

**[Rosemary Enright]:** Welcome, everyone. We are going to continue with our discussion of employee handbooks and the policies we should include. We’ve had many episodes on this, Mike, but there’s just so much to talk about here. So we promise, dear listeners, that that this will be the last one, although we haven’t had any complaints yet. But before we jump in, Mike, you know we got a question. Baddadada: The question for today is: If you could have front row seats to any concert, what concert would that be?

**[Michael Sciotti]:** In their prime, I’m going to get it down to two, in their prime very clearly, the Beatles and Van Halen.

**[Rosemary]:** Those are awesome. The Beatles would be awesome. I did not think of that, Mike. That would be great. This is going to sound. Everybody’s going to think I’m crazy, but I just saw the movie “Song, Song Blue,” which is with Kate Hudson and Hugh Jackman. And it’s about a tribute band and they are...It’s a tribute...The movie is a tribute to tribute bands. And they’re a tribute band, Mike, you’re going to roll your eyes, I’m sure, to Neil Diamond. And I have to say, yes, but I have to say, it came to mind because, I mean, when I saw them perform, and it’s a tribute band, and I see the costumes and all of that, I had no idea. I mean, just no idea. And I thought, you know what? That would probably be fun to have been in the, in his prime, like you said, you know, that. Now, the other, if I were going to do one currently, Mike, I would say Michael Bublé. And the reason I say Michael Bublé is he usually comes out with the whole orchestra and he’s kind of a showman like Hugh Jackman, you know, on the stage, you know, so that’s where that’s where I’d go with it. But fun. All right. But I really like yours. I think the Beatles would be cool. So all right. Now, now we got to get down to the boring stuff, Mike. And I thought, Mike, to shake it up this time, you know, because we chat back and forth about the different policies, but let’s, I’m going to throw out a policy that I think a lot of people may not be thinking about. And, you know, and that should be included in the employee handbook. And then, you know, and then I’d love to hear your comments and then you throw one out and that you think people may not be thinking about it, just think. That’s yeah, I have it in there. It’s a sentence or two, not a big deal. And we’ll point out why we think it’s significant. I’m going to start off, Mike, with the electronic monitoring notice. All right. And so for our listeners who aren’t familiar with that, New York State several years ago, is it three years now, Mike? Think it may be. Yeah.

**[Mike]:** Three or four.

**[Rosemary]:** Yeah. And you may be thinking, well, why do you bring something up like that, Rosemary, if it’s three or four years old? Because a lot of people aren’t aware of it. All right. So the electronic monitoring notice, really simple. New York State provides the language for you. You include it in your employee handbook. And basically, if you know, I’m just going to put it in simple English, it’s hey, employees understand that we can check your emails that are on our systems, your voicemail messages, basically any electronics that are the property of the company, and upon which you use it to do work, we may access that and monitor it without giving you notice. And so of when we’re doing it, let’s say on a particular day, this policy in the handbook, that is your notice, employee that we may do that. And so that should be in everyone’s handbook. Now, if you’re sitting there thinking, my gosh, I don’t have that in my handbook, you can give us a call. But quite simply, if you just go out and do an internet search and just put in “New York State Electronic Monitoring Notice,” it’ll come right up with the language. Really easy. Don’t change the language. Take it exactly as it is and just put it right in your employee handbook.

Standalone policy. Electronic monitoring notice. Now, the other thing I just want to say about that is that for those of you who may not be familiar with this, excuse me, every new hire should actually be given a copy of this monitoring notice, the very one that you're going to put in your handbook. And you want to get a signed acknowledgement of receipt. So it's part of the standard onboarding process. Now you may be thinking, well, should Rosemary and Mike, should I turn around and give all of my current employees this notice because we didn't know about it? The answer is no. Okay, oddly, the law does not require you to do that. All right, so it's got to be posted in a conspicuous place where employees can see it and have access to it. So, i.e., the employee handbook. I also initially, when it came out, said, you know what, put it up on your board with all your labor notices, you know? But your new hires should always get that. Signed acknowledgement of receipt, keep a copy of that signed acknowledgement of receipt in their file so you can show you gave it to them. And the other thing, well, I'm probably stealing all the thunder. I'll let... Mike, do you want to add, I was going to go on and on. Mike, do you want to add anything to that?

