

Labor & Employment ADVISORY

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NLRB General Counsel Issues Advice Memos Approving At-Will Employment Disclaimers

In two recent Advice Memos, the General Counsel's office of the National Labor Relations Board (NLRB or the "Board") concluded that two at-will employment clauses in employee handbooks did not violate the National Labor Relations Act (NLRA). In reaching this conclusion, the General Counsel distinguished the policies at issue from an at-will employment clause found to be unlawfully broad by an NLRB administrative law judge (ALJ) in February 2012.

Background

At-will employment disclaimers are common in employee handbooks and usually require employees to acknowledge that their employment is at-will and may be terminated at any time, and also advise employees that such at-will status may not be altered absent a writing signed by an authorized representative of the employer. These clauses are intended to defeat any employee argument that an implied employment contract, for any period of time or for an indefinite period, was created by the remaining provisions of the handbook or by a supervisor's representations.

The issue of whether at-will employment disclaimers may violate the NLRA has been generating concern since an NLRB administrative law judge found an American Red Cross disclaimer unlawfully broad in early February 2012. The ALJ determined that the American Red Cross Arizona Blood Services Region violated the NLRA by maintaining an employee handbook provision that stated, "I further agree that the at-will employment relationship cannot be amended, modified or altered in any way." The ALJ found that an employee could reasonably construe this provision as relinquishing her right to engage in concerted action in an effort to change her at-will status through union representation or collective bargaining.

Following the ALJ's decision in *American Red Cross*, the NLRB issued a complaint against Hyatt Hotels Corp. alleging that Hyatt's broadly written at-will employment disclaimer also violated the NLRA. The Board took issue with several clauses in the disclaimer, including the following: "I acknowledge that no oral or written statements or representations regarding my employment can alter my at-will employment status, except for a written statement signed by me and either Hyatt's executive vice president/chief operating officer or Hyatt's president." Before a hearing on the matter could be held, the case was settled.

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General Counsel's Advice Memos

Recently, charges filed with the NLRB alleged that two at-will policies, one from a California trucking company and the other an Arizona restaurant, were overbroad in violation of the NLRA. In response to the charges, the General Counsel's office issued two Advice Memos analyzing the policies, finding both to be lawful under the NLRA, and recommending dismissal of the charges.

The two memos contain the same analysis and, in large part, identical language. As both memos explain, an employer violates the NLRA by maintaining policies that explicitly prohibit NLRA-protected activity or that could reasonably be construed as prohibiting such activity. The two policies are reproduced below, with emphasis added on the portions specifically attacked in the charge:

Policy #1:

Employment with Rocha Transportation is employment at-will. Employment at-will may be terminated with or without cause and with or without notice at any time by the employee or the Company. Nothing in this Handbook or in any document or statement shall limit the right to terminate employment at-will. **No manager, supervisor, or employee of Rocha Transportation has any authority to enter into an agreement for employment for any specified period of time or to make an agreement for employment other than at-will. Only the president of the Company has the authority to make any such agreement and then only in writing.**

Policy #2:

The relationship between you and Mimi's Café is referred to as "employment at will." This means that your employment can be terminated at any time for any reason, with or without cause, with or without notice, by you or the Company. **No representative of the Company has authority to enter into any agreement contrary to the foregoing "employment at will" relationship.** Nothing contained in this handbook creates an express or implied contract of employment.

As to both policies, the General Counsel noted that the provisions do not require employees to refrain from seeking to change their at-will status, but instead focus the language on prohibiting the employer's own representatives from entering into employment agreements. Moreover, Policy #1 specifically provides that the at-will employment relationship can be modified by the president of the company, and the language of Policy #2 reinforces the employer's explicit unambiguous policy that "nothing contained in this handbook creates an express or implied contract of employment."

The Advice Memos distinguished the above policies from the *Red Cross* policy found to be overly broad in February. According to the General Counsel's office, the Red Cross decision hinged on the use of the personal pronoun "I," whereby the employee specifically agreed that the at-will relationship could not be changed in any way, essentially constituting a waiver of the employee's right to engage in concerted activity in an attempt to change her at-will status. Thus, the Red Cross policy "more clearly involved an employee's waiver of [her] Section 7 rights" than the policies at issue in the Advice Memos.

Implications

The Advice Memos issued by the General Counsel should provide some comfort to employers and human resource professionals that at-will employment policies, in general, are not likely to be a new area of focus for the NLRB. The purpose of Advice Memos is for all NLRB Regions to have the same guidance in addressing similar issues. While Advice Memos do not have the same authoritative force as a published decision of the Board, they do set out the agency's enforcement position and provide guidelines that will be followed by all Regions when faced with charges challenging at-will employment policies. Therefore, in light of these Advice Memos employers should, in consultation with counsel, review and revise their employment at-will policies based on the following guidelines:

- Include an unambiguously stated purpose for at-will policies (e.g., "Nothing contained in this handbook creates an express or implied contract of employment").
- Include language that simply focuses on the employer's policy that its own representatives are not authorized to modify an employee's at-will status.
- Consider including language that permits the employer's president, or some designated representative, to enter into written employment agreements that modify the at-will relationship.
- Avoid language that requires employees to refrain from seeking to change their at-will status or to agree that their at-will status cannot be changed in any way.
- Avoid drafting at-will employment policies in the first person.

Ultimately, employers should consult counsel to determine if at-will policies are appropriately drafted to protect employer interests without violating employee rights.

The General Counsel's Advice Memos can be viewed at:

<http://mynlrb.nlr.gov/link/document.aspx/09031d4580d6f56e> and
<http://mynlrb.nlr.gov/link/document.aspx/09031d4580d6f56d>.

The *American Red Cross* decision can be viewed at: <http://mynlrb.nlr.gov/link/document.aspx/09031d4580808984>.

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