

[Rosemary Enright]: Hello, everyone, and welcome to, what is it, Mike? Episode six? Five? Six. We’re having so much fun that I forgot.

[Michael Sciotti]: Something like that...

[Rosemary]: And again, our producer is going to kill us for not giving the exact number. But anyway, welcome everyone to episode 5 or 6 of the Barclay Damon *Labor & Employment Podcast*. I am Rosemary Enright, sitting here in Buffalo, New York, and I’m joined by my colleague Mike Sciotti, who is sitting in Syracuse today. And, for those of you, if you’re watching no, Mike does not have like an oar or something that goes through his head there. You can see a ceiling fan. So we’re actually recording this in late January, and we are in the throes of a week-long now polar vortex and blizzard and everything else. So Mike’s working from home. I live and work in the same building, so I just came down to the studio. But yeah, so he’s at home with a fan above his head. So bear with us. All right, so this episode we’re going to continue our discussion of the employee handbook. So two sessions before we talked about, the first at a high level, those things that I’ll call “housekeeping.” What do you think, Mike? Housekeeping, administrative type things, when you’re thinking about how to draft your handbook and the second or the follow-on episode we hit on the leave and accommodation policies and had some great discussions on that. Today we’re going to focus on the code of conduct, social media, and how the National Labor Relations Act may or not may, but does play into those policies. So something to think about. But before we jump in, Mike, we got a question. You ready?

[Mike]: I’m ready.

[Rosemary]: All right. The question today for you is if you could appear in any television show, what television show would it be?

[Mike]: Easy. I’m a trekkie. “Star Trek.”

[Rosemary]: And you know what? I believe that, and I can see that. Now just tell me quickly. So the question is just if you could appear. So tell me, what would you want to do? And it’s because there’s always crazy things going on in Star Trek.

[Mike]: I want to fire the phasers.

[Rosemary]: Of course. Do they still have that thing... I’m going to date myself. Where they going? They’d stand down those circles and they’d get like, like pull. What was?

[Mike]: The transporter, Rosemary. Yes, they do have the transporter.

[Rosemary]: Do they still have the transporter, Mike?

[Mike]: They do, they do. Okay. Got it. They do. Yeah.

[Rosemary]: I've watched some of it. But I'm definitely not a "trekkie." So for me again dating myself, you know, I thought a lot about this because there's so many fun shows out there. And you know, I'm thinking, you know, who might I want to meet or are there cool costumes or is it a cool time period? And then I ultimately, Mike settled on "Northern Exposure" drama, the television show Northern Exposure back in the '80s. Probably the now is the early '90s. I do remember it was not the early don't date me that much. Maybe. But takes place in Sicily, Alaska, and I just love the show. Quirky characters, quirky town and the every show, you know, there was always some sort of message in there, but if I had to pick a particular episode, it would be the one that was called The Fling, where they build a giant catapult. And at the very end of the show—it was an hour long—they fling, a piano through the air, and it comes down and smashes. And I know that sounds crazy, but the whole point of the show is it's not what you fling, it's the fling itself. So in other words, you know, that whole thing, Mike, where people put something, you know, that's worrying you in a red balloon and let it float away. They just let it go. I think that's probably what the fling was. But anyway. But that would be my show, "Northern Exposure." But of course, there's also Seinfeld and you know, all of these, you know, great fun shows that would be terrific. But, but there we go. All right. He could. Mike and I could go on and talk about this stuff for hours, but unfortunately, we have to get down to the serious stuff, so. All right, so, Mike, I think I'm going to let you kick it off. So we know the topic's code of conduct, social media. So what do you want to talk about? What do we need to tell everybody?

