



Episode 63: “Avoid Big Trouble in the Big Apple: NYC Employment Laws,” With Lee Jacobs

Speakers: Ari Kwiatkowski and Lee Jacobs, 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 episode 63. I am so happy and thrilled today to have Lee Jacobs join us on the podcast. Lee is a partner in Barclay Damon’s New York City office. He has years of experience in representing clients in a wide variety of matters, white-collar matters, litigated matters, and just day-to-day employment-related advice, particularly in the hospitality industry, which we’ll get to actually next week. But, after my long-winded introduction, Lee, welcome to the podcast. Thank you so much for joining.

[Lee Jacobs]: It’s my pleasure to be here, Ari, and a pleasure to see all of you, be all with you for the very first time. This is going to be the first of many (hopeful) conversations that we have.

[Ari]: Yes, an inaugural episode, we’ll call it.

[Lee]: Absolutely.

[Ari]: So, Lee, our listeners know that I always ask our guests to share a fun or different personal excuse me, fun or different fact about their personal or professional lives. So I don’t mean to put you on the spot, but I do. Can you indulge me and share something about you that would be interesting to our listeners?

[Lee]: I think it’s apropos for the beautiful weather that we’ve had. And it’s August. And I’m a hospitality lawyer and, you know, restaurants and the like. I live in Jersey City. I have a rooftop on my high-rise building where I have planted six tomato plants, and I am enjoying the bounty of my harvest every night now with fresh heirloom tomatoes. The one I picked last night was the size of my hand and I grew that in a container on a rooftop in Jersey City. So I’m pretty proud of that fun fact.

[Ari]: I like that. So we should add “green thumb” to your firm bio page.

[Lee]: I’ll take that for sure.

[Ari]: And I hope you’re having lots of caprese salads and whatever else that would be tomato-based.

[Lee]: Absolutely. Trying to figure out different ways to use tomatoes tonight. That was actually, it was in my commute in this morning was how can I have something other than basil, tomato, and mozzarella?

[Ari]: Yes. Okay, fair enough. Well, let’s dig in, Lee, to our listeners, you know, the purpose of this episode—and Lee and I talked about it offline for quite a while—is to kind of give employers who have just whether it’s employees in New York City or employers who have cross-state operations, we have plenty of clients who have employees located upstate. What we’re Western New York and in the city. And I think the purpose of this episode is to really highlight what you need to know as an employer if you have employees in New York

City. So, Lee, I think we'll dig in. I wanted to start, you know, most of us who are in upstate New York are familiar with the New York State Division of Human Rights. Could you talk a little bit about whether NYC has a counterpart to that? And if so, what is that counterpart?

[Lee]: Sure. New York City has its counterpart. It's called the Commission on Human Rights, the New York City Commission on Human Rights. Fun fact about the state of New York. There are actually 12 different commissions on human rights throughout the state. There's one, for example, in Niagara Falls, Orange County, one...

[Ari]: True.

[Lee]: They're all... one in Suffolk County, Nassau County, in Long Island. And each of the different agencies are tasked with enforcing not only federal law, state law, but whatever any specific law is relative to that jurisdiction. And when you come to New York City, it's almost the apex of federalism that it hasn't done... New York as a city has added layers of protection on top of what the federal government guarantees, what the state of New York has guaranteed, New York City has given even more. I will say that the state of New York has caught up to the city of New York in many aspects, and I'm talking about protected classes here in a sense of reasons why it is illegal for your employer to treat you differently. We all know the big Es, race, age, sex, etc., etc.. But the idea of crown laws of racially... hairstyles that are associated with a certain race, or religion, or ethnicity started here in New York City. It was adopted by New York State—"ban the box" laws which were you can't ask about criminal history started here in New York City; now adopted in New York state... safe and sick leave. New York City. Now in New York state. And, you know, coming down the pike, we have wage transparency in effect here in New York City, will be soon in New York state. And, you know, the newest category that's here in New York City is height and weight.

[Ari]: Yes. And I wanted to ask you about that. Yes, because I wanted to get your take on whether you think that will trickle down.

[Lee]: I think it will, yeah. I think it ultimately will, because history has shown that cities that take strong positions to protect their workers in those cities, like New York, Chicago, San Francisco have shown that those rules that are adopted at the city level eventually get adopted on a statewide. I do think height and weight discrimination is coming statewide. When? Who knows. I can see this taking a number of years and how it actually plays out here in New York, in the city. We'll see.

[Ari]: Lee, is it as it very... is that in effect yet in the city or is that forthcoming?

