NLRB Steps Away From The At-Will “Ledge”

November 1, 2012 | | Labor And Employment

Gerald F. Lutkus
Of Counsel
(Retired)

Employers have been out on the ledge over recent NLRB actions on at-will disclaimers, but a guidance issued this week by Acting GC Lafe Solomon may have thrown a little water on the raging fire over whether these routine at-will disclaimers violate the National Labor Relations Act. On Oct. 31, 2012, Solomon released a guidance based on two advisory opinions, **Rocha Transportation** and **Mimi’s Café**, both of which found at-will employee handbook language to be legal under the NLRA.

Rocha Transportation : “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.”

RELATED PRACTICE AREAS

Labor and Employment
Labor Relations

Lawful! Lawful because the clause makes it clear that the at-will relationship can be changed.

Mimi's Café : "No representative of the Company has authority to enter into any agreement contrary to the foregoing "employment at will" relationship."

Lawful! This language is lawful because it did not require employees to agree that the employment relationship cannot be changed in any way; rather it merely explained that the employer's representatives are not authorized to change it.

Hyatt International (also from Region 28): "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."

Unlawful! Solomon has stated that at-will employment provisions that restrict modification of an at-will status exclusively to a writing approved by a senior company official violate the NLRA. These clauses are unlawful, according to Solomon, because they could dampen concerted activities if employees believe that union representation could not alter their at-will status.

American Red Cross. 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.

Unlawful! NLRB ALJ Meyerson concluded that this 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.

Our partner and fellow blogger, Scott Witlin, is quoted this morning in an article by *Employment Law 360* saying that the NLRB was "splitting hairs" and had essentially set a trap for the unwary by drawing such a fine distinction in the American Red Cross case. However, the new guidance, according to Witlin, is a positive step for employers because companies can use them for guidance. "Anytime you get an opinion or a ruling that says that language is lawful, that's helpful because you can always model your own language against the language that has been blessed by the agency," Witlin said.

As he is doing with social media cases, Solomon has now instructed the Regions to submit cases involving employer handbook at-will provisions to the Division of Advice for further analysis and coordination.

Copies of the advice memoranda in Mimi's Cafe and Rocha Transportation are available here (Mimi's) and here (Rocha).