*Barclay Damon Live*:*Labor & Employment Podcast*

Season 3, Episode 2: “The Essential Guidebook: Unpacking the Employee Handbook” With Lee Jacobs and Rosemary Enright

Speakers: Lee Jacobs and Rosemary Enright, Barclay Damon

Lee: Hello. Hello, and welcome to the second episode of the third season of Barclay Damon’s *Labor and Employment Podcast*. My name is Lee Jacobs, and I’m pleased to be joined by my partner, Rosemary Enright. I’m down here in New York City, Rosemary’s up in Buffalo. Good morning, Rosemary.

Rosemary: Good morning, Lee. How are you today?

Lee: Doing good. So are you excited for our discussion today on handbooks? It’s going to be a two-parter, but the first part is the handbook basics.

Rosemary: And that’s right. I have been… I’ve just been dreaming about it, Lee. Actually, in all seriousness, I love this topic. Ari and I talked… I did an episode, I think maybe two years ago on this, and we had a lot of great feedback because, I mean, they’re so important. We’re going to talk… we’ll go through all of that now. But yeah, I actually, I actually am excited about this. And again, y’all may have heard me mention Ari, you know, Ari’s doing great—if you didn’t listen in on our first podcast for this third season, you might not know where she is. She is currently out on maternity leave. She had a little baby girl, Stella, so she’ll be back in the spring. So we’re holding down the fort between now and then. But in honor of or consistent with what Ari likes to do is, we always like to start off with some fun or interesting fact. And as Lee said, I’m in Buffalo. And so, you know, but I’ve spent a lot of time in New York City, Lee. And one of my favorite spots this time of year is Rockefeller Center and the ice-skating rink there. And I have to say, I’ve never skated there. I have stood there, you know, like the kid on the outside with their face against the window looking in because I’m a terrible skater. And I think if I get out there, you know, I’ll wipe out, I’ll wipe out six people, but …I’m serious! But it looks like so much fun. So, you know, for all the time, you know, living in Buffalo, I guess the fun fact is living in Buffalo where, you know, we have a “nice” winter season. I, you know, I’m not a great skater and as a result have never I have never skated at Rockefeller Center. So that’s my little fun fact.

Lee: What my fun fact is kind of similar to yours, Rosemary. And I’m pretty certain you’re a better ice skater than me because I have never been ice skating.

Rosemary: Wow.

Lee: And the reason for it is I wear a size 16 shoe. And when you go to rent skates, they don’t have skates in my size. And I’m not buying ice skates to wipe out and take out six other people with me on the ice-skating rink! But the …for those you know, when you look at the… I actually walk past the rink every morning underneath Rockefeller Center on my commute in from the subway. And the rink is so much smaller in person than it is when you see it on television. And that that always amazes me—the first time I saw it in person. But who knows, maybe one day I’ll make it up to Buffalo with you, Rosemary, and you’ve got a friend who’s got skates that I can squeeze into. And you’ll teach me how to ice skate. It should be a fun scene for all to watch.

Rosemary: That’s right. That’s right. And just one last quick question around the Rockefeller Center rink, Lee, is it…they don’t… they put like a Christmas tree in the middle of it or where or. No, it’s not in the middle of it. Now. There’s the rink, but the tree is around it somewhere.

Lee: So the Christmas tree is it is to directly next to it, to the left of it to the right of it. I think upon your perception and in the summer to the summer in the spring when the Rockefeller ice rink is closed, it actually is turned into outdoor seating for the restaurants that are now here in Rockefeller Center and in the underground dining areas. And it’s actually quite nice and pretty when it’s warm to sit out there and have a drink and enjoy a nice meal. And so when you’re down here in the spring, I’ll take you there for sure, Rosemary.

Rosemary: All right. I’m going to hold you to that, Lee.

Lee: I look forward to it. But so I think handbooks—I think I’m going to throw you a question that we didn’t prep for here, Rosemary, because this and…

Rosemary: Oh no!

