

## NLRB CHALLENGES "EMPLOYMENT-AT-WILL" ACKNOWLEDGEMENTS

Virtually all employers that have an Employee Handbook also have an acknowledgement of receipt of the Handbook. It is very common in the acknowledgement for an employer to clearly spell out the fact that the employee is an "Employee-At-Will". Now this common employer practice is being challenged by the NLRB.

### DO HANDBOOK ACKNOWLEDGEMENTS VIOLATE THE LAW?

In at least two recent cases filed against large private employers, the NLRB has taken the position that any "employment-at-will" acknowledgement that could *reasonably tend to chill employees* in the exercise of their rights under the NLRA is unlawful.

Employee rights under the NLRA are very broad. A union doesn't have to be involved. Those rights include acting together for their "*mutual aid and protection*." That phrase has been interpreted to include discussions about wages, hours and working conditions. Any employer action that *interferes with, restrains or coerces* employees in the exercise of those rights is an unfair labor practice and is unlawful. An employer that requires employees to agree to remain employees-at-will or suggests that the status can't be changed will now likely be found to have committed an unfair labor practice. It is important to note that, depending how it is written, merely having a policy or acknowledgement reflecting the employment-at-will status of employees can be unlawful – even if the policy or practice was never enforced. With the NLRB taking this position, nearly any policy or employer practice could be interpreted to "*reasonably tend to chill*" employees in exercising their broad rights. This puts employers in a very tough spot.

### THE "UNLAWFUL" EMPLOYMENT-AT-WILL ACKNOWLEDGEMENTS - DO THESE LOOK FAMILIAR?

The Acknowledgement language in these recent cases is not at all unusual. Even though the language is quite common, both of these large employers got into trouble with the NLRB. This is what the NLRB was looking at and challenging in those cases.

First, in a case against the **American Red Cross**, an Administrative Law Judge (but not yet adopted by the NLRB) found the following language in a handbook acknowledgement to be unlawful:

*AGREEMENT AND ACKNOWLEDGEMENT OF RECEIPT OF EMPLOYEE HANDBOOK.*

*I further agree that the at-will employment relationship cannot be amended, modified or altered in any way.*

The judge ruled that the employer's requirement that each employee sign this acknowledgement constituted an unlawful waiver of the employee's right to advocate for a change in their employment-at-will status – with or without the help of a union.

In another case, this one against **Hyatt Hotels** (which was settled before trial) indicates just how aggressive the NLRB has become in challenging handbook acknowledgements. Here is the entire Hyatt Hotel Handbook Acknowledgement with the alleged "unlawful" sections highlighted:

*ACKNOWLEDGEMENT OF EMPLOYEE HANDBOOK*

*I acknowledge receiving a copy of part 1 of the [name of hotel handbook] and I agree to comply with it. I also acknowledge that I have received or will be receiving a copy of part 2 of the [employee handbook] and I agree to comply with it. I understand that the Employee Handbook is a guide to the practices and policies of [the named Hotel]. I also acknowledge that if Hyatt does not enforce a policy, guideline or rule, or delays enforcement of a policy, guideline or rule, it does not mean Hyatt has waived its ability to enforce any policy, guideline or rule in the future.*

***I understand my employment is "at will." This means I am free to separate my employment at any time, for any reason, and Hyatt has these same rights. Nothing in this handbook is intended to change my at-will employment status. 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.***

*In order to retain flexibility in its policies and procedures, I understand Hyatt, in its sole discretion, can change, modify or delete guidelines,*

rules, policies, practices and benefits in this handbook without prior notice at any time. **The sole exception to this is the at-will status of my employment, which can only be changed in a writing signed by me and either Hyatt's Executive Vice President/Chief Operating Officer or Hyatt's President.**

#### THINGS TO THINK ABOUT

The NLRB continues to act aggressively to protect employee rights to organize and to band together over issues involving wages, hours and working conditions. Merely having an over-broad policy or even a simple "employment-at-will" handbook acknowledgement can lead to costly litigation at the NLRB even if no union is involved. If the language of the Hyatt and Red Cross handbook acknowledgements looks familiar, then consider reviewing your handbook acknowledgement and consider making some changes to avoid trouble later on.

Private employers should consider these things:

- The NLRB's only remedy after finding that a handbook acknowledgement was unlawful would be to order it to be rescinded with notice to the employees that it is no longer in effect. There are no fines or monetary penalties under the NLRA for an employer's unlawful acts.
- Knowingly maintaining an over-broad acknowledgement or policy could be used as evidence of an unlawful anti-union motive in related proceedings.
- Maintaining an over-broad acknowledgement or policy could arguably extend the six-month statute of limitations for filing charges under the NLRA.
- A finding by the NLRB that a policy or acknowledgement is unlawful could turn into a rallying point during a union election campaign.
- Various state law decisions suggest that having a contract disclaimer or "employment-at-will" language in a handbook is strong evidence that the handbook is not an enforceable contract. Weigh the benefits of the disclaimer against the risks under the NLRA.
- It's a good idea in any event not to require employees to "agree" to follow handbook policies and rules because the "agreement" by an employee may actually create a contract when none was intended.
- Don't stop with a review of the acknowledgement - the NLRB is also aggressively challenging Social Media Policies and other common employer policies on the same basis - because they *tend to chill employees in the exercise of their rights*.

If you have any questions, please feel free to contact Steve Lyman at [slyman@hallrender.com](mailto:slyman@hallrender.com) or your regular Hall Render attorney.