



Season 3, Episode 6: “Building Bridges: The Art of Employee Onboarding, Part 3”

Speakers: Lee Jacobs and Rosemary Enright, Barclay Damon

[Lee Jacobs]: Hello, and welcome to episode six of season three of the Labor & Employment Podcast. My name is Lee Jacobs, and it’s my pleasure to, as always, be joined with my colleague Rosemary Enright. Good morning. Good afternoon, and good evening, Rosemary. How are you?

[Rosemary Enright]: I am great! And I’m broadcasting live from Studio B, once again, in Buffalo, New York.

[Lee]: And I’m down here in New York City, and the Radio City Music Hall right across the street from the Rainbow Room and all the other good stuff at NBC.

[Rosemary]: See, I gotta come and hang with you in New York, Lee.

[Lee]: You should. You should. Though I am going to be coming up to Buffalo, I think in the next two weeks or so. So maybe we should record in person. We’ll have to talk offline.

[Rosemary]: Oh, that’s a great idea.

[Lee]: But this is part three of “Building Bridges: The Art of Employee Onboarding.” Excuse me. If you’ve made it this far, and you’ve listened to episode one and episode two, you’ll see that Rosemary and I went on so many tangents and gave more information and were interrupted by not one but two fire alarms here in New York City. So, we’ve broken the episode up into three, um, three parts. And as customary, I think, even though we’re going a little out of order, some fun facts. So, my fun fact for this episode is as follows. You’ll hear that I’ve talked about over the different episodes that the practice of law is open book. And you’ve heard me say, I tell my students this. My fun fact is this year marks a year 17 of me being an adjunct professor at Brooklyn Law School. My life has changed in so many ways over the last 17 years. People have come in and out and back and into my life, and I’ve changed in so many ways. But one of the guiding constants has been my work at Brooklyn Law School and with younger lawyers. I love it, and I truly do believe the practice of law is open book and young lawyers are shaped by older lawyers. And I truly do want to pay it forward to every young lawyer that I come into contact with.

[Rosemary]: Wow. I’m just going to sound so shallow now!

[Lee]: No. No, no, no, no, no, no, no. I like this fact. This is good.

[Rosemary]: No, no. And I just want to say, I think that, I think that’s great. So. So, you know, I teed it up a little bit, saying that I’m here in Studio B, so in Buffalo. So, my fun fact is, as you might expect, I’m a Buffalo Bills fan and a diehard Buffalo Bills fan. I’ve watched them my whole life. I lived through the four losses. Yes, the four losses. Never get over that, and no, for all of you sitting there listening, the window has not closed. Despite what everybody’s saying, the window has not closed. But actually, the real fun fact is, as you may or may not know, Lee, they’re building a new stadium. So, the stadium where the Bills play has been there, I don’t know, maybe from the ’60s or ’70s. And quite frankly, I love it. It’s one of the old school stadiums and it’s outdoors—completely. There is no covering at all. So we’re hardy folk here in Buffalo. So, this Friday, I will

be going to. . . They've set up. . . You know how they have model homes. You know, that you go through when you're looking at a place, or model apartments, or condos? They have got like a, I don't know what they're calling it now, but there is a place that we go and they have a model of the stadium. Obviously not a huge like an apartment or house, but they've built a whole model and they've got all video and 3D and everything. And so, we go and pick our seats, because I'm a season ticket holder. So, I'll be doing that this Friday, and we have to buy a seat license. So, it's a thing now that a lot of the teams are doing, Lee. So, you buy a seat license, and that license then gives you the right to buy tickets. So, the license isn't the tickets, it's actually the right to buy the tickets, and then you got to buy the tickets.

[Lee]: They get you coming and going. Don't they?

[Rosemary]: Exactly right. But I just love that I'm going to see this model of. . . And the company who is designing it I think is the same company who might have designed the stadiums like SoFi out in LA and the one in Vegas and that. So. . . And it's still going to be open air. There's going to be partial coverings.

[Lee]: I want to hear back about the . . . if you still need to in bring in a volunteer. . . Or they get paid, right? To shovel the snow out?

[Rosemary]: That's right. Yeah. They get paid \$20 an hour to shovel snow. That's right.

[Lee]: Well, listeners, please enjoy the continuation of this episode. And as always, if there are any questions or concerns, please reach out to us. We're here to help and you'll hear the message that is contained so often through what we talk about: "An ounce of prevention is worth everything." Please, let us help you. So, enjoy!

[Lee]: Coming back to the themes from the . . . what we talked about in the prior episode, that's why it's important in my mind to have the same people do the onboarding. So, the same processes and therefore the same mistakes happen. And therefore, so when you have to catch them every couple six months or so, I would say at least you do an audit of these processes, a spot check, so you can fix them. And I and I know may not be the... you're not going to fix the problem, but you can stop the bleeding. And I know that's not necessarily a good phrase, but we want to stop the bleeding here.

[Rosemary]: Yeah, exactly.

[Lee]: On this case, on these issues. So, anything else about the wage acknowledgment form before we move on to another one of the micro machine lists that I read on?

[Rosemary]: No, no, I think I think I think everybody gets our point on that one. But it was so importantly for us to take the time to talk about that, I think.

