should have a checklist, and I'm going to quickly read through this. Again, don't have to pause, you can pick up the phone, give us a call, shoot us an email. We're here to help you through this. And I believe there's also some prior alerts from the firm that are on the website that helps explain all of these. So very quickly and I'm going to Micro Machine or is that the guy with the cars back in the '80s like Micro Machine try to get the list as quick as possible so: application, job description, offer letter, W4, I9, wage acknowledgment form, EEO1, survey harassment, diversity training knowledge, and direct deposit form, uniform acknowledgment, typical agreement confidentiality, non-solicitation, non-compete, handbook acknowledgment, arbitration agreement, contract, the New York State Wage acknowledgment form, emergency contact form, and other documents. So day one we have all of these documents, these papers that we're asking our employees to fill out. Rosemary, why are we doing it? Why are we going through this hassle? How much?

[Rosemary]: It's a good question. I often wonder. Yeah, but no, you know, so. So as I we're joking saying it's a good question, but we're going through all of this because at the end of the day, as an employer, we need to provide a safe workplace for all of our employees. And a lot of these things that we're talking about here when we're... now wage acknowledgment, maybe not safe, but, you know, a safe, a productive, there are all those adjectives you can use for a workplace. And all of these things ensure that everybody is on the same page.

[Lee]: So, Rosemary. So you mentioned wage acknowledgment forms, and I think that's a good place to start off with as because I think in my mind that's from the employer's perspective, from an employment lawyer's perspective, one of the most important documents in the onboarding process from your employee is it's probably their I9, W4, direct deposit, because they want to get paid, but the wage acknowledgment form. So to set the table, where does it come from? The Wage Theft Prevention Act is a part of the labor law here in New York. It has two pieces. On day one, upon hiring or upon a change in rate of pay of your employee, you are to give them a form, and that form will set out how much they're to be paid, when they're going to be paid, how they're going to be paid, etc., etc. The failure to... and I'm going to share the screen so you can see what we're talking about in the moment. But I wanted to set the agenda for everyone as to why this is so important. The failure to have the form or the failure to have the form correctly completed—there is no partial credit. Correctly completed is a \$50 per day penalty capping at \$5,000 per employee. But what it also does is it allows the employee's lawyer, in the case of a private suit that's filed for unpaid wage and hours to get every penny of their attorney's fees paid as well. And I'll tell you an anecdotal story in a moment about that, but I'm going to share my screen. The first thing that I'm taking you to is here is here: the Department of Labor website. We're talking about the New York Department of Labor. And this is they call it the notice of pay rate. And it discusses what it is. The WTPA, as I talked about, this is where it comes from. But the first form that I want to focus on is the LS54. Every employee in the state of New York gets a form, whether they're an hourly employee or an exempt employee, a president of a business, they make a yearly salary, they get their own form and we'll talk about that in a second. Everyone gets a form and they get the form in their native language, the language that they speak. The state of New York has done the work for us. If your employee speaks these languages, giving them this form, which we're about to show you on the screen if your employee speaks Burmese, Chinese, Haitian, Italian, Korean, Polish, Russian, Spanish, Vietnamese, or Yiddish, if they speak these languages and you don't give them the form in that language, but you gave it to them in English and they signed it nonetheless, sorry, form is not correct. So LS54, What are we talking about? What does it look like? Let me share that screen. Any comments while while I bring that up, Rosemary?

[Rosemary]: Yeah, well, you know, I was going to pose a question, but while he's bringing it up, I'll pose the question and I'll answer it. So some of you ...maybe some of our listeners may be sitting there thinking, my gosh, I didn't know about this form. What do I do now? And the answer is, you give it to your people now. So I've had clients say, well, should I just start with the new hires so as not to call attention to it much, which I get it. I get, that's what you're thinking. And the answer is, no, that's not what you're going to do. All right? What you're going to do is your. Yeah, typically. But, you know, luckily, I've had clients have this at the start of the year and they're like a start of the kick off of the new year and roll out of our new handbook and blah, blah, blah. We're updating all of our records. Here's the wage notice, right? So but if it isn't, if it's May, if it's June, if it's March 20th or what? The day where we're recording this doesn't matter. You're just going to give it to your employees and they need to fill it out. And you put it, it's kept in their personnel file. All right? So just ignoring it is not going to make it make it right. And you heard Lee at the beginning of this, he said that it is... he told you about the fee, the fines, remember, for up to \$5,000 per employee. It is very much in your best interests. And is required for you to complete these forms. Go ahead, Lee.

