

Season 4, Episode 7: “Is Your Employee Handbook (and Code of Conduct) Putting You at Risk?”

Speakers: Rosemary Enright and Michael Sciotti, Barclay Damon

[Rosemary Enright]: Welcome, everyone, to Barclay Damon’s *Labor & Employment Podcast*. This is Rosemary Enright, sitting in Buffalo, New York. I’m joined by my colleague Mike Sciotti, who’s in Syracuse today. How are you doing today, Mike?

[Michael Sciotti]: Awesome. Another cold, snowy day. I have four feet of snow at my house. Wonderful.

[Rosemary]: Oh my gosh. Well, that is perfect for us just to be inside shooting the breeze about this stuff. So. All right, so everybody so, you know, it is a continuation of our discussion. I think this is our fourth one, Mike, around employee handbooks. Lots to talk about. We were talking about the National Labor Relations Act and the NLRB. So the National Labor Relations Board and your social media policy. And hand in hand with that goes your code of conduct. And quite frankly, dear listeners, we had so much to talk about the social media. We didn’t get to the code of conduct. So now this particular episode will be all about the code of conduct. So that’s why I said it’s a continuation of our last episode. But before we jump in, Mike, we’ve got our question. Question of the day. Question of the day today is: what do you like best about your hometown?

[Mike]: Okay, so I live in Oswego, New York, and we’re on the water, so that is what I like the best.

[Rosemary]: And what body of water is that, Mike, up there?

[Mike]: Lake Ontario.

[Rosemary]: Oh, I didn’t know. I’m geographically challenged. I didn’t realize that. So it’s Lake Ontario. Okay.

[Mike]: And the beauty is you can see the lake effect snow band by looking out my window at my house. It’s about, it hangs about a mile half a mile offshore. And when it comes on shore, that’s when you get the snow.

[Rosemary]: Wow. I did not realize that. Well, you know, I’m in Buffalo, as I said at the start of the podcast, and we have those snow bands too. So Buffalo my... I’m looking out the window at Lake Erie and it’s the same thing. And those snow bands are so cool when they come across. Just love them. But so I think that’s a great answer. But I’m going to do a different answer because I could copy you and say, Lake Erie—but I think I’m going to go with my beloved Buffalo Bills. I’m a little heartsick over this season and what happened...We won’t get into the bad call. All right. It was a “catch,” everyone...

[Mike]: I agree. Yes.

[Rosemary]: Yeah, exactly. It was a “catch.” But here we are. So. All right. So with that said let’s jump right in. So Mike, do you want to set the table again as to why or how we, you know, when we’re talking about the NLRA and the NLRB in relation to the handbook, in case someone didn’t get a chance to listen to the previous podcast.

[Mike]: You don't want to be overbroad with your policies. You only want to do what is necessary to protect legitimate business interests. And when you go overbroad, that's when the board has an issue. They view... you terminate someone based on an illegal policy or an overbroad policy, they're coming after you. If you have in your handbook an illegal policy, they're coming after you if they find out about it. So it's important that you be specific. And the other thing in the code of conduct, Rosemary, I find it impossible to list everything that an employee could possibly do to warrant discipline. So sometimes you approach it... less is better, and maybe you have some type of catchall that says, you know, anything in the sole opinion and management that deserves to be disciplined based on the common-sense review of the facts. You know, I've seen employees, you know, I get a call, Johnny is under the conference room table barking like a dog. And I'm like, what? And they actually put the phone in the conference room years ago and I heard this guy barking. How are you going to put that in the handbook? You know, and don't try to have a code of conduct that goes for pages and pages and pages, because it's probably going to backfire on you. I think less is better. And, you know, don't take away common sense from management. You know, and in that case, we told him, get up right now or we're going to fire you. And he did. And, he was about to be disciplined, and he thought he was being funny or somehow protecting himself by acting the way he did. And, you know, he was gone within a few months. But it is stupid. So, you know, don't try to dictate everything because you can't possibly...

