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## Check Your Employment At-Will Policy: It May Be Construed as Violating the Law

By Warren E. Buliox

Often one of the first things that employment attorneys and human resources personnel learn is that most states, to varying degrees and with some limitations, recognize the doctrine of employment at-will, meaning that employment can be terminated by any party at any time and for any reason, or for no reason at all. This doctrine has long been memorialized by employers in non-unionized settings without fear of the threat of incurring legal liability. That, however, may be changing.

Recently, the National Labor Relations Board ("NLRB") has taken a stance against employer policies that foreclose any possibility of altering the at-will employment relationship. Such policies, according to the NLRB, are unlawful under the National Labor Relations Act (the "Act"), which prohibits employers from "interfere[ing] with, restrain[ing], or coerc[ing] employees in the exercise of the rights guaranteed" under the Act. The rights contemplated by the Act include the right to engage in union-related activities (such as forming or assisting a union) and the right to "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." These rights apply to all employees, whether unionized or not, and in recent years has been applied by the NLRB to invalidate a host of employment policies and practices in non-unionized settings.

In *American Red Cross and Lois Hampton*, Case 28-CA-23443 (February 1, 2012), the NLRB Phoenix Regional Office issued a Complaint and Notice of Hearing against American Red Cross Arizona Blood Services (the "Red Cross"). The Complaint contended, among other items, that Red Cross violated the Act by requiring employees to agree in an employee handbook

acknowledgement form that their at-will employment relationship with Red Cross could not be altered. The language at issue provided: "**I further agree that the at-will employment relationship cannot be amended, modified or altered in any way.**"

After a hearing on the matter, an Administrative Law Judge ("ALJ") for the NLRB agreed with the Phoenix Regional Office and found the handbook language to violate the Act. The NLRB noted that the appropriate inquiry in a case like this is whether the policy/provision at issue has the effect of chilling employees from exercising rights under the Act. In holding that the employee handbook acknowledgment form, and particularly the at-will employment provision, violated the Act, the ALJ noted that "[f]or all practical purposes, the clause in question premises employment on an employee's agreement not to enter into any contract, to make any efforts, or to engage in conduct that could result in union representation and in a collective-bargaining agreement, which would amend, modify, or alter the at-will relationship." This, according to the ALJ, had the effect of chilling employees from exercising rights under the Act.

In June 2012, the NLRB Acting General Counsel Lafe Solomon weighed in on the issue. In public comments made at a bar association meeting, Mr. Solomon advised that policies/provisions that have the effect of curbing an employee's ability to change the terms and conditions of employment (including the at-will status of employment) may violate the Act by restricting the ability to participate in activities protected by the Act, such as union organizing.

Thankfully for employers, the NLRB Office of General Counsel has issued advice memoranda that provide guidance on what policies would not be considered to violate the Act, and those policies are more in line with standard employee handbook language. In the first of two advice memorandum (*Rocha Transportation*, Case 32-CA-086799), the NLRB examined the following employment at-will provision:

Employment with Rocha Transportation is 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.**

[Emphasis original in the Advice Memorandum.] In the second memorandum (*SWH Corporation d/b/a Mimi's Café*, Case 28-CA-084365), the NLRB considered the following policy language:

#### **AT-WILL EMPLOYMENT**

The relationship between you and Mimi's Café is referred to as "employment at will." . . . **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.

[Emphasis original in the Advice Memorandum.]

In both cases, the NLRB opined that the policies at issue did not violate the Act because they could not be reasonably construed as restricting activity protected by the Act. The provisions did not restrict or limit in any way an employee's ability to seek to change the at-will status of the employment relationship through union organizing or other activities protected by the Act. Rather, both policies simply restricted *representatives* from each respective company from altering the employment at-will relationship. The employee remained free to work to change his or her working conditions through activities protected by the Act. In the Rocha Transportation policy, this was highlighted by the fact that the president of the company could enter into written agreements altering the employment at-will relationship, which meant that the company left open the possibility of employees altering their employment at-will status through collective bargaining and other activity protected by the Act.

In distinguishing *Rocha Transportation* and *Mimi's Café* from the ALJ's decision in *American Red Cross*, the NLRB noted the use of the pronoun "I" in the Red Cross provision ("I further agree that the at-will employment relationship cannot be amended . . . .") For the NLRB, this language, unlike the provisions in *Rocha Transportation* and *Mimi's Café*, amounted to an unlawful, mandatory personal waiver of the right to engage in concerted activity to change the employment at-will relationship.

The lesson in all of this for employers? Take a close look at your employment at-will policies and ensure that they cannot be reasonably construed as interfering with or otherwise "chilling" an employee's ability to exercise rights under the Act. Making sure that the policy only restricts company representatives (as opposed to the employees themselves) from attempting to alter the employment at-will status is a good start. Identifying an executive within the company who can consider and alter the employment at-will relationship may be even better.

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