

NLRB eyes non union workplaces

By Eli Kantor

Until recently non-union employers did not have to pay attention to National Labor Relations Board decisions except regarding rulings concerning union organizing campaigns. However, now the NLRB is aggressively asserting itself into the non-union workplace. The NLRB is already limiting what employers can say in their social media policies. Now it is attempting to regulate employer's "at-will" employment policies as well.

Recently, in *American Red Cross Arizona Blood Services Region*, 2012 WL 311334 (Feb. 1, 2012), an administrative law judge (ALJ) found that one employer's at-will employment provision unlawfully interfered with employee rights by requiring employees to sign an acknowledgement stating: "I further agree that the at-will employment relationship cannot be amended, modified, or altered in any way." The ALJ reasoned that this essentially required that employees agree that their at-will status could not be changed, thereby effectively waiving their right to seek a "just cause" termination provision through organizing and collective bargaining for a union contract. That case settled without any ruling by the NLRB, leaving the validity of employer at will provisions in doubt.

It appeared that this aggressive intrusion into the non-union workplace was limited to just one region of the NLRB in Arizona, but it was unclear what position the NLRB would take. On Oct. 31, the NLRB general counsel's Division of Advice issued opinions in two cases finding the employers' handbook provisions concerning at-will employment to be lawful. (The various regions of the NLRB send cases to the Division of Advice when there is uncertainty as to the state of the law, so that the regions can have some guidance as to whether there is basis for them to issue a complaint. These Advice Memoranda also provide guidance to employers and their counsel to help them to conform with the law.)

The Advice Memoranda provide much needed guidance to employers whose handbooks contain employment at-will policies. As the general counsel observed in both memoranda, it has become commonplace for employers to rely on such policy provisions as a defense against em-

ployees asserting that the employee handbook creates an enforceable employment contract. The two cases decided by the Division of Advice clarify the issue. They distinguish the language of the policy in *American Red Cross* from the policies that they analyzed in *Rocha Transportation*, Case 32-CA-086799 and *SWH Corporation d/b/a Mimi's Café*, Case 28-CA-084365.

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In both cases, the provisions stated that company representatives were without authority to enter into any agreement altering the at-will status of the employees, and that the handbook itself did not constitute an express or implied employment contract. The general counsel stated that the provisions did "not explicitly restrict Section 7 activity." (Section 7 of the National Labor Relations Act (NLRA) protects the right of both union and non-union employees to "engage in ... concerted activities for the purpose of collective bargaining or other mutual aid or protection (emphasis added).") Further, in neither case was the provision promulgated in response to union activity. Therefore, the only issue was whether employees would reasonably construe the language to prohibit union organizing or other concerted activity protected by Section 7 and, thus violate Section 8 (a) (1).

In both cases the charging party alleged that the at-will language in the employer's handbook violated Section 8 (a) (1) because it was overbroad and could reasonably chill employees in the exercise of their Section 7 rights. But the general counsel concluded that the contested handbook provisions could not be reasonably interpreted to restrict employees' Section 7 rights to engage in concerted attempts to change their employment status. The provisions did not require employees to refrain from seeking to change their at-will status or to

agree that their at-will status cannot be changed in any way. Instead the provisions simply prohibited the employer's own representatives from entering into employment agreements that provide for other than at-will employment.

Significantly, the general counsel distinguished the policy language from the *American Red Cross* case, where the employees were required to sign an acknowledgement form which stated, "I further agree that the at-will employment relationship cannot be amended, modified or altered in anyway," from these cases. The general counsel noted that the ALJ found that the employee's signing of the acknowledgement form — through the use of the personal pronoun "I" — was essentially a waiver of the employee's right to advocate concertedly to change his or her at-will status.

As these cases illustrate, the NLRB is examining employer handbooks closely. The Advice Memoranda now give employers guidance as to what they can lawfully say in their employment at-will policies. Employers should review their employee handbooks carefully to make sure that their employment at-will policies do not violate Section 7 of the NLRA.

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