[Rosemary]: Exactly. Well, and you know what I would say to that? Also, a couple of comments, Mike. And that would be if someone and I agree, I would advise against having pages and pages and pages. But let's say you ignored us and you did that. An employer did that or you already have one that's pages and pages. Where are you going to get in trouble there is you've got pages and pages and, and you say, you know, I can't think of an example right now, but let's say you will not steal company property. All right. So but they still, you know, somebody comes in and steals my wallet. Well it didn't say that, but you've specifically said company property. You know or there's other you know different flavors or variations on something. Now again we often will include language that says including this or that. But I will tell you the experience we have had in particular, and when you have a unionized workforce is, when you sit down and you discipline someone or if you end up terminating an employee... the union's going to sit... and they grieve it, they will sit down and say, well, show it. Show us where and your standards of conduct said this was a violation. How did this employee know? Right. That this because you've listed all these other things here, but you didn't list that one. Why isn't it there. And that's the argument they're going to make. And then if you make the if you... if your response is well because and I like your thing about common sense, but if you say common sense or some sort of response like that, you're going to get what? How would that employee know? Because, to Mike's point, in the previous episode said, you've got employees on the spectrum from here to here. The great employee, the not-so-great employee, the individual who, you know, maybe has been in the workforce a lot of years, someone who hasn't, I mean there's people come with all different experiences and all different understandings... and or lack of understanding and so they're you're going to get that argument. So you have to be very careful. As we said, if there's too many pages that's going to hurt you. Similarly, if you just say "behave yourself," that's not going to be enough either, because there will be a way to argue like this person, how would this person know? And think about, Mike? You know what I also, so I think about a unionized workforce... that for those employers who do not have a union, think about your unemployment, right. You're sitting at the unemployment hearing. How did the employee know? Now this is the truth. We had an employee who did in fact steal from the company. And I can't remember what it was. It was not money, but it was maybe it was a laptop, Mike. It was a phone. Who knows what it was? It doesn't matter. But the employee was awarded unemployment. Obviously, we appealed that and we went to a hearing and the ALJ actually asked the question, how do the employee know they couldn't take that? And they were... they meant it seriously. They said, show us your policy where it says... and how could.... And in this particular instance, the employer did not have, actually have a handbook, and they did not have the standard of conduct. But literally the question was "how did they know?" Well, because people should know they don't steal. That's what the commissioner's decision was upheld and they got their benefits.

[Mike]: And I have one even better than that. ALJ and unemployment said, well, how did the employee know they might lose their job if they didn't show up for work on time?

[Rosemary]: Right, exactly.

[Mike]: And I'm like, seriously? So, you know, and that's why last in the last podcast, we said there's I look at these from two perspectives. Number one, will the employee get unemployment benefits. And can we justify the termination if we're challenged, like with the Division of Human Rights? I don't worry so much about the unemployment because the unemployment judges, they come from a very unique background. It better be in writing and no matter what it is. So, it's a difficult scenario for employers. But as I like to say, we do the best we can. And one of the ways to combat that is in your code of conduct, two parts: expectations and prohibitions. So the expectations: we expect you to show up for work on time every day. We expect you to work while at work. We expect you to work a full shift. We expect you to cooperate with internal company investigations and things like that. You tell employees this is what we expect of you. And that list is just as important as the prohibitions. And, you know, it sort of says these are the minimum standards that we expect him, you know, hopefully you don't go overboard with them, but like, be respectful at all times. Well, I'm not quite sure I know what that means. Yeah. You know...

[Rosemary]: I just say I love that, Mike. I've never heard it said that way. "Expectations and prohibitions." Love it. I mean, I think that is terrific, guidance, that's terrific. I'm going to steal it now. Mike. And you.

[Mike]: I'm sure I stole it from someone, but I don't remember that.

[Rosemary]: It's great. But yeah I love that. So you've got you've got your expectations and the other thing I would say is in those expectations, I mean, it'll sounds silly but includes an expectation. We expect you to comply with the policies in this handbook. I mean and kind of that catch all at the bottom. So yes that's what is there.