[Lee]: I think I do, too. So, job applications and again we could do a whole episode on job applications

[Rosemary]: and we will and we will.

[Lee]: So, Rosemary, job applications, you know, we can do a whole episode just on them. But before we talk about the specifics, do you advise clients to use applications even in the first instance?

[Rosemary]: You know, I've never had anybody ask me that question. But if someone did, my answer would be yes, I would have them use job applications. And you may ask why. And I think in our previous episode, I talked about it, Lee, in which we had a discrimination charge, and the EEOC came in and said, show us your job applications. All right, we want to see for the past. And I can't remember, you know, the record-keeping requirements for that. I think it might be a year, Lee, don't quote listeners don't quote me on that, but I'm pretty sure it's a yeah ...

[Lee]: I think you're right again no quote but I think you're right

[Rosemary]: I think yeah I think it's a year and so they said show us your job applications that you have received so I'm not talking the application form you use although I'll talk about that in a minute. And they didn't have any. And the EEOC, of course, said, okay, well you, you're supposed to keep them for a year. And we, we lost our discrimination charge because we, we took the position that we were interviewing individuals from all different backgrounds and... but we couldn't prove it. And the complainant said, no, they don't. In fact, when applications from certain types of individuals are brought in, they just throw it in the garbage, which was not true. But we could not... there was no way to defend against the claim, because we didn't have the applications. So again, when I'm thinking about down the line, it's not a problem now, but you know, it's not a problem until it becomes a problem. Exactly. So that and then the other thing I was going to say is what we are getting more and more of and I don't know if you are is with the discrimination charges from the EEOC in particular every time they are now asking in their request for information as part of the standard process, provide us with a copy of your current job application. And so you know, I want I want my clients to have that information, you know, to be able to be able to respond and to show that we made a decision based on, you know, the qualifications and the skills and the experience of this person and nothing else.

[Lee]: Completely. Again, once again, Rosemary, in full alignment, I first I... the practice of law is open book, I googled it and I verified went to the EEOC. You are correct one year and so I feel a record to keep your requirement is one year. But when I have you know in the hospitality industry, I have a small coffee shop ask me, I've got six employees. Why on earth do I need an employee application? Like, what's the point? And the point of it is, as I think you put it best, is, is that when you're faced with the discrimination and harassment, whatever lawsuit you may have, this proves what you knew about the employee on day zero. And without that, it's going to be a much harder fight for you to win. And. And what... So if you do using an application, which we think you should, the application tells us what we knew of the employee on day zero. And it helps us defeat claims of wrongful treatment or whatever may happen in the future. But what I find then is what happens is, is that you have this competing force, is then clients, business owners. Okay, I need to use an application. I'm just going to Google and I'm going to download an application from

[Rosemary]: Ugh!

[Lee]: Exactly! Download an application from the Internet. Why is that a bad thing? And Rosemary, why does that why did that make you have that visceral reaction?

[Rosemary]: I'm sorry about that, Lee. Isn't that funny that I reacted that way?

[Lee]: Exactly. I had the same one I led you to where I wanted you to go.

[Rosemary]: Oh is that what it was. Now, is that what was it that was so big for the very reason? Well, you know, it was the some of the items that we talked about in our previous podcast. All right. You've got some random job application out there that has a whole series of questions or requests for information that we shouldn't be asking about. And quite frankly, you don't want to know about. All right. You don't want to know about I don't want to know the age of someone. I don't want to know when they graduated from high school. I don't want to know if they've been... have a prior criminal conviction. I don't want to know their previous rates of pay. I don't want to know any of that. And all of that should be irrelevant in the hiring decision. Right. And so you want to make sure that you have an application that, first of all, reflects the information you truly need. Right. So because everybody's different, that six-person coffee shop, Lee, is going to be looking for something or needing something very different than, for example, our law firm, or Oracle, I talked about Oracle the last time, right? So it should be specific to your organization and you need to make sure it is compliant with state, federal, and local laws. And what I ...the reason I point to local is, you know, ban the box, which is the question on the application as to whether you have been convicted or you have a prior criminal conviction is not statewide yet. It will be, I'm sure, but it is on the local level. So I sit in Buffalo and so ban the box, that's

what it's called is in effect in Buffalo. So companies in Buffalo can't have it on there. But if you go outside the... Buffalo proper and go into any of the suburbs, it's permissible out there. Now, of course, we advise all of our clients to remove it, but still. So it's local, state, and federal law. You want to make sure your application is compliant with that and is specific to your organization, and downloading some generic form is not going to get you there.

[Lee]: And you will lose a lawsuit on day zero. Yeah, because if that application asks for you know, prior wage history, asks for age, asks for this, and someone applies and they are an older person and it is... they... there's no need for it. You're may lose the fight on day zero. Next one: job descriptions, offer letters. Do you do you think they're one necessary? And if two, how do you how do you how do you advise clients to go forward in creating them?

[Rosemary]: Yeah. So the same thing. Don't go out and Google sous chef and the job description and download it. Do not do that. All right. Again, you can do it and start with that.

[Lee]: Exactly.

