



Episode 16: “Guide to Employee Handbooks, Part 2: Mandatory Policies, With Megan Bahas”

Speakers: Ari Kwiatkowski and Megan Bahas, 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]: Hey, guys. Welcome back to “Guide to Employee Handbooks.” This is our second episode in our three-episode segment where we tell you what you need to know about employee policies and drafting employee handbooks. Today, I am thrilled to announce that Megan Bahas is joining us. She’ll be joining us for this episode, and for next week’s episode. Megan is an important member of our Labor and Employment group. She’s counsel to the firm. She works with me in Buffalo. She has a ton of experience with drafting employee policies and employee handbooks. And she’s definitely a go-to person in the group. And whether she likes it or not, she is a go-to person for me. So, Megan, thanks for coming on. Welcome.

[Megan Bahas]: Thanks, Ari.

[Ari]: So good to have you today. And, Megan, you may or may not know this, but I usually make our guests say something interesting about themselves. But I think I can do it for you if you like, which is for our listeners: Megan is building a house basically like around the corner from me. So in addition to being colleagues, we are soon to be neighbors. And, Megan, if you have anything else you want to add to that, please feel free.

[Megan]: No, you caught me on the spot with that one, so I’ll go with that as my interesting fact.

[Ari]: Yeah, perfect. I did not brief you for that, so I figured I might just slip that in there. So again, Megan, thanks for joining. So to our listeners...today, what we really plan to focus on are some of the mandatory policies or required policies that are typically included in employee handbooks and need to be included. But before we jump into that topic, I think it’s important—if you listen to our first episode in the series, you know, Rosemary kind of touched a little bit about, you know, why you might need a handbook, why you might not want to have a handbook. But before we jump into the mandatory topics, Megan, you know, I know you do a lot in this space. Are there certain considerations that employers should keep in mind when deciding whether to have a handbook and what to include in that handbook?

[Megan]: Yeah. So I’ll say at the outset, I think today’s age, all businesses that have even one employee, you should have an employee handbook of some kind. That wasn’t perhaps always the case, but it certainly is with today’s regulatory environment. And so in terms of what goes into a handbook, I would say there are several factors that that sort of determine that or inform what you’re going to put into an employee handbook. The first and probably the most major factor would be your employee headcount. So how many employees you employ. Many employment laws’ applicability is based on the number of people the employer employs. So, for instance, a big one, the federal Family and Medical Leave Act only applies to employers that have over 50 employees. So certainly if you have over 50 employees you’re going to have a Family Medical Leave Act policy in your handbook. Alternatively, if you have less, you’re not going to have something like that in your handbook. So

paid sick leave is another type of law which heavily depends on how many employees the employer employs. It often also determines not only whether a paid sick leave law is applicable to the employer, but also the level of benefits that an employer will have to provide under those laws. And then another just example would be some EEO, the Equal Employment Opportunity laws also depend on how many employees the employer employs. So it's an important thing to know when you're preparing employment policies. And keep in mind how many employees you have and what employment laws apply to you.

[Ari]: That's a good point, Megan. Are there certain industry considerations that you give, when counseling employers about this, meaning like what their business is? I think that works in conjunction with how many employees they have, but I think that's probably another consideration when you're...when we're counseling clients about what policies they should have.

[Megan]: Yeah. So certainly the industries matter. Industry rules in health care or transportation, for instance, they have industry-specific rules that impinge on employment. So DOT, Department of Transportation, regulated drivers, for instance, have certain employment-related rules related to drug testing and whatnot. So, yes, some of those industry specific rules certainly can creep into the employee handbook and policies that the employer either chooses or is required to have based on those industry regulations.

[Ari]: Makes sense. And also for things you and I talked about this before, but like unionized workforce excuse me, unionized workforces, government contractors, all different kinds of things that apply. Right?

[Megan]: Yes. So those are, again, two major... When I'm preparing an employee handbook or policies, for instance, two major questions that I ask the business are you unionized, for one? Because if there is a union, you can't just go and rewrite the handbook however you see fit. There's a bargaining obligation with the union when it comes to changing workplace policies or rules. And secondarily, you'd also want to make sure that anything you're putting in the employee handbook doesn't at minimum, conflict with the material that's in the collective bargaining agreement. Oftentimes, collective bargaining agreements cover things like vacations, sick time, oftentimes workplace rules. So you don't want to make anything in the handbook conflict with what's in the CBA. And so you'd said also, whether they're a government contractor, if a business is a government contractor, oftentimes there are specific requirements for employment policies relative to that. So, for instance, federal government contractors are required to put in their handbook a pay nondiscrimination statement.

