



## Episode 15: “Guide to Employee Handbooks: What’s New in 2022, Part 1, With Rosemary Enright”

Speakers: Ari Kwiatkowski and Rosemary Enright, Barclay Damon

**[Ari Kwiatkowski]:** Hi, everyone, this is a Barclay Damon live broadcast where we discuss all things L&E, labor and employment. I’m Ari. Let’s dig in.

**[Ari]:** Hi, everyone. Welcome to “Guide to Employee Handbooks; What’s New in 2022.” This is our first episode in our segment where we tell you what you need to know about employee policies, employee handbooks. And I’m really excited to announce that today, Rosemary Enright is joining us again. So if you listened to the podcast before, you know that Rosemary is our Labor and Employment practice group leader, and she works in the Buffalo office with me. Rosemary, thanks for joining.

**[Rosemary Enright]:** You’re welcome, Ari. I’m glad to be here again.

**[Ari]:** Yes, glad to have you. So guys, let’s get into it. Today, we’re talking about employee handbooks. As I mentioned earlier, this is our first episode in this segment. Rosemary is joining us today to tell us what’s new for 2022. And then Megan Bahas, who’s an attorney in our Buffalo office, will join us the next couple of weeks to kind of go through all the details. But basically, what I want to know, Rosemary, just to get this out of the way, you know, in the beginning, are handbooks required in New York if you’re an employer?

**[Rosemary]:** So that’s a great question, Ari. And in fact, handbooks are not required in New York, but we advise our clients to have handbooks for a whole host of reasons. The first is, quite frankly, if you end up with a wrongful termination claim or a discrimination claim, one of the first things the agencies investigating that claim are going to ask is do you have a policy? And did you follow the policy? ...And it certainly makes you.

**[Ari]:** ...and did the employee acknowledge the policy?

**[Rosemary]:** Exactly. That’s exactly right. And did the employee, did the employee receive a copy? Did they know about it and so forth. So that’s absolutely right. So that’s the first thing they’re going to ask. Think about your unemployment. Well, how did the employee know that this was a violation, you know, or did you do an investigation? Do you have an investigative process? So they’re always, you know, it’s the first thing the agencies are going to ask. So we always want that, you know, because, again, we’ve got policies. We’ve got procedures. They’re also going to ask, did you have an EEO policy? Do you have an anti-discrimination policy? You know, and so all of those things help, should you end up in the unfortunate position of being the subject of a wrongful termination claim. But the other thing I also think it helps is for the employees to know, they want to know what’s expected of them. Right. And so by putting that in a handbook. So these are our attendance requirements. These are our standards of conduct. This is, you know, what you do if there’s an error on your paycheck, you know. This is what happens at the time of termination relative to your pay out of sick time or your pay out of vacations, forfeit your language. So it really, you know, it serves as a source of information for the employees and it serves as a source of protection for the employer and, of course, the employee. So, yeah, you know, and the thing is

now what I'd say, Ari, and you can tell me if you agree with this, is, you know, I think if you are a small organization, you know, you've got 10 employees or something like that. I don't know that you need to jump through all the hoops of having a big handbook per se. I would have, you know, your EEO policy and the required anti-discrimination and sexual harassment. But, you know, other than those types of things, I don't know that you need to put in all the time and the effort but I think when you're getting into 15 or more because then 15 you're subject to the ADA and other state and federal laws, then I think you should probably have a handbook, but I think below that, you know, less than that you're probably fine. But for those mandatory policies, I don't know if you agree with that.

**[Ari]:** I agree, Ro. I think if you have, you know, if you are talking about a smaller employer, you know, I agree it may not make sense to, you know, dive into things that may not be applicable to you, of course. But, you know, I think it's a good practice to just have those bare minimum. I don't want to, by "bare minimum"—and I'll talk about this with Megan next, you know, next week. But what's required, you know, in New York, I think it's a good idea because I think as you pointed out, it really does it protects the employee. It makes it easy for employees to understand their responsibilities, but it also protects you, you know, in the unlikely and unfortunate event that an issue arises. So, yeah, I agree with you.