**[Mike]:** I think that's all accurate, good sound advice. I would simply point out one thing. If you're redistributing your handbook every year, like we recommended way back in the first handbook episode, you're going to be getting signoffs from your employees every year. So you should have not just one, but a lot of them. And I think that's simply the best practice.

**[Rosemary]:** Yeah, exactly. Well, and the other thing I was just going to add quickly on this, I'm going to flip it to Mike and let him pick a policy. You know, I've had employers say to me, but you know what, we really don't do that. So do we really need to keep it and put that policy in there? And Mike, what's your answer to that question?

**[Mike]:** 100% yes, because you may not think you're going to do it. You may never do it. But all of a sudden you may have to do it as part of an internal investigation, maybe of a sexual harassment claim or something else. And you would then be hamstrung, and you wouldn't necessarily, you might be breaking the law if you were to go and do it at that point. So yeah, let's give the notice. Doesn't say you have to do it. You're not telling your employees you're going to do it. You're simply warning them we might do it. No big deal.

**[Rosemary]:** Precisely. Exactly! I couldn't have said it better. So that was my first policy that I wanted everybody to be aware of Mike. Okay, so go ahead. You throw one out.

**[Mike]:** Yeah, so I wanted to just briefly, one of the kits I'm still seeing issues on direct deposit of payroll checks. Here in New York, you cannot force an employee to do direct deposit. If they want a real check, you have to give them a real check. You can encourage direct deposit, but you cannot compel it in any manner. So if you have something in your handbook, it's simply, the company encourages employees to use direct deposit as a means of getting their paychecks quickly. You are not required to do so. That's something nice and simple, nothing dramatic. I do see still handbooks that we're reviewing where it's mandatory. And I'm like, not so fast. You can't do it. Nothing earth-shattering, just a nice little general reminder.

**[Rosemary]:** Yep. And that is a great reminder of Mike, cause you're right. I saw one recently where the language was all checks will be direct... divided direct deposit. So that's a great one. All right. So the next one on my list, Mike, is the HERO act. All right. And the reason this came... is top of mind for me, Mike, is because a lot of us, you know, I have sat back and said, phew, pandemic is over. Yeah. COVID still out there. But the pandemic's over and here in New York State, we were obligated because we were in a pandemic to put together a, what is it called Mike? Was it a safety plan? I can't remember the official title of it.

**[Mike]:** Yeah, I call it a, I think I called it a health and safety plan. Forgot exact language that department used.

**[Rosemary]:** Yeah, so a health and safety plan that talked about when there is some sort of pandemic, what are we as an employer going to do? So what is all of our policies and procedures in response to that? And so when it was no longer classified as a pandemic, a lot of employers pulled you know, in their handbook, they

had a reference to the HERO Act. Some of them actually included the plan in their handbook and they pulled all of that. And what everybody needs to realize is that the HERO Act didn't go away. What the HERO Act says is that every employer in New York has to have a health and safety plan that says if some sort of health crisis, similar to what we had with COVID, were to arise, you know, this is our health and safety plan. So we've got, and so we have to still comply with that. And let's hope we never have another situation like that. But what you have to have in your handbook is a reference to the HERO Act. So again, if you shoot us an email, we're happy to send over some sample language, but it should be a standalone policy. It'll say the HERO Act. Again, this is specific in New York state. And then you put in, you know, I can't remember how I've written in the past, consistent with the New York State blah, blah blah act, Employer X has a health and safety plan that outlines A, B, and C. It can be found in the following locations. If you have any questions regarding this, please contact so-and-so. That's all it is. I would not include the plan in the handbook. It's going to make your handbook unnecessarily long. Because here in New York, they had prescribed what had to be in the plan. So it's quite long. I mean, think, Mike, it's like 11 or 12 pages long, depending on how much you put in it, right?

