
Hiring to Firing Podcast* — The Evolution of Employee Sick Days in a Post-COVID-19 Workplace With *Parks and Rec

Hosts: Tracey Diamond and Evan Gibbs

Guests: Lisa Whittaker

Tracey Diamond:

Our topic today is sick days and also favorite foods. So, Evan, do you have a favorite food that you like to eat when you're not feeling well?

Evan Gibbs:

Oh, you know, when I get sick, I'm not much of an eater, I'm much more of a sort of lay around and drink fizzy water or some kind of hot drink or something like that. I'm not a huge eater when I'm sick. What about you?

Tracey Diamond:

I would say probably chicken soup. My partner Richard always swears by chicken soup. He actually thinks it has medicinal properties. I'm not sure I really believe that chicken soup has medicinal properties, but it does feel good. It's a feel-good food when you're not feeling your greatest.

Evan Gibbs:

I know one food that does have medicinal properties. And those are the Hostess powdered donuts, which Hostess is owned by JM Smucker's. And our guest on today's show is one of the in-house lawyers at JM Smuckers. I think that's apropos of our talk today and we could do a whole episode on the Smuckers brand of products like the peanut butter, the jelly, the Uncrustables.

I personally could go on for a long time about the little white powdered donuts, the donettes. But you'll have to keep listening to get into that in today's episode.

Tracey Diamond:

Yummy.

Welcome to *Hiring to Firing*, the Podcast. I'm Tracey Diamond, Labor and Employment attorney at Troutman Pepper. I'm here with my co-host, Evan Gibbs. Together, we tackle all employment and HR issues from hiring to firing. Today, our guest is Lisa Whittaker, Director and Managing Counsel, Employment and Labor Law at the J.M. Smucker Company. Thank you so much for taking time out of your busy schedule today to join us, Lisa. Let's start out by having you tell us a little bit about J.M. Smucker, as well as its holdings and your role in the company.

Lisa Whittaker:

Yes. So, I am the Director and Managing Counsel for Employment and Labor Law. I work closely with our HR teams, our employee relations teams, leave and accommodations teams, as well as our operations folks, so including plant managers and bakery managers, as well as site HR. I help to advise on policies and procedures, help to establish standard operating procedures, as well as working with our office of leadership team and executive leadership team on all things reorganizations and other situations that may need advice and counsel.

Tracey Diamond:

Excellent.

Evan Gibbs:

I was just curious. Were you in private practice before you went in-house?

Lisa Whittaker:

Actually, I was in the in-house and a retailer, two retailers, before joining Smucker and going into the CPG World.

Evan Gibbs:

Very cool. Very cool.

Tracey Diamond:

Do you see a big difference in terms of the type of work you do, working in this world versus working in retail?

Lisa Whittaker:

Absolutely. Retail is so fast-paced, yet, very futuristic thinking. My memory serves two seasons before, so for instance, this is spring, the team would be working on next summer's lineup and traveling to Europe, looking at the trends, setting the colors. Very futuristic thinking and hoping that they are spot on about what we, as a consumer, are going to like several seasons from now. Very fast paced. Sales, sales, sales. Very competitive industry.

CPG, with Smucker being Fortune 500 that's been around for, I think, 127 years, will be the celebration this year. Stable company, so many offerings, including James Jelly's Preserves, Jif Peanut Butter, Milk-Bone Biscuits, and of course, the ever-popular Uncrustable. Just a stronger foundation, not as much change as you see in retail. Yeah.

Tracey Diamond:

My kids love the Uncrustables growing up. That would be in their lunchbox every single day. What would you say your favorite product is?

Lisa Whittaker:

I love Jif Peanut Butter. I would say, my go-to is probably the Strawberry Preserves. The jam is good. Jelly's good.

Evan Gibbs:

A fun choice.

Lisa Whittaker:

The preserves. Yes.

Tracey Diamond:

Yeah. Tastes very fresh.