[Lee]: So what's up on your screen is an LS54 I'm... we will also make a link to this file available on the website that posts this podcast on our firm's website. So you'll be able to find this form there as well. But I'm going to try to also explain it to you for those that are just listening to it as well, not viewing. The form has got three columns. The first column on the left-hand side discusses employee information. It asks for name, DBA, your employee ID number, physical address, mailing address and phone number. It all has to be there. I once had a class action that was sustained, meaning allowed to move forward because the phone number wasn't included on this form. The second option is when is this notice given at hiring or before a change in pay rates, allowances claimed or pay day. And there are two checkboxes. So if you're obviously if it's at hiring or a raise, it's an easy checkbox. But in that scenario where it's an employee that we didn't do this before, what do you advise your clients to do, Rosemary, when they're faced with it's not at the hiring and we've already given them a change in pay rate. What do you advise them to check?

[Rosemary]: Well, that's a good question, Lee. I'll be honest. I've not been asked that question.

[Lee]: So what I advise is I tell them to make another checkbox and just say provided, provided after hiring.

[Rosemary]: Yeah.

[Lee]: Because the goal is because the damage is done. Right. We're not going back and we're not backdating these. We can. Right. So we want to be truthful and honest about all. Yeah.

[Rosemary]: That's.. Yep. I would agree with that Lee. I would agree with that.

[Lee]: Yeah. And so, and mind you this LS 54 is just for hourly employees, if

[Rosemary]: That's the point I was going to make. Lee, I was going to say there's different forms for the different for this...

[Lee]: But this first column is the same for all forms. And then when we move to the second and third columns, it depends upon if you're paid weekly, if you're paid salary, paid by piece or by item, there's a different form and we'll touch on all of them momentarily. But here and this is hourly. The third question is the rate per hour. And this number should never drop below minimum wage. Even if your employees get a tip credit or meal credit or uniform deduction, whatever it may be, this is the rate before all deductions. So in New York state, if we are in New York City, Long Island or Westchester, it's \$16 an hour. If we are upstate, anywhere else, it's \$15 an hour. Never anything lower. Box four, line four, item four has a bunch of boxes that you have to check if you are taking tips, a tip, credit, a meal credit, a lodging credit or other type of credit or allowance. And there's even a box for "none" if there are no credits or allowances being taken. Because the point here of these forms is to make your employees, as Rosemary said, and I actually agree with, she said: the point is to make this a safe working environment. And I think your employees, knowing what they're being paid, is encompassed in making it a safe working environment for giving notice of what you're being paid. Box...I once had a class action lawsuit sustained, and a client had to pay a ton of money because he had 1,100 employees, 1,100 employees over four locations where it had tips \$5 per hour, but the checkbox was not checked.

[Rosemary]: Oh my gosh, that's crazy. Over a check box!

[Lee]: The judge in that case sustained it and it was the original. And remember, \$5,000 per employee, 1,100 employees. So handy dandy calculator, \$5.5 million was the bare minimum damages before we even got into the unpaid spread of hours and overtime that was in a... these are one of the things where your onboarding program can control whether or not you're going to win a fight that can start as late as six years later. And I note this says on this literally on the form in bold, the employee must receive the signed copy of this form. The employer must keep the original for six years. This has a six-years statute of limitations and it must be there. Before we jump into the other forms that exist, question for you, Rosemary. So the Department of Labor, while they provide you this form, it isn't a legal requirement to use this actual form. You can create your own form. Do you have thoughts one way or the other? Because I have thoughts on it both ways.