[Rosemary]: But again, it should reflect the actual duties and responsibilities of the individual in the job. And Lee and I could talk about job descriptions for multiple episodes. So from my perspective, absolutely necessary. All right. It is how we are going to evaluate someone. That's how we train someone. It's how... if someone needs an accommodation, it is how we then can make the determination, is this an essential function or not, and how might we accommodate that? So, there's a whole host of reasons. You want a job description again? Go ahead.

[Lee]: And do want that...you want the employer to sign it, too?

[Rosemary]: You know what's interesting is I so I can go either way on this generally. Generally, what I'd say is I'd prefer that it's signed and dated because again, then I've you know, I can say that we sat with this individual and that we reviewed the essential functions of the job. They fully, you know, understood the expectations and they indicated they could perform all of these functions. So but so I would prefer it. But, you know, if you haven't done that, I'm not going to lose sleep over it. And so you've got to go back... unlike the wage notice

[Lee]: Exactly...

[Rosemary]: ... this went through and we said you got to go back with this. You don't have to. I wouldn't say you have to go back. You may disagree, Lee.

[Lee]: So I think I think you've got it. Again, one of those things where you had to take an internal look at your at your business and your job force. I think Oracle, maybe I could be wrong. Not necessarily. They probably required you to sign it because it was a business process. But I think everyone knows what eight or I would assume everyone knows but a systems computer programmer, blah, blah, blah does, right. But in you know, I'm thinking of some of my clients, that six-person coffee shop, the porter who is the person who cleans the back of the house, may... a porter could be different from one spot to another and then there is with the we were just had a partner retreat we had a generational divide in differences session and generation alpha, the newest generation. They will speak up for themselves as they should and make sure their rights aren't trampled over and they will say, and I've been hearing this in my hospitality places because you can hire people as young as 15, 16 depending upon what you do and the time of year that are saying, this isn't in my job description. You can't ask me to do this. So I advise clients to say that and consistent...so like porter and being asked to do things consistent with what porter would do. So you get a catchall, because employees think, especially the younger ones. I have a document that says this is what I'm supposed to do, what I'm going to do, nothing more, nothing less than that. So yeah, I think job descriptions are super important. Yeah. When think about offer letters. Sorry, Rosemary. Yeah.

[Rosemary]: No, I was going to say offer letters because I know you want to talk about that. I know. Yeah.

[Lee]: What do you think about offer letters? Do you think they do you think they're important or required?

[Rosemary]: You know, so required. You know, New York State and fed don't really care about it. But I do like a simple conditional offer of employment. And the key there is, you know, that it's a conditional offer and it may be based on a variety of things. You know, maybe it's a, you know, reference checks, ability to present documentation showing you are permitted to work in the United States. They all should quite frankly, be conditional based on that. So and but you don't want to include everything, including the kitchen sink in that conditional offer letter. It's a high level. Here's your job title, here's your start date, here's your starting rate of pay. You know, and there's a few other things. I don't have to go through them all. But yeah, and I would have them sign that. So, you know, it's signed by whoever signs the offer letters. The HR person, the CEO, and then ask them to return it with a signature and a date. So I'm good with those.

[Lee]: I advise and I like to think of it in the sense of the documents that are required for people is almost an inverted pyramid over your pyramid of your structure. So those at the top get more documents than those that are at the bottom of your organizational structure. So everybody, everybody, no matter where you are from top to bottom, gets the I-4, the W-9, the wage acknowledgment form, your handbook, acknowledgments, note everything we're going to talk about. Then as you move up the chain, then in my mind we're thinking, okay, everyone gets a job description. Does the porter in the back of the house of a six-person coffee shop need an offer letter?

[Rosemary]: Probably. No, not.

[Lee]: Probably not. Does a mid-level employee in a large business require an offer letter? Probably, yes. Right. You got to think about it as you move on and then as you move up the category. And now moving to some other documents, Rosemary, you know, we're talking about everyone gets a handbook, obviously... about confidentiality, non-solicitation, non-compete agreements. What are your thoughts on those? Do you like giving those out in generalities to employees?

[Rosemary]: No. Well, because you use the word generalities. Right. So, yeah. So no. So the use of those, what we refer to them as collectively as restrictive covenants. So those have got to be specific to the job. Right. And so, you know, there's the famous case that everybody knows about was it Jimmy John's? That they had the individuals who were making the sandwiches had them sign non-competes that they could not go and work.

[Lee]: I think you're right. I'm going to check that as you continue on,

[Rosemary]: Because I'm pretty sure it was Jimmy John's. All right So clearly and if an individual who works at Jimmy John's...

[Lee]: As usual, you're right.

[Rosemary]: Yeah. Thanks. And Subway, you know, a non-compete doesn't work there. All right. And quite frankly, neither would a non-solicitation. Now, might confidentiality, even that's a bit of a stretch, but if there's some secret sauce, at Subway or Jimmy John's and you don't want people to share that. You have the Anchor Bar here in Buffalo with the secret sauce that they use, maybe something around that. But you know, as a general premise, I'd say no, I do not say that when people come in, I'm going to hand them these three documents that they have to sign. It's got to be far more individualized. And it depends on the industry and what they do. Like you said, your porter in the back of the house, you know,

[Lee]: Doesn't need it. And I agree with you fully on this and that leads to, you know, my last question in this, in the general documents, as we're moving higher up the pyramid. Contractual employees. Who in your opinion should actually receive an employment agreement or contract as opposed to just the slew of other

documents that we give them when they start in their employment? I know it's a loaded question and I'm curious to see where you go.

