

## THE PERFORMANCE REVIEW PODCAST

Greenberg Traurig

Episode 16

Guest: Lauren Green, Barry's Bootcamp

Announcer ([00:06](#)):

Welcome to The Performance Review, Greenberg Traurig's California Labor and Employment Law Podcast, where we discuss and review important trends and topics for California employers, with hosts Ryan Bykerk and Philip Person.

Philip Person ([00:18](#)):

Welcome back. It's part two of our privacy discussion. During today's discussion, we will continue with the conversation on employee privacy. We're delighted to welcome back our guest Lauren Green, internal counsel at Barry's. She had so much fun the first time, she was begging us to come back for a second part. But before we go any further, let's remind our listeners about your practice, Lauren.

Lauren Green ([00:46](#)):

Thank you for having me again, after I had to beg quite a few times before you agreed to it. I really appreciate it. I'm excited to be back. As a quick refresh, Barry's is a global boutique fitness brand with fitness studios all over the world. We currently have about 40 international franchise studios, and we just recently added our 47th corporately owned studio in Austin, Texas. We had a big grand opening this last weekend, which looked like a lot of fun.

Lauren Green ([01:22](#)):

I wasn't able to go, but I heard the energy and atmosphere and everything was great. We're really excited about that new studio there. I manage the legal department at Barry's, which touches a variety of aspects of the business, such as franchise, trademarks, general corporate, and most pertinent to our discussion today is all the client and employee privacy issues.

Ryan Bykerk ([01:50](#)):

That's right. We were commenting at on the last episode about how busy you must be and you absolutely are. Kind of to recap a little bit, in our last episode, which was sort of part one about employee privacy, we talked about the CCPA and we talked about how it's going to be superseded by the CPRA, and in some respects already is. Just a reminder, if you haven't heard that episode, it's worth going back, taking a look at that one.

Ryan Bykerk ([02:16](#)):

There's good, important information in that. Today, though, we're going to be talking more about just sort of general employment privacy issues and in particular employee privacy surrounding COVID-19,

which, of course, has been a big topic of late. Lauren, can you tell us a little bit about... I just want to flag, that's such an understatement that COVID has been a big topic of late. Major understatement.

Ryan Bykerk ([02:41](#)):

Lauren, can you tell us a little bit about just what general privacy issues you handle, how COVID has added to that or changed that as it relates to your world of employee privacy?

Lauren Green ([02:53](#)):

Yes. COVID has touched on just about everything and employee privacy is no exception. I mentioned in the previous episode that at Barry's, we take our clients and employees' privacy very seriously. With just over 1,100 employees across the organization, we understand the importance of safeguarding their private information and keeping it confidential. Again, privacy touches many aspects, including background checks, resumes, medical information, and other personnel records.

Lauren Green ([03:33](#)):

And then on top of that, COVID just added an additional layer of complexity and concerns over the past couple years. With regard to other general privacy laws outside of the CCPA and the CPRA, they don't all fit under a single umbrella, but they include things such as the California Constitution, the US Constitution, Fourth Amendment Rights, HIPAA, which is protecting employees' medical information.

Lauren Green ([04:07](#)):

There is the Fair Credit Reporting Act, California Privacy Act, which, for example, that one prohibits one-way recordings. There's the just common law tort actions, invasion of privacy, intrusion upon seclusion, misappropriating of likeness. There is the Electronic Communications Privacy Act of 1986. And in that act, that generally prohibits interception, access, and disclosure without a party's consent of electronic communications that affect interstate or foreign commerce. And then now COVID-19 and vaccination privacy is also a consideration.

Philip Person ([04:55](#)):

That's a lot. That's a lot to consider. I like how you said it. And now let's sprinkle on a little bit of COVID and vaccination privacy rules that you need to know as well. Those are a lot of laws to know and to be up on top of. What are some things to know in the world of employee privacy that our listeners should know about?

Lauren Green ([05:17](#)):

Right. If it wasn't complicated enough, so now there's COVID, which is fun. A more obvious employee privacy topic that I get asked a lot is if you, as the employer, can monitor your employee's computer and work cell phone usage and activity, or even their social media activity. Generally, the answer is yes, but some other things to keep in mind when thinking about employee privacy include the fact that in California, in particular, you cannot record a conversation without consent.

Lauren Green ([05:54](#)):

There's also the ban-the-box law in California, where employers cannot inquire about an applicant's criminal history until after they make a conditional offer of employment. There are confidentiality

considerations when it comes to drug testing. Those are some major privacy concerns that I've seen pop up.