[Lee]: It's forthcoming. It comes online in November of this year. And essentially, you can't discriminate solely against an employee or a person for housing, etc., etc., based solely on their height and/or weight. You have to have a bona fide reason to exclude someone based upon their height or weight.

[Ari]: Right. Well, as someone who's almost 5' 10", I support that.

[Lee]: As someone is 6' 4", I also support that as well.

[Ari]: So, thanks so much, Lee. I think that's great context. I think it would be helpful—if you don't mind kind of, I think let's start with the New York City Human Rights Law. To our listeners. As Lee explained, New York City has its own commission on human rights. It also has its own New York, New York City human rights law, which is kind of an analog to the New York state human rights law. But I thought it would make sense, Lee, to kind of just run through some of the differences or maybe additional protections, as you called them, that are available to employees in the city that employers really need to be aware of. So where should we start? Shall we start with the protections for victims of stalking and sexual violence?

[Lee]: Sure. I mean. I think that's a good place to start. So there are multiple categories of differences. Like I said, the state of New York has caught up to what the protections that New York City has given. And here we're talking about domestic violence victims, sex violence victims, or stalking... victims of stalking. The state of New York and New York City are in agreement. Domestic violence victims and children of domestic violence victims have the same protections they have. You cannot be discriminated. You can't lose your job because you have to go to the police or you have to testify in court. You have to go to a shelter. You have to do something for your safety. You can't ask someone if they're a victim of domestic violence. New York City, in New York state, are in alignment, full alignment in that. Where New York City is different is that New York City extends those protections to people who are victims of sex violence, and victims of stalking. So those same things that you may need because you are the victim of a sex crime, you may need to go to the police station, seek mental therapy, mental counseling, etc., etc., or stalking. You have to move. You need to go to a shelter, whatever it may be. Those same protections that a domestic violence victim would get applies in New York to a victim of sex violence, or stalking. And this is something that I could see in the years to come. New York State adopting as well.

[Ari]: Right. Agreed. Agreed. So I think that was important to point out. I think the next one I wanted to ask you about is caregiver status, because I'm not aware of anything that's really remotely close to this in the New York State Human Rights Law. So I think it would be really helpful to touch on that. If you don't mind.

[Lee]: Sure. So in New York City, it is illegal to discriminate, to ask someone if they are a caregiver. And we'll talk about what that is in a moment. Like on an app, a job application or to deny a promotion or to, you know, fire them, etc., etc., because they are a caregiver. So this is specifically is when you have a child, a minor, and you need to provide care to that child, and that child resides in your household and/or there is a person that relies upon you, a covered relative, for medical care and treatment and support, and that applies to the caregiver so in this instance if I'm the caregiver, it would be my children, my spouse/partner, my parent, my sibling, my child, or my grandparent, as well as the child or parents of my spouse or domestic partner. The reason why this specific rule exists, you got to. I'm also a professor of law at Brooklyn Law School. And I one of the first things that I teach my students is, is that New York does not have one book of law. You can't sit on a... you know, check out one book from the library. You have to get the human right law, the penal law, this law, that law, every different types of law. So we fill in the holes as we go along. So where this came from is caregiver status. It sounds a lot like, you know, FMLA, Family Medical Leave Act or paid leave... before those things existed, before there was safe and sick leave here in New York City that was guaranteed or New York state sick leave where you can take time off to take care of a child or a family/loved one. This is where that same public policy function comes from. Someone cannot be discriminated against because they have to take care of a sick child or sick parent. And New York City is explicit about that.

[Ari]: Makes sense. So does this particular provision include any mandate that's based on caregiver status, an employee should be given any reasonable accommodation or is it simply you cannot discriminate, retaliate, etc., against someone who has caregiver status?

[Lee]: So you can't discriminate flat out. And every single one of the laws under the human rights law here in New York City and New York State Division of Human Rights, if you are a protected status and you are retaliated against for using that protected status, that in and of itself is a violation of the law as well. So what would happen here in this scenario is, is that presumably an employee in New York is taking time off, is requesting time off, whether it be a sick time or, you know, unexpected or they are scheduling time off at regular intervals to take... to do things. It's incumbent on employers to understand that there are no magic words that an employee has to say. An employee doesn't have to walk into their boss's office and say, "I need paid family leave" or "I need family medical leave act." It's on you as the employer with the advice of your trusted counselors to see what the constellation of facts are telling you. And it's on you as the employer to perhaps say and go, I notice that every Wednesday you're taking time off. And I heard you telling your coworker that you're going to your mom's doctor. It's on you to go to the employee and speak with that employee, find out what's going on, see if any type of accommodations are needed. Now, mind you, caregiver

status doesn't give you paid time off to go to the doctor unless you're taking paid sick leave or other some type of other thing. Sure. But it's on you as the employer to have your ear to the ground and try to understand what your employees need. And the law won't forgive you if you make a mistake. These are strict liability, right? A lot of a lot of these things.

