LOCKE LORD® QUICKStudy
Labor & Employment Practice
August 9, 2012

The NLRB's New Attack on At-Will Employment Provisions

And Other Reasons to Update Your Handbook If You Haven't Done So Recently

By: Kevin D. Kelly

Continuing a trend of aggressively pro-labor decisions and rule-making, the NLRB is now surprisingly taking aim at employers who require employees to sign "at-will" employment acknowledgements. The NLRB's new focus makes this a good time for employers to update their employee handbooks and policies, particularly any sections devoted to at-will employment.

Virtually all employers require their non-union employees to acknowledge that they are employed "at-will," meaning that the employment relationship can be terminated by either party at any time for any lawful reason. Many employers include such acknowledgements with their employee handbooks, while others require employees to sign stand-alone acknowledgements or include at-will employment provisions in written employment contracts. Such acknowledgements help ensure that employees cannot claim that they were promised lifetime employment or employment for a set period of time.

In the case of *American Red Cross Arizona Blood Services Division*, the NLRB decided to challenge these ubiquitous at-will employment acknowledgements. The Red Cross required its employees to sign, as a condition of employment, a document entitled "Agreement and Acknowledgement of Receipt of Employee Handbook." That document stated that the employment relationship is at-will and that "the at-will employment relationship cannot be amended, modified or altered in any way." The NLRB's General Counsel contended that this restriction on changes to the at-will employment relationship was a violation of the rights employees enjoy under Section 7 of the National Labor Relations Act ("NLRA"). The administrative law judge hearing the case agreed with the NLRB's General Counsel.

Section 7 of the NLRA provides that employees are free to engage in concerted activities for their mutual aid and protection. Section 7 is what protects employees from employer reprisals if they seek to form a union. The administrative law judge ruled that the Red Cross's acknowledgement was too broad and could be read as requiring employees to waive their right to engage in concerted activities to change their at-will status. Keep in mind that under virtually all union contracts, employees may only be terminated "for cause," which is the absolute antithesis of at-will employment. Apparently believing that employees could view the acknowledgement as prohibiting them from unionizing in order to change their at-will employment status, the judge

ruled that the acknowledgement violated NLRA Section 7 and ordered the Red Cross to remove or revise the acknowledgement.

The NLRB's brand-new attack on at-will employment acknowledgements is not limited to the Red Cross case. Shortly after the Red Cross case was decided, the NLRB went after Hyatt Hotels regarding its at-will employment acknowledgement. Unlike the Red Cross's acknowledgement, however, which stated unequivocally that the at-will employment relationship could never be modified, Hyatt's acknowledgement stated that at-will employment could be modified, but only by the company's chief operating officer or president. Nevertheless, the NLRB attacked this acknowledgement too, contending that it, like the Red Cross's acknowledgement, impermissibly infringed on employees' Section 7 rights. Hyatt settled the case and changed its acknowledgement before the case could be ruled upon. The fact that the NLRB chose to challenge a policy like Hyatt's that allowed for changes to the at-will employment relationship shows the extent to which the NLRB will scrutinize at-will employment acknowledgements in the future.

With the NLRB's new focus on at-will employment, it behooves all employers to check and update their handbooks and other at-will employment statements or acknowledgements. A few minor adjustments can help ensure that an at-will employment acknowledgement will survive scrutiny even by an aggressive NLRB. This may also be an opportune time for employers to update other provisions of their handbooks, particularly if they haven't done so in a while. In the past five years, there have been a number of significant changes that may require adjustments to handbook policies. Here is a list of 10 areas with new developments in the last five years:

- Expansion of the FMLA to cover military caregiver and military-related exigencies and the 2009 updated FMLA regulations
- The ADA Amendments Act, which substantially broadened the reach of the ADA
- The Genetic Information Non-Discrimination Act (GINA)
- Continued expansion of state non-discrimination statutes to cover classifications not protected under federal law
- New NLRB scrutiny of social media policies
- Continued aggressive litigation of wage and hour issues by plaintiff's attorneys and the Department of Labor
- New guidance from the EEOC on the permissible use of criminal record information with respect to applicants and employees
- The Ledbetter Fair Pay Act, which expanded employees' ability to challenge pay decisions that occurred in the past
- New state laws restricting credit checks of applicants and employees
- Expanded mandatory use of E-Verify under state and federal law

Updating a handbook or other employment policies is well worth the effort in today's challenging compliance environment.

For more information on the matters discussed in this *Locke Lord QuickStudy*, please contact the author:

Kevin D. Kelly | T: 312-443-0217 | kkelly@lockelord.com