**[Mike]:** Yeah. And I would say there are still some employers that are including it, but if you want to include it, you can. I would make it an appendix like the sexual harassment policy. That way it doesn't clog up 10 pages in your handbook or something like that.

**[Rosemary]:** Exactly. Yeah, so I just wanted to make sure that everybody has that their handbook, that reference. So, all right, back to you, Mike.

**[Mike]:** One I had is I see in a lot of handbooks policy on job descriptions and you know, I just wanted to say not required, not mandatory in any sense, but maybe something generic is okay. But I just wanted to talk briefly on job descriptions. They're not binding on the government, number one. The government will do their own investigation into what is an essential function of the job. They're not binding on wage and hour issues, meaning if you put the employee's exempt or non-exempt in there, the government is still going to take a look, especially if it's an exempt status. I think job descriptions are something that I typically recommend be signed off on by the employee in the position. And when HR is developing them, I think it's something you need to talk to the supervisors about and the employees currently in the position to really figure out what the essential functions of the job are as opposed to you sitting in your office and trying to do it and understand it. Go talk to the people in the position because I think that would be very helpful. And I think a signoff is also helpful in case the employee tries to dispute later on what they were hired to do. The other thing I always put in a job description, I said, think about simple things. Does the employee need to be able to tell the difference in colors? Maybe they're working at a job where color is important. Green is good, red is bad, and you hire someone who's colorblind and they can't figure it out. But there's easy ways around it. You write "green" and "red" on little stickers next to the buttons. Job descriptions are good. It's a good help if they're accurate and try to make them as accurate as possible. And when the job description changes, that should change as well. And other little things, colors, do you have to be able to read, do you have to be able to write, do have to be able to understand English. You know, these are things that maybe, maybe not, but sometimes they're overlooked. And I tell people, take a hard look at what the person really needs to be able to do because it's important if you're going to do a job description, one, it's accurate. And if you're going to have a policy, that the policy is an accurate reflection of what you are actually doing in the workplace. Like I've seen policies, Rosemary, we conduct a yearly assessment of job descriptions. And then I say, tell me about that. We really don't do that. Then don't ruin your policy. It makes things worse.

**[Rosemary]:** Yeah, well, and it's funny, because I was going to ask, I've not seen any policy relative to job descriptions. I was going to ask about it. So that's the example right there. People say we do that. OK, got it. So the other thing I'm going to throw out on job descriptions, Mike, and I want to hear your opinion on this. If the job could require overtime, I include that as an essential function.

**[Mike]:** Yes.

**[Rosemary]:** And so I have encouraged, I work with a lot of manufacturers. And so a lot of times, as you know, Mike, in high peak times of the year or months, they've got mandatory overtime, right? And so they might have to come in on the weekend or something like that. And somebody says, hey, I can't do that. And...And maybe it's for childcare reasons, that's a whole 'nother discussion. But it may also be, we've had people say, I have a medical condition, and I can't work more than so many hours. And so if the ability to work overtime is an essential function of the job, then we can have a discussion with that employee about that. Because as we all know, you don't have to remove essential functions from a job. But again, as Mike said, think about it. Is it, I mean, because is it truly an essential function? But I think if it comes up regularly, which it does with a lot of my manufacturing clients, then include it as an essential function. Comments on that, Mike, thoughts?

**[Mike]:** I agree with all that. And remember, there's lots of different types of workers out there. You know, ones that want as much overtime as they could possibly get and they're happy for it and they thank you very much. And then we have those out there that really don't even want to work 40 hours a week, let alone go over 40. And then I'd have the true class where they might have a medical condition that limits their ability to work, let's say, more than 40 hours in a week. You know, we get these notes, Rosemary, Johnny can only work Monday through Friday, nine to five. And I'm like, wow, I wonder what disability causes that.