[Ari]: Right? Yep. So important. We've talked in prior episodes about that specifically in a context of disability discrimination claims, because I think that can get really hairy in terms of what you said with there are no magic words basically that an employer has employee has to say.

[Lee]: Yup. And it's and with so many of the things that we do in the employment practice, whether you know, disability, how we pay people, how we do discrimination investigations. Right. Let's say the discrimination, a thousand people would agree. And then in an investigation, an employee should be fired or the investigation should be closed with no discipline. But if you don't dot your Is and cross your Ts along the way, it doesn't matter if you got the correct outcome at the end, doesn't matter.

[Ari]: So true.

[Lee]: So you got to know these rules because the penalties can be staggering if you don't.

[Ari]: Yes. So, Lee, I think that was helpful when that came out. That was... I don't say it was surprising to me, but obviously that caregiver status is pretty distinct from the human rights law. But I think this is another one... I wanted to talk about on employment status, because it's my understanding that is also protected under the New York City Human Rights Law. So if you could tell our listeners about that, I think that's a good one to hit.

[Lee]: So New York City has made it explicit that you cannot discriminate against someone because of their employment status. So let's think about this for a second, right? If someone... if you're an employee, if you're... this is someone's employee, they're not unemployed, so it doesn't really apply to you. So we're looking at job applicants. So in New York City, it is illegal to make it a condition of a job posting, a job application, a job interview, or whatever it may be that you are currently employed.

[Ari]: So that means don't ask any questions about current employment status.

[Lee]: You can ask your current. You can ask about your employment history. You can ask about what you've done for your background, but you cannot make it a requirement of the job to be presently employed...

[Ari]: Understood. So if you have if you're an employer in New York City and you have that on a job description or on an application, then that is a red flag alert and you should be removing that.

[Lee]: And now there are bona fide reasons for asking that question, like if there's a government contract or something to that nature. But as a general rule for regular employees, for regular businesses in New York City, you should not make it a condition of their employment to be that they have a job somewhere else presently.

[Ari]: Got it. So I guess that would cover unemployment status, current employment status, and like prior gaps in employment...

[Lee]: I mean, it is fair game to know that someone is unemployed, or was unemployed at a certain point. But it cannot be, that was the decision to deny employment was because of the unemployment. That's the problem.

[Ari]: Yeah. That's very interesting because I think under you know a lot of our clients upstate take a look at, you know, if an applicant has a 15-year gap of employment or has worked for 15 years, you know, I think that is taken into account depending on the position. But a fair amount of time.

[Lee]: Absolutely. But then I think in in that scenario, again, think about so many of the things that we do aren't a problem until they are a problem. So in that scenario there you don't want to have your written documentation if (presuming there is a written documentation) that says they are unemployed, therefore we are not hiring them. Correct? It would be.

[Ari]: Right.

[Lee]: That's just one of ...you just don't have that as written down anywhere because this is a... you're right, it is a dicey thing that there are certain professions that you want to have someone who's been in the field, has the experience, etc., etc. But you can easily say you haven't worked for 15 years versus being as being unemployed as has no relevant experience in the field.

[Lee]: Right. You can read right the same thing without using the word "has been unemployed."

[Ari]: Right? Right. That makes sense. So, Lee, this is this is kind of a big one. You know, sexual harassment, obviously sexual harassment prevention laws in New York state and in the city have been, I think, a hot topic the last couple... you know, the last few years since there were some updates to the standards and things like that. But I think New York City does apply a different standard. It's a little bit distinct in terms of proving sexual harassment in the workplace. So I'm hoping you can educate us a little bit on that.