Lee: I think you’re going to be able to handle it. Okay? This is something I get from my clients. “I can download a handbook from Legal Zoom. I can download a handbook from the Internet or ADP or Paychex or whomever my PEO is has a handbook for me. That’s good. That’s enough, right?” What are your thoughts on that?

Rosemary: What is that emoji? You know that …Hand on the head?

Lee: Oh yeah, yeah, yeah.

Rosemary: Yeah, yeah. So, so now. So here’s, here’s how I would answer that. You can start with that. Yeah. All right. You can start with that. But no, that’s not enough. A generic handbook is exactly what I just said. It is *generic*. A handbook has to reflect your organization. So there are, you know, there are maybe some cultural things, but there’s also policies that are specific to you and to your organization. And, oh, by the way, there are also there are also policies or I can’t think of the word I want to use, Lee, but there are requirements. There are state requirements. Right. So just quickly, for example, in New York, there is a very specific type of anti sexual harassment or sexual harassment policy that you have to have. You download something off the web. They’re not going to have that. Right. So, you know, if you want to start with that, to get you thinking, to get the creative juices flowing, have at it. But no, I would never just download a handbook and say, “this is enough.” Because there’s just so much more for your organization and for the state. And in some instances. And, Lee, I think this is probably true in New York. There are things that are specific to some cities or counties, you know, and so, you know, just like this is not necessarily in a handbook like, for example, the ban the box, Lee. You know, ban the box in Buffalo, right? So right in the city is… ban the box that is in effect here. But if you cross out of the downtown Buffalo and go into West Seneca or Lockport or one of those others, it’s permissible there. All right. And so, again, very specific. So it is a… I’d say it is a dangerous or a risky proposition to just think you can use a generic handbook.

Lee: And I couldn’t agree more. And I’ve seen it fail the following ways because the… you know, a handbook isn’t required by law. There’s no law that says you must have an employee handbook. It’s a best practice because the handbook is supposed to serve as a tool for you to one, you know, make sure your employees know their rights, responsibilities, etc., etc. But it’s really your sword to properly discipline, terminate your employees, and a shield to protect you from any claims that your employees may make against you. So if you download a handbook from Legal Zoom, ADP and it’s a national handbook and you do nothing to edit it, that handbook is going to sit on your shelf and you’re never going to use it. And so then when someone comes and says, hey, you fired me improperly, and then you literally take the shrink wrap off of the handbook for the first time and you go to the DOL auditor, the human rights inspector, the Division of Human Rights, inspector or plaintiff’s counsel, and you show them this generic handbook, it’s going to be worth nothing. It’s going to… you’re going to have absolutely no ability to stand behind it, to say, someone violated my policy. Because you never used the policies. So, you know, and the other side of it, too, is that, you know, you’re using it as this tool to protect yourself. But as Rosemary says, it sets the tone, the mood. It should reflect your actual business, because if it reflects your business, you will use it. And your employees on day one, if they see a generic handbook from Legal Zoom that says “welcome to company, we’re so happy to have you here. Thanks Company boss” versus “Welcome to Lee and Rosemary’s Croquet School.” You’re (from you the fun fact from croquet and ice-skating school) and it has our mission and vision statement put into it and it has our signatures put into it on it. And it also includes our actual policies about how to take time off and to do certain things. People will use it, your staff will know it’s real and it’s showing that you are taking things seriously and jumping in further into what you were talking about, Rosemary, about required and notifications and things that that must be said. There are… we talked about in the last episode, you know, that there is no partial credit for some of these things. There is no partial credit if you fail to give your employees some notifications. And we try and you know, in many ways to get these notifications to your employees. The first thing is, you know, those posters, those big mega posters that have the little posters, all of them in there, that’s the first place where we try to get our notifications to our employees. By the way, the posters that you get from your payroll companies that have blanks in them, like where it says, “who is your EEO officer,” “what is your payday?” You need to fill the blanks …a blank poster is still an incorrect poster, not a half credit poster. So please fill them, fill those things in. But there are other ways to…

