COLLAZO FLORENTINO & KEIL LLP Client Advisory

For Clients And Friends Of The Firm

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New NLRB Guidance Regarding At-Will Employment Policies

As discussed in our August 2012 Client Alert, the Board has been taking the position that employers' at-will employment disclaimers, commonly included in company employment handbooks and offer letters, may in certain contexts unlawfully deter employees from exercising their Section 7 rights in violation of the National Labor Relations Act. Although at-will employment provisions were not explicitly prohibited, the Board held earlier this year that such policies may be unlawful if employees can reasonably construe the language to prohibit their right to join a union or discuss terms and conditions of employment with coworkers. On October 31, 2012, the NLRB Acting General Counsel released two advice memoranda ("Advice Memos") about two pending cases in different regions of the Board involving at-will employment handbook provisions. Both provisions were found to be lawful.

In *Rocha Transportation*, the Company maintained a clause in its handbook that employees' employment is at-will and may be terminated at any time. Specifically, the provision stated, "No manager, supervisor, or employee of the Company 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 any such agreement and then only in writing." The Handbook also clarified that "nothing in the employee handbook creates or is intended to create a promise, contract, or representation of continued employment." The Board's Advice Memo explained that the handbook's at-will provision would not be reasonably interpreted to restrict an employee's Section 7 rights largely because it did not require employees to refrain from seeking to change their at-will status. Instead, the provision encompassed the possibility of a potential modification of the at-will relationship through a collective bargaining agreement ratified by the company president.

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Moreover, in *SWH Corporation d/b/a Mimi's Café*, the Company's handbook included an even broader at-will clause than that of *Rocha Corporation*, establishing in pertinent part that, "No representative of the Company has authority to enter into any agreement contrary to the foregoing employment at will relationship." Emphasizing that the context of the language was relevant to the analysis, the Advice Memo explained that the contested handbook provision would not reasonably be interpreted to restrict an employee's right to engage in concerted attempts to change his or her employment at-will status. The provision did not require employees to personally refrain from or waive their right to seek change to their at-will status, and prohibited only its own representatives from modifying an employee's at-will status. In contrast, in *NLRB v. Red Cross*, the February 2012 case described in detail in our prior Client Alert, the Board found unlawful an acknowledgment stating, "*I* further agree that the at-will employment relationship cannot be amended, modified, or altered in any way." [Emphasis added.] In *Red Cross*, the Board held that the acknowledgement essentially required employees to personally waive their right to collectively advocate for changes to their at-will status.

Although the Board's recent Advice Memos give employers reassurance that at-will clauses may be drafted in a manner that is lawful, such clauses must still be crafted carefully. We continue to recommend that employers (both unionized and non-unionized) review at-will clauses within company handbooks, offer letters, and employment agreements to reduce the risk that these materials may be construed by the Board to infringe upon employees' Section 7 rights.

If you have any questions or need assistance reviewing or revising your company's policies, please contact Farah Mollo at (212) 758-1078, or Rebecca Fischer at (212) 758-7793.