[Lee]: Sure. So sexual harassment, the rules. I as a New York City-based attorney, I want to say started again here in New York City and then were adopted and taken up by New York State. To give a little bit of the history of it is that the federal rules are the most employer-friendly, least employee-friendly. New York State was somewhere in the middle, and then New York City was most employee-friendly, most employer disfriendly. Since the last two years, New York State has tacked more towards New York City. So specifically speaking about the hostile workplace, a hostile workplace, it used to be that—and this is the...as I think about it, the federal and state standard used to be that "hostile workplace" needed to be severe and pervasive and ongoing, meaning that it had to be so shocking of the senses. You know, not just so you know, an offhand joke, it needed to be right, but everybody knew about it. It permeated everything in the workplace and it had to be continuous, not just a one-off kind of thing. But New York State has tacked closer to New York City now, where New York State is now, it can be either it can be severe or pervasive, or ongoing. It doesn't need to be all three of them at the same time. And here in New York City the standard is even said differently, but it is essentially the same as the severe or pervasive; it is that the employer excuse me, the employee just has to prove by a preponderance of the evidence, meaning more likely than not, that they were treated differently because they were a member of one of the protected classes. And in New York City, I think there are almost 21 or 22 different protected classes. And the application of it, like the actual real effect as to an employer, what you should be aware of as one of the major differences between New York City and New York State. So in New York State, under New York State rules, you as an employer are not vicariously liable, meaning you're held liable for the sins of your employees. And I'm speaking specifically about supervisors and managers. If your supervisors and managers embark on a pattern and course of harassment and discrimination on your employees, on the New York State standards, you as an employer will not be vicariously liable unless it is established that you knew about it, you were told about it, you ignored it and you did nothing...And you and then you allowed it to continue to happen. So you actually had... or you participated in it. You were, as the employer, you participated in it. In New York City. In New York City those rules are not there. If it is, your manager or supervisor engages in harassment or discrimination, you as the employer are vicariously liable regardless of whether you knew about it or not.

[Ari]: Right.

[Lee]: Hard stop. So because the city's, the city human rights law considers your employee, your managers and supervisors as direct agents of you, as the owner of the business. So the only way to really do a good defense of any of a sexual harassment or discrimination claim in New York City is to prevent them, is to

prevent them from happening in the first instance. And that's doing your trainings, having handbooks, having policies and procedures that your employees know how to follow, how to file complaints, having a romantic and a romantic employees policy. I am totally against employee fraternization. My clients hate me when I say this. But there is under any circumstances that your employees should be in romantic relationships. Hard stop.

[Ari]: Right.

[Lee]: Now. That's a big one. That's the big catch where I've had so many clients that are before the Commission of Human Rights that are saying to me, but I didn't know my supervisor, my manager was doing this. They were doing this at night in the back of the kitchen. And I didn't know they were making these jokes or offensive comments.

[Ari]: Right.

[Lee]: And my answer is too bad. So sad. I'm sorry. Like it's in the chat. It's in the WhatsApp chat. If they you've got witnesses. It happened. There's strict liability. Now let's figure out a way to get out of this and make sure it never happens again.

[Ari]: Right? Right. Yeah. Very important, I think, Lee, to point that out because I think by and large part, you know, unfortunately, when sexual harassment occurs in the workplace, it's, you know, it's not something that maybe management or top-level people know about. It is more boots on the ground issues that develop. So I think, you know, particularly in certain industries, industries you're familiar with and where your clients work, and I think it's a huge issue.

[Lee]: It is. And these are again, one of those things that if you don't dot your Is and cross your Ts, follow the rules from the very beginning, you will lose before the fight has even germinated. So if you do not have a sexual harassment policy, if you are not doing your yearly sexual harassment identification and prevention training with your employees and with your managers, remember, your managers need a separate training, and there is a complaint filed against you and you haven't done those things, you are going to lose that fight.

[Ari]: Right. Yep.

[Lee]: Even if you even if you didn't do anything wrong, you're most likely still going to lose that fight because you're engaged in the fight that you could have, should have, and would have prevented in the first instance. And that fight is going to turn from whether or not the harassment or discrimination occurred, it's to whether or not you were complying with the rules and responsibilities as an employer in New York City or New York state.

[Ari]: Right. And of course, as we've talked about on the podcast before, you're required to have the policy and do the annual training.

[Lee]: Correct. Qnd there's no... I've been in I've been in hearings, and I'm sure you have as well, and I've been in private civil suits where, you know, it's been since 2016. You've had ...you were required to do sexual harassment training. Why haven't you?

Right.

[Lee]: It's 2023, right. The City of New York offers free training. You can go on their website and download to a video that you can have your employees watch for free. There is no excuse, in my opinion, and there's no defense. You can put up now. This is part of New York City. New York state employment practices.

[Ari]: Yep. Same for New York State. Obviously, as well. They have the training video available on the website. So our last topic I think we want to talk about today, which is marijuana usage. Can you kind of give us a rundown of you know, this is also a big topic, I think, throughout the state generally over the past couple of years. But can you give us a rundown of what might be different in New York City?