[Rosemary]: I was just going to say, and that's literally what I was going to say. That's a loaded question, Lee. Wow. So here's what I'd say. If so if we're talking about it, contractual, so giving. So I would say as an easy answer, a quick answer. My C-suite. All right. So my C-suite, I'm going to have a contract for them because there is probably a severance in there somewhere. You know, and, there may be arbitration. I mean, there's a whole slew of things that would be that would be specific to an individual at that level. So I think, you know. Well, I say and what... that game show final answer, I don't know that's my final answer, but that would be my initial answer. And if you all can't tell, he and I, we make a point of not like rehearsing these so that you can see, as I'll say, well, I got to think about that and I'll do the same to him. So anyway, you go ahead. What's your answer...

[Lee]: I love for everyone to see how the sausage is made in many respects and the and... I tell my students of Brooklyn Law that the practice of law is open book. You know it's you want your lawyers to be thoughtful think about things and not come to a rote answer the way that it's supposed to be every time. And that's why people hate us sometimes, because the answer is always depends, you know. So for me, when I get my clients come to me, I wanted employment contracts for all my employees and I say no. And they say and they said, well, I want an employment contract. And I say again, no. They say I want an employment contract. Then convince me. Tell me why you need an employment contract for someone. Because as we spoke about this in the last episode, as it were two episodes ago, as a reminder, everyone's presumed to be at will. You owe them nothing. They owe you nothing. There is no requirement to give someone two weeks' notice, to give severance, etc. etc. So why give your porter a contract and now you owe them something more than just the... a termination that is lawful. Meaning you didn't do it for bad reason. Don't do more. But I agree with you, C-suite, regardless of your organization, when you're at the top of your pyramid, no matter what kind of business it is, those are the ones that I will say yes. Anyone below that, you've got to convince me. You got to convince me because you... it's got to be the right business decision. You don't want to be giving away more than you need to your employees.

[Rosemary]: Exactly. And you know, and keep in mind, you can always I've had some employers who have said, let's... I want to give them an agreement because the employee wants one, Lee. Right. Because somehow they feel, you know, I want some sort of something in writing more than just an offer. And so I have drafted employment contracts. I use that word loosely, in which it states that the relationship remains at will and so and all that basically all the contract is doing is memorializing more terms and conditions of employment than what would typically be in a conditional offer letter. You know,

[Lee]: I think that that's a workable thing and a good idea. And for our international listeners, you know always as what's different between America and a lot of other countries that our clients work from, employees are presumed at will and that is whether or not you... on a personal side think that's a good or a bad thing. That's the foundation of our employment relationship here in the country, and you never want to change that. Period. Hard stop. Okay. So, Rosemary, I'm going to go very quickly through some hospitality stuff.

[Rosemary]: Great.

[Lee]: So that is also required on onboarding day one. So very first tips, tips, tips. When you are a restaurant and bar and you receive tips, you are holding those tips on behalf of your employees. They are not yours. Point one. Point two—and I'm going to use New York upstate numbers, outside of New York City because the math is easier. Minimum wage is \$15 an hour with a tip credit for \$5 an hour for an effective rate of \$10 an hour. You do not pay your employees \$10 an hour. You pay your employees \$15 an hour with a \$5 tip credit for an effective rate of \$10 an hour. And you are allowed to do this. Take a tip credit of \$5 an hour when your employees are tipped, when they make more than five... at least or more than \$5 an hour in tips over the course of their shift. So if they make enough tips to bring them back above \$15 an hour minimum wage for the entirety of the shift, you can pay them \$10 an hour. If you don't... if they don't make it enough in tips, you have to bring them back up to \$15 an hour. In ...a requirement in order for you to be able to do this to

pay your employees ten versus \$15 an hour is you must have a tip-sharing agreement. And that tip-sharing or tip-pooling agreement must be in writing. Identify where the money coming into the tip pool goes... when injections of cash come in, when they get ejected out where it goes and 5% year, 10%, year 12% or whatever it may be. That's important and required from the onboarding perspective. There are other things that are required for tipping, about tip pool requirements, recordkeeping requirements that we won't touch here because that can be a whole episode on its own. But note that you have to give the tip-sharing, tip-pooling agreement on day one or you cannot take the tip credit. Hard stop.

[Rosemary]: So, Lee, let me just ask just like everybody, you know, our listeners, they can go out on the Department of Labor website and they can download the notice of pay rate form that we went through. So what about this tip, you know, sharing your tip-pooling agreement. Now, what did they get it? What are they?