[Mike]: The, the prohibitions are just as important. But I think you need to really sit down. And I say vet your handbook before it's published, or maybe vet parts of it. So maybe show it to some supervisors who have to implement it. Maybe show it to some workers who you trust and will give you an honest opinion. Do you understand everything in here? And make sure you may think in HR, oh, it's perfect, but then it gets out there and you have to implement it. And everyone's like, what are you talking about? And so I said vet these things and it's not going to take long. Just, you know, give it a week and people will get back to you with their honest assessment. But, you know, once you get past the expectations, what do you not want employees to do at work? No fighting. Okay. That that makes some sense. You know, we're going to get into something that's in there.

[Rosemary]: No gambling...

[Mike]: No gambling, no bringing into work cannabis, controlled substance, alcohol, and in the cannabis one. But believe it or not, I have like 10 or 12 items that I tell employers think about putting in there. Let me just give you a feel for some of them, obviously

[Rosemary]: Tell all of them, if you tell you if you're ten, go ahead. I think you should share. Please.

[Mike]: So, don't come to work impaired. That's, you know, it could be drugs, it could be alcohol. It could be sickness. So I'm so sick, I'm not able to safely perform the essential functions of my job. I'm not going to discipline you. I'm just saying, tell us if you're sick. It's okay. I don't want you doing anything unsafe. But with the cannabis and this goes with alcohol. And controlled substances—don't come under the influence. Don't bring it on company property. Don't try to sell it or barter it while at work. Don't use it while at work.

Also, I put in there don't use... because now with, Wi-Fi, don't use company computer or our Wi-Fi to order cannabis or alcohol or controlled substances. And you're like, well, wait a minute, on the internet? Oh yeah, on the internet, you know, I can send you links to all these wonderful, I call them, I think, semi-illegal sites where you can order all sorts of stuff, you know. Oh yeah, there's, there's a, my favorite is...It's hand in hand with this with people that we always tell employers, confirm the degree the employee says they have directly with the university. There's a website out there and go ahead and Google it, "cheaperthantuition.com. And if you go to cheaperthantuition.com, you can order a Harvard law degree and they'll give you a transcript. They're going to ask you what year you graduated and, what courses you took. You get to sort of tailor it and it looks real. And so, so oh yes. What's wonderful ...there is there are websites out there, Rosemary, for fake driver's license. And they program that little metal strip on the back. So if someone scans it, it works.

[Rosemary]: Really.

[Mike]: So. Oh, it's amazing. The, there are fake...you can get fake Social Security cards. It is. You know, when I started looking into this years ago, I was like, oh, my God, this is crazy. What people can do. But I like limiting the use of our internet or our company for business purposes only. You got to be careful, though. I like to be specific. Don't use it to order drugs or alcohol. My guess is people are using your system for personal reasons that aren't illegal, like, you know, and you don't want to have a policy that that's over overbroad. Other things that we see on the cannabis that I like calling out is "no drug paraphernalia at work." So some people, you know, I put that one in there when someone brought a bong into the workplace and put it on their desk, they weren't using it, but it sends the wrong message. Do not bring in drug magazines. There is a whole cottage industry now. You know, High Times, Vegas Cannabis. There's an example I use where Mike Tyson's on the cover smoking a joint. You know, ban those things from the workplace. So it's... you just want to sort of think it through and you know take a look at your mandatory sexual harassment policy and there's... you can come up with, you know, don't violate the policy. But you can come up with things that do, and you know, don't order these things. Don't bring them into work. And the workplace sort of dictates what is acceptable. And here's an example I always like to use because we're on a spectrum. Our law office is on the high end of what is expected of its workers, and I would call it a professional organization. And you have professionals like hospitals and CPA firms and, you know, the highly educated workforces that do high level stuff, engineering firms, things like that...And then you have this example, and this is the example I always give when I do sexual harassment training. The woman cashier is surrounded by pornography. And then everyone's like, I give a lot of examples and everyone's like shocked. And then I start laughing. I said, she works at a porn shop. That is the workplace. And that sort of dictates what is acceptable and what is not. And I think when you draft your code of conduct, you need to realize that. Where do you fall on that spectrum? If you're a, a bar with 20 employees, you know, there's a difference between Tully's and a dive bar. Tully's is going to hold their people to higher standards. The dive bar. Maybe people are swearing and who knows? But you always have to, when you do this, your code of conduct don't steal, you know, from like, IBM or something, their code of conduct. Because, does it work in your workplace? Does it make any sense whatsoever, the prohibitions that you're putting on the employees. And I really want you to think it through. So let me pause there, see if you want to say anything or have questions.

