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The latest from the NLRB on employment-at-will policies

Just two years ago, employers weren't terribly worried about the approach the National Labor Relations Board (NLRB) took toward employment-at-will policies.

True, the board did seem to signal at the time that it might start looking more closely at employee handbooks, but it wasn't ready to make any major policy statements—just yet.

And the board did issue two advice memos touching on handbooks, employment applications and offer letters—in particular on disclaimers that purport to remind employees that their employment is at-will.

But it didn't actually announce policy, other than to warn employers that "the law in this area remains unsettled." Since disclaimers are widely used in handbooks (and employment applications and offer letters), the NLRB's sudden focus on such provisions was potentially significant.

Fast forward to July 2014. There have been two noteworthy developments this year.

The NLRB's first move

First, on Feb. 25, 2014, the NLRB General Counsel's Office issued a memorandum on "Mandatory Submissions to Advice," which noted there should be "centralized consideration of certain issues" by the General Counsel's Office. The memo went on to cite "cases involving 'at-will' provisions in employer handbooks" as an area identified for such centralized oversight.

The NLRB's 26 regional offices are now submitting cases involving at-will provisions to the General Counsel's Office for guidance, to the extent that prior NLRB case law precedent or earlier Advice Memoranda do not definitively resolve the pertinent legal issues.

In other words, the NLRB wants to collect all the agency's cases, review them and consider what, if any, policy should guide the agency's other offices when considering at-will provisions in employee handbooks.

Look for continuing developments from the NLRB on this subject.

A significant decision

Second, the General Counsel's Office recently reviewed an at-will policy to determine whether informing employees that their employment is at-will violates the National Labor Relations Act (NLRA)'s prohibition against banning so-called "concerted activity" to better working conditions.

> *Two recent NLRB actions mean employers should review their at-will policies.*

The argument labor advocates make is that telling employees they can be fired at will amounts to also telling them that organizing to create job security through a labor agreement would be against the rules.

At issue was the following at-will policy of Lionbridge Technologies in Washington, and whether it obstructed employees from organizing a union or interfered with other concerted activity under the NLRA:

- *Employment at [the Employer] is on an at-will basis unless otherwise stated in a written individual employment agreement signed by the [Senior Vice President of] Human Resources. This means that employment may be terminated by the employee or [the Employer] at any time, for any reason or for no reason, and with or without prior notice.*
- *No one has the authority to make any express or implied representations in connection with, or in any way limit, an employee's right to resign or [the Employer's] right to terminate an employee at any time, for any reason or for no reason, with or without prior notice. Nothing in this handbook creates an employment agreement, express or implied, or any other agreement between any employee and [the Employer].*
- *No statement, act, series of events or pattern of conduct can change this at-will relationship.*

A rock-solid defense

The good news is that the General Council's office found the provision to be lawful. It reasoned:

- The language, on its face, did not expressly limit any union organizing or concerted activity.
- The employer did not promulgate the disclaimer in response to union organizing or concerted activity.
- The employer had not applied the policy unlawfully.
- Employees could not reasonably construe the provision to prohibit union organizing or concerted actions.
- The language did not threaten discipline for those seeking to unionize to change their at-will status.
- The policy did not ask employees to waive any rights they held under Section 7 of the NLRA.

In concluding the policy was lawful, the General Counsel's Office essentially aligned with what employers have long intended regarding their at-will disclaimers: Such provisions have everything to do with providing a rock-solid defense to claims by ex-employees for breach of an implied employment contract and nothing whatsoever to do with inhibiting union organizing or other concerted activity.

While this latest news from the NLRB is clearly favorable and pro-employer, employers should nevertheless carefully review any at-will policy to ensure it is lawful, in light of the NLRB's continued interest in scrutinizing such provisions.

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