"EMPLOYMENT AT WILL" POLICIES ARE FOUND TO BE UNFAIR LABOR PRACTICES UNDER THE NLRA

by

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At-will disclaimers in employee handbooks typically clarify that the employment may be terminated at any time, for any reason, and by either party, and ordinarily do not allow the at-will status to be modified unless it is reduced to writing and agreed to by the employer. Employers rely on these provisions to protect themselves from claims that an employee has an enforceable employment contract with the employer based on the handbook's employment provisions. Recently however, the National Labor Relations Board ("NLRB" or the "Board") has closely scrutinized and disapproved of broadly-worded at-will disclaimers that can have a "chilling effect" on the employee's right to engage in concerted activity under the National Labor Relations Act ("NLRA" or the "Act"), to the extent that they potentially imply that union representation and collective bargaining will not alter the at-will employment status. In two recent complaints, the NLRB's Acting General Counsel has taken issue with seemingly common at-will provisions, indicating that there may be a new enforcement target that all employers should be aware of when drafting at-will provisions.

In NLRB v. American Red Cross, 2012 WL 311334 (N.L.R.B. Feb. 1, 2012). the American Red Cross in Tucson, Arizona was found to be in violation of Section 8(a)(1)[1] of the NLRA by "[m]aintaining an overly-broad and discriminatory provision in its 'Agreement and Acknowledgement of Receipt of Employee Handbook'" form. Specifically, the complaint alleged that the at-will provision in American Red Cross's employee handbook was overly-broad, discriminatory, and violated the Act because it required the employee to sign an acknowledgement stating,

> "I further agree that the at-will employment relationship cannot be amended, modified or altered in any way."

In determining whether the at-will employment provision violated the Act, the Administrative Law Judge ("ALJ") stated that "the appropriate inquiry is whether the [work rule] would reasonably tend to **chill** employees in the exercise of their Section 7 rights," [2] citing Lafayette Park Hotel, 326 NLRB 824, 825 (1998).

The ALJ also relied on previous NLRB precedent set out in Lutheran Heritage Village-Livonia, 343 NLRB 646, 646 (2004), which provided that a work rule violates the Act upon a showing that:

1. Employees would reasonably construe the language to prohibit Section 7 activity;

2. The rule was promulgated in response to union activity; or

3. The rule has been applied to restrict the exercise of Section 7 rights."

Even though the ALJ acknowledged that the at-will provision at issue did not "mention union or protected concerted activity, or even the raising of complaints involving employees' wages, hours and working conditions," there was "no doubt that employees would reasonably construe the language to prohibit Section 7 activity."

The ALJ reasoned that the signing of the at-will acknowledgement form was essentially a waiver which forced the employee to agree that their at-will status could not be changed, thereby relinquishing their right to advocate concertedly, whether represented by a union or not, to change their at-will status. The ALJ stated that the provision premised employment on the employee's agreement not to enter into any contract, to make any efforts, or to engage in any conduct could result in union representation and in a collective-bargaining agreement, which would amend, modify, or alter the at-will relationship. The ALJ stated that "[c]learly such a clause would reasonably chill employees who were interested in exercising their Section 7 rights."

The Red Cross contended that, despite its position that the clause was not unlawful, **that it repudiated its conduct by permitting the employee to strike out the offensive wording upon her objection before signing the acknowledgement form.** Further, after receiving the complaint, the Red Cross deleted the entire provision and re-issued the handbook for re-execution by all of its employees, out of "an abundance of caution."

Accordingly, the Red Cross argued that:

1. Since it did not enforce the provision against the employee, it could not have restricted her Section 7 activity; and

2. The recently amended language in the handbook remedied any previous overly-broad and discriminatory provisions, making the issue before the Board moot.

The ALJ rejected these arguments, holding that the maintenance of the at-will acknowledgment forms, which were still distributed to employees for execution for almost one year after the employee's initial objection, was still an unfair labor practice, "even absent evidence of enforcement."

The ALJ also noted that no efforts were made to delete the offending language until after the General Counsel filed the complaint. Further, the ALJ was not convinced that Red Cross employees were adequately informed of the at-will provision retraction or given any assurances that their Section 7 rights would not be interfered with in the future. Therefore, the Red Cross did not establish effective repudiation of the unlawful at-will provisions.

As a result, the ALJ found that Red Cross violated Section 8(a)(1) of the Act and ordered it to post notices assuring its employees that it would respect their rights under the Act.

In addition to physically posting paper notices, the notices also had to be distributed electronically, i.e., by email, posting on an intranet or internet site, and/or other electronic means, if that was how the Red Cross customarily communicated with its employees, to ensure complete message dissemination.

