

THE GENERAL COUNSEL FOR THE NATIONAL LABOR RELATIONS BOARD PROVIDES GUIDANCE ON LAWFUL 'AT-WILL' EMPLOYMENT STATEMENTS

Labor & Employment Alert
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On October 31, 2012, the General Counsel for the National Labor Relations Board issued two advice memoranda addressing recent concerns about the legality of “at-will” employment disclaimers in employee handbook acknowledgement forms. Human resource professionals have been watching this issue closely since virtually all non-union employers have some version of an at-will statement contained in their policies.

Concerns about these policy statements surfaced after an Administrative Law Judge from the Region 28 office of the NLRB recently issued a determination that an employer’s acknowledgement form violated Section 7 of the National Labor Relations Act. *American Red Cross Arizona Blood Services Region and Lois Hampton, An Individual*, 2012 WL 311334 (NLRB Feb. 1, 2012). The offending language required employees to affirm: “I further agree that the at-will employment relationship cannot be amended, modified, or altered in any way.” The Administrative Law Judge’s determination was based on the analysis 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.” Although it settled subsequent to the issuance of the complaint, the regional director from the Region 28 office issued a complaint asserting that the employer had maintained an overly broad and discriminatory acknowledgement form containing the following language: “The sole exception to this is the at-will status of my employment, which can only be changed in a writing signed by me and either Hyatt’s executive vice-president/chief operating officer or Hyatt’s president.” *Hyatt Hotels Corp., d/b/a Hyatt, Park Hyatt, Andaz, Grand Hyatt, Hyatt Regency, Hyatt Place, Hyatt House, Hyatt Summerfield Suite, Hyatt Residence Club, Hyatt Vacation Club, Hyatt Gold Passport and Hyatt Reports v. Unite Here Int’l Union*, Case No. 28-CA-061114 (Region 28).

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The General Counsel's advice memoranda distinguished the language in *American Red Cross* and clarified that the language in *Hyatt* does not violate the act. Both memoranda provide language that the NLRB's General Counsel asserts is lawful:

Employment with Rocha Transportation is employment at-will. Employment at-will may be terminated with or without cause and with or without notice at any time by the employee or the company. Nothing in this handbook or in any document or statement shall limit the right to terminate employment at-will. No manager, supervisor, or employee or Rocha Transportation has any authority to enter into an agreement for employment for any specific 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

.... nothing in the employee handbook creates or is intended to create a promise, contract, or representation of continued employment...

AT-WILL EMPLOYMENT

The relationship between you and Mimi's Café is referred to as "employment at-will." This means that your employment can be terminated at any time for any reason, with or without cause, with or without notice, by you or the company. 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.

Explaining why the specific language is lawful, the General Counsel gave the exact same explanation in both advice memoranda: "[w]e conclude that the contested handbook provision would not reasonably be interpreted to restrict an employee's Section 7 right to engage in concerted attempts to change his or her employment at-will status.

The provision does not require employees to refrain from seeking to change their at-will status or to agree that their at-will status cannot be changed in any way. Instead, the provision simply prohibits the employer's own representatives from entering into employment agreements that provide for other than at-will employment." Both advice memoranda go on to indicate that the provisions explicitly permit the authorized representatives from the employer to potentially modify the at-will relationship through a collective bargaining agreement ratified by the designated employer representative.

Bottom Line for Employers

Employers can now review their employee handbooks and adopt some of the sanctioned language to ensure that their at-will statement will be considered lawful by the National Labor Relations Board while still protecting the employers' expression of the at-will employment relationship.