CLIENT ALERT: NLRB Division of Advice Finds "At-Will" Language Contained In Two Employers' Handbooks Did Not Violate the Act

On October 31, 2012, the National Labor Relations Board ("NLRB" or the "Board") – Division of Advice issued two memoranda in which the Associate General Counsel Barry J. Kearney concluded that the "at-will" language contained in two employee handbooks did not violate Section 8(a)(1) of the National Labor Relations Act (the "Act"). *See Rocha Transp.,* NLRB Div. of Advice, No. 32-CA-086799 (Oct. 31, 2012); *Mimi's Café*, NLRB Div. of Advice, No. 28-CA-084365, (Oct. 31, 2012). In both *Rocha Transportation* and *Mimi's Café*, Mr. Kearney advised that the policies in the two handbooks were not unlawful because they could not reasonably be interpreted to restrict an employee's Section 7 right to engage in concerted activity. Both *Rocha Transportation* and *Mimi's Café* appear to provide sound examples of valid handbook language, but also continue the trend of inconsistency by the Board as it continues to expand into the non-unionized workplace.

Rocha Transportation

Rocha Transportation, located in Modesto, California, transports freight to and from the Central Valley and the Port of Oakland. Upon commencement of employment, new employees received the Driver Handbook containing the following Statement of At-Will Employment Status:

> 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 such agreement and then only in writing.

In his unfair labor practice charge, the Charging Party alleged that the at-will provision was "overbroad" and "would reasonably chill employees in the exercise of their Section 7 rights."

Mimi's Café

Mimi's Café is a restaurant operator with locations in 24 states, including Arizona, where the Charging Party was employed. Similar to the situation in Rocha Transportation, new employees were given a copy of the Teammate Handbook and signed an acknowledgment when they received it. The relevant portion of the at-will policy, and the basis of the charge, is as follows:

> No representative of the Company has authority to enter into any agreement contrary to the foregoing 'employment at will' relationship.

The Charging Party brought a similar claim to the one in *Rocha Transportation*, alleging that the provision was "overbroad" and "would reasonably chill employees in the exercise of their Section 7 rights to select union representation and engage in collective bargaining." Both cases were submitted by the Regions for advice.

Two-Step Inquiry

In determining whether a work rule or policy will have a "chilling" effect on Section 7 rights, as described above, the Board has developed a two-step inquiry:

> (1) An employer's work rule is unlawful if it explicitly restricts Section 7 activities. *See Lafayette Park Hotel*, 326 NLRB 824, 825 (1998).

> (2) If the rule does not explicitly restrict protected activities, it will nonetheless be found to violate the Act upon a showing that: (a) employees would reasonably construe the language to prohibit Section 7 activity; (b) the rule was promulgated in response to union activity; or (c) the rule has been applied to restrict the exercise of Section 7 rights. *See Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646-47 (2004).

In *Rocha Transportation*, Mr. Kearney advised that the contested handbook provision "would not reasonably be interpreted to restrict an employee's Section 7 right to engage in concerted attempts to change his or her employment at-will status…[T]he provision simply prohibits the Employer's own representatives from entering into employment agreements that provide for other than at-will employment." Mr. Kearney opined that because the provision explicitly permits Rocha's president to enter into an agreement which could modify the at-will relationship, no employee could reasonably conclude their Section 7 rights were being restricted in any way.

Similarly in *Mimi's Café*, Mr. Kearney explained that the provision "does not require employees to refrain from seeking to change their at-will status," it simply "highlights the Employer's policy that its own representatives are not authorized to modify an employee's at-will status." Mr. Kearney concluded that reiterating the fact that the handbook does not create an express or implied contract of employment will not be considered a violation of 8(a)(1).

In light of his analysis, Mr. Kearney advised that the Regions should dismiss both allegations.

Conflict with *American Red Cross*

The two memos issued by the Division of Advice appear to conflict with an earlier decision by Region 28. In *American Red Cross*, Case No. 28-CA-23443 (Feb. 1, 2012), an Administrative Law Judge held that an employer's at-will provision stating, "I further agree that the at-will employment relationship cannot be amended, modified or altered in any way" violated Section 8(a)(1) because it contained "no limiting language or context." The ALJ held that the provision restricted the employees' rights because employees would reasonably construe the language to prohibit Section 7 activity. The ALJ concluded that the agreement, which the employees were required to sign, was "essentially a waiver" of the employees' rights "to advocate concertedly." See also, MBJ Client Alert dated Sept. 13, 2012. In distinguishing the *American Red Cross* case from the two cases under review, Mr. Kearney explained that American Red Cross's provision "more clearly involved an employee's waiver of his Section 7 rights than the handbook provision [used by Rocha and Mimi's]." As a waiver, the clause was illegal, whereas the handbook language in *Rocha* and *Mimi's Cafe* did not require an employee to waive Section 7 rights.

Conclusion

While the memos issued by Mr. Kearney were intended to further clarify the Board's view on at-will provisions, the inconsistency in these cases leaves employers in an undesirable position of trying to determine whether their "at-will" language is in violation of the Act.

As the topic of at-will provisions in employee handbooks continues to attract the attention of the NLRB, Mr. Kearney echoed the sentiments of the Board's Acting General Counsel, Lafe Solomon, who stated that the law in this area "remains unsettled," and has instructed all of the regional offices to submit all cases concerning employer handbook provisions to the Division of Advice for further analysis. While this is an issue that will continue to develop moving forward, it is clear that employers should review the at-will language in their handbooks in order to avoid committing violations of the Act.

Employers should contact their MBJ attorney with questions about how these, and other developments at the NLRB, may impact their business.

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