

National Labor Relations Board—Marginalized or Given New Life?

By *Byrona J. Maule, Phillips Murrah P.C.*

Does your company have an employee handbook with an “at-will statement?” Does the at-will statement provide that it can only be amended in writing, by the president or some other designated officer of the company?

What company does not have an at-will policy, in a similar form—after all, this is Human Resources 101!

Well, tell that to the National Labor Relations Board (“NLRB”). In a day and age when the NLRB has been marginalized by the enactment of federal legislation protecting employees¹, the NLRB is searching for a way to remain relevant, and it appears that the company handbook is the method the NLRB has chosen.

The NLRB has decided that at-will statements and other common policies can violate an employee’s Section 7 right to concerted activity.² The NLRB attacked an at-will statement that said, “I further agree that the at-will employment relationship cannot be amended, modified or altered in any way.”³

The NLRB found that this clause was essentially a waiver of the employees’ right to advocate concertedly, whether with or without union representation. The NLRB

found that the clause premised employment on the employee’s agreement not to enter into any contract or to make any efforts or to engage in conduct that could result in union representation—all of which would or could amend, modify or alter the at-will relationship.

So, maybe you are thinking that this at-will statement was overreaching, (i.e., could not be amended, period). But tell that to Hyatt Hotels Corporation. Their at-will language was challenged by the NLRB in three parts:

- 1) “I understand my employment is at-will.”
- 2) “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.”
- 3) “The sole exception to this is the at-will status of my employment, which can only be changed in a writing signed by me and either Hyatt’s Executive Vice-President/Chief Operating Officer or Hyatt’s President.”⁴

This policy clearly provides for an amendment to the at-will

policy. What is a collective bargaining agreement, if not a writing signed by and agreed to by the appropriate company



officer? But the NLRB did not stop there; the NLRB also attacked Hyatt’s social media policy, code of business conduct and ethics, regarding reporting violations, and its policies regarding confidential information, civic involvement, scheduling, confidential investigations, cooperating in an investigation and non-disparagement. The case ended in an informal settlement—leaving the issue of employee handbooks securely within the purview of the NLRB, until a court decides the issue.

I recommend you take the time to read the petition

in the Hyatt case, as the NLRB graciously quotes the language that it challenges.⁵ I found reading it a sobering

experience. Prudent companies will compare the language being attacked by the NLRB with their company’s handbook. At a minimum, companies will gauge their exposure. Proactively, a company might make an edit

here and there to minimize exposure. After all, who wants to be the company that breathes new life into the NLRB?

About the Author...

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¹ The National Labor Relations Act was passed in 1935. Since that time, Congress has passed the Fair Labor Standards Act (1938), the Equal Pay Act (1963), Title VII (1964), the Age Discrimination in Employment Act (1967), the Occupational and Safety Health Act (1970), the Pregnancy Discrimination Act (1978), the Americans with Disabilities Act (1990), the Family Medical Leave Act (1993), the Genetic Information Nondiscrimination Act (2008), . . . and the list goes on. It appears that it is not likely to stop, either (e.g., the Affordable Care Act (2010), etc.). While I support these protections, it has marginalized the purpose of unions (i.e., to protect the worker).

² 29 U.S.C. § 157, (employees have the right to self-organize, to collective bargaining, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.)

³ American Red Cross Arizona Blood Services Region v. Lois Hampton, Case 28-CA-23443 (February 1, 2012, Arizona).

⁴ Hyatt Hotels Corporation, et al. and Unite Here International Union, Case 28-CA-061114(2012, Region 28, Arizona).

⁵ The petition is available for review at <http://attorneys.phillipsmurrah.com/bjmaule.aspx>.