**[Rosemary]:** Exactly.

**[Ari]:** Thanks, Ro, really good point. As I mentioned a few moments ago, Megan and I are going to jump into things that are required. But what I wanted to talk with you about today is just, you know, what's new in 2022. You know, we're a couple months into 2022. And this is a really good time to kind of evaluate for employers to evaluate and see, you know, what are the changes in the law? What do we need to do? So a couple easy ones. You know, I wanted to ask you, the New York State Human Rights law, I think there were some changes that went into effect pretty recently as it relates to domestic workers. Is that right?

**[Rosemary]:** That's right, Ari. So in the past, domestic workers were not included or covered under the Human Rights Law. And it has been amended new for 2022. And domestic workers are, in fact, covered. So basically what that means is if someone is a domestic worker, they can now bring a discrimination claim. So an employment-related claim based on some protected characteristics.

**[Ari]:** Yes.

**[Rosemary]:** So that is significant.

**[Ari]:** Sorry, Ro. That's very significant. Not necessarily an employee handbook update per se. But we just wanted to make you aware because that was a pretty important update and is new for 2022.

**[Rosemary]:** Yeah. So exactly.

**[Ari]:** Turning to the Hero Act, you know, to our listeners, if you've listened to the podcast, we spent a lot of time talking about the Hero Act. Brienna Christiano and I went through Section One and Section Two and we did touch on this role. But let's just tell our listeners one more time. What does the Hero Act say about employee handbooks or for prevention plans as it relates to employee handbooks?

**[Rosemary]:** Well, you know, probably many of our listeners heard you and Brienna talk about the Hero Act, but if you haven't had a chance to listen to it, please do, because there's a lot of great information. But you know, for me right now, for purposes of 2022 and teeing up the handbook discussion I think a lot of people are confused, Ari, because they think "Oh the Hero Act." So because the mask mandate has been lifted and because you know the COVID designation, you know, is only in effect till March 17, on March 17, the Hero Act goes away. And it doesn't. The Hero Act is here to stay.

**[Ari]:** Yes.

**[Rosemary]:** And what the Hero Act says is you have to have a prevention plan. And that prevention plan is implemented or you have to comply with your, you know, your company's prevention plan. When there is a designation of an infectious airborne disease. So the designation still exists for COVID as we know. But what the Hero Act says is you must have, your employees must have a copy of and notice of your prevention plan, because the prevention plan isn't specific to COVID. It's for airborne infectious diseases. I think a lot of people are confused by that. So what it means so what the Hero Act requires is that you have information in the handbook about your prevention plan. Now, these prevention plans as you and Brienna I'm sure talked about they're 12 pages long, Ari. Who on earth is going to put that in their handbook? So my counsel—and I'd love to hear your thoughts on this, Ari—my counsel relative to the Hero Act requirements for 2022 is to, in the handbook, put just two or three sentences that just talk about or refer to the Hero Act and say our prevention plan it can be found here. So most companies have a bulletin board so where they post all of their labor posters, put your prevention plan there.

**[Ari]:** And employees should have already received them too, right, Ro?

**[Rosemary]:** Exactly. They should have. They should have, it should be up. But you know, we've had some people say, oops, I missed that. All right. But then what they've said is, oh, it doesn't matter, but it does matter. It needs to be, there's got to be notice. It's got to be up, and it has to be or what we advise is that, no, it does have to be. I was going to say, we've advised, but no it is required that there is a reference to it in the employee handbook.

**[Ari]:** I agree with you 100%. That's exactly how to handle it, too.

**[Rosemary]:** Yeah, exactly.

**[Ari]:** So thanks, Ro, you know, that's a good piece of info for our listeners. And I think chances are if you're an employer in New York, you're covered by the Hero Act's requirements. So it's really important. We reiterated that with Brienna, but it's important that people if you're an employer, you really have your hands around the requirements of the Hero Act.