[Lee]: So I, I think to come to the end first is probably to give you the conclusion: there really is no practical difference between now in New York state, in New York City for marijuana usage. But how we get to that conclusion is different. So in New York City, it is explicit. There is a rule that says unless you are doing a job like a school bus driver, a teacher, you know, a doctor, or a crane train operator, things of that nature, you cannot be tested for marijuana usage. Hard stop. Done. It is an explicit rule. And regardless of why you use marijuana, whether it be for recreational or medical purposes and this is before cannabis was legalized in the state of New York, we look at New York state's rules. New York state's rules come from where you cannot discriminate against someone for the usage of marijuana in an employment context comes from disability laws. So it comes from that medical marijuana has been legal in New York for quite some time. And so if you were using medical marijuana as... under a doctor's orders with a prescription, you could not be discriminated against that. So we got coverage on medical marijuana disability rules. Now that cannabis is legalized in the state of New York for personal use and consumption. Now we come to off-duty laws. That is, your employer cannot tell you to withstand from doing something that is otherwise legal for you to do as a citizen of the state of New York. So it is legal for the citizens of the state of New York to consume marijuana. Therefore, you cannot be ... unless you are a teacher or a school bus driver, crane operator, etc., etc. is now, per se illegal to test someone for marijuana usage. So it's the same conclusion, but we get there with different results. As I said, in the future of this becomes a problem in who knows? Because the marijuana market here in New York is still in its infancy. But who knows? New York State may adopt a rule similar to New York City's rule that says you can't test for marijuana usage. And as a reminder, I tell when I do employee trainings, I explicitly, and I do this to all my trainings. Whenever I'm in front of employees, I bring up weed that, you know, it's legal to smoke weed in New York, but it is not legal to smoke weed on the job. Is technically—and I tell my employers it is technically legal. They go on their 30-minute lunch break, they can take up and smoke during their lunch break. They can. It's legal. It's off duty laws. They're not on the clock. They clocked out. They can smoke. So.

[Ari]: Right.

[Lee]: What I tell my employers, it's just like if someone's an alcoholic or has a drug problem, it's not that you think they are stoned or you think that they are drunk. It's that it's their work performance... that they've returned to work. Their eyes are bloodshot, they're dropping orders, they are making mistakes, they are slow to answer the phone, etc., etc. You are putting down all these other facts. Oh, and by the way, we think they're stoned so. It's the workers performance, not the fact that you believe they're stoned is the reason why they're being disciplined.

[Ari]: Yes. And that could really be the subject of a whole separate podcast episode. I think.

[Lee]: Of course.

[Ari]: So, Lee, thanks so much. I think I think we hit everything we wanted to talk about. I think this was a great kind of overview. But before we sign off, is there anything else maybe I missed or anything else you wanted to caution employers about in terms of having employees both upstate and downstate, or maybe employers who are just breaking into the New York City workforce?

[Lee]: Sure. This is just the tip of the iceberg. Stay tuned, because just as we're starting here now within the discriminate action and harassment protected classes realm, there are different notifications, and fliers, and posters that need to go up in New York City that are not required outside of the city. There is different employee acknowledgment rules, handbook acknowledgment rules. There's different safe and sick leave rules

are different. They've come into alignment recently, but they were different previously. The amount you pay is different. Minimum wage here in New York City, Long Island and Westchester is \$15 an hour. Upstate. It's different.

[Ari]: Right.

[Lee]: And newsflash, if you haven't heard, minimum wage is increasing every year, starting in the New Year for the next four years, up until it reaches a certain level, then it will change every year thereafter. So it's going to change again next year and that's going to require new LS54s or LS55s. We expect the exemption threshold levels for those who are qualified for overtime ...are not your managers, your professionals to go up as well. So and they're going to be different in New York City and Long Island and Westchester as opposed to upstate.

[Ari]: Right.

[Lee]: So please, please stay tuned.

[Ari]: Yes. Well, thank you so much, Lee. To our listeners. Lee is actually going to be joining us for our next episode as well. We're going to kind of pivot, switch gears, and we're going to talk what you need to know about the hospitality industry. So I'm really looking forward to that episode. Lee, thanks again so much for joining this week and I will see you in a couple of weeks.

[Lee]: Absolutely. It's my pleasure. Thanks so much, Ari.

[Ari]: The *Labor & Employment Podcast* is available on barclaydamon.com, YouTube, and all your favorite podcast streaming platforms. Like, follow, share, and continue to listen. Thanks.

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