



## Episode 17: “Guide to Employee Handbooks, Part 3: Recommended and Optional 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.” I am back with Megan Bahas for episode three, the final episode of our three-episode segment where we go through what you need to know that was new in 2022, and what policies to include in your employee handbooks, and what policies are mandatory for you to have if you have specific numbers of employees. Megan, thanks so much for joining us again. Welcome back.

**[Megan Bahas]:** Thanks, Ari.

**[Ari]:** So today, I think we’ll focus on some good-to-have policies and then maybe we’ll wrap up the episode by talking about some optional policies. To our listeners, if you listened last week, you know, we went through things that were mandatory, things that you have to have, you know, if you qualify or you have certain numbers of employees or just generally. Megan, I think we should dig into, you know, employees or excuse me, policies that we think are good to have. What couple come to mind for you or what would you recommend or what do you recommend employers have in terms of optional policies?

**[Megan]:** Yeah, so there’s a number of policies that are not per se required to be included by any particular statute, but they’re certainly good to have. And when I say “good to have,” I mean they clarify the ground rules for employees, they clarify conduct, they clarify issues related to wage and hour. And moreover, oftentimes they’re...I don’t want to say they’re self-serving, but they often are protective to the employer and are helpful in the context of defending employment-related claims, whether it’s discrimination, unemployment insurance claims that the employer decides to contest. Oftentimes they can be helpful in that context. So a few that come to mind in the wage and hour context in particular would be timekeeping procedures. It’s something that you want to have in an employee handbook, particularly for non-exempt employees. So a standard timekeeping policy would clarify what are your timekeeping mechanisms, whether it’s a time clock, whether it’s a payroll company, ADP punch system, whatever it is, you want to make clear in the employee handbook that employees have to record all of their hours worked. There’s no off-the-clock work permitted. And if for some reason, there’s a rogue manager or something that a circumstance where an employee does work off the clock, they’re required to report that immediately so that they can be paid appropriately.

**[Ari]:** Yeah, I think that’s a really good one to point out, Megan. So I think, you know, last week we talked about mandatory EEOC specific policies that would fall under that umbrella. Are there others that you would recommend that are good to have that maybe aren’t necessarily mandatory?

**[Megan]:** Yeah, I guess I would add one more to that to the wage and hour bucket, if you will. And then that would be on meal breaks. We’ve had situations, Department of Labor audits related to meal periods and the big issue with meal periods in New York State is that an employee, if they are interrupted during their 30-minute work meal period, the whole period needs to be paid. So if they’re

interrupted by work, that can lead to significant overtime claims because if you have someone who's working 40 hours a week they're being docked for a 30-minute meal period that they then claim they did not take because their manager maybe made them work through the meal period or what have you that would trigger overtime obligations and back pay. So a meal period policy can actually be helpful in defending those types of claims, particularly if you're clear in your policy that employees are required to take a work-free meal period, they're not permitted to perform any work, and if for any reason the meal period is interrupted they're required to immediately report that. It at least gives the employer the ability to say in the context of a claim, look, our policy is clear based on the employee they received a copy of the employee handbook. They signed an acknowledgment stating that they read all the policies. We never had any reports of missed meal periods, and what have you. So that's another one. And then I guess outside of the wage and hour context, good-to-have policies regulate employee behavior, employee conduct policy that I include in all my employee handbooks that I prepare or review for clients as a general standards of conduct policy. And that just generally outlines at a broad level—I like it to be broad anyway—that it basically says we expect you to behave professionally. We want to create a comfortable and safe workplace for our employees and the general public customers, what have you. And here are some examples of types of conduct that we prohibit. And then you list them. Insubordination is a big one. Stealing, general, poor job performance, acts or threats of workplace violence. And so, you know, New York is an at-will state, but I would say that that's a...I like to say that's sort of a trap for the unwary because in the context of a claim where an employee alleges some sort of improper termination, whether it's discrimination, whether it's in the context of an unemployment insurance claim, the agencies that review those types of claims, I'm talking the Department of Labor, the EEOC, Division of Human Rights. It's often very helpful to a defense in those claims. If you can point to a policy in the handbook that expressly prohibits the type of behavior that the individual was fired for. So that's why you want those, at least examples of the major buckets of misconduct that you can point to and say this was against our policies and the employee knew that, they had a copy of the employee handbook.

**[Ari]:** Yeah, I think that's really important, Megan. And one thing that you just touched on a couple of minutes ago was the acknowledgment piece of having an employee handbook. And obviously where this really comes into play is where you mentioned where an employee brings a claim, whether it's a wage and hour type claim or a discrimination claim. And I think one of the things that you know, those agencies look for, as you pointed out, is an acknowledgment from the employee that they actually got the policy, read the policy, etc. So I'm assuming you would recommend that for every time you give an employee a handbook, that they sign an acknowledgment. And in fact, I think for some policies it's required.