[Lee]: So these are two... there's two places generally where I've seen people get them. It's either word of mouth. That this was I ...this was the form that I used when I was an employee or before I bought this business or this was the form my father used or whatever it may be, and they could be right or wrong, you know. And where I've seen them be wrong is you include people in the tip pool who shouldn't be there, like managers, supervisors, back of house people, or they get it from us. They get it from me, they get it from other industry professional tools that know how it works. And I think you said it earlier, Rosemary, there is absolutely no need to reinvent the wheel. There is people in... tipping in New York has been happening since forever and these forms and templates exist. Just find the one that exists that works right for your business, and we can help you work it out and make it the right way. Okay. Uniform acknowledgments. So this is not necessarily hospitality, but it can be anywhere where someone is given uniforms or equipment or things of the business. If you are giving your employees things that are yours that you expect them to keep in good condition and to give back to you at the end of employment, you have to give them an acknowledgment form that they've received it. They understand that it is not theirs. They're going to keep it in good care and return it at the end of their employment. And the... that's really it when it comes to hospitality. There are two other topics that I want to talk about for paperwork and then move into New York City based things. The first is a direct deposit form. We had talked about that anecdotally before. Rosemary, do you like direct deposit forms? Do you do you think they're a good thing or a bad thing?

[Rosemary]: So. Well, you know, a direct deposit form. In other words, I've got to fill it out to save this information. Yeah, I'm being literal there and busting is chops. But, but I'm good with that. I'm good with that. But what? What a lot of people don't realize. Listen up here. If you're out walking the dog and you know you're not totally engaged: New York State does not permit employers to mandate direct deposit. So yes, you heard that right. So I can't tell you how many new employers I start working with and I get their employee handbook and it says right in there, direct deposit is required. Okay. It's a violation of the New York laws. All right. They have to be given the option. All right. You can recommend it. You can encourage it, if you want to. Can not require it. So do not require direct deposit. And one of the things that Lee and I were talking about with this, besides the fact that you need to comply with New York's laws is, if you're doing direct deposit, then your people aren't seeing what they're being paid. And just like... in our last episode, Lee made reference to the Wage Theft Protection Act, which requires that notice of pay, right, which we just talked about. It also requires that your employees get a wage notice and it's prescribed what goes on that notice. Now, a lot of probably our listeners work with ADP and different payroll companies. They know what New York State requires. But the point is, if you're doing direct deposit, your people may not even be looking at it. And so if there are errors on there, you know, there was a deduction taken erroneously, you know, or they're short paid or, you know, one of your manual workers, the punch wasn't right or something? And now they're short paid now and then they find out X number of months down the line. It just opens a whole can of worms and creates headaches where you don't need them. Again, I'm not saying you shouldn't do direct deposit, but it just it's a consideration.

[Lee]: Where I've seen where I've seen the wheels going off the card in this scenario is two is in two places. The first is, you know, you have a population of employees that don't have computers, don't have iPhones. Right. And now you're mandating them to use direct deposit or highly suggested or whatever the word you want to use. And you know that they can't access it because they don't have computers. And the law requires

you to give a pay stub, the wage notice with every payment. I once had a cause of action. It wasn't sustained, but it was a cause of action that was brought that said you knew you weren't... these people weren't getting their paystubs, so you should have printed them out and give it to them. So I tell people now as part of their processes, if you have ADP, you have paychecks, you have the big payroll companies, they can run an audit and see who has actually logged in and gotten their paystubs. I can see a nefarious plaintiff's attorney making an argument saying you should have known better. The law requires you to give a pay stub. So give the pay stub. And the other thing I would say to Rosemary is, is I'd be even a bit more explicit is what you say is that you cannot fire someone because they want to use direct deposit. You can do not you cannot deny employment because... revoke an offer because they don't want to use direct deposit. And this is the same true here in New York City is a little bit of aside. That's why we have cashless bans, restaurants and bars and stores must accept cash. The state has a large population of people who are underbanked, don't have banks, don't have banking accounts, don't have checking accounts. And so if you're forcing someone who doesn't have a checking account to do direct deposit, how are they getting paid? Then you're going to say to yourself, well, Lee, if you don't have a checking account, then how are they getting paid anyways? They go to cash... check cashing stores. That's how they get those checks cashed. To mandate someone to use direct deposit means they have a bank. And that's a problem in New York. Not everyone has a bank.

[Rosemary]: What did you call it? What did you say? They call it New York City cash. What did you say?

[Lee]: Cashless ban.

[Rosemary]: Wow. Interesting. I will admit I did not know about that.

[Lee]: You cannot if you walk into a restaurant, a bar, or a grocery store, a place of essential services. Yeah. You cannot demand credit card only. And if you and if you are a cashless store, you have to said I have a number of clients, you set up an ATM and think of like a laundromat kind of okay yeah. Where you can load cash into the system and then you get a card where you can deduct values from it. And there are there are good business reasons for it and you got it. Any city where you are late at night dropping off cash, No employer wants that,

[Rosemary]: Right? Yeah. Interesting. Okay.

[Lee]: So and then New York City has a form that I want to tell you all about. It's called the New York City Commuter Benefits Form. I think this is a great thing that should be put everywhere. New York City mandates employers to give their employees the option to take out of their paychecks, pretax money to pay for commuting, commuter MetroCards, accessory tolls, bus fare, ferry fares, public transportation, you can pay for it ahead of time and pay for it tax-free. And you're mandated to give this form to your employees on day one. When they get onboarded.