[Rosemary]: Well, no, I had asked you all that because I was curious to hear about the cannabis. So I think that's great. That was very helpful. Excuse me. So what I wanted to talk about also, Mike, so we're talking about the prohibitions, and we've said it a couple of times that the whole "don't be disrespectful" and that that's overly broad. And you may be sitting there thinking, well, wait a second. We don't want people to be disrespectful to each other or to their supervisor. And the reason it's too broad... All right. So again, we talked about this in episode five. You know the NLRB looks at this through a very different lens. All right. And so their position is that, for example, if an individual is being disciplined... so and I can't remember the exact words in the decision, Mike, you might remember it, but an individual who's being disciplined may blurt something out during the meeting. And often how many times have we said during a meeting that someone might use an expletive toward their, their supervisor, the person administering the discipline, and we say, you know what? You're fired. You're out. All right. The days of doing that are gone because the NLRB

has taken the position that the employee or the worker is in an emotional situation. They are they have no control over the situation and that they may have an emotional outburst. And as such, that should not... they should not be disciplined because you have a manager or a supervisor who's saying to them, I am disciplining you, or I may be terminating you. And that person may react. That would be disrespectful. All right, using an expletive like that. But the NLRB takes the position. Well, in that particular instance, it's not. You want to go ahead, Mike, I don't know if you want to comment.

[Mike]: I think and let's be honest. Supervisors also swear. Owners also swear. So there's a little bit of cursing that is overlooked at work. It is, you know, I don't want to say "accepted," but tolerated. And you need to sort of be consistent. So let me change your facts a little bit. Johnny says to the supervisor, you're a dumb ass or you just that's all he does. Yeah, I'm letting them walk on that. But then he's threatened you. Then he throws something, then he pushes all the stuff off your desk, makes some other, you know, the threat outburst. I think that's enough.

[Rosemary]: Mike, you're talking about context here. Yeah, yeah.

[Mike]: Context. Context matters. You know, you could. Oh, I just did supervisor training yesterday, and I told a group of supervisors, you cannot discipline all day long. You got work to do. My guess is you could... here they're all shaking their head. They're like, yeah. And you have to sort of be selective but consistent, nonetheless. So, you know, don't be Mickey Mouse stuff. It's going to happen. But consistency, context, all these things make a difference. And to the extent you have any doubt whatsoever, you know, you can...if you're not sure it's okay to terminate, do this. You're suspended with pay. Go home for the rest of the day. Take those few hours to get, you know, consult with HR, consult with legal counsel. Can we terminate in this scenario? And if we say you can't, you've held the employee harmless because he was paid for the rest of the day. And if you can terminate, it costs you a few bucks. Okay. But you got peace of mind. Yeah, relative to it, you remember, you don't have to terminate on the spot. You can think about it. And many employers think... I have to do it. No, you know, you think about it. And, you know, I'm not saying for a long time, like a day, you know, make sure you get your ducks in a row, and you honestly assess, should we fire this person for this conduct? And, you know, then you make your decision and you live with it. And the other one of the other things, when you do discipline and stick with your decision, don't be wishy-washy. You're in charge. If you made a mistake, it's going to come out at some point, you know? But management expectations, go with it. But do it smartly. Get a get some good advice before you make the determination. Like my rule of thumb, I tell every employer, if you're going to terminate for something on social media, you're going to run it by me first. Otherwise, you are proceeding with a huge risk. Because I want to know what other employees commented. Did other employees do a thumb up or some other stupid emoji that that they can do? I want to know those things. And sometimes they look at me like, well why? It's... goes back to what we talked about last time. Protective and concerted activity. Sometimes we have to analyze what was said and figure out if the employer is set on termination. We have to give good advice. Is this defensible? And you know if you just take that time, don't rush the termination. He's going to be there tomorrow. And the other thing, and it's sort of a side note, if someone who's violent or throwing stuff, don't ever be afraid to call law enforcement, you know, they are your friend in this area and, you know, yeah, someone might get arrested. I don't care. If someone's acting out in the workplace, throwing stuff, threatening people. Call the cops and they'll come. They'll come pretty quick.