Rosemary: Can I interrupt you for a second, Lee. I just want to say that to your point about filling those in, I cannot tell you how many times I’ve… a client has sent over to me. And, you know, I didn’t realize that this was the type of handbook they had. It’ll be a new client they will send over, “well, here’s our policy. This is what we relied on to discipline this particular employee or separate them from the company.” And literally, like you just said, there’s the parenthetical with “company name.” And I look at and it’s like, where did you get this from? And most recently, we actually had someone file a harassment complaint. And so I asked for the… all the documentation and the client sent it over and their complaint form was, as you said, you don’t get partial credit: they had downloaded the New York State sample complaint form, but they left everything blank. So where it said insert who they, you know, the name of, who they contact, how they …got all of that was just the parentheticals and that and I said to them, this is useless. This shows you don’t take it seriously because an employee is going to look at this and say, well, who do I go to? It just says here that you were supposed to insert a name, so you clearly didn’t do …take it seriously. You’re just checking the boxes. We don’t want to be just checking the boxes.

Lee: And the question is here, is that and it’s a… it’s hard to forecast the future, but I would almost rather be in a situation where someone could feign could legitimately say I had no idea the rule existed. Right. And have actual innocence as opposed… or not innocence, but innocent ignorance as opposed to intentional ignorance. As someone who just downloaded this shrink-wrapped form from the Internet and just let it be. You’re going to be looked at differently when it comes for inspection. Yeah, but so, yes. So the blanks are important. Fill in the blanks, remove the brackets. And the handbook also gives you another opportunity to give those same notifications that should be on your posters, also in your handbook. Like, for example, did you know that New York has a bone marrow and blood donation leave policy? There should be a poster and a notification in your handbook.

Rosemary: Mmhmm

Lee: Just that simple. And when and… it’s odds are if you don’t have it in there they’ll probably never be a problem and you’ll never know about it until that one day one employee needs to make a bone marrow donation and you discipline them and then it just skyrockets into something completely out of control, right?

Rosemary: Yeah.

Lee: So and your handbooks need to be updated. And that’s going to be what, part two, you know. So stay tuned. We’re here. We’re talking about the basics of a handbook, what should be in it. But every year your handbook should be updated because laws change, things become new, outside events change things. Think COVID right? Things change and your handbook needs to be updated as a result of it. And think… as I advise to my clients every year your handbook should be updated. There should be new handbooks, new acknowledgments, irrespective of whether or not you actually change anything inside the handbook. This is making sure you’re getting it to everyone. You get acknowledgments for everyone. And hey, while you’re doing it, give them the new wage…give them a wage acknowledgment form again. Just in case, to protect yourself. Because we are human beings and we make mistakes. What are your thoughts on updating handbooks of Rosemary? Like how often? When should they be? What do you advise to people?

Rosemary: Well, you know, that’s a great question because this time of year, I’m actually… let’s go back a few months, end of November, beginning of December. Most of my clients are reaching out to me saying, Rosemary, it’s that time of year. I’ve trained them, right. They know how important it is. And so they’ll check in and say, Rosemary, what do we need to do for 2024? As Lee said, we’re going to talk about that in our next episode. But I in fact, I just finished two last week and, you know, once your handbook is in a place where you need it to be, Lee and I are going to talk about that. Then every year you may be thinking, oh my gosh, I’ve got this 35 or 40 page, whatever the, you know, that the length of it is… handbook. That’s a lot of work every year, Rosemary and Lee. It really isn’t. And once you’ve got it where it needs to be, so we don’t need to go in and change, you know, the, the…

Lee: The bone marrow, it’s going to be the same forever….