Ryan Bykerk ([06:15](#)):

You've identified, I mean, numerous different sources of law, numerous different issues that can come up. I know for our listeners, one of the things that they're probably looking for is kind of some practical ways to help manage those things. Can you give us some insight into how Barry's handles employee privacy issues, maybe kind of on like a practice level?

Lauren Green ([06:37](#)):

When we talk about all of these different privacy things, those are, like you said, good to know, but then how does that translate into the real world? How can employers make sure that they're staying on top of these things and they're not going to become an issue? Some of the policies and procedures that Barry's has in place for protecting employees' privacy include things like we have to have measures in place to store employees' medical information and making sure that we're storing that medical information separately from their personnel files.

Lauren Green ([07:16](#)):

We make sure to obtain signed authorization before releasing any personal or medical records. We also are very mindful of what we can and cannot request from employees. For example, if we were to request a certification for medical leave under FMLA or the CFRA, we know that we cannot ask the employee for medical facts about his or her condition. Those are some examples of how we incorporate these type of privacy laws into our day to day kind of policies and procedures.

Philip Person ([07:58](#)):

We talked about COVID and the effect it's had on the workplace, one being that we have a lot of remote workers now. We have some people who are working remotely full time. Some companies are coming back part-time and have a hybrid model. How has employee privacy changed in the world of remote work?

Lauren Green ([08:19](#)):

Right. I'm sure Barry's is not the exception where we have many employees that are still doing remote work. I think that's definitely here to stay. You're hearing more and more about maybe a hybrid model, but I just don't know if... I just don't believe that remote work is going anywhere. I could make the argument that employee privacy is possibly a greater issue due to remote work. Employees are at home now and the line between their work devices and personal devices are much more blurred.

Lauren Green ([08:58](#)):

For example, an employee is probably more likely to use their personal devices to transfer data to their employers and employees are holding Zoom calls in their private spaces and even on their personal devices. You can pull up a Zoom meeting on your cell phone now. No problem. Onboarding is another place I've seen affected by remote work. Before employees would've been expected to come into the office and complete onboarding there, which meant they completed all their physical paperwork rather than submitting documents online.

Lauren Green ([09:36](#)):

And that process is much different now, so at least it varies. I'm sure at many other companies too, employees will almost look at you like you have two heads if you ask them to sign an actual physical document rather than sending the document for electronic signatures through a DocuSign or something, for example. Then this remote work technology is used to share personal information where employees are even sending their social security cards by email or through a company's onboarding site.

Lauren Green ([10:13](#)):

And then another part of the onboarding is ensuring that we have our IT team involved to set up the new hires' workstation from day one, right? I mean, before anything is going on, you want to make sure you have all the security in place and that the data is maintained on the company's server. Those are some examples of where I've seen remote work kind of flip things on its head.

Ryan Bykerk ([10:43](#)):

Right. I guess, what are some of the ways that a company like Barry's or really any company can kind of deal with this increased access into employees' personal lives? What are maybe some of the practical things you can do to help mitigate potential issues there?

Lauren Green ([11:01](#)):

I would say that communication is key, communicating policies to employees, setting the stage up front, making sure they understand what you expect as an employer and where your privacy policies come into play and how they affect the employees. The best practice is to put the employees on notice in writing of your work from home and privacy policy. You should have very clear work from home privacy policies, and then making sure that the employees understand those and that they acknowledge them in writing.

Philip Person ([11:44](#)):

Another impact of COVID-19 is not just the remote work, but also vaccines and the vaccination status of employees. What can you tell us about specific privacy issues in light of COVID-19 and employee vaccination status? Can employers require the vaccine or require a disclosure of the vaccination status?

Lauren Green ([12:08](#)):

Yes, they can. An employer can generally require mandatory FDA approved COVID-19 vaccinations if employers abide by California's anti-discrimination, harassment, and retaliation laws. What that means is that if you are going to require COVID-19 vaccination, you just want to make sure that you do not discriminate against or harass employees or job applicants based on a protected characteristic.

Lauren Green ([12:40](#)):

Employers want to make sure that they provide reasonable accommodations related to a disability or sincerely held religious beliefs, and employers want to make sure they do not retaliate against anyone for engaging in protected activity, such as requesting a reasonable accommodation.

Ryan Bykerk ([13:00](#)):

Relatedly, what about contract tracing or reporting procedures? What can employers do there?

Lauren Green ([13:06](#)):

There are COVID-19 regulations related to reporting. In California as of January 1st, 2021 was California's AB 685 that allows the state to track COVID-19 cases. It actually requires employers that have a sufficient number of COVID positive cases, that meet the definition of a COVID outbreak to report certain information to the local public health agency in the jurisdiction of the work site within 48 hours of learning of the outbreak.

Lauren Green ([13:47](#)):

Not only can we contract, trace, and report, but there are some requirements that we must in certain instances.