**[Rosemary]:** Yeah.

**[Ari]:** So, Ro, I want to just shift a little bit; something else that's new for 2022 is executive and administrative overtime exemptions. I think at the end of December, they increased the threshold amount. Is that correct?

**[Rosemary]:** They sure did. And you know, Ari, we should probably just take a minute or two to make sure everybody's clear. You're sitting there thinking WHAT??? The FLSA. So the Fair Labor Standards Act increased the...Noooo. Okay. This is New York, right? Ari, how many calls do we get that the client says somebody just said to me that there's a different exemption, a different salary threshold in New York. Is that true? The answer is yes. All right. It is true. So, Ari is right, On December 31 of 2021, the executive and the administrative salary threshold in New York State went up to \$990 per week. So that means if you want to claim the exemption for your executive or administrative employees. So when I say when you if you want to claim the exemption, the exemption from overtime, that means you have to be paying them a minimum of \$990 per week.

**[Ari]:** Yes. And that's for upstate.

**[Rosemary]:** Right. Well that is, that's I was going to say that's upstate. So your Westchester. Suffolk and

Nassau Counties went up to \$1,125 per week on December 31, which is the same now as the city. So New York City has been at \$1,125 for a couple of years now. Okay. And so now we might have a listener out there sitting there thinking, Ari, well what about the professional exemption? The answer is the professional follows the FLSA. So excuse me. So the federal salary threshold still applies to professional and in fact, it applies to all the other exemptions. Right. So you're highly compensated and so forth. But executive and administrative in New York State only.

**[Ari]:** Yes.

**[Rosemary]:** Is different from FLSA. And that did go up.

**[Ari]:** Yes. Yeah. Thanks for clarifying. Yes. So this is a very I think this is an appropriate topic for us because back when we had our second episode of the podcast, we talked all about paid sick leave, COVID leave, etc. And I wanted to ask you, what's up with New York State paid sick leave? Were there any amendments or is there anything new for 2022 as it relates to paid sick leave?

**[Rosemary]:** So with New York State paid sick leave in mid-December, the Department of Labor came out with some more guidance around the regulations or the rules.

**[Ari]:** Finally.

**[Rosemary]:** Finally, finally. And the two that I think are most interesting or what our listeners really care about is the counting. So before, for purposes of, you know, how many employees do I have? Am I over 100 am I under 100. It was in New York State. They've now said you've got to count nationwide. So how many employees do you have nationwide? Doesn't matter how many are in New York. If you have more than 100 nationwide, then it's 56 hours. Okay. So it's the counting. The second piece that I think is important for our listeners to know for 2022 is the accruals. So there was all this, these questions around, okay, well, if, if our organization front loads the sick leave on January 1 of every year, why on earth do we have to carry over. Right. We're not doing an accrual. We're doing a front load. And the Department of Labor came out and they said, listen, doesn't matter if you front load. You still got a carryover. And again and it's a crazy thing, it doesn't mean that the employees get to use more than the 56 or the 40 hours that they're entitled to under paid sick leave. It just means now that you're just carrying over all of this sick time.

**[Ari]:** Right.

**[Rosemary]:** And again, just quickly, Ari, and I just want to say, so many clients ask us why did they do that? And the answer is because they wanted to make sure on January 1, if somebody was sick, they had paid sick leave. So that's why they did the whole carryover. And, you know, and then the question is, well, if your front load, why does it matter? And the answer is, I don't know. There is no good answer to that.

**[Ari]:** We wish we knew.

**[Rosemary]:** Yeah, it's confusing, but at the end of the day, they still can only use up to 40 or up to 56.

**[Ari]:** Got it. Got it. So this kind of dovetails nicely, Ro, paid family leave. I think there were also some changes to paid family leave this year, right?

