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At-Will Provisions of Employee Handbooks Now At Risk

By Jessica Summers

A recent series of cases and statements coming from the National Labor Relations Board (NLRB) has raised questions as to whether the "at-will" language included in almost all employee handbooks violates the National Labor Relations Act (NLRA). The increasingly negative approach the NLRB has taken to at-will clauses is of concern for employers that have regularly relied on such language to help ensure the provisions in their employee handbooks - and statements by supervisory employees - are not construed as enforceable guarantees of employment or contractual employment policies.

In *American Red Cross Arizona Blood Services Region* (found here), an NLRB Administrative Law Judge (ALJ) determined that a written notice to employees informing them that their at-will status could not be modified could be construed to restrict those employees' exercise of their Section 7 rights under the NLRA. The employees in this case received the employee handbook and were then asked to sign a form acknowledging their at-will status and agreeing that this status could not be "amended, modified or altered in any way." The ALJ concluded that this acknowledgement was impermissible because it was tantamount to a waiver by the employee of the right to engage in concerted activity to change his or her at-will status.

Not long after the ALJ's decision in Red Cross, an NLRB regional director took a similar position when the NLRB itself filed a complaint against Hyatt Hotels. The complaint alleged that Hyatt's handbook acknowledgement form was overly broad and discriminatory under the NLRA. The NLRB specifically took issue with the part of the policy that stated that employment was at-will unless altered in writing by the hotel chain's COO, President or Executive Vice President. Hyatt ultimately settled the case and agreed to change the language in the acknowledgment, although it was not specified what alternate language would be adopted.

While the positions taken in these two cases could be seen to reflect the isolated views of certain NLRB officials or ALJs, a recent statement by the Board's Acting General Counsel, Lafe Solomon, strongly suggests this is not the case. Speaking at the Connecticut Bar Association's Annual Meeting in June, Solomon stated that broad at-will statements accompanying employee handbooks might violate the NLRA. According to the Acting General Counsel, the potential violation arises from the possibility that employees could construe the at-will statements to mean that even collective bargaining could not change their at-will status.

To date on this issue, we have a decision by one NLRB ALJ, a complaint filed by an NLRB regional director and a statement by the Acting General Counsel. There are sure to be more developments as the NLRB continues to extend its reach into non-unionized workplaces. Until there is further guidance, employers should be sure not to simply state that at will status "cannot be modified." Further, instead of stating that at-wills status "can only be altered by agreement between the employee and employer", employers would be safer stating that at-will status "can be modified provided it is done so in writing signed by the President." Specifically identifying the President or other company leadership arguably still leaves room for unionized or other concerted activity as any labor agreement would need to be signed by the President or leadership. Further, it prevents the additional legal issues that could arise by indicating that at-will status can be altered but not making clear who in the company has the authority to do so.