Philip Person ([13:58](#)):

What specifically happens if someone at work tests positive for COVID-19?

Lauren Green ([14:04](#)):

An employer cannot disclose the identity of a person who tests positive, because that information is considered confidential medical information, but employers can disclose that an individual in the workplace tested positive, just not the identity of the person.

Ryan Bykerk ([14:23](#)):

Got it. We talked about whether employers can require vaccines. Can employers ask employees about their vaccination status?

Lauren Green ([14:32](#)):

Yes, they can, but they should keep in mind all of the privacy laws that we've been discussing here previously. Employers can ask about an employee's vaccination status, but they should not ask why an individual may or may not be vaccinated, and an employee's vaccination status should remain confidential.

Philip Person ([14:56](#)):

Because our listeners come and they ask for the tips, so let's give them some tips. How can an employer find out about their vaccination status?

Lauren Green ([15:06](#)):

Well, employers can ask for their vaccination card, an employer can do a visual inspection of the vaccination card, or they can ask employees to attest to a vaccination status, which would essentially be the honor system. And then employers covered under the California Consumer Privacy Act must comply with their privacy notice obligations under California law before gaining data on employee vaccination status. That's important to remember.

Ryan Bykerk ([15:43](#)):

All right. Well, look, that pretty well covers it. Obviously there's so much more that could be said about privacy, but what a great overview. Lauren, thank you for coming on again and giving us this sort of part two on privacy. There's a lot for employers to really think about and be careful about in this space.

Ryan Bykerk ([16:03](#)):

As you know, Lauren, since you are a repeat guest and you gave us a fantastic crazy employment story last time, which if you're listening to this episode and you haven't heard, you should certainly go back and listen to. You know that here at the end of the episode, we always ask for a crazy employment story. We would love to hear another crazy employment story from you.

Lauren Green ([16:27](#)):

Yeah. This one actually doesn't involve me personally, but I came across this employment story the other day and it caught my eye because it involves The Price Is Right, which is actually one of my favorite shows growing up. Unfortunately, because of the time that it's on during the day, I don't get to watch it very often anymore, but I have very fond memories of watching it growing up. This story involved an employee who sought and was actually awarded workers' compensation benefits.

Lauren Green ([17:08](#)):

She had claimed that she was seriously injured in an on the job accident, and she was out of work for several years. Her claim was that she could not stand, sit, kneel, reach, or grasp I think were kind of the main points of her injury. Later on, these injuries got called into question because she appeared as a contestant on the game show The Price Is Right. While on the show, if you've ever watched it, she spun the big wheel. She spun the big wheel twice.

Lauren Green ([17:48](#)):

And if you haven't seen it, I mean, they're reaching all the way up, right? They really have to put their whole body and everything into it to even get that thing to spin around one time. She didn't seem to have a problem reaching and grasping at that wheel. There was an investigation and turns out her injuries weren't quite as severe as she originally claimed. I think ultimately she was indicted and pleaded guilty to federal fraud charges. In the end, it didn't quite work out.

Lauren Green ([18:29](#)):

I'm not sure if she won big on The Price Is Right or not, but my guess is that even if she did, it probably was not worth it.

Philip Person ([18:41](#)):

It didn't offset her fraud charges.

Ryan Bykerk ([18:43](#)):

You got to win a lot of money to do that.

Philip Person ([18:47](#)):

I've always wondered how heavy that wheel is, but clearly it's heavy enough that as injured as she claimed to be, she should not have been able to spend that. Moral of the story is, if you're injured, don't go on your favorite game show.

Lauren Green ([19:00](#)):

Don't go on your favorite game show. Yep, that's exactly right.

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Ryan Bykerk ([19:04](#)):

Keep your story straight. Keep your story straight, people.

Lauren Green ([19:07](#)):

Yeah, or don't lie. Maybe originally you should just be good.

Philip Person ([19:12](#)):

I think that should be the takeaway. Don't lie.

Ryan Bykerk ([19:15](#)):

Don't be bad.

Lauren Green ([19:17](#)):

Don't commit fraud.

Ryan Bykerk ([19:18](#)):

Yeah, good policy.

Lauren Green ([19:21](#)):

Yeah.

Philip Person ([19:22](#)):

Excellent story.

Lauren Green ([19:23](#)):

The most practical advice of the day.

Philip Person ([19:26](#)):

Excellent story and advice from Lauren on part two. Thank you again for being on and thanks to all our listeners. If you have any crazy stories you want to share with us, follow up questions, feel free to email us at [theperformancereview@gtlaw.com](mailto:theperformancereview@gtlaw.com). Until next time, we'll catch you later.

Announcer ([20:02](#)):

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