**[Rosemary]:** Yep. There sure was. So paid family leave was amended to include siblings. So, you know, as you know, paid family leave is you are taking time off to care for someone with a serious medical condition, and they added siblings to that. And it's interesting. I've had that come up a lot this

past year. I've had quite a few employers call me. Yeah. And say I've got an employee who needs to take care of their sibling who isn't well. And last year, the answer was, well, they're not covered, sorry, under paid family leave.

**[Ari]:** Yeah, I think this one makes sense.

**[Rosemary]:** It really does make sense. Yeah. So they've amended it that... now the other is an Ari, I don't know that a lot of people knew about this, but when paid family leave was enacted back in 2018, you know, you can take what you've got to take a full day increment and it can be continuous or it can be intermittent. So everybody knew that but there was a cap on the number of days of intermittent days you could take in your leave period. And it was 60 days. So even for employees who worked an average of five days a week, they still were capped at 60 days of paid family leave taken intermittently. They have eliminated that for 2022, which is significant. Yes. So now it's based on the average it's still based on the average number of days that an employee works. So what that means is, you know, if you have an employee who works five or six days a week, they, you know, they could take 82 intermittent days because there's no cap.

**[Ari]:** So that is significant.

**[Rosemary]:** Significant for 2022.

**[Ari]:** Right. Yeah. I'm glad we pointed that out, Ro.

**[Rosemary]:** Yeah.

**[Ari]:** Let's kind of switch gears. I know for 2022, something new in New York is expanded whistleblower protections. So I know that this is something that I think went into effect at the end of January of this year, Ro. So this is definitely a newer thing that employees need to keep an eye out for, can you kind of explain just what's new about the new whistleblower protections?

**[Rosemary]:** Sure. And this is one of those, Ari, where you know, I know all of these, you know, we're doing this session because it dovetails nicely or it's a great lead-in to what you and Megan are going to talk about. But this is definitely something that you're going to want to change your policy if you have one. So the whistleblower protections have been expanded. All right. And so now we can have former employees covered by this, and independent contractors.

**[Ari]:** Yes.

**[Rosemary]:** So basically, everybody, you know, if somebody observes something or believes something to be inappropriate, and they report it, they've got the protection.

**[Ari]:** Yes. And before, it did not include independent contractors. So this really expands the definition of "employees."

**[Rosemary]:** Exactly, That's exactly right. Which is a little scary, you know, if they if they're doing that. What could happen next. That's a great way to say it Ari, they're expanding the definition of employees to include independent contractors. Great point. But and then the other is, you know, in the past, you know, the whistleblower protections were kicked in if someone felt there was substantial or significant, the potential for substantial or significant and, you know, harm or damage. And they've actually lowered that now. All right. And so now what the standard, Ari, is, if it's a violation of any sort of law or policy. So before it was significant or substantial damage or harm now it's they just violated this law. They just violated this policy. And if the individual who is reporting has a reasonable belief that is that's also what's changed; they have a reasonable



belief that there was a violation. They are covered.

**[Ari]:** Yes. So that's significant. Because I think before it was you know, there was an actual violation of a policy. So, yeah, you know, I'm reporting it now. It's really expanded. It's if the employee or well, I was going to say or independent contractor, but independent contractors are employees under this statute. I know a reasonable belief now of a violation. I think that's really significant.

**[Rosemary]:** It's huge. Yeah. So. And yeah, obviously, the policies will have to be amended. But the other thing is the employees have to be given notice, Ari, about this whistleblower policy. And the expansion of it and what they can report and how they can report and that. And so they've got to be given notice of that at their at their time of hire. And I would put it in the handbook and that, which you and Megan will talk about.

**[Ari]:** And I think the Department of Labor published that notice last month. So in mid-February. So I think that's why I think there was a little bit of a lag, because I remember when the... I know it went into effect at the end of January, and we were getting calls from clients wondering if, you know, there was a form notice or and I think there was just a little bit of a delay in the publishing of that.