**[Rosemary]:** I've had that same discussion.

**[Mike]:** It's called push them back and start making medical inquiries. If it's truly an essential function of the job, and they say they can't perform it, you're entitled to now know why and to discuss potential reasonable accommodations that could allow them to do that. And if suddenly their doctor refuses to answer the questions that you pose, you don't have to grant the accommodation. They don't show... you discipline them for not doing their job and you might have to fire them. So it's very important to push back when you want to push back because I think most, most people don't want to work. And I think that's what you're seeing. But just realize the law is clearly on your side, employers, and we can push back.

**[Rosemary]:** Mm. Yeah, exactly. Great point. All right, so think it's my turn now. So I'm to throw out just quickly, paid prenatal leave. All right. And now to be clear, all right, so this is new in New York State. If you're not familiar with it, Mike and I can talk about, we'll talk about it in another episode in the interest of time here. But for paid prenatal leave, there is not a requirement to include it in the employee handbook. There are things that we have to have—our sexual harassment policy. We're going to have our blood donation leave, others that, the HERO Act, these different things that we've talked about. New York State does not require us to include it, but I have, Mike, and I'd be interested in your take on this, I have been saying to my clients, why not put it in there? Right? It's, you know, a simple three or four sentences just outlines what, you know, what the benefit is and directs people to HR. So again, it shows good faith on our part, compliance, we recognize what our obligations are and we will comply with those obligations. I see no reason to hide the ball, but Mike, I don't know if you want to add.

**[Mike]:** I agree fully and I might actually take it a step farther and say why I really, really encourage it to add it and to develop a leave form that gives the employee the ability to check the box. It's like, okay, what leave are you using today to go to prenatal care? They have their choice. They don't have to use the prenatal. They can use sick.

**[Rosemary]:** Right. Yep.

**[Mike]:** They could use PTO if they wanted to. It's up to them. And you just give them, mark off the various boxes and you make them check it. You don't have to go into, you know, more reasons and rationale-wise why, but I would point out to them in writing that this leave bank exists. The other thing I think it's important just for tracking purposes, Rosemary, is your pay stub... that it clearly shows what leave buckets were used during the week. Was it PTO, was it sick and safe? Was it prenatal? I think the more you break it out, the

better you are in the defense of any wage and hour claim that could come your way. So I totally agree with everything you say. And I would encourage everyone to expand it a little bit, and to think about the form, and the wage statement, and how all these things interact together and just make your life easy.

**[Rosemary]:** Yeah, I agree that... great points. Great points, Mike. All right, I'll flip it over to you. What's your next policy?

**[Mike]:** Conflicts. I believe that you should have a very simple policy that requires employees not to self-deal and to alert the company in the event that they believe there's any potential conflict of interest. So you're a truck driver for Pepsi. Are you going to take a part-time job as a truck driver for Coke on the weekend? I don't think so because I think Pepsi is going to have a problem with that. And you know, I can't give you a magic list of everything that you can, should put in there, but you know, if, you know, your brother owns company X and you're only getting bids from company X, there should be something in the policy that holds the employee accountable for self-dealing or potential conflicts. And we see some of this in... it's already starting to find its way into New York state law, like with the not-for-profit boards have a conflict of interest form they need to fill out every year. It's something similar to that, that I think you should at least consider, to put them on notice. Hey, if there's something we should know, you really need to tell us and maybe give like four or five examples of conflicts and put the burden on them. It's really a... it's a heads-up policy and potentially on the back end, a discipline policy, in the case you discover the employees been scamming in you.

**[Rosemary]:** Yeah. and you know, and I don't think I have anything to add to that, Mike, other than I agree. I agree. All right. So, you know, those were, so I threw out my three or four. So I think Mike, you had two more that you wanted to hit on. So I'll flip it over to you.