[Rosemary]: Yeah, exactly. You know, and I have to just follow up on you. When we were talking about the disrespectful and you said, Johnny says to his supervisor, you're a dumb ass and walks away. I do have to tell you, we... I've got a client and they're, it's a union, unionized workforce. And the employee did, in fact, swear, and the client was going to was going to, and employment because of that. And one of the questions or comments that the union made because they, they grieved it was, well, the supervisor has sworn on this occasion, this occasion... they went and verified it. And sure enough, just like you said, and we're like, okay, well, we'll be rolling back that action.

[Mike]: Yeah. And yeah. And you know, but let's be honest, to everyone listening to us here. Every workforce is not prim and proper 24/7 it simply is not possible. And, you know, you just have to use common sense, get that confirmation before you actually terminate. That being said, I'm not saying run everything by labor and employment counsel. You know, someone takes a swing at someone. All right. They're done. You know that's not protected activity. Someone transmits pornography from one employee to another. There's nothing to discuss. It's going to be termination unless you're working in a porn shop. But other than that, I mean, yeah. What are you going to do?

[Rosemary]: Yeah, exactly. So. So I brought up that prohibition because again, we're talking about code of conduct expectations and prohibitions. So and we were focusing on some of the ones that are, you know, vague. So we had talked about this disrespect. The other one might that I think is important as... well... two of them insubordination because I think and I'd be interested in your opinion on this, I think that is an interesting one, because you may have an employee who is pushing back because they believe the conditions under which, for example, they are working are unsafe. They feel it is unsafe or, they were entitled to their break, and they didn't get their break. And I'll have someone call, an employer, call me and say we needed them to do this or it's safe and they're wrong. And so I'm going to discipline them or because they're being insubordinate. All right. So my answer to that is, again, everything we've talked about let's look at context all of that. But the NLRB. And when you say see insubordination they're going to say too broad. All right. And I want to hear your opinion on this, Mike. So, you know, then someone will say, well, how do we do that then? Well, you've got all of these policies and then your expectations. You're going to say you will not disrupt the workforce. You will...what's the verb I want... you won't...you will, "reasonably given instructions," and those types of things, those expectations. So if you are given a reasonable instruction and that's an expectation and you fail to do so, then the employer... you as the employer can take action. So that's, to me, how you get to the insubordination. It's through these other policies, and through the expectations section of the code of conduct. I always worry a little bit, Mike, about that. Just saying "insubordination." Your thoughts on that?