Evan Gibbs:

A fun choice and a great combo with the peanut butter, too.

Lisa Whittaker:

There you go.

Evan Gibbs:

Just so that the audience is aware before we started the podcast, I professed my love for the Hostess Donettes. That's my personal favorite, are the little white powder donuts. They're like crack. I mean, open those things and I just – I cannot stop eating those. I mean, if I open a bag, I'm probably going to eat the whole thing in one sitting. I mean, it's dangerous. It is dangerous. I only buy them a few times a year. But when I do, it's all out.

Lisa Whittaker:

I love the chocolate. The chocolate packets that only has four, or five in it?

Evan Gibbs:

Yeah. See, that's the way to go.

Lisa Whittaker:

There needs to be some portion control. Not that that really falls in the portion control.

Tracey Diamond:

It's some form of portion control, at least.

Evan Gibbs:

That's a good strategy.

Tracey Diamond:

Maybe it's too much still, but yeah.

Evan Gibbs:

I'll have to remember that. Next time I'm really craving them, I should get the smaller pack.

Lisa Whittaker:

Yeah.

Tracey Diamond:

Evan, do you want to kick us off on our topic?

Evan Gibbs:

Yeah, absolutely. Yeah. Today, we're talking about – we're not talking about baked goods and jams, even though we could talk about that all day. We're actually going to talk about sick days, which, of course, with the COVID pandemic over the – occurring over the past few years has really become a timely topic, and we've had to develop a lot of new policies and nuances around sick days. To kickstart our discussion today, we're going to play a clip from season three, episode two of the show *Parks and Recreation*. I don't know if you've seen it, *Parks and Rec*, but this particular episode is aptly called Flu Season. This show, in general, it follows the antics and relationships between a group of employees of a Parks and Recreation department in the fictional city of Pawnee, Indiana, including Leslie Knope, who is a really great main character.

In this particular episode, which came out in 2011, Leslie Knope is the deputy director, played by, of course, Amy Poehler, she has the flu, but she refuses to leave work. I don't know about the two of you, but I've certainly been in that situation where you're not feeling great, but you also really don't want to get behind. In the clip we're about to play, she's sitting in her office while the rest of the staff speaks to her through a conference phone from the next room. Let's listen to this clip.

Leslie:

We've developed a revenue sharing formula that will hopefully appeal to most business owners.

Tom:

Leslie, go home. You're sick.

Leslie:

I'm not sick. It's just allergies. Come on guys, just let me in there.

Tom, Jerry, and Donna:

No, you can't come in here.

Jerry:

You're not coming in. Leslie, you look tired and you're all sweaty.

Leslie:

You look tired and you're all sweaty all the time. What's your excuse? You wanna go there, Jerry?

Jerry:

No.

Tracey Diamond:

This clip in particular rings so true for me, because my family jokes that I never believe it when I'm sick. I always say I have allergies. I could be dying of the flu, and I still think it's allergies. I understand where Leslie Knope is coming from here.

Evan Gibbs:

That's really funny. I only recently – I can remember if it was last year or 2022, was the first time that I actually got the flu. I had stuff that was flu-ish, flu-adjacent. I got the real flu and it was the worst. People always talk about how bad it is. Man, it really is pretty terrible when you get the actual flu. Again, it's a topic we could talk a lot about. But the actual legal question for today, do you all think that employees have a different mindset about taking sick days than they did pre-COVID? Do you think that COVID changed? Just generally, employees, I guess, take on using sick days?

Lisa Whittaker:

I think it really cuts both ways. I think prior to COVID, when we did not have the level of technology and accessibility that we do now, folks would actually go home, take the sick day, lay down, relax, step away, because they didn't have an option. They wouldn't just jump on a conference call maybe as readily as now. I feel like, folks will just work from home and still work, instead of truly resting and recuperating. I had a situation not too long ago where a person on my team was clearly sick and said, "I'm just not feeling well." It was the flu. "And so, I think I'm going to take the afternoon and lay down." Like, yeah, I support that. You're not going to get better if you don't lay down and relax.