**[Mike]:** I got to, you know, I think three or four, but I'll be quick with each of them, I promise. The first one I actually just thought of, wasn't even on my list initially, is the following policy to put the burden on an employee. If you are taking any prescription or non-prescription medication or are otherwise compromised, maybe by illness or sickness, and it affects, ...you believe it's going to affect your ability to safely perform your job, please tell us. Now we're not asking what the med is initially. Let's say it's for prescription something or other. Yes, I'm on a prescription med and it makes me dizzy. I don't want Johnny driving a forklift, a company car. And it's not, it's, and basically you say, go to HR if this happens or your supervisor. And then from there, we'll decide what we're going to ask the employee, but it's more of a safety policy. Something that, that I think you're totally fine to ask and you're putting the burden on them to come forward.

**[Rosemary]:** Absolutely. And you know, that's kind of related and we won't get into it because I think, Mike, we should actually probably do a whole episode on the alcohol- and drug-free workplace. We won't get into that now. But that's a lot, you know, because when you think about it with, you know, adult use marijuana legalized in New York and that. So we'll talk about that in another one. But I agree. So OK, go ahead.

**[Mike]:** Another one, pay raises. I see a lot of pay raise policies, which is fine and I don't have an issue with it. But one of the things or two things I think you need to put in there. One, you're going to be okay with anyone that's listening. The other one, you're going to be a real hesitant to put in. We don't guarantee a pay raise.

**[Rosemary]:** Absolutely, Mike, absolutely.

**[Mike]:** And so and that's the one you're probably going to be okay with. I also think you should add in there: please remember we reserve the right to modify pay downward. The reason I put that in there is I don't want anyone to ever think that, you know, you're guaranteed this forever. What happens if the economy takes a dive? Where is one of the places that a company can cut costs, potentially wages? And what happened during COVID? People's bonuses were taken away. People's salaries were downward adjusted. I just like a little reminder in there to remind them of that. Not that you're going to do it, but I don't want to run into some

crazy plaintiff's attorney that's going to say, you can't do that. And I'm bringing a claim against you. Just reserve your right to review salary upward, downward, or keep it the same every year or whatever period of time that you care about, whatever. Nice and simple.

**[Rosemary]:** Yeah, right. Could I... and I want to add to that, Mike, you know, I like that you said, you know, it isn't guaranteed. And I would also go so far as to say, a lot of employees will say, well, look, I got a "satisfactory" on my annual review, my performance review, or I got an "exceeds expectations," I should be getting a raise, you know. Or you gave me 2% or 3% which is the same as the person who sits next to me and they only got a satisfactory, I had an exceeds, what the heck? Because again, remember our employees can discuss their wages. And so I like to include language in there that these reviews, when Mike was talking about the job descriptions, review them every year and sometimes they'll put in there, we're going to review the job descriptions, a lot of times they'll put in, we're going to do performance evaluations every year. I don't want somebody thinking that that performance evaluation directly leads to a pay raise.

**[Mike]:** Yeah, and I would add one more thing. That's a great comment on performance reviews. I would also tell you this. I want the performance review to be an accurate assessment of the individual—the good, the bad, and the ugly. I see performance reviews, and I've had this happen dozens of times over the years, where they're only used as a pep talk and they don't put anything bad in. And I actually had a case once where, "we have to get rid of Johnny because he's Satan reincarnated and he's destroying the workplace." I say, well send over the discipline and the performance reviews. And one week before they gave him a glowing performance review and they explained to me, it's a pep talk. No, it is not. And the other thing, Rosemary, on reviews, I like letting the employee comment. And I think it's important that you look at the comment, that you react to it if necessary, but let them comment. And I just think it's a great area for you to potentially get some great stuff from your employees on.