[Rosemary]: Well, to me, keep it simple. Take what New York State gave you, download it and have the employee fill it out. To me, why reinvent the wheel? That's my take on it. I see. No need to reinvent the wheel.

[Lee]: Love it. I am in the we are in 100% alignment and I take it even one step further because I've seen plaintiff's lawyers and Department of Labor auditors, they just literally look for the form. They just want to see the logo that's up on the top. So why make their job more difficult by putting it in a pretty customized form when they're just there to look at their job, they have a checklist. They just want to see the form exists that's make their job easier for them.

[Rosemary]: Yeah, exactly.

[Lee]: So other forms that exist...there's the LS 55 this is when you have an employee that works multiple jobs for you and they have different rates of pay. And so again, for those that aren't listening, that are viewing excuse me, column three, this has multiple lines now for your rate of pay and it has lines for allowances, again. It has a line for regular pay day. All forms have it for what your regular pay day is must be filled in. If you are a manual laborer, you must be paid on a weekly basis. Everyone else can be paid as otherwise. But if you're a manual laborer every single week, you must be paid. There's a box that at checked, whether it's pay is weekly, biweekly or other. And then line seven is your overtime pay rate to go back to the LS 54. For just one quick second, this is always one and a half times what's in line number three. You deduct your credits, your tip credits, your uniforms, your meals after. You don't do 15 minus five. Okay, So I'm really paying my employee \$10. So overtime is \$20 an hour. No, it's not. Overtime is 15 times one and a half. So 15 plus 7.50, 22.50 -\$5. Your overtime rate is \$17.50. But you really you have to put in \$22.50, the full rate before any credits come into play. And then the LS 55, which I've now got back up on the screen, when you've got an employee who is working two different jobs, at two different pay rates overtime is a blended fixture between the two of them. The employee doesn't get overtime on the rate that they were working hours 41, 42, 43, doesn't get overtime based upon the rate where they worked most of their time because think about it, employer can be nefarious here. They could put them, when they go into overtime rates to the... a very low hourly rate or put all of their hours, most of their hours on a low hourly rate. The law requires it to be blended. And there's a formula that thankfully is right here on the LS 54 that explains how to do your weighted overtime. And then LS 56. This is for an employee that works a fixed number of hours per week, 40 hours or fewer in a week and their rate of pay per week. Note that this form is not... cannot be used for employees in the hospitality industry except for commissioned salespeople, but it can be used for every other industry. The LS 57, this is when someone's paid on a varying hour day rate, piece rate, flat rate or other non-hourly pay rate. If you're using this form, you should be speaking with some type of expert in my opinion. This is what we're getting...you may fill our the form properly, but odds are you may be paying your employee the wrong way. At the end of the day. Do you do you have anyone that actually ever uses this form? Rosemary?

[Rosemary]: Thank heavens, no.

[Lee]: Yeah, Same here. Yeah, same here. I wouldn't want to deal with it.

[Rosemary]: And the... what I want to say as Lee is flipping through these and showing them to you don't at all be concerned. My gosh, how do I know which of these to use? The New York State has done a great job. The Department of Labor on the page where Lee first started explaining what each form is and where to find it and when you should use it, because it's a lot. If you're sitting there listening, this may sound very overwhelming to you. It really isn't. I think it's pretty straightforward.

[Lee]: And it's almost to the mindset that I advise my clients. This is part of your onboarding packet. Everything is the same except the employee's name and the employee's signature. Everything else can be filled out and done correctly. You've got hospitality, all of your servers make minimum wage, they all get the same tip credit. So you create one form, minimize error, minimize risk. And the same is true, you know, you have employees. And moving to the next one here, the LS 58, which is for prevailing rates and jobs for overtime pay rate. This is for employees that may have some type of other collective bargaining agreement or something else that may be out there. And this is one of the forms that is actually a two-page form. Again, it's on the website. And the last one is the LS 59. The LS 59 is for exempt employees. This is for your president, this is for your employees that are not being paid hourly, that are not eligible for overtime. They also receive one of these forms. I can't tell you how many times I've been in receipt of a lawsuit or a settlement demand or threat of a lawsuit from a high-level employee who had a terrible job termination, for whatever reason you want to stay. And we're fighting over whether or not there was discrimination or not. And their lawyer just comes in and says, yeah, can you show me the LS59 and I don't have an LS 59. Well, you lost. You do realize you lost your case before you even move forward. We may not win. We may win the discrimination, harassment, etc., etc. but we will lose on the LS 59. So here too, three columns, same column