[Mike]: You know, I think just to recap, you know, the... you got to start where we told you in the prior podcast what laws apply to you. I'm assuming you're past that and you've identified what you must have in your handbook, and the areas you must cover. Now we're going to be getting into some stuff, Rosemary, where it's sort of, do I have to have a code of conduct? The answer is no. Do I have to have a social media policy? The answer is no. Should you? Absolutely. And for a couple reasons. See, you know, the two things we're always thinking about in when we go to discipline an employee and let's assume it's termination. Will they be unemployment eligible? And can we defeat any type of employment claim that might roll out of the termination? And that can come out in lots of different ways. You know, they can file a claim with the EEOC, the Division of Human Rights, either one of the departments of labor, OSHA, the National Labor Relations Board. It's the alphabet soup. So, you know, the handbook I view is your front line of defense. And, you know, let's start with the code of conduct. And I think it has two parts: prohibited actions by employees, and things that you expect employees to do. And one of the things that, you know, the questions we next would ask are, do you have a union or no union? If you have a union, obviously your collective bargaining agreement becomes of utmost importance, and it may or may not reference your employee handbook. That's really an individualized analysis CBA by CBA, and by company. But let's get past the union issue. What if I don't have a union? Am I covered by the National Labor Relations Act? The answer is yes. Your non-employees have, I'm sorry, your non-supervisors have certain rights. They're allowed to engage in what's called protected and concerted activity, band together to discuss terms and conditions of employment. And two of the areas that the National Labor Relations Board really attacks nonunion employers on: are the code of conduct or conduct rules in general, no matter what you call it, it doesn't have to be within a code of conduct. It could be buried somewhere in your handbook and the social media policy, because employers are trying to control or dictate certain conduct outside of work that they expect them to abide by. And these policies become, you know, ripe for you fired employee X for violating the code of conduct. Employee X runs to the National Labor Relations Board saying, I was engaged in protected and concerted activity in a nonunion setting. My firing was illegal. And then we have to justify the policy, and we have to justify the terminations. From a big picture that's sort of why we care about these things and why, you know, employers sometimes are shocked when they hear from the National Labor Relations Board. What do you mean I can't have a policy that says that? And here's a here's an example of one the board, you know, it's an easy one for them to find that you violated. Dear employees, you cannot discuss your wages with each other. And, you know, most employers think, well, that's okay, or I don't want employees discussing wages with each other, but it is a term and condition of employment that policy would be struck down as illegal by the board. And, you know, you're going to have to revise your manual accordingly. You know, the other part of this, Rosemary, is that I'll go ahead. Go ahead.

[Rosemary]: No, I just want to interrupt you for one second. So I want to go back. I thought you were going to give an example of an employer, you know, one of your clients get you getting that letter from the NLRB. And so I just wanted to share, very recently, like one month ago, a client nonunion environment got a letter from the NLRB. They called me on the phone, and they said, Rosemary, what is this? Why are we getting this? We don't have a union... it's precisely what you said, Mike. I said, send it over to me. And I looked at it, and they had fired an employee, and that employee went to the NLRB and said I was wrongfully terminated because in this particular case, they said they did not follow progressive discipline. And there were some other things that the employee said, but they also said in there that they were speaking out on behalf of other employees, Mike. So that "concerted activity" that you discussed, and our client was shocked to find out that this could happen. And so we talked all through it and, and we actually responded. And for those of you who are listening, you get this letter. And the first thing that you got to do is you got to complete—I don't know, I can't remember Mike, what's the... and it's not an information request, but that form...

[Mike]: It's like a questionnaire.

[Rosemary]: Yeah. Of course that's what it is. It's a questionnaire. Yeah. So you have to fill out a whole questionnaire. So we completed the questionnaire and submitted it. And we were waiting for an investigator to be assigned and, and I'm pleased to report we got a letter saying, we've dismissed it. So I suspect maybe they had assigned an investigator, the investigator interviewed the complainant, i.e., the former employee, and discovered, you know, or decided rather that there was a cause of action there, but literally just happened, as I said, within the past month. So just wanted to let you know if you're sitting out there thinking, well, how does this happen, how do we know? Well that's how it happens. The employee picks up the phone calls, and the NLRB will always, like any of these agencies, will always reach out to the employer because they don't want to have a chilling effect. They want individuals to come forward if they believe that the employer engaged in some sort of wrongful conduct anyway. So I wanted to give that example. So I'm sorry Mike. Now my oh, and the other thing that...

[Mike]: That raises a great point when you just said this, this protected and concerted activity can come at an employer lots of different ways. You could have a group of employees go to management together, you could have a single employee go to management together on behalf of like ten others. And the other thing that... the reason we chose code of conduct and social media together was we also see protected and concerted activity in social media. "My boss is a jerk. He fails to address safety concerns that I am raising." Five other employees chime in, saying, yeah, he's a jerk, jerk, jerk. And you know, you know, and, and the question becomes, what do we do about it, as an employer? And, so that's sort of the big picture. And, you know, where I also like to describe this. The National Labor Relations Board is a political animal. Is dictated... the course their enforcement is dictated by who's in the White House, you know, and this has been going on for forever. You know, when the Democrats have control of the board, it is more employee-friendly. And when a Republican has... the Republicans have control of the board, it is, more employer-friendly. And that's... I've been doing this now 35 years. And, that's been the way it has been, it is a political animal. And, you know, and one of the things that we talked about, Rosemary, the other day was revise your... review your handbook every year. One of the reasons we recommend that is because of the change in the board. When the board changes, you'll suddenly see the like... they'll have a model social media policy. Suddenly that policy changed from 2025 to 2026. And did you adjust with their enforcement mechanism? And so, you know, I pay particular attention to any sample policies that the board may issue because, you know, that's really what they think about when it comes to enforcement. So, you know, enough sort of the politics of this, but I think it's important just for people to realize.