**[Rosemary]:** Yeah, exactly. Go ahead. I think you had one more, right?

**[Mike]:** Yeah, benefits, don't go crazy. In the benefits section. Remember, depending on the benefit, you ... they may or may not be covered by ERISA and you may have summary plan descriptions. I think you put enough in the benefits to make sure the employees understand what they are, and what they are not, and how to get them. Is it automatic? Things like that. Sometimes I review handbooks and the benefit section goes on and on and on and on. And next thing you know, everyone is asleep because it's so long and detailed when you don't need to do it. I think that's one area where people can roll back a little bit in their handbook. If they're looking for a shorter one, that may be a way to do it. Any thoughts on that?

**[Rosemary]:** Yeah, no, I agree with you. And the only thing actually, the only thing I will say, Mike, is that I have, on occasion, had our benefits partners look at look at the benefits section, because, you know, full disclosure, listeners, I'm not a benefits attorney. Like I can go through and I can say, yeah, I get... you know, I understand all this. well, you should think about this, maybe remove that. But to get into the real nuts and bolts of it, which again, to Mike's point, you don't want to include all that detail. But some of them, when you get into like a tuition assistance, of course, that's also now the Trapped at Work Act. But still, you got a tuition assistance in there or I'm trying to think of some of the other ...there's something about, you know, if there's something about the Affordable Care Act, you know, you've got references or discussion in there. Some employers have got, you know, those types of things. I think you want to have a benefits attorney look at and just make sure that you are giving the proper notices because there are some requirements in that area that I myself am not qualified to do.

**[Mike]:** Yeah, and I agree fully, you know, the other areas we see it as 401k...

**[Rosemary]:** That was it. I was drawing a blank, yeah.

**[Mike]:**...the health insurance. Those we have to be careful with you know, a simple explanation might be good, but then you may also need the summary plan description. And that's where our benefit partners come into play. And I tell everyone. Labor and employment benefits is a subsection of it. And the other thing to realize benefits are there's a lot of crossover with tax. There's a lot of tax issues. So, you know, sometimes the benefit partners we have also specialize in tax issues. So it's a real unique area. And then my last area is safety. Either have a standalone safety manual or put it in your handbook. I don't care which way you do it, but you need to get a handle on what you are required to have in that manual via OSHA or the Department of Labor or the Department of Health. That is something that you must finetune to your industry, to what regulations you must follow, et cetera. Because if the worst-case scenario happens, you have a death at work. Remember you have an obligation to call OSHA, I think it's within four or eight hours, depending on the situation. They're going to say, where's your safety manual or safety policies? They're going to be asking and they're going to ask about training and things like that. So it is something you really need to take a strong look at. And I would also say this. I think, Rosemary, would be a good idea to come back later and do some more on the handbook, not necessarily the next couple of episodes. But I could probably rattle off another 20 policies. So I think to everyone that's listening, we're probably going to shift gears a little bit, but I think it's a subject that we can easily come back to at any time.

**[Rosemary]:** Yeah, well, you know, it's funny when you were talking, I thought to myself, you know what, we should talk about dress code, lots of landmines in dress code, you know. So, but yes, I think you're right. So we'll give everybody a break from handbooks, and we'll move to something else. But we're at our time, we're a little over, sorry, everybody. Gave you a little bit more time on the treadmill, right? That's what I say. You're exercising and listening to us. So on behalf of Mike and myself, thank you for listening. Please check us out on Spotify and YouTube. If you have comments, questions, topics you want us to discuss, let us know. In fact, one of my clients shot me an email and said, could you talk about rest and meal periods or breaks and meal periods? And I just got the email from them. So Mike and I talked. And so that's going to be our next episode. Episode eight, we'll be diving in and chatting about breaks and meal periods in New York. Thank you all and we'll talk to you soon.

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

*Disclaimers:*

*This material is for informational purposes only and does not constitute legal advice or legal opinion. No attorney-client relationship has been established or implied.*

*Barclay Damon Live podcast transcripts and captions are automatically generated through artificial intelligence, and the texts may not have been thoroughly reviewed. The authoritative record of Barclay Damon Live programming is the audio file. Thanks for listening.*