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NLRB Attacks Employment At-Will Disclaimers

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The **National Labor Relations Board (NLRB)** recently challenged employment at-will disclaimers in employee handbooks. This is another example of the NLRB's expansion of its enforcement efforts beyond the traditional unionized workplace setting. The NLRB has also recently taken issue with employers' social media policies and sought to require employers to post notices to employees informing them of their right to join a labor union and other rights under the **National Labor Relations Act (NLRA)**. The agency is clearly becoming more active and looking for ways to regulate a broader group of employers than it has in the past.

At-will employment disclaimers are a staple of employee handbooks. It is common to define what at-will employment means, explain that an employee's at-will status cannot be changed except in a writing signed by the company president, and require that an employee sign an acknowledgment of his or her at-will status. This approach protects employers from claims that employees have employment contracts, and it is now under attack by the NLRB.

Two recent actions demonstrate the NLRB's new scrutiny of these employment at-will disclaimers. In February, an NLRB Administrative Law Judge (ALJ) ruled the American Red Cross Arizona Blood Services Region violated Section 8(a)(1) of NLRA by having a provision in its employee handbook acknowledgment saying, "I further agree that the at-will employment relationship cannot be amended, modified or altered in any way." The ALJ ruled this provision could be interpreted to limit employees' rights to engage in concerted activity in an effort to change their at-will status. The NLRA protects employees' rights to engage in "concerted activity" to seek changes to the terms and conditions of their employment. The Red Cross revised its disclaimer, but the ALJ nonetheless required the Red Cross to inform its employees that the disclaimer had been revoked and removed from its handbook acknowledgment and post a notice to employees assuring them that it would not violate their NLRA rights.

Also in February, the NLRB filed a complaint against Hyatt Hotels Corporation arguing the company's required employee handbook acknowledgement form violated the NLRA's protection of concerted activity. The NLRB alleged that several provisions in Hyatt's handbook acknowledgement were overly broad and unlawfully limited employees' rights to engage in concerted activity. Those provisions were:

- "I understand my employment is 'at will.'"
- "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 Hyatt's president or executive vice president/COO.
- "[T]he at-will status of my employment... can only be changed in a writing" signed by the employee and one of the two Hyatt executives.

This matter was settled before there was a hearing on the complaint, with Hyatt agreeing to delete these at-will disclaimers from its handbook acknowledgment form, notify employees that the disclaimers had been revoked and removed from its handbook acknowledgment, and post a notice to employees assuring them that it would not violate their NLRA rights.

The NLRB's focus on employment at-will disclaimers is another example of the agency's increased enforcement



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efforts that can affect all employers - even those that don't have unionized workplaces. The complaints against the Red Cross and Hyatt are the first attacks the NLRB has ever made against these common at-will disclaimers in handbook acknowledgments. These enforcement actions are an alarming development for employers due to the prevalence of such disclaimers in handbooks and handbook acknowledgment forms and their importance in defending against employee claims. Employers should have their employment at-will disclaimers in employee handbooks, handbook acknowledgment forms and other personnel documents reviewed by counsel to be sure they do not unlawfully limit employees' rights to engage in concerted activity under the new analysis being used by the NLRB.

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