[Rosemary]: It is. And somebody may be sitting out there thinking, okay, you just said for me to check for a model policy each year, where can they find the model policy? Like how would they know if the NLRB published, an updated policy?

[Mike]: Yeah. You just go to the National Labor Relations Board website, just Google it. It will take you there. You can also sign up for emails from the board, and you have various categories you can pick from. That is a nice simple way to do it. If you revise your handbook once a year and maybe you didn't sign up for the emails, I'd go to the board website, and under I think it's under the general counsel's office. This is where we typically find guidance and sample policies. Sometimes the sample policies are attached to guidance. So, you know, you may have to look and see what guidance came out in 2026. And take a look at those. They don't necessarily make it easy on us. And that's why it's almost impossible for your typical employer, Rosemary, to stay up to date on everything because, you know, you and I get five to 10 emails a week on updates, and we cannot keep up with that. I mean, there's so much between statutes, regulations, guidance, and case law that comes out. You know, it's crazy to expect your rank-and-file employer to stay up to date on this stuff is difficult. And if not downright impossible. But I tell everyone, do the best you can. Yeah. And we'll go from there. That's right.

[Rosemary]: We'll go from there. All right, all right. So let's talk about the social media policy, Mike. All right. So what are your what are your what are your tips.

[Mike]: First tip: don't be overbroad. The second tip is use the board sample policy. But whatever that may be. But the key on the social media policy is not trying to dictate every little thing that an employee may or may not be able to do outside of work. I think it is simply a mistake. Certain things you can always dictate, you know, hey, if you have a private Facebook page, let's say, don't wear company clothing or hats or say to the world, hey, this is on behalf of company X, when you're doing whatever it is that you're doing, you know. Be careful until the employees, hey, don't engage in illegal conduct on your private social media because I'll be able to discipline you. So, you know, employees do stupid things on social media. Someone goes, does Facebook Live and they start snorting cocaine, and they say, hey, I'm snorting cocaine. What are you going to do about it? Well, I'm going to fire you. You know, number one. But number two, we need to realize that social media, Rosemary, is a water cooler for employees to blow off steam, to complain about their boss, to complain about work. Let them a lot of times. It's like, I don't care... if you think all your employees love you, you are dead wrong. They... I just don't want you trying to nitpick everything, but you really have to look at anything on social media. They are allowed to discuss terms and conditions of employment and that could be a safety issue. It could be wage issue. It could be some test or training that is going on in the workplace.

[Rosemary]: Dress code. Complain about vacation.

[Mike]: Yeah, it could be, lots of things that come out. Yeah. And the key is don't go overbroad. And, you know, the social media will be tied into the code of conduct. Let me give you an example of something that's too broad in a code of conduct. "We don't want you taking any pictures of the facility." The board would say that's illegal. And they're like, well, wait a minute. The board would reason this. I can walk across the street, stand on the sidewalk, which is a public sidewalk, and I could take pictures of your building all day long, and there's nothing you can do about it. The employer's response is typically this: That's not what I...my concern is. Too bad you wrote your policy overbroad. What you really were trying to get at, and what becomes of particular importance is the policies in your code of conduct and social media need to be narrowly tailored only to protect legitimate business interests. So let me give you an example. You will not take photographs or videos or otherwise reproduce confidential company documents, such as profit and loss statements, customer contact lists, the secret formula for Pepsi, whatever it may be, you have to tailor it very narrow because the board reviews your handbook from a very unique perspective. Rosemary and I went to law school. Many of you listening to this have a four-year degree or an advanced degree. And we're... you're on what I would call the higher echelon of education. Are all your employees of that same mindset? They are not. And some of them may not have even completed high school. The...and then again, there's nothing wrong with that... is simply the board analyzes things. And you know, I call it the... they "dummy up the rule." What would someone that really has no common sense and no brain think about this policy if they were to have read it? And that's how I describe the board. They analyze this from a, you know, what would the least educated worker with limited understanding of the English language perceive this policy to mean? And