Well, the next morning, I see this co-worker is online, working away. I sent a message, “Are you better today?” “Well, no. I feel terrible. My stomach is still a mess. I still have a headache. I still have a running nose. But I just have so much work to do. I'm just not going to get on any calls, or get on camera, but I just got to get this work done.” In my opinion, I think it cuts both ways, to your point, Evan, folks don't want to get behind. Now you can still be at home doing all the things, just maybe not joining calls and not falling behind.

Evan Gibbs:

Yeah. I mean, it's funny. It's like, when you get sick, it's almost – unless, it's really, really bad, you just can't function. It seems like a lot of times, at least for me, I mean, I've used feeling that way as sort of a justification to not get on calls and not communicate directly with people, but to use it to catch up on all the other stuff that I'm behind on. It's almost like, I don't want to call it a free day, but it's a day where it's like, “Oh, my gosh. I'm sick. I can finally catch up on work. I can finally catch up on the actual work that I need to do and I'm not on calls all day.” I think you're right. I think that the ability to work from home has definitely changed that dynamic for sure. What do you think, Tracey?

Tracey Diamond:

Well, I think that it depends on the type of worker, first of all. Not everybody has the ability to be able to work from home. But I think there's a couple of things here. On the one hand, I think employers are a little bit more empathetic to the concept of, “You're sick. We don't really want you to come into the office. You should really go home.” Whether it's to work from home, or it's just to go home and be sick. I think before COVID, the sense I got was, oh, if you're sick, you're just supposed to keep on going and no one's going to believe you that you're really sick if you take too many sick days and you don't want to use them up. There was this implicit discouragement from taking sick days.

Now, because there's just a little bit more of a better understanding of what the consequences can be if someone is contagious and they're around your other coworkers, I think that employers are more apt to say, “If you are not feeling well, we don't want you here. Please, go home,” and really encouraging people to go home. To Lisa's point and to your point, Evan, going home, if you have the ability to work from home doesn't necessarily give you the day off. It just means that you're not going to give it to everybody else, but you're still expected to get – the work is always going to be there and for professionals, it just continues to pile up and there's this fear of, “If I take that time off, I'm not going to be able to make it up.”

I think that that goes to this bigger issue of the blurring of lines between personal lives and work lives and how this feeling of always being on the hamster wheel and not being able to shut down and separate yourself, and work can sometimes be problematic and lead to burnout.

Evan Gibbs:

Yeah. I think that's right. I think the reactions of the staff here to Leslie being ill are particularly funny here. For example, her co-worker, Tom Haverford, who's played by Aziz Ansari in this next clip, he wears a motorcycle helmet and he sprays himself with hand sanitizer. The reaction of Chris Traeger who's played by Rob Lowe is really the best. We're talking about the Rob Lowe who has not aged in the last 30 years, I think.

Lisa Whittaker:

That is so true.

Evan Gibbs:

Yeah, I looked him up before we played the clip-on note. I was looking him up, so he's 59. Yeah, I saw current pictures of him. It's like, oh, my gosh. The guy looks exactly the same as he did in the 90s and 2000s. Anyway, let's take a listen to this next clip.

Ben:

I'm sorry, are you leaving? I thought we had a meeting.

Leslie:

No, we do, it's just I think it's a little chilly in here.

Ben:

Are you okay? Your eyes are glassy.

Chris:

Oh my god, oh my, is she, is she sick? Are you sick?

Leslie:

No.

Tom:

Yeah, she's sick. That's why I'm wearing this and misting myself with hand sanitizer.

Leslie:

I'm not sick, I just have allergies, okay? I took a Claritin and I threw that up. So I took another one, I threw that up, and then I took a third and it stayed down. I'm getting better.