[Mike]: I agree wholeheartedly. You know, the safety issue comes up all the time. Yep. You need to remember New York has multiple whistleblower statutes on the books, one for everyone and then one for health care. We have retaliation provisions buried in the labor law. We have OSHA and the OSHA whistleblower. And then, you know, there are unique... for you, like unique industries. The mine industry has their own whistleblower provision. There's lots of them out there. The first thing I always tell employers is make sure you're right, that it is a safe condition. Because the employee doesn't have to prove it was an unsafe condition. They have to simply show that they believed and have a good faith basis for believing that it was unsafe and illegal. They don't need it to be actually illegal. So we have to be careful with the whistleblower laws, with OSHA. But we... and make sure you are doing everything correctly. We are met with many times the employee saying, "I'm going to OSHA." I just had this happen the other day. He gave a detailed complaint. I was retained to investigate his complaint but didn't have...it was detailed in the extent of the allegation, but not detailed with specifics facts, like what day and who was present and things like this. The employee was ultimately terminated because he refused to cooperate with me and he refused. He was trying to use sick leave and safe leave because he thought the workplace wasn't unsafe, and the employer informed them that's not an appropriate use. And, he refused to come to work. But we found out through the grapevine he was moving out of state. And that's all that was going on. He was trying to do the trying to drain his sick time bank, but, you know, be...make sure you are correct. And sometimes if you are... meaning you run a safe workforce, they're accusing you of being unsafe. I told the HR director and they were convinced. I said, give the guy OSHA's phone number and the guy they did, and the guy was taken aback. He's like, here go ahead, call OSHA if you think, he did. OSHA came out. Guess what? Passed with flying colors. So, I mean, sometimes... I don't recommend that in every circumstance, but in this one, it worked, and it worked to our, it advantage. But remember, their standard is not an actual violation or an actual safety risk. It's a reasonable belief, which is a plaintiff's attorney's dream. You know, make sure you button it up, that you confirm everything. You know, if especially if it's a safety issue or something unsafe. Photos, videos, you know, and ...

[Rosemary]: You know what? I'm going to interrupt you there might just the interest of time because I just want to say, I think that would be a great episode for us to go through OSHA. We'll do that for all of you, so listeners, listeners. So hang tight on that because I think that's great, everything he's talking about. And that came up in the context of that insubordination, just saying insubordination in your prohibitions. I wouldn't do that. I get at it through other things, but it comes up a lot around safety. And then very quickly, Mike, the other thing in terms of prohibitions, again, putting on the hat of we could end up with an unfair labor practice would be, you know, a lot of times employers will have a prohibition that you cannot leave your workstation, right? You can't leave your workstation without permission. So again, got to be careful there. What's the context. Right. Because if there's an unsafe...if the employee has a reasonable belief there's an unsafe work condition or what you sometimes get into and we can't we don't have time now in this episode to go into details around it. But there are things around, you know, union and, if there's a... they want they walk off the job for some reason, all right. Or there's a strike or something like that. And so it's more complicated than that. And we don't have the time here. But I just wanted to point that out that I'm always careful was saying that an employee, one of the prohibitions is "cannot leave your workstation without permission." So I don't know, Mike, if you want to put a finer point there.

[Mike]: Yeah. Just briefly, I mean, context, context, context. Because the leaving could cause an unsafe work condition. You know, maybe it's an assembly line and they have, like, four breaks throughout the day. Otherwise you have to get approval from the supervisor because someone has to be in the slot. Right. You know, so context really makes a huge difference in that scenario. I think that's how you have to evaluate it. What are you going to...And then let's say I'm at a desk. What are you going to do, chain me to my desk and tell me I can't go to the restroom? There's other ways to combat the restroom issue. One of my clients put in place a policy. You cannot bring your cell phone into the bathroom, and leave it at your desk. Boy, is that cut down on long bathroom breaks that people were taking and he meant it. And he told them because he knew what was going on. And I said, well, let's come up with something else, but don't stop people from going to the restroom. Don't stop them from getting water. Remember, you have in your expectation list "work while at work." That's not all eight hours, I got news for you. Yeah. You know, it's more like seven. Yeah. And they're chit-chatting. Everyone does it. So use some common sense in context matters. Yep.

[Rosemary]: Perfect. All right gang. Thank well. So sorry. I think we went a little long on this one. But there's so much to talk about with this stuff. But so we'll end here. Thank you all for joining us again. As I always say look for us out on Spotify and others. And again, my producer will kill us or our producer will kill us for not listing them all. I promise, Kyla, from here on out, we'll list them all. Seriously, for those of you listening, you've got questions, you've got comments, topics you want us to talk about. Please let us know. We're happy to be happy to talk about it. And thanks as always, Mike. It was a lot of fun.

[Mike]: Thank you. And, everyone out there realize we have a lot to say, and we know we try to keep these short, but you wind me up, I just start talking, so, you know, just stay tuned. We'll, we'll keep you give you a lot of these.

[Rosemary]: All right. Thanks.

[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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