most employers just go crazy when they see that because they're like, that's not what we meant. That's not what we were trying to do. Too bad. They've struck down your policy. So it really... the board forces you as employers to take a hard look. What do you want the employee not to do and to tailor it and to limit it in such a manner. You know another thing. Don't be disrespectful. Yeah. Okay. What does that mean. You know that they're going to get into that. Well you can't swear at your boss. Well what if I said this and I think I alluded... to my boss is a jerk because he won't address the safety issues that myself and my coworkers have raised. I don't think there's anything you could do to the employee. I just leave, I just leave the employee alone. Well, he called me a jerk. Well, maybe you are. Maybe you didn't address the safety concerns. Let them blow off the steam. Because I think it is a mistake to try to be very minute discipline issues, being overbroad in the code of conduct. But, you know, every institution, Rosemary, is a little different. So the code of conduct is a little different.

[Rosemary]: Can I stop you for one second and I'd be curious and your thoughts on this. So I want to make two points. The first is when, when Mike said, you know, I don't know how you said it, Mike, don't break the law. Something like that. But keep in mind and so he made the reference of snorting cocaine and that you can however, if someone or I would what I should say is in addition, that's what I mean to say is, in addition, if an employee on social media engages in conduct that would violate our anti-harassment policy or our sexual harassment policy, something like that. So they are not protected on social media from if they go out and they start making comments that would violate those policies. So I say that because you can include in your social media policy a statement that says they cannot violate our sexual harassment, our anti-harassment, you know, all of those, those policies like that, that can be stated clearly in your handbook, and you can take action for that.

[Mike]: Yes. And 100% agree. And just a reminder to employers out there, you're... the model sexual harassment policy that New York is has given us basically says, you know, harassment could occur away from work, during non-working hours, using private devices and cell, your own cell phone, your own computer, and you still can be held accountable if it is sexual harassment. So the New York policy gives you a lot of leeway and is very broadly written. So, you know, I can sexually harass someone on social media and I can actually hide it. And what do you mean? Well, I could make a post, Rosemary, that only the person I'm harassing can see and no one else can see it. So the proof would be that the employee who is being harassed giving their employer a copy of the post, and an investigation will ensue and discipline may occur. The board is not so unforgiving as to say you can't follow the law. Yeah. And, if, if a certain statement or requirement is dictated by, you know, the Department of Labor, Division of Human Rights, it's okay. You're going to be able to do it.

[Rosemary]: You know, the other point I wanted to make, Mike quickly is, and I've said this a hundred times, if I've said it once and my clients are always upset, but the employee puts out their, "my manager is a jerk" and says whatever else they're going to say. And the employer gets upset and they're like, well, I want to respond. Or they're talking about things in the workplace. And they say, well, we'd like to post something. And what I always say is, no, don't do that. All right. Let them do it. But people are thinking, and I'm... what I always say is, number one, I think anybody reading that will often think, okay, this is a disgruntled employee and move on. But secondly, by you giving or by the employer responding in some way, you are giving oxygen to that flame and what's going ...and it's going to keep it top of mind. And you're then going to have an employee and the five people, Mike said, you know, you get five people that like that comment all now piling on, and it's going to be much worse.

[Mike]: So I agree.

[Rosemary]: There's that saying, Mike, that something about like today's newspaper, you wrap tomorrow's fish in it or something like that, that you know what? Just it rots and nobody thinks about it. So it's easy for Mike and I to say, because there isn't... it isn't us they're calling the jerk out on social media for the world to

see. But I always say the worst thing you can do, unless it's a violation of our policies or the law or something like that, let it go, because it's only going to be worse. You're going to keep it front and center.

