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NLRB Takes Aim at Non-Union Employers

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The National Labor Relations Board (NLRB) recently handed down a series of decisions that challenged the fundamental tenet of the employee-employer relationship: at-will employment. This new affront came on the heels of a decision several months ago which rendered unlawful the confidentiality requirements that many health care employers follow in conducting internal investigations. Although it is not clear whether the NLRB will prevail in its most recent challenge to the at-will relationship, what is clear is that the NLRB is taking aim at non-union employers.

Most employers have a disclaimer in their employee handbooks confirming that their employees are employed on an at-will basis, meaning that either the employee or the employer may terminate the employment relationship at any time with or without cause. To ensure that the at-will employment relationship is not altered by the words or actions of lower level managers, employers typically include language in their handbooks stating that the at-will relationship cannot be modified without the express written approval of a senior company executive. In a string of recent cases, the NLRB has taken the position that the "cannot be altered or modified" disclaimer language is a violation of Section 7 of the National Labor Relations Act (NLR A). Section 7 of the NLRA gives employees the right to engage in protected concerted activity in order to improve their working conditions. In *American Red Cross Blood Services, Arizona Region and Lois Hampton*, No. 28-CA-23443 (2/1/12), an NLRB administrative law judge found the American Red Cross Blood Services' handbook unlawful because it included the statement, "I further agree that the at-will employment relationship cannot be amended, modified, or altered in any way." The judge ruled that such language was unlawfully overbroad and acted as a waiver of the employee's right to advocate concertedly to change his or her at-will employment status. While the NLRB has clarified that it is not holding that all at-will language is *per se* unlawful, it has made clear that such clauses will be scrutinized closely on a case-by-case basis.

In a bit of good news for employers, the NLRB's General Counsel recently released an analysis of at-will employment clauses in two employment handbooks and concluded that neither violated the NLRA. *See* Advice Memoranda of the Office of the General Counsel, Nos. 28-CA-084365 and 32-CA-086799 (10/31/12). Employees at Rocha Transportation, a California-based trucking company, and SWH Corporation, doing business as Mimi's Café, an Arizona restaurant, each filed charges with the NLRB alleging that the at-will employment clauses in their employee handbooks defined at-will employment so broadly as to cause them to believe that they could not engage in activity protected under the NLRA.

Rocha Transportation's handbook advises employees that their employment is at-will and may be terminated at any time. It further states that "[n]o 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." Likewise, Mimi's Café's handbook states, "[n]o representative of the Company has authority to enter into any agreement contrary to the foregoing 'employment at will' relationship."

The NLRB's Division of Advice concluded that each handbook's language was lawful. Respecting Rocha Transportation, the NLRB reasoned that because the employer's at-will employment clause explicitly states that the relationship could be changed, employees could not reasonably assume that their NLRA rights are

prohibited. Respecting Mimi's Café, the NLRB concluded that its at-will clause passed muster because it did not require its employees to refrain from seeking to change their at-will status or agree that their employment relationship could not be changed in any way. Rather, it merely stated that the company's representatives are not authorized to change it.

Due to the fact that this area of law remains somewhat unsettled, the NLRB has asked its Regional Offices to submit cases involving employer handbook provisions that restrict the future modification of an employee's at-will status for further analysis. Employers should review the at-will disclaimers in their employee handbooks to ensure that they do not contain a provision which eliminates any possibility of modifying the at-will relationship.

In another recent bold move, on July 30, 2012, the NLRB issued a decision that affects how all employers (not just those with unions) conduct human resources investigations. It is standard practice for many human resources professionals to instruct employees to maintain the confidentiality of internal investigations. Employers often have legitimate concerns that if employees talk to each other about an investigation, not only could it cause unnecessary disruption in the workplace, but also that as a result employees may have the opportunity to align their statements or even conceal evidence. There are also valid concerns of protecting the accused employee from stigmatizing allegations should those allegations ultimately prove to be false. The NLRB has, however, made it clear that the practice of routinely instructing employees to keep investigatory interviews confidential violates the National Labor Relations Act.

In *Banner Health System d/b/a Banner Estrella Medical Center and James A. Navarro*, 358 NLRB No. 93 (7/30/12), the NLRB challenged a health care company's practice of requiring all employees who participate in an internal investigation to keep the contents of the investigation confidential and not to discuss it with other employees. The NLRB ruled that "the [Employer's] generalized concern with protecting the integrity of its investigations is insufficient to outweigh employees' Section 7 rights... [I]n order to minimize the impact on Section 7 rights, it was the [Employer's] burden to first determine whether in any given investigation witnesses needed protection, evidence was in danger of being destroyed, testimony was in danger of being fabricated, or there was a need to prevent a cover-up." The NLRB held that the employer's "blanket approach clearly failed to meet those requirements."

The practical application of the NLRB's ruling dictates that employers cannot, as a matter of course, instruct employees to maintain the confidentiality of investigations. Instead, confidentiality instructions should only be used on a case-by-case basis, when warranted by particular facts.

These decisions make clear that the NLRB is moving swiftly and boldly to make itself relevant to non-union workforces. Given the results of the recent election, we expect the NLRB to continue to target the policies of non-union employers for the foreseeable future. As a result, employers should review their policies and employee handbooks with the assistance of their counsel to ensure that they are narrowly tailored to withstand the NLRB's scrutiny.