on the first. The middle column is where we discuss how the employee gets paid. And the third column is the acknowledgment. I have a story about this one and this is what beat into me the importance of these forms. The very first entry, my very first entry into labor and employment. I started with an actual federal trial here in New York, in the Southern District of New York. It was whether or not an employee was eligible for overtime. It was in the hospitality industry, so it was a sous chef or a line cook. We had said he was a sous chef. As a sous chef, he's ineligible for overtime because he is a creative professional. He falls under the creative exemption, which would be filled out on this form. He said he was a line cook, a line cook under the hospitality wage order is eligible for overtime when they work more than 40 hours a week. We paid the employee \$2,000 per week. He claimed he worked 60 hours per week. Under his math, huge overtime would be allowed to him. Not going to worry about that with you all. But I was able to convince a jury after a three-day trial that he was in fact a sous chef. The overtime claims go away. My client failed to give the employee an LS 59—they did not know about ...these things existed. The judge awarded on summary judgment the failure to pay to give this this form awarded the employee \$5,000, and then a week later, his lawyer put in a fee application for \$123,000. Exactly! That that that look, Rosemary, was actually it! On motions to the judge we got to cut down to \$83,000. But in that case. We may have won the trial, won the issue, won the lawsuit, but my client lost. They lost because they had to pay everyone, and no matter how good of a job I did, the client lost this fight six years before when they first hired this employee because they didn't give the right form, which is in the right form. Let us help you give the right.

[Rosemary]: That's right. Let's just say. Which is precisely why we're going through all of this. You're like, my gosh, this is a this episode's on, you know, and the onboarding and the required documents and that we can't you know, what about all the other documents? We'll touch on those. But of everything, I mean, they're all important. But boy, this one I mean, you just heard Lee give you two examples of situations in which the client I mean, they thought they did the right thing and Lee wins and they still end up \$83,000 plus \$5,000 to the former employee. That just kills you. And it's completely avoidable. A form on the DOL website. And actually, you should download them and you got a bunch of them in your office, and it just goes right in the onboarding packet. "Oh, all right, here's an exempt employee. They get this form."

[Lee]: So that's a wrap on our conversation regarding wage acknowledgment forms as it relates to the onboarding process. So, whether you're using an LS 54 for an hourly employee, an LS 55 for an hourly employee with multiple rates, or an LS 59 for an exempt employee who earns a salary, or any of the other forms that may be there for wage acknowledgment purposes, the failure to use them is serious. It's a \$50 per day penalty as we discussed, capping at \$5,000 per employee. And under certain circumstances, that penalty could double or even triple. So, make sure to include as part of your onboarding packet a properly filled out LS 50 whatever form. And Rosemary and I are standing by to help you. Anyone here at the Berkeley Damon team is standing by to help you create and perfect your onboarding packet to make sure that you dot all your i's, cross all your t's, and have all of the required information so you literally start off with your employees on the right foot, on day one, every time. Stay tuned for part three as we continue our discussion of onboarding. And remember, we're always here. We love to hear from you. We love your feedback. And to that end, our Spotify question for this episode is: "Do you currently use wage acknowledgment forms? Yes, or no?" We look forward to our next episode and talking to you then. Be well, everyone.

[Ari]: The Labor & Employment Podcast is available on barclaydamon.com, YouTube, and all your favorite podcast streaming platforms. Like, follow, share, and continue to listen. Thanks.

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