"At-Will" Employment Policies under NLRB Scrutiny

Over the last two years, the National Labor Relations Board (NLRB) has been aggressively seeking to expand the application of the National Labor Relations Act to the nonunion workplace under Section 7 of the National Labor Relations Act (NLRA). Over the last year, the NLRB has issued rulings and advice relating to employers taking adverse employment action against employees who use social media to discuss the terms and conditions of their employment and, in the fall of 2012, the NLRB began to chip away at the employment at-will doctrine. In essence, employment policies are found to be unlawful when they interfere with the rights of employees under the NLRA, such as the right to discuss wages and working conditions with co-workers.

In the Matter of Hyatt Hotels Corp., Case No. 28-CA0061114, the NLRB found that Hyatt's at-will acknowledgments in the employment handbook violate an employee's Section 7 rights under the NLRA. As part of its settlement, the company agreed to rescind and revise existing acknowledgments.

On October 31, 2012, the Acting General Counsel of the National Labor Relations Board, issued two memoranda addressing the issue of whether to pursue allegations that an employer violated the NLRA by maintaining statements in employee handbooks regarding the at-will nature of the employment relationship.

In each Memorandum, the Acting General Counsel observed that it is "commonplace" for employers to include statements about the at-will employment relationship, "as a defense against potential legal actions by employees asserting that the employee handbook creates an enforceable employment contract." Each Memorandum cited in support of that statement the decision in *NLRB v*. *Ace Comb Co*., 342 F.2d 841, 847 (8th Cir 1965) where the Eighth Circuit (which includes Iowa) stated:

> It must be remembered that it is not the purpose of the Act to give the Board any control whatsoever over an employer's policies, including his policies concerning tenure of employment, and that an employer may hire and fire at will for any reason whatsoever, or for no reason, so long as the motivation is not violative of the Act.

In each of the matters considered in the separate memoranda, the Employer's employment at-will policy did not explicitly restrict activity that might be protected by Section 7 of the NLRA. Furthermore, in neither situation was there any contention that the employer promulgated its at-will policy in response to union or other protected activity, or that the policy

had been applied to restrict protected activity. Each policy was viewed under the standard that the policy or statement would be unlawful only if employees "would reasonably construe" the policy to restrict Section 7 activities (engaging in concerted activities for the purpose of collective bargaining or other mutual aid or protection).

In light of the NLRB's interest in at-will employment policies, it is incumbent upon employers and human resource professionals to review their companies' employee handbooks to make sure that there are no provisions which could be reasonably construed by an employee to infringe upon or restrict the right to advocate or engage in concerted activity seeking abandonment of employment at will. Handbooks or acknowledgment forms that require employees to agree to or abide by all employer policies may be problematic especially if the at-will provision is described or defined as the "policy" of the company.

For additional information on the NLRB's analysis and advice memoranda on at-will employment policies, please contact Lisa Amato laa@wysekadish.com.

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