**[Megan]:** Absolutely. Absolutely. It's a critical piece of a defense. If you're going to use a policy to your benefit in the context of one of those types of claims, the reviewing agencies want to see that the employee had a copy of it and that they signed off to that effect for sure. And I guess one other thing that I will mention in the context of standards of conduct... I described how you'd want to be at least somewhat specific. But one school of thought, which I happen to subscribe to, is not to be too specific when it comes to putting specific categories of discipline that would be associated with a particular violation.

**[Ari]:** Yes.

**[Megan]:** Because well, that has its benefits in the sense that it can create uniformity and consistency and discipline, which is always a good thing. You don't want to have certain individuals, say, in a protected class being treated differently by managers than other individuals for the same type of misconduct. It can also box the employer in, and it doesn't allow very much flexibility. So if you do have an instance where somebody is insubordinate and your handbook gets into granular detail about a first act of insubordination results in a written warning. But really, when you look at the circumstances, it was something that was very severe and the employer really wants to terminate

the person over it. If that person files the claim, you're going to have a problem because you run into a situation where you didn't follow your own policies. And that's never good in the context of defending a claim.

**[Ari]:** Yeah, that's a really good point. And actually, I kind of have a situation right now that I'm dealing with for a client. And it's that type of issue where it's the handbook is very specific as it relates to insubordination in particular, and what the penalty is for it. But this particular employee engaged in conduct that, you know, the employer believes is so egregious that shouldn't apply. And this, for me, at least has come up in the context of a labor arbitration. But I think it's a similar concept. It's good to be specific, but you don't want to get yourself into a corner if you're an employer and you know, you've been doing this a little longer than me, but we've been doing it for years. You know, you can't predict how people are going to act in the workplace. So.

**[Megan]:** Yeah, in my personal preference, you know, and it's not every case...employers may have their own preferences on this. And there's definitely different schools of thought that are justifiable. But what I like to do in a general standards of conduct policy when it comes to discipline is basically state that discipline can take many forms. It can be a verbal warning, can be a written warning, can be a suspension or immediate termination. And I like to say that one form of discipline does not necessarily precede another, that the employer reserves the right to look at all of the circumstances of misconduct and implement the discipline that it deems necessary or appropriate in a particular case. Now, if you're in a unionized workforce, you're hampered a bit in that regard because oftentimes the CBA will be very specific, particularly when it comes to things like attendance. There's sometimes point systems associated with that. One equals X number of points or one no call-no show equals whatever number of points. And so if you have something negotiated with the union, obviously that type of level of specificity, i.e., that's included in a CBA would need to be followed. But, you know, absent a circumstance like that, my practice is to recommend generally that the employer at least leave themselves some flexibility and leeway in their policy.

**[Ari]:** I think that's a really, really smart practice and really smart advice. So, Megan, I think we, you know, I think we did a good job kind of going through policies that are good to have policies that we recommend. I wanted to transition a little bit and just talk about some policies that are a little more optional, maybe contingent upon the composition of the workforce. But, you know, we classify them internally as optional. So, you know, if you could kind of give us a primer on that, policies that we would recommend that maybe don't rise to the level of, "you should definitely have these."

**[Megan]:** Yeah. So there are several of those. I would say that things like outside employment, maybe nepotism, very granular things like exit interviews or operational-specific policies like, you know, you're in a restaurant business and, you know, treatment of customers; how you want your guests to be treated or parking. Those types of things or that can go in an employee handbook if you have specific circumstances that you want you know, specific circumstances or rules that you want employees to follow, all of that can be memorialized in policies and employee handbooks. And I guess I'd say the other major category, which depends on, again, the employer size, their financial wherewithal, industry, would be the benefits that they offer outside of those that are, of course, statutorily required time, I'm talking about things like vacation time or PTO, bereavement leave. Do you pay for holiday days? Those types of things. And so with those, though, if you do choose to include them, you again want to be cognizant, as you always do, of your jurisdiction specific rules. So, for instance, if you do decide to adopt a vacation policy—and I'm actually not aware of any state that mandates the provision of vacation time, they do say that if you do elect to adopt a vacation time policy or provide employees with that benefit, there are rules that need to be followed. So, for instance, in New York, there's no obligation to provide vacation time. There is for sick time, but no obligation to provide vacation time. But if you do and you decide to not pay any unused time out upon separation from employment, you have to state that in your policy.

**[Ari]:** Yeah, I was going to ask you about that, Megan, because I feel like that's a big one.

**[Megan]:** Right. Right. And so, yeah, the state's position is you don't have to provide this benefit. But if you choose to do it and you choose to forfeit unused time, then you have to make that clear in writing. So that's something you really need to pay attention to. Other states are more nuanced as well regarding vacation and PTO. So California and Colorado, for example, they say you don't have to provide vacation, but if you do, you cannot allow employees to forfeit time. So they give employers options of other things like an accrual cap. So they say basically if somebody accrues say 40 hours of vacation time at the end of the year or upon separation from employment, you have to pay that out. You can't let them forfeit it.