Rosemary: However, yeah, the bone marrow is going to be the same forever. Exactly. You know, but something like the O policy may change because we need to add an additional protected characteristics. So it’s …let’s just go through and see what needs to be updated for 2024. So, quite frankly, you know, it’s the time is fairly minimal. But Lee, I encourage everybody to start the new year with a new handbook. And the other thing I’d say, Lee, when you said, you know, every single year, give it to your employees again, get another acknowledgement. Again, you may think, do I really need to do that? Well, here’s the answer: If somebody joined your company five years ago or 10 years ago. Right. And now something all of a sudden pops up, things don’t go well and you’ve parted ways. Imagine sitting there and they said, Well, yeah, they gave me the handbook 10 years ago. All right. I you know, I didn’t realize X, Y, Z, whatever that happens to be. I didn’t realize that was going to be a violation. I didn’t understand that was the policy. It was 10 years ago or it was part of my onboarding. They handed it to me and just had me sign off on an acknowledgment. I didn’t read it. How many times have you had that, Lee, where you’re sitting in a deposition and you say, all right, well, isn’t this your signature? Yes, it is. So. And you’re saying that you didn’t look through… that you didn’t read the handbook before you signed it? Well, I didn’t have time. It was just part of a process. It was me and 20 other people, you know. And so by doing it every year, you’re reintroducing it, right? You’re reeducating your employees saying, here it is, policy, procedures. Please take some time to read it, sign off on the acknowledgment. You know, so I’m a strong, a firm believer in that, Lee.

Lee: I think and the other issue that I’ve had is that it’s not necessarily people, who of course they say they signed it, but yet they didn’t read it. But my handbooks, because I’m down here in New York City, are approaching 70 pages now in some instances.

Rosemary: Wow.

Lee: Right. It’s crazy. But when you have the appendixes and all those other things that we’re going to talk about,

Rosemary: Yeah.

Lee: My clients aren’t printing them out. So they’re electronic and they’re part of the onboarding process. And so you could make the fair assumption that your employees aren’t sitting there scrolling through 70 pages of that handbook. So again, doing it every year, training, acknowledgments, and we’re going to talk about it, the importance of what should be in the acknowledgment form and what it should contain so that way you can protect yourself. Because all of these things, at the end of the day, it’s going to be your word versus the employee’s word. And the more documentation you have to support your word is going to be helpful and beneficial in defeating any claim that your employee can have. Now, Rosemary, you and I, we had agreed on like… I have got a list of I think it goes to the letter X, there’s 26 letters in the alphabet. So there’s like 24 topics and we could go forever. So I’m just going to hit on some of the biggies that should be in your handbook. So, I think the very first thing is employment at will, every handbook needs to include in employment at will provision. It should be there in the front, in bold, in my opinion, and caps. It should have its own section and it should also be on the acknowledgment form. So employment at will, it means exactly this in New York and most states, all states except Montana. Did you know that? And Rosemary and Montana employees are presumed not to be employed at will… Well, everywhere else you are.

Rosemary: I know that. That’s a fun fact.

Lee: That’s a fun employment fact. So “employment at will” means you can fire your employee for no reason or any reason at all, so long as it’s not because of a protected class or characteristic. So, you can just let them go as long as you’re not discriminating against them and your employees don’t have to give you two weeks’ notice or anything like that. We ask. We socially, we think employees should give two weeks’ notice, but there’s no requirement. That’s what “employment at will” means. And if your handbook doesn’t include an employment that will provision and you also give to your employees documents such as NDAs, confidentiality agreements, non-solicitation agreements, non-compete agreements, and you don’t necessarily… and you give them an offer letter, you maybe even give them something that’s called an employment agreement and it doesn’t contain within an employment at will. And then you try to fire your employee without giving them notice. You could run into some problems. Because the law, a court may say this person is not an employee at will, they’re actually a contracted a contractual employee, and that gives them a whole ‘nother rights and benefits as opposed to what an employee at will has. That’s… what are your thoughts on this one, Rosemary?

Rosemary: You know, I have to say and this particular one, I don’t think I have anything to add to that. I think that I think you’re spot on with your points. So I’m not going to add anything on that one.

Lee: Huh! But good for me there on that one. I’m going to pick out here. I’m going to ask you if if you want to discuss about this one, Rosemary, why is it important to have a drug and alcohol-free workplace statement in your handbook?

