

PUBLICATION

NLRB Turns Attention to At-Will Employment Provisions

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The National Labor Relations Board (NLRB) has been criticized by employers and politicians for its recent efforts to expand its enforcement efforts beyond the traditional unionized workplace setting. Such efforts include employers' social media policies and its currently failed effort to require employers to post notices to employees informing them of their right to join a labor union. The agency is undeniably seeking to regulate employers more than it has in the past.

Most recently, the NLRB has made forays at regulating employers' use of "at-will" provisions in their handbooks. These disclaimers are a staple of employee handbooks and typically seek to define that employees can be terminated or quit at any time for any lawful reason, with or without notice. They usually explain that an employee's at-will status cannot be changed except in a writing signed by a high-level company officer and they require that the employee acknowledge his or her at-will status via a hard copy or electronic signature. This exercise helps insulate employers from claims that employees have employment contracts.

This practice is now under attack by the NLRB.

In February of this year, an NLRB Administrative Law Judge ruled that the American Red Cross Arizona Blood Services Region violated the National Labor Relations Act (NLRA) by having a provision in its employee handbook acknowledgment stating, "I further agree that the at-will employment relationship cannot be amended, modified or altered in any way." The judge ruled that this provision could be interpreted as limiting employees' right to engage in concerted activity in an effort to change their at-will status, whereas the NLRA protects employees' right to engage in "concerted activity" to seek changes to the terms and conditions of their employment. Even though the Red Cross revised its disclaimer, the ALJ nonetheless required it to separately inform its employees that the disclaimer had been revoked and removed from its handbook acknowledgment, as well as post a notice assuring employees that it would not violate their NLRA rights.

That same month, the NLRB filed a complaint against Hyatt Hotels Corporation, contending that the company's employee handbook acknowledgement form violated the NLRA's protection of concerted activity. The NLRB alleged that several provisions in Hyatt's handbook acknowledgement were overly broad and unlawfully limited employees' right to engage in concerted activity, including phrases such as:

- "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 Hyatt's president or executive vice president/COO.
- "[T]he at-will status of my employment...can only be changed in a writing" signed by the employee and one of the two Hyatt executives.

This dispute was settled before the hearing, with Hyatt agreeing to delete these disclaimers from its handbook acknowledgment form, notify employees that the disclaimers had been revoked and removed from its handbook acknowledgment and post a notice assuring employees that it would not violate their NLRA rights.

These enforcement actions are the first, but unlikely to be the last, attacks the NLRB has made against these common at-will disclaimers in handbook acknowledgments. They represent an alarming development for employers given the prevalence of such disclaimers in handbooks and handbook acknowledgment forms and their importance in defending against breach of contract and related employee claims.

To discuss the NLRB's recent activities or to schedule a review of the at-will language in your company's manuals, please contact any of our more than 70 Labor & Employment attorneys located in Birmingham, Alabama; Atlanta, Georgia; Baton Rouge, Mandeville and New Orleans, Louisiana; Jackson, Mississippi; Chattanooga, Johnson City, Knoxville, Memphis and Nashville, Tennessee; and Houston, Texas.