[Rosemary]: Well, that's interesting. That's great. I agree with you.

[Lee]: It's a good thing.

[Rosemary]: All right. So just so Lee, I think it might be helpful. Just do a day one. These documents because you just said that's day one. So just with our list, just tell them day one, this is what you must do.

[Lee]: Day one, I believe if you if there is a job description and you want an acknowledgment for it, you're acknowledging the job description. If there's an offer letter. You want them to acknowledge the offer letter. W-4 taxes, I-9, immigration, New York State wage acknowledgment form, New York City if we're in New York City, commuter benefits form, direct deposit form if you're using it. In the hospitality industry, uniform acknowledgments, tip-pool agreements if you're using them. Confidentiality, non-solicitation, non-compete agreements, handbooks and acknowledgment that you received your handbook. And then that's day one. And

if you're over 100 employees, day one is also the EEO1 self-identification survey form, where we're asking the employees to identify their racial background and makeup for the or the government...

[Rosemary]: ...which is voluntary.

[Lee]: Which is, voluntary to everybody. And then day two and after you know is can be... we're removed you know... we haven't spoken about it but day two and after is where they're getting the training and you're getting acknowledgment of training and particularly in New York state sexual harassment training. Yeah that happened and it and it's there and the certificate goes in their file.

[Rosemary]: Yeah exactly. And then and then, Lee, I think the next thing I don't know where we are. How much time do we have left, Lee?

[Lee]: It's been for... dear viewers, we've had... listeners, we've had two fire alarms go off here in New York City. So I'm not sure the actual time. What I... we have some other topics to talk about, I...

[Rosemary]: I mean, that's what I mean. That's right. Because I wanted to hit on just quickly like these notices because...

[Lee]: I think, you know, because I think we can go through them. I think what we should do is we'll go through them quickly and we can make the notices available on the website. Okay. I think yeah, I think that's a great idea.

[Rosemary]: So, so Lee let's I'll, put you on but I'll put you on the spot.

[Lee]: Please!

[Rosemary]: So the first one, so you all know I've got my, our list here so we don't forget anything. The New York State requires that now on day one, you give notice to your employees of your lactation accommodation policy. Now, do you really have to give that to everybody, Lee? I mean, you've got in a person, let's well, I'll just say someone who self-identifies as male. Does he care about lactation accommodation? Are we required to give it to him?

[Lee]: So the answer to the question is, I don't care the reasons, but yes, you give it to everybody. I can give it for ...from an administrative/auditing place. You know, you onboard every employee the same way. So if the same mistakes happen, we can fix the same mistakes. And then as we move to this particular employee, you're sitting across from an employee who may self-identify as a man, but you don't know what can or cannot happen in the future. He needs those rights. And more importantly, what if this employee becomes a manager or a supervisor in the future? They also need to know this information because they will then be tasked with making sure that employees, maybe years later, after they've been onboarding on day one, now needs these notices and these rights. Because so many things in the employment practices realm, it's on you as the employer, the supervisor, the manager to listen for the magic words, not for the employee to come to you and say, hey, I need this. So yes, give it to everybody. But no reason. Not exactly.

[Rosemary]: And so, you know, I'll have, you know, employers ask me, they'll say, well, isn't it enough to ...if I just hand them the handbook and it's all in there, why do I have to give them? And we'll talk about some of the other notices that you've that you actually have to present on day one or day two. So. So what do you think, Lee? What's your answer to that question? Why is it... why do we have to actually hand them certain notices and can't just give them the handbook?

[Lee]: Well, one is because the law requires it. The law explicitly says that you must give these things. And, you know, we make... and I advise one, it's in the handbook, two the notice is also there and then there's an

acknowledgment that says you read the handbook and then on the bottom of the handbook, acknowledgment, it says, I also received the following notices. So from a bare reason, it's: you are required to give the notices by law. But I think as a practical reason, there is no requirement to have a handbook in New York State. So New York is a very employee-friendly state. It just is. So for those employers who don't give a handbook, here is how the state is saying these are the important things we want our employees to know about.

[Rosemary]: That's a that's a brilliant answer. I love that answer, Lee. And the other thing that is kind of lesser, but I'd add in there is, you know, you hand somebody, an employee, a handbook that's 50 pages long, are they going to sit there and read it? Let's just be honest. No, no. And so, so precisely. So by handing this to them and it's short and sweet lays it out, you know that they understand...

[Lee]: And that they will then and then I think also the last point is then you're thinking now from the mindset of an auditor or investigator. They want to see the form make the job easier for them. The form looks a certain way. I see the form, it looks that way. Done. Next, move on to the next thing.

[Rosemary]: You know. And Lee just hit on a great point there with the auditor, because you may think, my employees are all happy. No one's going to go the Department of Labor and complain but realized the Department of Labor also, you know, I don't know how it does it I always do this motion, Lee, I don't know why but you know there's some random number generator is going to throw out a number and guess what today Barclay Damon gets picked for just a random audit and they're going to come in and they're going to go through and again, they're looking for all of these things to make it easy for them and don't make it hard on yourself because this is all so easy to do.