In NLRB v. Hyatt Hotel Corp, Case 28 CA-061114 (February 29, 2012), shortly after the decision in American Red Cross, the NLRB's Acting General Counsel filed an unfair labor practice complaint against Hyatt Hotels in Phoenix, Arizona stating that its at-will provisions also violated Section 8(a)(1) of the Act because it required employees to acknowledge that their at-will employment status could not be altered unless it was in writing and signed by a top Hyatt executive. Specifically, the provisions at issue provided:

- "I understand that 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 Hyatt's Executive Vice President/Chief Operating Officer or Hyatt's President."

- "In order to retain flexibility in its policies and procedures, I understand Hyatt, in its sole discretion, can change, modify or delete guidelines, rules, policies, practices and benefits in this handbook without prior notice at any time. 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."

Again, the Acting General Counsel took the position that these provisions constituted employer interference, restraint and coercion with respect to an employee's exercise of their right to engage in concerted activity should they want to change the status of their employment, as guaranteed by the Act. This case settled before the matter was presented for hearing, and Hyatt agreed to modify its at-will employment policies on a nationwide basis.

Similar to the American Red Cross directive, the settlement required Hyatt to revise the at-will provisions, rescind the acknowledgement forms that included the challenged at-will provisions and post written notices in all Hyatt hotels across the country that the at-will language at issue would no longer be in effect.

NLRB Response

Lafe Solomon

NLRB's Acting General Counsel (& Communist)

Then at a June 2012 Connecticut Bar Association annual meeting, Lafe Solomon, NLRB's Acting General Counsel, addressed his view and recent interest in at-will disclaimers during a meeting with the Connecticut Bar Association. He stated that he is not necessarily targeting policies that generally outline the at-will employment relationship, but explained that an employee acknowledgement which could reasonably lead an employee to believe that even union representation and a collective bargaining agreement could not alter their at-will status is unlawful because it implies a futility of unionization and fails to acknowledge that a collective-bargaining relationship could affect the at-will relationship.

THEN … On November 1, 2012 …

NLRB Acting General Counsel Lafe Solomon released an analysis of at-will employment clauses in two employee handbooks, finding that both are lawful under the National Labor Relations Act.

SWH Corporation d/b/a Mimi's Café
http://mynlrb.nlrb.gov/link/document.aspx/09031d4580d6f56d

Rocha Transportation
http://mynlrb.nlrb.gov/link/document.aspx/09031d4580d6f56e

In reviewing these two decisions, the National Labor Relations Board (NLRB) Office of General Counsel (G. C.) issued two Advice Memoranda clarifying whether employment at-will language in an employee handbook, applications or other employment policies violates the National Labor Relations Act (NLRA) by "chilling" employee rights under Section 7 of the NLRA. Concern had arisen among employers as a result of findings in an earlier unfair labor practice charge (ULP) indicating that certain employment at-will provisions violated the NLRA. The Advice Memoranda reflect a commonsense approach by considering the context of most at-will employment provisions in employee handbooks.

In the first Advice Memorandum, the NLRB Office of General Counsel considered the following language in the Rocha Transportation Employee Handbook:

> 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 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.**

In the second Advice Memorandum, the Office of General Counsel considered the following language in the Mimi's Café Teammate Handbook:

> 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 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.

In the ULP charges filed against Rocha Transportation and Mimi's Café, the claimants alleged that the bolded language in the handbooks violated the NLRA "because it is overbroad and would reasonably chill employees in the exercise of their Section 7 rights."

In rejecting these claims, the NLRB Office of General Counsel stated that any language that potentially violates the NLRA cannot be read in isolation but must be considered in context. The employment at-will policies at issue did not explicitly restrict employee Section 7 rights to change their at-will employment status through concerted activity among themselves, or through union organizing. Further, there was no indication that the policies were implemented in response to union organizing or that the policies had been applied to restrict protected concerted activity by employees. Thus, the handbook provisions would only be unlawful if employees would reasonably construe the policies "in context" to restrict their Section 7 activities.

The G. C. concluded that the handbook provisions did not require employees to refrain from seeking to change their at-will status or to agree that their at-will status could not be changed in any way. Instead, the handbook provisions simply made clear that the employer's own representatives were prohibited from entering into employment agreements that would provide for other than at-will employment and were not authorized to modify an employee's at will status. The Rocha Transportation provision clearly indicated the possibility of a modification of the at-will relationship through a collective bargaining agreement ratified by the company's president.

Further, the clear meaning of the Mimi's Café provision was to reinforce the purpose of the at-will policy, *i.e.*, that the handbook did not create an express or implied contract of employment. The G. C. noted "[i]t is commonplace for employers to rely on [such] policy provisions . . . as a defense against potential legal action by employees asserting that the employee handbook creates an enforceable employment contract."

The G. C. distinguished the prior <u>American Red Cross Arizona Blood Services Region</u> case which had raised concerns among employers about the liability of at-will disclaimers. In that case, the employer was held to have violated the NLRA by maintaining the following language in an acknowledgement form that employees were required to sign:

"I further agree that the at-will employment relationship cannot be amended, modified or altered in any way."

