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# CLIENT ALERT: NLRB Scrutinizes At-Will Disclaimers

In what is emerging as a disturbing trend, the National Labor Relations Board ("NLRB") continues to expand its enforcement actions into nonunionized workplaces by challenging commonplace employer policies and practices. *See* MBJ Aug. 13, 2012 Client Alert, "NLRB Concludes That Instructing Employees To Maintain Confidentiality Of Investigation Violates Employee Rights." The NLRB has turned its attention to at-will employment disclaimers, which are commonly included in most employee handbooks in an effort to defeat potential claims that an employer's policies alter the at-will relationship and confer a promise of continued employment or other benefits.

On February 1, 2012, after a hearing on a complaint issued against American Red Cross Arizona Blood Services Region by the Regional Director of NLRB Region 28, an Administrative Law Judge held that requiring an employee to agree "that the at-will employment relationship cannot be amended, modified or altered in any way" was likely to have a chilling effect on employees' exercise of their Section 7 rights and therefore violated the National Labor Relations Act. *See NLRB v. Am. Red Cross*, Case 28-CA-23443 (NLRB Feb. 1, 2012).The ALJ acknowledged that while the phrase in question did not "mention union or protected concerted activity, or even the raising of complaints involving employees' wages, hours and working conditions" there was nevertheless "no doubt" that "employees would reasonably construe the language to prohibit Section 7 activity." Specifically, the ALJ adopted the position advanced by the General Counsel's Office:

> [T]he signing of the acknowledgement form is essentially a waiver in which an employee agrees that his/her at-will status cannot change, thereby relinquishing his/her right to advocate concertedly, whether represented by a union or not, to change his/her at-will status. For all practical purposes, the clause in question premises employment on an employee's agreement not to enter into any contract, to make any efforts, or to engage in conduct that could result in union representation and in a collective-bargaining agreement, which would amend, modify, or alter the at-will relationship. Clearly such a clause would reasonably chill employees who were interested in exercising their Section 7 rights.

Shortly after the *American Red Cross* decision, the Regional Director of Region 28 filed a complaint against Hyatt Hotels, Case 28 CA-061114 (NLRB Feb. 29, 2012), alleging, among other things, that certain at-will language violated Section 8(a)(1) of the NLRA because it was likely to have a chilling effect on employees' exercise of their Section 7 rights. In this instance, however, the language was much narrower than the language at issue in *American Red Cross*:

> I understand my employment is "at will." This means I am free to separate my employment at any time, for any reason, and Hyatt has these same rights. Nothing in this handbook is intended to change my at-will employment status. 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 Vice-President/Chief Operating Officer or Hyatt's President.

The Hyatt case settled before any determination was made as to whether the above language did in fact violate the NLRA. The settlement included the following language:

> WE WILL NOT maintain any overly-broad acknowledgement forms which provide that you understand that your employment is "at will," and that you acknowledge that no oral or written statements or representations regarding your employment can alter your at-will employment status, except for a written statement signed by you and either our Executive Vice-President/Chief Operating Officer or Hyatt's President.

These two cases appeared to most practitioners to be regional aberrations at the time. However, it has been reported that in mid-June, NLRB Acting General Counsel Lafe Solomon spoke publicly at a Connecticut Bar Association meeting about his view that an at-will disclaimer that purports either to waive an employee's Section 7 rights or implies that exercising any such rights would be pointless would violate the NLRA.

Given the developments discussed above and Mr. Solomon's statements, we are anticipating that the Board will be subjecting employer at-will disclaimers to increased scrutiny. With virtually no guidance from the Board as to what it might deem to be an acceptable at-will disclaimer, employers face yet another new challenge created by recent Board activity — how to preserve employees' at-will status while ensuring that the disclaimer does not threaten to chill Section 7 rights. We suggest you contact your MBJ attorney to discuss your at-will employment provisions.

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