[Lee]: You know, I agree. And then and also, just as a clarification here, what we were talking about before in the prior section are forms that your employees need to fill out. Right. And return to you.

[Rosemary]: Good point.

[Lee]: You're we're talking about notices that you just get they don't have to do anything, but you just give them to your employee other than sign the acknowledgment.

[Rosemary]: Lee, correct. Exactly. Yeah, exactly. So that's a great thank you for making that clarifying. You're right. Everything else they're filling out, this one we're giving them. We're giving them notice. And you know, what about background checks? All right, if an employer does background checks and he noticed that that we need to be giving.

[Lee]: Yeah, I think we need to start from the job posting that says a job, a background will be part of the application process. If there's a conditional offer letter, if you're doing a background check, there needs to be a conditional offer letter. Excuse me, that says that you've passed that that says you must pass a background check and then once you passed, the background check comes back, there are certain things you must do or not do. So I'm going to ask a question to answer you this question here, Rosemary, are we talking about criminal background checks? Are we talking about credit background checks? What kind of background are we jumping to?

[Rosemary]: I'd say both. Yeah, both.

[Lee]: So in both instances, if you're doing a credit check, you need to give a Fair Credit Reporting Act notice to your employee. If you are doing a background check for criminal interactions with the criminal justice system. This is everywhere from arrests through "I've been in jail, served my time and...all the ways through the end. You and you must give them a notice. Pursuant to New York State's correction law, Article 23A. I get into this debate internally with my clients. Why are you doing a background check? Why? Because there are so many hurdles we need to jump through in order to... if we want to do it, what's the point? Right. Are you really going to not hire someone because he got a drunken intoxication and he urinated outdoors when he was in college.

Are you really not going to hire him for that? You want to go through this whole rigamarole all for this? I try to focus in on the job description and the job and then what would be the disqualifying things before having a blanket background check policy. But again, every industry is different.

[Rosemary]: So I was going to say that's exactly right. I was going to say, you know, you've got, you know, the I guess you'd call it the health care industry. I work with a lot of employers who have home health care aides and, you know, PCAs. And so there are requirements there. I work with several schools, obviously, requirements there.

[Lee]: Bus drivers, transportation companies. There are requirements, but absolutely. But like, if you're and a line worker in a factory, a porter in a restaurant, a salesperson in a store, what for? What's the point?

[Rosemary]: Why open the door? Why open the door here?

[Lee]: Yeah, exactly. Exactly. So go ahead. And as I said, though, the whole point of this, the public policy is that New York firmly believes people are due a second chance. And that comes to the New York City, which is even expanded even further on this background checks as it relates to criminal histories, that it's called the Second Chance Act here in New York. Mayor Adams made it a big part of it, saying that if you've been convicted and you served your time, if unless there is a direct link to your criminal activity, to your job, you should continue to have your job or you should not be turned away from your job because everyone deserves a second chance. And if the background check comes back negative or bad and you don't want to hire or you want to now fire your current employee who has just been arrested for a domestic violence situation, you then need to give to that employee—I've had this happen, an example a reasoning as to why their DV arrest disqualifies them from continuing to be a bartender. Now can you link the two?

[Rosemary]: Yeah, well, that's right. It makes sense, you know.

[Lee]: It does it really. And more New York City nuance. But back to you at with the list Rosemary.

[Rosemary]: Yeah, yeah. Well, and the interest, I don't know because again listeners, we had to stop because of two fire drills so I'm not sure on the timing here. So I don't know that we want to talk in great deal about everyone outlet Lee, go through the list but I just want to talk about one quickly. A notice in particular, the electronic monitoring, Lee.

[Lee]: Yes, yes, please do. Yeah.

[Rosemary]: And so if what I say to clients is if you think at any point you are going to be monitoring your employee's email, or you might go into someone's email or their voicemail or you distribute phones. All right. You give them cell phones. All right. And you might be monitoring their cell phone usage. So anything electronic. So you need to provide those employees with an electronic monitoring notice. And again, New York has made that very simple. Also, we have it. We can flip it to you in a second, it's very short and sweet. But on day one, you need to hand the employee the electronic monitoring notice. It's one or two sentences and it says you should basically be aware that we will or we do monitor and it lists, I keep hitting the mic, sorry. And it lists everything. And they sign off on that. That is for every single new hire. All right. And I can't tell you how many clients when something comes up and they say, all right, well, we want to go in and look at this employee's email. I asked them, all right, have you given them the electronic monitoring notice? No, I don't know what that is. All right. Well, you know what...I do have the saying that there's no expectation of privacy. I get that. But you don't have the electronic monitoring notice. I'm not saying you can't look, you can't check. But you're in violation of the law. You've got to give them a notice. So all your new hires get that on day one. What about if you're sitting there thinking, my gosh, I haven't done this? Don't worry. Current employees, you are not required to physically give them a notice, right, Lee. With your new hires, with your current employees, as long as you post the notice. And again, I'm very. So here's your bulletin board in the cafeteria. You know the electronic notice is posted there. The electronic monitoring is posted there with all your wage and hour,

all those... it's up there. It's also in the handbook. So for current employees, that is enough notice. But all new hires must be actually given the notice and they must sign off on it. So and I just see this. It comes up weekly, Lee, which is why I wanted to bring it up. I just thought it was I don't know if you want to add anything to.