Ben:

All right, you're burning up.

Leslie:

You're burning up. What?

Chris:

I have to get out of here. I have 2.8 percent body fat. My body's like a microchip. A grain of sand could destroy it. My body's a microchip.

Ben:

Leslie, go home.

Leslie:

No, I can't. I can't go home. I have to get ready for the Chamber of Secrets.

Ben:

Commerce.

Leslie:

If this meeting does not go perfectly, then the Harvest Festival is going to be over before I begin. I cannot go home.

Evan Gibbs:

In some companies, I've heard from clients that workers are afraid to take a sick day, because the company doesn't give them many paid sick days, or they're afraid to incur – some folks use attendance points for taking a sick day. Lisa, how does it work at Smucker's?

Lisa Whittaker:

Yeah. So, we have 22 sites since the acquisition of Hostess. To be honest, the attendance point calculation process varies from site to site. You're spot on when you touch on the fact that the employees are afraid to miss work. I don't know if it's necessarily because of the attendance points. I think it's because of the inability to be paid. They know, if I missed today, yes, they do have some sick days, especially in jurisdictions that require that we provide a given number of sick days, but they don't really want to use up their sick days, unless they're really, really sick, or they just want – they feel like they can come to work. They can stay away from folks and everything is going to be okay.

We really saw that during the pandemic, even though we were very clear about what was expected and the duty to test and quarantine, etc. We still had folks that came to work, knowing they were sick, or remained at work even after they started to feel symptoms. They didn't want to go home. Oftentimes, it was someone else who let us know that a given worker was not feeling well, or had a temperature. We had temperature check stations. I think we had an instance where someone still entered the workplace after it flashed red and let them know that they had a temperature.

Unfortunately, I think even though we provide a sufficient amount of sick days versus PTO days and they're able to buy vacation days, weeks of vacation as well, I still think some folks come in, even though they know they don't feel well, maybe blaming it on allergies, like Tracey.

Tracey Diamond:

It's a tough call, particularly in manufacturing. I see this a lot with attendance points in the manufacturing world. On the one hand, there's always this feeling of on the part of the company that employees are abusing sick time and that they're taking days off just because they want to have more days off and that they're not really sick. Employers don't really want to be in the business of making judgment calls as to whether a person is sick or not.

On the other hand, they don't want employees coming to work when they're truly sick. I'm not really sure what the answer is in terms of how to manage the middle in between those two extremes. I do think that's a challenge that employers tend to face. What do you guys think?

Evan Gibbs:

Yeah. I mean, I don't think there is a clear answer. I mean, I really think it's a case-by-case basis. I mean, I've seen, and I'm sure both of you have as well. I mean, there's so many different systems out there that companies use, whether it's a point system, or whatever it is that they've decided to implement. I think they all at the end of the day, face the same problems that you described, Tracey.

Lisa Whittaker:

Agree.

Tracey Diamond:

One of the things I think we're seeing in more current times than in years past is it used to be that sick days were just for employees on illness. Now many, as Lisa pointed out, many jurisdictions require sick days and they require those days to be used, not just for the employees on illness, but for family members' illnesses, for public school closures, that kind of thing. I think that's something that we're seeing, the idea of stretching the idea of what a sick day is and to encompass a bunch of other things. Do you think that goes too far, or do you think that that's the right way to go?

Lisa Whittaker:

Yeah. In my opinion, I think it's the way of the world that we're currently living in. I think it is really responsive to the fact that we know mental health issues continue to rise, or are more prevalent, and/or we're more willing to acknowledge mental health challenges, the level of stress that individuals are under. To me, I think it makes sense. A sick day is a sick day is a sick day, and some mornings you wake up and you – that you're not feeling like it's going to be a day where you can pull it together. I'm in support of that. I think, again, going back to the sickness and managing it and who judges whether you're sick, or it's allergies. I think, again, who's to decide whether you're having a mentally healthy day, or mentally unhealthy day?