[Ari]: Right. I think it's important to point out, because particularly the unionized workforce piece, because you know, I think most employers who have unionized workforces are somewhat familiar with what would trigger like the bargaining obligations, but I think it's such an important question to ask, obviously, because as you point out, you know, if you're in that situation as an employer, you can't just start changing policies without really checking on that.

[Megan]: Correct. Correct.

[Ari]: Right.

[Megan]: Yeah. And it becomes a little bit more complex, too, when you have perhaps a master employee handbook that applies maybe to certain employees in your business that are not unionized or, say, your admins or your back of the house, but then you have maybe manufacturing employees that are subject to a CBA. So that sometimes leads to an employer having two separate handbooks, one applicable to the union workforce and then one applicable to the nonunion workforce. Or if they want one master handbook, they can have some sort of addendum. There's a number of ways

that you can do it, including carveouts that say if there's anything in this employee handbook that conflicts with the CBA, the CBA controls. So it becomes, you know, a little bit administratively, I don't want to say complex, but some thought kind of needs to go into it, not just willy-nilly putting down whatever in the handbook when you have a unionized workforce.

[Ari]: Absolutely. And I'm really glad you pointed that out. So if you're listening and you have a unionized workforce, you know, definitely considerations to keep in mind. And we would definitely recommend talking to somebody, you know, about the extra considerations because I know for me, I've had a couple clients who have had a combined unionized, nonunionized workforce. And it definitely can be a little, as you said, complex, so...Megan, before we jump into the mandatory policies, any other considerations that are kind of preliminary you think our listeners should keep in mind?

[Megan]: Yeah, I'd say second to employee count or almost equally as important as employee count is the jurisdictions in which you operate. If you are an employer that has operations in one state, good for you for purposes of the employee handbook, because that makes it easier. If you are a multi-state employer and if you are national in that you operate in a number of different states, handbooks can become complex. You need to be cognizant of the various state laws that impact employment and moreover, local laws. I'd say over the past five, 10 years it's been a trend that we're seeing, that not only states are enacting employment-related laws, but localities. So you have cities, you have counties issuing laws that impact the employment relationship. For instance, "ban the box" laws which relate to criminal history and background checking and that sort of thing. So another big one is sick leave laws which again I mentioned before and we'll talk about more later, but localities and states have been passing those, which makes it quite a puzzle to fit those pieces together for states, for employers that operate in different jurisdictions.

[Ari]: That's a really good point. So yeah, and I think a lot of the employers that we represent, or at least a number of them do have, you know, a few employees like we're in New York, a few employees in Pennsylvania, like a couple employees in New Jersey. And I think the reality is, even if you have like one employee in another state, this is something that you need to keep in mind and be cognizant of.

[Megan]: Absolutely. Absolutely.

[Ari]: All right. Thanks, Megan, I think those are great things for businesses, employers to keep in mind when considering whether to have an employee handbook and what to put in the handbook. Anything else before we kind of jump into what is required to be in an employee handbook?

[Megan]: That covers the major, I guess, preliminary consideration.

[Ari]: Yes, I think that's great. So, Megan, let's jump in: mandatory policies. We can focus on New York State... Can you just kind of give us a primer on mandatory policies, what, if you're an employer in New York you must have in your employee handbook?

[Megan]: Yeah. So I would say again, five, 10 years ago, we could tell our employer clients that there's very little that's "required" per se to be in an employee handbook. You know, there's definitely good to have things in there like EEO. Equal Employment Opportunity, nondiscrimination type policies which again, would be typically good to have. That is not the case anymore. There is now a number of laws that require certain material to be in an employee handbook. A trend we've seen, particularly in New York State and other states like California, Colorado, there are increasingly more and more things that have to be in an employee handbook. So now a new employment law will be passed, for instance, a new law this year, for example, now makes reproductive health decision-making a protected class. Employers can no longer discriminate on the basis of reproductive health decision-making. So that law is passed. That's not the end of the story now. The state also says in addition

you need to put X, Y, Z material regarding that in your employee handbook. So it's no longer necessarily just passing a new employment law. What the state is liking to do is now say and put this material or policies pertaining to it in your policy manual or your employee handbook.

[Ari]: Right.

[Megan]: So we're seeing a lot of that.

[Ari]: Yeah. And like the Hero Act comes to mind for me as we're talking about that, too, which I know you probably had on your list to talk about. But. You know, I think that's one it's kind of similar to what you just mentioned.