[Lee]: No, I think that's crucial because it's a one of the newer ones that are out there and the other sides and employees will always expose, pick at our weaknesses and try to get there. Yeah, but we go quickly through this. So here are your notices to be provided at higher New York State lactation accommodation, electronic monitoring, our background check notices if we're doing them, Fair Credit Reporting Act, under the New York Correction Law, Article 23 a New York City's Fair Chance/Second Chance Act notices and procedures. And then when we are a New York state, the pregnancy and employment rights notice, New York City also has a pregnancy and employment rights notice. And again, give these to every employee. Then New York City has an earned safe and sick time act notice of employee rights that must be given to your employees. And there is also in New York City a stop sexual harassment act information sheet that must be given to your employees and is the last thing I'm going to quickly go through this for time purposes. As Rosemary was saying, there's now your posters, right? So now we're onboarded. Our employees have now left. They filled out all the paperwork. They've received all their notices. Now they're in day two eating lunch in your employee breakroom. They should look up and they should see posters. And on the posters... there should be a whole bunch of them. And we'll put a list up on the website so you have them. But there should be as much as Rosemary said, what applies to pay minimum wage? How you get paid, when you get paid. Human rights laws, notifications, unemployment insurance, law notifications, worker's comp, paid family disability, in both English and Spanish, by the way. Worker's comp, clean indoor act Employment of minors, voting Leave, Construction industry, Fair play Act If you're there Criminal convictions, Records Article 23 again, Nursing Mothers in the Workplace, Hero Act, Electronic Monitoring, Military Veterans Benefits and Rights. Extended Whistleblower Protections. Captive audience fans. That means that free speech in the in the workplace in New York City, there are even more posters that you need to have up there because people think my clients here in the city will. ADP sent me the New York State poster that has all those things in it. That's enough. No, no, no. You need to go on to the New York City's websites and download the following: living wage for assisted workplaces. Wage excuse. If you are an employer where you hire and you know that you are employing people who receive public assistance, there is a living wage notice that must be given. There's a New York City human rights law notice that must be given, the earned safe and sick Time Act must be posted, and automated Employment decision Tools. A new one that has just come out: Workers Bill of Rights must be posted here in New York City, up on your wall. And a temporary schedule change law, which applies to certain industries here in New York City, must go up on the wall. I tell my clients these things, they go up on the wall and they also go in your handbook. Why? Because that way we are covered for whatever reason, you have a remote employee who never shows up in your lunch break and they never see the voting leave notification. Well, it's in your handbook and vice versa. So that's why everything is where it is supposed to be, in my opinion, everywhere.

[Rosemary]: And don't forget, don't forget, Lee, Also, New York State now requires all of those posters to be available electronically.

[Lee]: That is correct. Yeah. And not only electronically. You get that poster in from ADP where it has your payday information it expects you to fill in what day is payday? You got to fill it in. Where there's the OSHA notification that says this is a safe workplace. This is our OSHA person fill it in. A blank form is a wrong form. Fill it in.

[Rosemary]: It's so funny you say that because as we were dealing with a harassment charge and so that the DHR asked for the complaint form and my client, they came so close, they downloaded the complaint form that New York State has posted. Only problem is where it said, you know, where you're supposed to insert like the company name and everything. It literally said company name, and that was what was in the parenthetical with the line and then call "insert representative." So all of that was just literally not filled in. And the DHR response was, well, clearly they don't take it seriously.

[Lee]: I... in my opinion, I think that you would be viewed worse than someone who said there's a form? Yeah. What, there's something I have to give out?

[Rosemary]: Exactly,...

[Lee]: Cause you knew and you ignored it. You didn't even read it.

[Rosemary]: Yes, exactly.

[Lee]: I think we've spoken about so much on this topic, but as you've all—and thank you for bearing with us—know that this is something that we can wax poetically for hours about. I mean, and on that note, we will continue to wax poetically about. And to that end, we thank you for joining us here for this episode as we continue our conversation about onboarding. And stay tuned. We have coming in the near future episodes about off-boarding, how to properly terminate an employee and conduct exit interviews. We have future episodes coming up about how to conduct a workplace investigation in the right time, the right way to do it, and most importantly, when to call in for reinforcements and to seek outside help. But so the Spotify question for those of you that are out there listening today, it's just going to be a very simple one. After listening to us for probably over an hour over onboarding, do you feel you've got onboarding down pat, yes or no? And if the answer to that question is no, please reach out to me or Rosemary, we want to help you, because so many of these things that we've talked about, an ounce of prevention is worth so much more.

[Rosemary]: Absolutely.

[Lee]: Pick up the phone, shoot us an email, we'll help you get the right form and then you'll never have to worry about that \$50 per day penalty/\$5,000 per employees that will last for six years.

[Rosemary]: I love how you got it all in and that's exactly

[Lee]: Please, let us help you. And with that, thank you. Thank you, dear listeners.

[Rosemary]: Have a great day!

[Lee]: Thanks, everyone.

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