



LABOR & EMPLOYMENT

ALERT

AT-WILL EMPLOYMENT DISCLAIMERS DRAW NLRB SCRUTINY

By Scott Cooper

The National Labor Relations Board's Acting General Counsel recently claimed in two cases that allegedly overbroad employment-at-will disclaimers contained in employee handbooks chill or interfere with employees' exercise of their rights under the National Labor Relations Act (the Act) to engage in protected concerted activity.

Employment-at-will disclaimers and acknowledgements are common in employee handbooks. Such provisions are intended to defeat any employee argument that an implied employment contract of indefinite duration is created by the other provisions within the handbook. The disclaimer usually states that an individual's employment is at-will and, as such, may be terminated by either the individual or employer for any reason, at any time.

However, the Acting General Counsel has taken issue of late with employment-at-will statements that are deemed overly broad, such as those declaring that the at-will relationship can never be changed or amended. For instance, on February 2, 2012, an NLRB administrative law judge (ALJ) determined that the American Red Cross - Arizona Blood Services Region violated the Act by stating in its employee handbook, "I further agree that the at-will employment relationship cannot be amended, modified or altered in any way." According to the ALJ, requiring employees to sign such an acknowledgement violated the Act because it could be reasonably construed by employees to relinquish their right to engage in concerted activity to alter their at-will status through union representation or collective bargaining.

Although the Red Cross rescinded and revised the offensive provision prior to the conclusion of the case, the ALJ still ordered it to advise employees in writing that the provision had been revised or rescinded, and further ordered the Red Cross to post a notice assuring employees that it would not violate their rights under the NLRA.

Likewise, in a case against Hyatt Hotels Corp., the Acting General Counsel issued a complaint alleging that Hyatt's policy of requiring employees to sign an acknowledgement of receipt of Hyatt's employee handbook violated the Act because it contained a statement advising employees that the only way to change their at-will employment status was through the use of a writing signed by the employee and either Hyatt's executive vice president or president. The matter settled on May 24, 2012, without a decision.

The settlement in the Hyatt case leaves certain questions regarding the Board's take on this issue unresolved. Still, employers would be prudent to seek the advice of qualified counsel in reviewing their at-will employment disclaimers to ensure that those disclaimers are not written so broadly as to suggest that they preclude employees from engaging in concerted activity as a legitimate means of altering their at-will status.

As always, we will continue to monitor Board activity and update our clients as necessary.

For more information about this Alert, please contact Scott Cooper at 973.994.7513 or scooper@foxrothschild.com or any member of Fox Rothschild's Labor & Employment Department.