**[Rosemary]:** Yeah, there was.

**[Ari]:** Yeah. All right, Ro. Last but not least, this is a I think a pretty new topic in New York, the New York Labor and Employment Law Space. But it's certainly different: electronic monitoring in the workplace. And I know that this is set, I believe to go into effect May 7 of 2022. So still a little bit of time. Obviously nothing prevents employers from getting into compliance sooner. But can you tell us a little bit about what's new with respect to electronic monitoring?

**[Rosemary]:** Yeah, and you know, it'd probably be helpful, Ari, for us to tell our listeners what electronic monitoring is. I just had a conversation with somebody yesterday. Well, what about does it apply to things with the firewall and that? And I know. So basically when we talk about electronic monitoring, what we're talking about is if you as an organization or a company, an employer are going to, the word they use, is "intercept." All right. If you might intercept, all right. Or read or listen to, let's say, emails, you know, on your company email system, voicemails. Let's say you've got a company cell phone. And so there's ability for them to, you know, your employer to monitor or see what the texts are and that. So basically any sort of monitoring of those electronic communications, Ari. So that's what this covers. And we are now in New York State required to give new hires notice that we might we electronically or we electronically monitor all of these communications. So, you know, you may be sitting out there. We might have a listener out there, Ari, saying, well, you know what, I have a policy that says there is no expectation of privacy. Isn't that enough? And the answer is, no, it's not. Right. I mean, New York State has made it very clear. You must literally have a policy now that says electronic monitoring. And you just talk about, you define it and then you know what the company does. It's only going to be four or five sentences. But the New York State requires that new hires be given it at their time of hire.

**[Ari]:** Yes.

**[Rosemary]:** So, you know, just like Ari, when a new hire starts, you might hand you're going to hand them the sexual harassment policy. They review it they sign off on it.

**[Ari]:** You know, the employee has to acknowledge this as well. So it's not just giving it to them, they have to sign the acknowledgment. I think that's in the statute.

**[Rosemary]:** That's exactly, Ari. That's why I mean, so it's just like the sexual harassment policy. So at the time of hire, you're going to give them this electronic monitoring policy, make sure they

understand it. They sign the acknowledgment. You keep a copy of it in their personnel file. They're also—and we are also advising it when the employee handbook, I'm sure you and Megan will talk about that; and you may even want to have a notice up in the workplace. In fact, you know, I mean, those bulletin boards get pretty full. So, you know, it isn't required. But as I said, what is required is as Ari and I said is at the time of hire. And I put it in the employee handbook. And for your current employees, you're probably listeners by sitting there thinking, what do we do about current employees? And the answer is you could turn around and distribute it and have them sign off on it. Or if you're going to be updating your policy, or rather your handbook, in the next month or so, which a lot of employers are they do typically do that in Q1, which is why we're doing these podcasts now. You know, you add the policy to the handbook and the new or the current employees get it. So, yeah.

**[Ari]:** Yes. And as you mentioned, Ro, the bulletin boards get full. But you can also post this notice in a conspicuous place. So. Well, thank you so much, Ro. I really appreciate it. I think this was really helpful, really informative and a really good primer on what's new and what employers in New York should keep a lookout for with respect to developments in 2022. So thank you so much for joining.

**[Rosemary]:** You're welcome, Ari.

**[Ari]:** To our listeners, tune in next week I will be joined by Megan Bahas and we will go through employee handbooks, what we recommend having in there, what's mandatory and required by law. If you have an employee handbook, you won't want to miss it. Tune in. Thanks.

**[Ari]:** The Labor Employment Podcast is available on [barclaydamon.com](http://barclaydamon.com), YouTube, LinkedIn, Apple Podcasts, Spotify, and Google Podcasts. Like, follow, share, and continue to listen. Thanks.

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