The G. C. stated that this language required the employee – through the use of the personal pronoun "I" – to agree that at-will status could not be changed and was **"essentially a waiver" of the employee's right "to advocate concertedly . . . to change his/her at-will status."**

The NLRB guidance on at-will provisions in employee handbooks, employment applications, employee acknowledgment forms and other employment documents has clarified that at-will policies phrased in terms of what the ***employer*** can and cannot do, ***rather than what employees can and cannot do***, generally will not violate employee Section 7 rights under the NLRA.

Employers should carefully review their employment at-will policies for compliance with the NLRA.

Of course, we now have a serious conflict of laws issue.

In Fennessey *v.* Mt. Carmel Health Systems, Inc., 2009-Ohio-3750 (10th District Court of Appeals, July 30, 2009), Barbara Fennessey began working as a registered nurse at Mount Carmel Health Service in September 1976. During her employment, Mount Carmel distributed employment manuals to all of its employees. On October 25, 1999, Fennessey used physical restraints to confine an unruly patient, then poured water over the patient's face in violation of hospital protocol. The incident was investigated, and Fennessey was placed on administrative leave. She returned from leave on January 10, 2000, and was immediately terminated.

On January 13, 2000, she commenced an appeal of her termination via the internal three-step nonmanagement appeals process outlined in the employee manual. On January 20, 2000, she reached an agreement with Mount Carmel that allowed her to resign and collect payment for her unused leave in exchange for executing a release. She later refused to sign the release and requested that she be allowed to continue the appeals process. Mount Carmel denied her request, claiming that the earlier oral agreement had resolved the issue.

After voluntarily withdrawing a previously filed claim against Mount Carmel, Fennessey refiled her lawsuit on January 9, 2006, alleging breach of contract and promissory estoppel. (Promissory estoppel occurs when you make a promise that an employee relies on to her detriment.)

On September 26, 2008, the trial court granted Mount Carmel's request for the dismissal of both claims. Regarding the promissory estoppel claim, the trial court found that the employee manual contained no promise of continued employment, and no other promises were made by Mount Carmel. On the breach of contract claim, the trial court determined that the employee manual that Fennessey signed and acknowledged clearly stated that she was an at-will employee. Fennessey appealed the trial court's decision.

Under Ohio law, the employment-at-will doctrine allows either the employer or the employee to terminate the employment relationship at any time and for any reason as long as the reason isn't illegal (*i.e.*, discriminatory). There are, however, limits to an employer's discretion to terminate an employee, including (1) the existence of an implied or express employment agreement or (2) a clear and unambiguous promise of continued employment upon which the employee reasonably relies.

Mount Carmel's employee handbook contained clear language delineating Fennessey's employment as at will. Additionally, it contained an acknowledgment page (which Fennessey signed) stating:

> **"At any time, for any reason, I can separate my employment relationship and . . . Mount Carmel Health System has the same right regarding my employment status."**

The handbook also contained a disclaimer stating:

> **"An employee of Mount Carmel Health System is an employee at will."**

Although Fennessey acknowledged the at-will language contained in the handbook, she argued that other provisions in the employment manual contradicted the at-will relationship. Specifically, she argued that the statements explaining the employee appeals process and termination during the new-hire introductory period modified the at-will status by instituting policies that had to be followed by different types of employees. But the court disagreed, finding that none of the provisions altered Fennessey's at- will employment status because they didn't ensure the length or terms of her employment.

The court then turned to the breach of contract claim. Fennessey argued that the handbook's progressive discipline provision created an implied contract of employment. The court rejected that argument, reasoning that a finding that a progressive discipline policy created an implied contract of employment would eradicate the use of employment manuals in at-will employment relationships.

The court also noted that there was no evidence that the parties intended to create an employment contract given the handbook's specific and unambiguous disclaimer to the contrary. In other words, the disclaimer trumped Fennessey's argument that the handbook represented an implied contract of employment. Thus, the court of appeals upheld the trial court's dismissal of her claims.

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

As an employer, you are likely familiar with some of the ways the courts have eroded your ability to terminate an at-will employee. This case, however, highlights the importance of a well-drafted employee handbook. Mount Carmel's handbook contained three provisions that no handbook should be without:

1. An at-will-employment disclaimer,
2. An acknowledgment by the employee affirming her at-will status and
3. A statement clarifying that the handbook is ***NOT*** a contract.

Notice: Legal Advice Disclaimer

The purpose of these materials is not to act as legal advice but is intended to provide human resource professionals and their managers with a general overview of some of the more important employment and labor laws affecting their departments. The facts of each instance vary to the point that such a brief overview could not possibly be used in place of the advice of legal counsel.

Also, every situation tends to be factually different depending on the circumstances involved, which requires a specific application of the law.

Additionally, employment and labor laws are in a constant state of change by way of either court decisions or the legislature.

Therefore, whenever such issues arise, the advice of an attorney should be sought.

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