Rosemary: I could… I was going to make a wise remark and realized I shouldn’t. You know, I do have to say, you know, what’s interesting with that one, Lee, is that’s really kind of a loaded… that’s a loaded question and a loaded policy. And the reason I say that is because in New York, as we all know, adult-use marijuana was legalized several years ago. So what… let me just step aside, deviate or tangent from the initial question, and that is if you had a drug and alcohol-free workplace policy and you put it in place more than… it’s been what two years Lee? that was legalized. Yeah. Two years so if it is more than two years old, it is very likely it is going to violate New York law. All right. And because at the time when you would have drafted that, marijuana or cannabis would have been considered an illegal drug. It is no longer that, which means that your policy needs to be updated. So let me just make that point, first of all, that, all right. If you absolutely if you take anything from this, I mean, there’s a lot to take from this. But I mean, as I said, that has to be changed. So anyway, so why is that important? Because for me right now, Lee, I can’t tell you how many of my clients have got employees who, after hours are enjoying, or I guess I would just say enjoying or using marijuana, which is permissible in New York State. The thing is, you still can’t report to work under the influence. You can’t, on your break time, go out and chew inedible. I think that’s the right way to say it or use an edible. So there is… by having a policy that clearly states you know whatever you do outside the workplace on non-working time is fine, so long as it does not impact, all right, your ability to perform your job safely and for you to interact with your coworkers safely. And so what we’ve been running into, Lee, a lot is individuals come in and on their break, they return to work and they appear to be under the influence. And we’ve actually had employees get injured. So I work with a lot of manufacturing companies and it’s problematic. So by having that policy and clearly stating what the expectations are and the actions that will be taken when something happens, then you can that you can then as the employer turn to it. So the employee understands the expectations. They understand what they’re permitted to do and not do. And then when that is violated, you can then take action and you can rely on that, right? So to me, it is… that policy is so important given the state of, you know, here in New York, adult-use marijuana.

Lee: The way the way that I like to think about it is that when someone… when I my client’s hospitality to someone you know I get a call, he’s stoned again what do I do? I said I don’t care that he’s stoned. Tell me, is he doing his job? Tell me, is he is he in a danger to himself? Is he a danger to his coworkers? Because that’s what I care about. So when you do the write up, it’s he’s a danger to himself. He’s a danger to others. He’s failing the specific job performance. Right. Oh, and by the way, he smells of the dankest reefer possible and his eyes are bloodshot. We are terminating him for poor performance, not because we believe he was stoned.

Rosemary: Precisely.

Lee: And we’re going to we’ll talk a little bit more about marijuana in our second episode of this. But there are so many required policies or best practices that there should be in there. So, for example, I’m just going to run off some of them. You should have in your handbook notices about worker’s compensation, unemployment insurance, insurance, and short-term disability. All three state programs. They should be in your handbook. There should be miscellaneous leave notices in your handbook that advise your employees about military leave, jury duty leave, witness leave, voting leave, crime victim leave, voluntary emergency responder leave, bone marrow donation leave. These things need to be in your handbook. There must be in your handbook. There must

Rosemary: Don’t forget, the EEO statement that should have been up in your “e”s.

Lee: That was the next thing that I was going to ask you about. What is the most important one? And for me it’s employment that will to you and hidden question: EEOC. What’s it EEOC statement and why should it be in your handbook?

Rosemary: It is so important to have a statement in your handbook that that explains that you are an “equal employment opportunity,” you know, and for our applicants. So we offer opportunities to all qualified individuals. And our EEO statement is for applicants. It is for our current employees, for promotions, for transfers, for raises, for educational opportunities, everything terms and conditions of employment. And we want that statement that says basically it doesn’t matter if you’re green or you’re blue or you’re tall or you’re short or you have brown eyes or blue eyes, none of that matters. We are agnostic. All right. We are we are looking for the most qualified people who can perform the essential functions of their job. And we strictly prohibit anyone in our organization from violating this policy. Right. And so so to me, that is so important when I’m at whenever I’m responding to the DHR or the EEOC I point out our policy. And it’s one of the first lines, as you were talking about the shield, right? So it’s the shield. But the other is I also think, quite frankly, a lot of times, Lee, employers will just plug in the standard, you know, and policy, and I’m fine with that. But I have others who will put an intro into it, again, talking about how important it is to them and how their workplace and their company is richer and stronger and better because of its focus on bringing in all different types of individuals.