[Mike]: So yeah. And I would 100% agree with that. And also sometimes, Rosemary, we're called upon... client will call us saying, I want you to send them a letter saying, take that post down. No. You know why? Because our letter is going to wind up on social media. That's right. And now instead of one or two people looking at the post you wrote, I have 100. And like Rosemary said, you're feeding oxygen into the fire. Sometimes it's simply best to let them... it burn itself out. Now, if there's a threat, call law enforcement, right. Don't be afraid to pick up the phone and say, hey, Johnny, our employee just threatened physical harm to me on social media, and, they'll come over, you know, then what happens is, in the hands of law enforcement. But you know that. Let them blow off steam. They don't love you. You know, they're not going to say all good things about all the time. Yeah. It is... don't take things personally. And sometimes it's best not to look. Like one of the things that's sort of off the subject, but I'm a fan of supervisors not being friends with their subordinates on any social media. I mean, I don't want to know what they're saying. And, you know, sometimes you'll learn of it through other means, but, yeah, just let it burn itself out because they don't love you 24/7 and they're not going to. Right. Show me a workforce where everyone is happy with every decision, with all their pay, with every benefit. It doesn't exist. And I... you know, you just need to realize that social media is a water cooler. And one of the things is to let employees blow off steam, let them. And the other reason not to go hard and heavy on employees for social media, or maybe just ignore some stuff, is all of a sudden and, you know, you talk to four or five employees about some issue. Those four and five employees don't like the fact that you addressed it with them. And the next thing you know, they're knocking on the door of a union saying, can you help? And you may be faced then with an organizing campaign or something like that. So it's a balance that we constantly, as employers have to have. And sometimes you can discipline without discipline. And I use this a lot where it's a, you know, someone is a long-standing employee they're complaining about something to people, but they won't come forward. Call them in, have a heart to heart, frank discussion with them, saying, I, I'm hearing through the grapevine, or I saw something on social media. Do you like working here? I mean, have we done something to offend you? You know, and it puts them immediately on their heels. And also, people are much braver on social media than they are in person. So you can get a message across to someone by just having a discussion. Call it coaching, just call it a discussion. But you don't have to discipline. You know, where the board gets concerned is where you have a, one, an illegal policy on its face, or two, you're disciplining employees for things that they, they view as violations and sometimes just have a discussion, you know, do you like working here? You know, years ago, one of my clients, they had a... one of the employees had a blog, and all of a sudden it went from all these nice things about whatever they were blogging on to "I hate my employer." And they're like, well, what should we do is have a chat with her and you, you don't know. And my best example and is this... the reason to have a discussion is this example. A employee went to social media saying how evil the employer was because all the other employees were invited to like social hours and the Christmas party and... but my group wasn't. And then other members of her group chimed in and the CEO got wind of this, and he's like, that's total B.S. everyone is invited to everything. And I said, did you check that? He's like, what do you mean? I said, how are your invites to events sent out? And they're like, electronically. I said, well, go check. Have your IT person check. And sure enough, that group was not on the like "all company." Yeah, that all company. And the CEO called them all and told them what happened, apologized, and they fixed it. But yeah, it was an example of the CEO was getting... he was fired up because this is a lie. This is a lie. And it turns out it wasn't. Mistakes happen. And you know, a good leader will simply say, I'm sorry. Because I said, walk and tell them you're sorry and don't discipline them for anything that was said, because it's I thought it was right on the edge in concert. And so I said, but they were right and have those frank discussions with people because, you know, you might be wrong and don't overlook someone. We have this spectrum of employees, Rosemary, in the workplace, the great employee, the employees no one can stand and we think they're lazy. And everyone in between. We treat everyone the same. That's how you're going to keep out of trouble, number one. But number two, we have people that whine constantly. I call them "whiners." They whine about everything in the workplace. Your managers need to be trained on when someone comes to you with an issue. This is what

I want to hear out of their mouth: “how can I help you?” I don’t care if they mean it or not. That’s what I want them to say. Because even the whiner, the worst employee, can have a legitimate concern. But and I’ve had so many times where they get shut down because of the reaction from the manager. Instead of, how can I help you, it’s “what the hell do you want now?” But it doesn’t go over well. And they shut down. But this code of conduct and, you know, I got a lot more I’m going to say. But let me pause.

[Rosemary]: Yeah, I was going to say what we should do. My... given the time because somebody says, and I always say, somebody is on the treadmill and they’re ready to get off. So why don’t we stop here? Because I think that was a great conversation all about the social media and other things that came in, and the NLRA. And so thank you everyone for listening and join us for the continuation of this. And we’ll go into the code of conduct, and chat about that and provide examples. But as we always say, please check us out on Spotify. Questions, comments, suggestions, things you want to hear, about from us. Let us know on Spotify. And, like I said, join us on the next episode. We’ll continue this conversation around the code of conduct. Thanks, Mike.

[Mike]: Thank you.

[Rosemary]: The *Labor & Employment Podcast* is available on barclaydamon.com, Spotify, and all major podcast platforms. Be sure to like, follow, and stay connected for future episodes.

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