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Employment Law Alert

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NLRB Provides Guidance on At-Will Provisions

Employee handbooks commonly contain an at-will disclaimer specifying that the employment relationship can be terminated at any time, with or without cause or advance notice. Earlier this year, however, a National Labor Relations Board ("NLRB") administrative law judge called into question whether at-will provisions are lawful, ruling that a disclaimer used by an American Red Cross unit interfered with employee Section 7 rights under the National Labor Relations Act ("NLRA") to engage in concerted activities. The controversial decision was just the latest in a string of NLRB actions over the past year questioning the lawfulness of common employment policies -- including social media and confidentiality provisions -- and leaving employers uncertain about how to draft workplace policies without running afoul of the NLRA. But now, in a welcome move, the NLRB's Office of General Counsel has issued guidance assuring employers that carefully drafted at-will provisions can withstand challenge under the NLRA.

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In the *American Red Cross* case, employees were required to sign a form acknowledging their at-will status. The acknowledgment contained the following language: "I further agree that the at-will employment relationship cannot be amended, modified or altered in any way." The administrative law judge found that the at-will language was unlawfully broad under the NLRA because by signing the form an employee was effectively waiving the right to "advocate concertedly … to change his/her at-will status."

On October 31, 2012, the NLRB's Office of General Counsel issued advice memoranda endorsing two employers' at-will provisions and drawing a clear distinction with the American Red Cross provision. In particular, the NLRB evaluated at-will disclaimers in use by Rocha Transportation, a California trucking company, and SWH Corporation d/b/a Mimi's Café, an Arizona restaurant, and concluded that neither made the at-will relationship unalterable, in contrast to the American Red Cross language.

The Rocha provision stated that only the company president — not managers or supervisors — had the authority to make an agreement for any type of employment other than at-will employment, and only in writing. The Mimi's clause stated that no company

representative had the authority to enter into an agreement contrary to the employment at-will relationship.

The NLRB found that while these two disclaimers reaffirmed the at-will relationship, neither provision extracted a personal promise from 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. Rather, the provisions simply prohibited the employer's own representatives from entering into employment agreements that provide for other than at-will employment. The NLRB also noted that there was no evidence that Rocha or Mimi's issued the policies in response to union activity or applied the policies to restrict Section 7 rights. The new advice memos are available here (Rocha) and here (Mimi's).

In a press release announcing the advice memoranda, the Office of General Counsel explained that because NLRB law on at-will employment disclaimers remains unsettled, it is asking regional offices to send cases involving at-will provisions to the NLRB's Division of Advice for uniform review, as the agency did previously with social media cases. While the NLRB continues to sort this out, employers should take the time to review their at-will disclaimers – whether in employee handbooks, acknowledgments, offer letters, etc. – to ensure that the language is not overly broad under the NLRA but more closely tracks the at-will provisions endorsed in the recent advice memos.

For more on the NLRB and employment policies, click here to read our recent Employment Law Alerts.

Miller Law Group exclusively represents business in all aspects of California employment law, specializing in litigation, risk management, wage and hour class actions, ERISA litigation, trials and appellate law. If you have questions about your workplace obligations, please contact Michele Ballard Miller (mbm@millerlawgroup.com) or Carolyn Rashby (cr@millerlawgroup.com), or call (415) 464-4300. To learn more about our firm, visit our website at www.millerlawgroup.com.

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