**[Ari]:** Right.

**[Megan]:** I guess that control that they allow an employer to have on that. As they say, you can implement an accrual cap. So you can say once you've reached 40 hours of vacation time, you can't accrue anymore. So those are the nuances that you need to be aware of state law, if you do choose to adopt vacation or other types of benefit policies, that are strictly optional.

**[Ari]:** Right. All right, Megan, thanks so much. This has been great. You know, before we close for this week, I just wanted to ask, is there anything else that you think our listeners should know or should keep in mind that you've come across in your practice that has been a more important issue?

**[Megan]:** Yeah, I think when it comes to employee handbooks, one thing that sort of permeates my review of the entire document is the NLRB and the rules that they've come out with relative to employee handbooks. And so sometimes employers that don't have a union setting kind of forget about the NLRB. They think, why does that apply to me, I thought NLRB was just union stuff. Not so. In March of 2015, the NLRB general counsel published a long guidance document on employee handbooks and employer policies that was very, very employee-friendly, I would say. While that was rescinded under the Trump administration, now that we have a new Democratic administration under President Biden, we can expect that the NLRB will take similar positions. They're coming out with more aggressive positions, employee-friendly positions. And so, you know, well, it's not a law, this March 2015 guidance memorandum general counsel's memorandum, it's good to keep in mind because it's sort of a preview, I think, of what you could perhaps expect of today's board if your handbook makes its way in front of the board. So I'll point out just a few examples of what I'm talking about. And so here's what I'm going to read a quote from the general counsel's memorandum because I think it's illustrative of what the type of restriction on employer policies that that I'm talking about. So it says "Employees have a Section Seven right to criticize or protest their employer's labor policies or treatment of employees, thus rules that can reasonably be read to prohibit protected criticism of the employer will be found to be unlawfully overbroad. For instance, a rule that prohibits employees from engaging in disrespectful, negative, inappropriate, or rude conduct towards the employer or management, absent sufficient clarification or context, will usually be found unlawful." So if you have statements in really any of your policies that talk about employees being rude or inappropriate, you've got to be careful about how those things are phrased. Employers might look at that as a somewhat benign statement, but if it's phrased in a way that kind of falls within this bucket, you've got to rewrite it or the National Labor Relations Board, if your handbook finds its way in front of them, may find a violation of the National Labor Relations Act. I guess just one other that sometimes comes up when I'm reviewing is employee communications with third parties, meaning the media, for instance. So oftentimes I'll see in a handbook it will say, you know, if any media inquiries are received by an employee, make sure you direct them to our PR or our spokesperson or our president, whatever it may be. But you have to be careful about how that's phrased, because the National Labor Relations Board takes the position that employees have rights under the National Labor Relations Act to discuss their employment with the media, to criticize their employment, employer to the media. So the way that that would need to be phrased is that employees are prohibited from

making statements on behalf of the employer to the media. You can't just have a blanket prohibition on them talking to the media. So those are the sort of nuanced rules, I would say, that the National Labor Relations Board has put out related to employment policies that you need to be cognizant of.

**[Ari]:** Yeah. And I think, Megan, I want to say last year I had a couple questions, they came up in this context and it was employees posting on social media. So I don't know if you can add anything in the context of what you were just discussing, but I think employees also have the right to discuss terms and conditions of employment with each other. So if you have a social media policy, can you give a little bit of guidance on what that policy should say or should not say?

**[Megan]:** Yeah, and that's one of the areas that's also heavily regulated by the National Labor Relations Board. And again, I'll make the point that it includes nonunion employers. This applies to all employers. And I think the most helpful analogy with that is that social media is now today's "water cooler." So you know that that's the way that the National Labor Relations Board views it. So conversations and whatnot that could be had between employees that are protected under the National Labor Relations Act, which could traditionally have been had in person, are to the same extent protected now that it's out there on the internet, on social media. And so, you know, understandably, employers are not so fond of necessarily negative material being out there about them on social media, but there's only so much that an employer is allowed to regulate in that regard.

**[Ari]:** Right. Yeah. I think that's an important thing to point out because as you said, I like that you said that social media is the new water cooler. That's probably definitely true. So. Well, Megan, thank you so much for joining. I really appreciate it. I think this was great for our listeners, a great primer, overview of the policies that should and can be included in employee handbooks. Before we sign off, anything to add?

**[Megan]:** I don't think so.

**[Ari]:** All right, well, thank you so much. To our listeners, tune in, in a couple weeks where we will delve into our next segment. Thanks so much for listening. See you soon.

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

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