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ACT NOW ADVISORY

NLRB's Scrutiny of Employment-at-Will Disclaimers Signals a Trend to Employers

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In a move that signals a trend to employers, the Acting General Counsel ("AGC") of the National Labor Relations Board ("NLRB" or "Board") recently claimed in two unrelated cases that allegedly overly broad "employment-at-will" disclaimers contained in employee handbooks have the effect of chilling or interfering with employees' exercise of their right under the National Labor Relations Act ("Act") to engage in protected concerted activity. As we previously discussed in "Helpful Guidance Summarizing the National Labor Relations Board's Position on Social Media Issues: Two Reports and One Decision" and "NLRB Acting General Counsel Issues Follow-Up Report on Social Media Cases," both the AGC and the Board have focused significant attention on employers' social media policies. Similar to the employment-at-will disclaimer cases discussed below, a principal issue of the social media cases has been whether such policies interfere with employees' rights to engage in protected concerted activities under the Act when such policies are overly broad. Importantly, and as we have reported in the past, the Board's pronouncements affect non-unionized employers as well as employers with unions, since the Act applies to almost all private sector employers—not only those whose employees are represented by unions.

Employment-at-will disclaimers and acknowledgments are commonly incorporated into employee handbooks. Such statements are frequently included in employee offer letters and applications for employment as well. To protect against claims of implied employment contracts based on provisions incorporated into these employer documents, many employers include statements that define the employment-at-will relationship between an employee and the employer. The employment-at-will statement usually provides that an employee's employment is "at will" and, as such, can be terminated by either the employee or employer at any time, for any reason. These at-will disclaimers often state that such at-will status cannot be changed, except for a written statement signed by both the employee and a high-level employer official. If such statements are far-reaching, for example, stating that the at-will relationship can *never* be changed or that any employer policy—except the company's at-will employment policy—can be amended from time to time, such statements may be subject to NLRB challenge. Given the NLRB's continued scrutiny of employer policies, both unionized and non-unionized employers nationwide should pay close attention.

Acknowledgment Claim

In a recently settled matter, the Regional Director for Region 28, acting on behalf of the AGC, had issued a complaint on February 29, 2012, alleging (in part) that the employer's policy of requiring employees to sign an acknowledgment, containing what was alleged to be an overly broad employment-at-will disclaimer in its employee handbook, violated the Act. Specifically, the complaint took issue with the following statements contained within the employer's acknowledgment:

- ***I understand my employment is "at will."***

- ***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 [the Company's] Executive Vice President/Chief Operating Officer or [the Company's] President.***

- ***The sole exception to [the Company's ability, in its sole discretion, to modify or delete policies] is the at-will status of my employment, which can only be changed in a writing signed by me and either [the Company's] Executive Vice President/Chief Operating Officer or [the Company's] President.***

The matter settled on May 24, 2012, without a decision. Therefore, neither an administrative law judge ("ALJ") nor the Board has opined on the AGC's contention that the language in question interfered unlawfully with employees' rights under the Act, and, if so, how it might be modified to be found lawful under the Act.

Handbook Claim

In an unrelated case also arising from an unfair labor practice charge filed with the NLRB's Phoenix Regional Office on February 1, 2012, an ALJ held that the employer violated the Act by maintaining an overly broad employment-at-will disclaimer and acknowledgment in its employee handbook.

The policy in question contained the following language: "***I further agree that the at-will employment relationship cannot be amended, modified or altered in any way.***" The Regional Director issued a complaint based on the charge and alleged that this language violated the Act because it would chill employees in the exercise of their rights under Section 7 of the Act, because they would conclude that the at-will language means that the at-will status cannot even be changed through collective bargaining.

In this case, the ALJ determined that requiring employees to acknowledge the employment-at-will policy violated the Act by expressly restricting employees' rights to engage in protected concerted activities. Indeed, the ALJ found that signing the acknowledgment could be seen as "a waiver in which an employee agrees that his/her at-will status cannot change, thereby relinquishing his/her right to advocate concertedly"

to change the employee's at-will status. In other words, the policy statement would restrict employees from engaging in collective action through union representation or collective bargaining so as to amend, modify, or alter the at-will relationship.

National Scrutiny

While these two cases both arose out of the Board's Phoenix Regional Office, and, as such, neither the Board itself nor any court has considered either case, it appears that the NLRB will be scrutinizing at-will disclaimers nationally. In June 2012, the NLRB's current AGC, Lafe Solomon, speaking at the Connecticut Bar Association's annual meeting, remarked that the NLRB will be focusing its attention on at-will disclaimers, noting that blanket at-will statements may violate the Act.

What Employers Should Do Now

Given the recent attention to social media policies, coupled with these two recent cases, you should do the following:

- Review the employment-at-will disclaimer in your organization's employee handbook, offer letters, applications for employment, and elsewhere to examine whether it contains language that the Board is likely to find overly broad. For example, ensure that any such statement does not provide that the nature of the at-will relationship cannot be changed under any circumstances.
- Generally, ensure that "at-will employment" is defined carefully with the guidance of your employment counsel in each employment-related document where that term appears.

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