Published on *The National Law Review* https://natlawreview.com

Labor Law: NLRB finds standard at-will employment provisions unlawful

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To comply with the NLRB, employment documents should not discourage collective bargaining or concerted activity

For decades, both unionized and non-unionized employers have routinely included at-will employment provisions in their employee handbooks and other employment documents, ensuring that workers knew that their employment relationship was terminable at will by either party. Recently, in ***American Red Cross Arizona and Lois Hampton*** and ***Hyatt Hotels Corporation and United Here International Union***, Region 28 of the **National Labor Relations Board (NRLB)**, located in Arizona, has attempted to outlaw this common practice by finding such at-will provisions unlawful under the **National Labor Relations Act (NLRA)**.

American Red Cross Arizona and *Lois Hampton*: Unlawful waiver of NLRB rights

As part of an unjust termination case brought by Lois Hampton and the NLRB, Administrative Law Judge Gregory Z. Meyerson held that the American Red Cross Arizona Blood Services Region maintained a prohibitively "overly-broad and discriminatory" statement regarding the at-will section of the employee handbook. The acknowledgement section of the employee handbook stated that the at-will employment relationship could not change without the signature of both the employee and either the executive VP/president or chief operating officer of the Red Cross. According to Judge Meyerson, such language essentially constituted a waiver by employees of their right to engage in concerted activities to change their at-will employment status, in violation of the NLRA. In addition to ordering that Hampton be reinstated and her record be expunged, the judge ordered the Red Cross to post explicit language reinforcing employees' rights to engage in concerted activities.

Hyatt Hotels Corp. and *United Here Int'l Union*: Settlement of claims

In a second unfair labor practices case, the Unite Here International Union and the NLRB alleged that a similar at-will provision in the acknowledgement section of an employee handbook was also "overly-broad and discriminatory." The statement read: "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 VP/Chief Operation Officer or Hyatt's President." The parties entered into a settlement agreement resolving the complaint. In the

agreement, Hyatt agreed to rescind and revise the sections of its employment agreement that purportedly presented unfair labor practices, including the at-will provision. Hyatt also agreed to post notices of the changes to the employee handbook, to provide employees with revised inserts for their employee handbooks and to revise and rescind any existing employee acknowledgement forms.

Important guidance for employers

Although these controversial cases have arisen exclusively in Region 28 of the NLRB, they reflect the organization's new stance with respect to at-will provisions. Indeed, Lafe Solomon, acting NLRB general counsel, has announced that at-will employment provisions that restrict modification of the at-will employment relationship exclusively to a writing approved by a senior company official violate the NLRA. Solomon reasons that such provisions are unlawful because they may cause employees to believe that union representation and collective bargaining could not alter their at-will employment status, thereby discouraging concerted activities.

Employers should examine at-will provisions in their employment documents for compliance with the NLRA. Because much in this area is still unclear, employers should make workplace-specific determinations regarding whether or not to modify at-will provisions in their employment documents. One option is to include language that states the at-will provision does not impact employees' ability to bargain collectively and engage in concerted activities regarding the terms and conditions of their employment under the NLRA. At a minimum, employers should stay informed of developments in this new area, which promises to create new NLRB litigation.

National Law Review, Volume II, Number 282