Evan Gibbs:

Yeah. I tend to agree with that as well.

Tracey Diamond:

Yeah, I wouldn't want to be in that business. Also, is it because of a sick kid at home, or it's the employees on illness? The employees are not going to really get much done if they know that they're worried about their kid.

Lisa Whittaker:

Exactly.

Evan Gibbs:

With the mental health days, I think that's definitely a trend in the right direction. I mean, I think that the stressors of the modern workplace are very real. The mental health toll is something that's not talked about a lot. I think companies that are offering a certain number of mental health days a year, I think that sends the right message that, "Hey, we as a company, we recognize that you might not have the flu, but that's not the only time that you're really not well enough to work," and recognizing that there are other circumstances that are relevant and very, very real, I think, is a step in the right direction to me.

Lisa Whittaker:

Yeah. I think to piggyback on that as well, Evan, I think many of us realized when we started, when this pandemic started four years ago and we went home, we worked even longer days, because there was one thing that leaving the office provided, it was a break. The likelihood that you would schedule a happy hour, or dinner, or go pick up dinner for the family and truly just take a break, even if you logged back on later, was more real. It was more accepted.

Whereas, once we sit down at these desks at home, we're not getting up before 5:30, 6:00 maybe, like we once did, or we're logging back on, or sitting on the couch and working longer hours as well. To your point about the long workdays and just the work stress, I think it's been amplified by the ability to work from home.

Evan Gibbs:

Yup. I totally agree.

Tracey Diamond:

Lisa, you alluded to this before when you talked about mandated sick days. As we all know in many jurisdictions, there is a requirement to provide a certain amount of paid sick days for employees to use, for not only their own illness, but for various other reasons. The problem I find is that the laws are not always consistent. For example, in Connecticut, employees are currently under Connecticut law, employees accrue sick days at the rate of one hour for every 40 hours worked up to a maximum of 40 hours a year.

In other states, many other states, the paid sickly accrual rate is one hour for every 30 hours worked. Then there's also differences in a bunch of things, carry over, front loading and whether or not the sick days can be used for example, for mental health wellness. When you're in a multi-state employer situation like you are, Lisa, and like many of our clients are, how do you keep track of it all? Do you have one policy, or do you just have different policies in different jurisdictions?

Lisa Whittaker:

We have a baseline policy, but then we have state addendums. Because to your point, Tracey, we have to make sure that we get it right for the given jurisdiction. We make sure to outline that and provide that based on where folks work. The system configuration is probably the trickiest, creating a different accrual, or bucketing. Those are these three jurisdictions. It's one hour for every 30 hours worked. Yes, we have the baseline for the folks that work in the state where there is not a specific requirement and that state addendums that outline the respective benefits.

Tracey Diamond:

That sounds like a good way to handle it. To your point before about how burnout and work life, work has gotten harder and there's more of it. These poor HR folks that are having to keep track administratively to what's become just a much more complicated world than what used to be, right?

Lisa Whittaker:

Agree.

Evan Gibbs:

Yeah, seriously.

Tracey Diamond:

What do you think about unlimited PTO policies? That's the other end of the spectrum that I see. Some clients have unlimited PTO. Do you think that that's hard to manage?

Lisa Whittaker:

It's funny, because we were just talking about this yesterday. My past life, both retailers went to the unlimited PTO for a number of reasons, including the fact that it was less liability on the books. As you know, when you pay out, Susie's got seven weeks of vacation because she's been here 25 years. That seven weeks of vacation days for Susie at her current salary is a lot of money.

Tracey Diamond:

Sure.

Lisa Whittaker:

There's the financial benefit of not having it on the books. There's also the reality that folks really struggle to probably even take three weeks, maybe even four and truly step away from work, not checking email, not responding. When we studied it at both of my prior employers, we really discovered that there wasn't going to be a situation where employees were going to take advantage. Because they still had to seek permission, advance permission to take vacation days. With sick days, there was a requirement, obviously, to notify as early as possible. I was just recommending unlimited PTO the other day on a call.