Lee: And I think that bookends to the last topic that I’ll talk about on this is reasonable accommodations, disability statements. That you should have a disability policy in your handbook, one that you will not discriminate against people that are disabled. Part of the EEOC policy, but more importantly, how an employee who does have a disability, how they can request a reasonable accommodation and engage in the interactive dialog. And just as you said, Rosemary, I have clients that edit their handbook to make it just like their own, not like a template, and they even embrace the diversity of the varied levels of able bodiedness that people can people can have. I have one client who has turned from stopped using the term disabled and now may use the term “people of determination”…

Rosemary: I love that.

Lee: And because the term disabled implies, you’re less than where as a person of determination and they learned of this term when they were at the World Expo in Dubai in 2021, I think where it was all about disability accommodations and that phrase that they want to start using is “persons of determination.” With that, though.

Rosemary: Well, actually, hold on one second. I’m sorry. I know we’re butting up everybody just bear with us. We try to be respectful of your time, but I want to make one comment about reasonable accommodations. You know, when I started doing, Lee, and I’ll be honest with you, I just I’m just starting it this year. I used to have a section on reasonable accommodations, and I would it was focused on people who were differently abled or people how did you say it?

Lee: Persons of determination.

Rosemary: Persons of determination. But what I’ve started doing this year is now reasonable accommodations. So that’s the title. And then there are three sections in it. And the first is for people who are differently abled, which we’ve just talked about. The second, Lee, is reasonable accommodations for religious reasons. So you know how, Lee, we will often in the section where we talk about dress code and personal appearance, well you know we include that statement that says accommodations, reasonable accommodations can be made for religious reasons, blah, blah, blah. All right. Well, so now in the reasonable accommodation, I include that front and center in there. And then the third section is pregnancy-related conditions. So those are repeated… the pregnancy and the religious accommodations in other sections of the handbook. But I have now started putting those three all in one section to really drive the point home that it’s not just people who are differently abled, but it’s, as I said, religious and also for your pregnancy-related condition. So I just wanted to throw that out there.

Lee: I think that’s perfect. And that and that moves into, you know, the last thoughts of what your handbook should include, you know, the forms and appendixes. You should have a sexual harassment complaint form that’s required New York State law. You should have a reasonable accommodation form. You should have a lactation accommodation form. And here in New York, it is still a thing. It is still a thing. The Hero Act, COVID sick pay still exists. It is still around through the end of this year. But the HERO Act was made, yes in response to COVID, but the HERO Act is in place ready for the next pandemic. So it’s still a thing. So you’ve got the handbook that’s that reflects you, your business, the ethos, your ethics, how you want to operate your business. And you’ve got your forms, your appendixes, and then in an acknowledgment form, that acknowledgment form, in my opinion, acknowledges that the employee received and read the handbook; that they’ve received and that they’re an employee at will, that they’ve received and read the sexual harassment policies separate and apart from that, and that they’ve received and read all of the required fliers and notifications that you’ve given to them as part of the onboarding process. Any variables on your end from the acknowledgment process before we wrap this up, Rosemary?

Rosemary: No, no, I think I think you hit on all of it. Lee, yeah.

Lee: Yep. And my mind, they, they sign it four or five times, not just one. Four times after each. Each one. Yeah. So that way, you know, at that deposition you sign this five times and you didn’t read it and you just can yet nail it again and again and again.

Rosemary: Exactly.

Lee: So with that, thank you, Rosemary. And to our listeners, thank you for listening to us. As we talked about before, we want to hear from you. We want to encourage the conversation. So please go to Spotify and we’ve got a Spotify poll up. And the question that we’re going to ask of you and it’s okay, it’s anonymous. No one is going to come and ding you for it, but do you currently, as of the day of listening to this podcast, have an updated handbook for 2024? A simple yes or no question. With that, we thank you and we look forward to continuing the conversation with our next episode, which is going to be on new updates for 2024. Thank you again, everyone. Thanks, Rosemary.

Rosemary: Thanks, Lee.

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