ARE EMPLOYMENT-AT-WILL POLICIES UNLAWFUL? THE NLRB TRIES TO EXPLAIN

THE NLRB OFFERS SOME ADVICE

The NLRB Acting General Counsel Lafe Solomon today (October 31, 2012) released an analysis of at-will employment clauses in two employee handbooks, finding that both are lawful under the National Labor Relations Act. This analysis, contained in two separate Advice Memoranda, will help guide employers in determining whether their Employment-at-Will policies are unlawfully overbroad such that an employee might reasonably believe that he or she could not engage in concerted activity protected by the NLRA.

SOME GOOD NEWS FOR EMPLOYERS - AND EMPLOYMENT-AT-WILL

Charges filed with the NLRB alleged that the handbooks, distributed by a California trucking company and a restaurant in Arizona, defined at-will employment so broadly that employees would reasonably think they could not engage in activity protected by the National Labor Relations Act. However, the two memos prepared by the NLRB's Division of Advice in Washington, D.C. found that they were not overly broad. That's good news for employers.

Here are the two policies with the challenged portions highlighted and which the NLRB advised would be lawful:

> **At-Will-Employment:** The relationship between you and Mimi's Cafe 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, byyou 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.

The NLRB would conclude that this clause was not unlawfully broad because it does not require employees to *agree* that the employment relationship cannot be changed in any way, but merely highlights that the employer's representatives are not authorized to change it.

> **Statement of Employment at Will Status**: 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 bythe 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.*

The NLRB noted that the Rocha Transportation clause explicitly states that the relationship *can be changed*, and so employees would not reasonably assume that their NLRA rights are prohibited.

BUT WATCH OUT - THERE COULD STILL BE PROBLEMS

However, the NLRB explains that an employer would violate the NLRA by maintaining work rules or policies that explicitly prohibit NLRA-protected union or concerted activity, such as joining a union or discussing terms and conditions of employment with coworkers. Even if not explicit, a rule can be unlawful if employees would reasonably construe the language to prohibit such activity. So, in addressing an earlier case decided by an administrative law judge (see our August 6, 2012 **HR Insights Blog article**) that created a great deal of concern for employers the NLRB made an attempt to distinguish the language used in the policy that the ALJ found to be unlawfully broad. In that case, the ALJ found that the use of the personal pronoun "I" in the policy acknowledgement form specifically agreeing that the employment-at-will status could not be changed in any way was essentially a waiver of the employee's rights.

THINGS TO CONSIDER

The law remains unsettled for sure, but the NLRB's Advice Memos help. In light of this advice, private employers should consider:

- Reviewing existing Employment-at-Will provisions;
- Eliminating any reference to an employee's "agreement" as to that status;
- Adopting policies similar to the policies that were found to be lawful in the Advice Memos; and

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- Ensuring that managers and supervisors are aware of the rights of employees and the complexity of the changing interpretations of the law.

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