Tracey Diamond:

There you go. I have seen some generational differences on the use of sick time, or the use of PTO in general with unlimited PTO policies. This is very anecdotal, but it seems to me what I'm seeing is that the older generations are less inclined to take enough time off when they have an unlimited policy, because it feels too amorphous. What we were saying before about how there's always the work to be done, even when you're "off," they feel that they won't be able to catch up and they may get in trouble if they take too much.

I'm seeing the newer generation, the ones that are just coming into the workforce are all about the unlimited PTO and taking full advantage of that. I think it'll be an interesting thing to watch as more generations make their way into the office, the work environment.

Evan Gibbs:

Yeah, that's interesting.

Tracey Diamond:

We have one more clip that I'd like to show. To this point, before COVID, it was a badge of honor and an expectation for managers at least to keep on working, even when they're sick. In this next clip, you could see the reaction of the staff when Leslie will not let them cover for her, even though she's sick. Let's take a listen.

Ben:

You know, I find it a little insulting that you don't trust me to handle this.

Leslie:

It's not that I don't trust you, okay? It's just, this Harvest Festival is my project. It's my career on the line. And I just need to make sure that I've done everything I can to make it work. Okay. It's showtime. Good evening, everyone. I'm Leslie Monster, and this is Nightline.

Tracey Diamond:

Lisa, just so you know, in this instance, the Adam Scott character and there's some other guy that's there are insulted. "Do you think we can't handle this? You have the flu. You're literally

falling on your face. Just let us take this Chambers of Commerce presentation and do it. You're not giving us a chance to shine." Go be sick is their attitude. She's like, "No, no, no. This is just so important." Then she pulls it together and gives the presentation. What do you think of Leslie's attitude here? Should she have let her staff handle the meeting?

Evan Gibbs:

Probably so. I mean, she did okay, but there's a real risk of, for example, I think of the analogous situation being that I've got a court hearing and I've got a peer in front of a judge to argue some motion. But I'm really sick and it's like, how much is it going to impact my performance, as opposed to letting a senior associate handle the court hearing? Am I ultimately doing a disservice to whatever task it is by handling it when I'm sick? It's a really tough call to make, especially as you're in a management role. If you're a control freak, like I am and you feel like you've just – it's got to be done this certain way. It can be really hard to let go of the reins, even if you're sick. I think that, at least for me, it would be good to remember that the next time I'm sick and there's something going on.

Lisa Whittaker:

Yeah. I mean, I think there's always that question and the example that we set as leaders for the next generations for our successors when we struggle to relinquish a little control. I think if we're working daily to continue to provide opportunities for our direct reports to grow, learn, stretch, feel forward, pick them up and start again. I think this attitude can become contagious and problematic. Especially that it was a presentation. Even that she insisted on sitting in the room through the presentation, but allowed someone else to lead it and chimed in, but I think we just have to relinquish control, because we may be gone tomorrow. The one goal we want to be able to say is, "Hey, I set so and so up for success. They may not know everything that I know, but they'll be able to learn it and they'll be able to teach the next person coming by them."

Tracey Diamond:

Such an important, important concept, and something that I think too often, we forget in our own pursuit of success. I think this is a really good place to end. I want to thank you so much, Lisa, for joining us today, Lisa, thank you so much.

Evan Gibbs:

Yeah, thank you. Thank you very much.

Tracey Diamond:

Such an interesting conversation. Thank you to our listeners for tuning in. Please, don't forget to check out our blog, [HiringToFiring.Law](#), and sign up for our podcast. You can subscribe, so you won't miss an episode. Shoot us an email. Tell us what you think. Thanks so much.

Lisa Whittaker:

Thank you for having me.

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