[Megan]: Yeah. So you know, I guess focusing on New York State, a big one is sexual harassment. A lot of companies are aware of that one now. It's been around for a couple of years, but New York passed a law strengthening sexual harassment prohibitions. And as part of that effort has basically established minimum standards of what is required to be included in a sexual harassment policy that's published. There's a training component to that. There is a complaint form that is associated with that. And the state actually has published a template policy, which is quite long.

[Ari]: Yes.

[Megan]: You don't have to adopt the state's policy per se, but it does need to have minimum components relative to defining sexual harassment, defining retaliation, providing for a complaint procedure. So there's a number of components. And then lastly, what's in the template policy and is also part of the minimum requirements is that there's information about external agencies. So where an employee can complain about sexual harassment. So the New York State Division of Human Rights, the EEOC, the New York City Human Rights Commission. So in a way, it's sort of an advertisement of where employees can go to file claims against you. It is now mandatory to be included in your handbook. So that's a big one.

[Ari]: Yeah. And so I think we'll keep going with the New York State specific ones, Megan, because I think there's definitely enough of them to fill our time. But one of the ones that we've talked about is the lactation accommodation. Can you talk a little bit about that? That policy and whether that needs to be included?

[Megan]: Sure. Yeah. Federal law, New York state law, and even New York City law regulate lactation accommodation and require that employers make certain accommodations for lactating mothers after they give birth. They need to make efforts to provide a suitable room or a space, private, shielded from view that's not a bathroom that mothers can express breast milk during work. And actually, New York City has the most robust of rules that impact the handbook to the point where they've actually published varying policies, lactation policies, which are quite long, that are to be included in an employee handbook, depending on the characteristics of the employer, whether they have a dedicated lactation room that is strictly for that purpose, or they make another accommodation, temporary lactation space or what have you. So that's another thing that should be in your employee handbook.

[Ari]: Thanks, Megan. And I think that's a good thing to point out. And I know we get some questions about lactation accommodations, so I think it's a good one to highlight, you know, in New York, can you talk briefly about paid sick leave, which I think needs to be included as well.

[Megan]: Paid sick leave is another component that is required to be included in the employee handbook. Relatively new concept in New York State, but definitely there's a written policy requirement

associated with that.

[Ari]: And is that is there a written requirement for paid family leave in New York as well?

[Megan]: Yes, there's a written policy requirement for that as well.

[Ari]: Great. So I think that's probably a good primer, Megan, on New York state law. I wanted to ask before we wrap up for this week, whether there are some mandatory or important policies under federal law you wanted to touch on?

[Megan]: Yeah. So there's a few major ones I'll just go over. As I said, a few of the major ones. One would be FMLA. So if you are an employer that has over 50 employees, the US Department of Labor has published a specific notice that is required specifically to be in an employee handbook. And this is different than just a poster requirement. The law actually says, put this in your employee handbook. And that's the case for all of these mandatory policies that I've been talking about. So there may be poster requirements that are also associated with these laws, but these are specifically policy requirements that they say has to be in a policy or an employment manual. So FMLA is one of those, it can be sort of redundant of an FMLA policy that's already contained in your handbook. So for that reason, I like to make the FMLA policy short and then include the required notice at the end as an appendix. But that's a major one. Another is OSHA several years back required that there be an injury reporting procedure in the handbook. Probably a good idea to have anyway. But that injury reporting procedure is required as well as a statement regarding nondiscrimination and nonretaliation if an employee is to report a workplace injury or illness. And then just another example I'll touch on is, which I mentioned earlier in the episode is federal contractors. There's specific pay nondiscrimination statement that's to be included. Right, in the employee handbook.

[Ari]: Right. Thanks, Megan. And I think that's a good point to point out for our listeners as well, the poster requirements, because I think for a majority, if not all of these policies that we discussed today, there probably is an accompanying state or federal poster, which a lot of our listeners probably know. But you can find those usually right on the New York State DOL website, the federal DOL website. So just something to keep in mind. But I think this is great, Megan, this is a good primer on what policies are mandatory. If you're taking a look at your employee handbook, which I think in the first quarter, a lot of employers are. So before we sign off for this week, anything else you'd like to add or anything you think we missed?

[Megan]: I don't think so. We covered quite a bit.

[Ari]: We did. All right, to our listeners, thanks so much for tuning in. Next week, we will pick up where we left off and we will tell you about some optional policies and some good to have policies in your employee handbook. If you are looking at your employee handbook or you're thinking about implementing one, you definitely don't want to miss it. See you next week.

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