

## **DOES YOUR “AT-WILL” EMPLOYMENT STATEMENT VIOLATE THE NATIONAL LABOR RELATIONS ACT?**

To maintain its relevancy and expand the scope of its authority, the NLRB continues its attack upon non-union employers' policies. This time the NLRB has positioned its cross-hairs upon employers' "at-will" employment policies or statements. Most non-union employers include within their employee handbook a statement that employees' employment is "at-will," meaning either the employee or the employer may end the employment relationship at any time, for any reason, either with or without notice. Most "at-will" statements further provide that no agent or representative of the employer may enter into any agreement to the contrary unless done so in writing and signed by the president or CEO of the company. These types of statements reflect nothing more than the reality of the legal relationship between the employer and the employee.

The NLRB, however, has recently taken a different viewpoint, finding that such "at-will" statements have a chilling effect upon employees' Section 7 rights. In American Red Cross Arizona Blood Services Region, an administrative law judge found that the employer had violated Section 8(a)(1) by maintaining the following language in a form that employees were required to sign acknowledging their at-will employment status: "I further agree that the at-will employment relationship cannot be amended, modified or altered in any way." The NLRB found this language to essentially constitute a waiver by the employee of his/her Section 7 rights to "advocate concertedly ... to change his/her at-will status."

The NLRB applies a two-step inquiry to determine if a work rule would "reasonably tend to chill employees in the exercise of their Section 7 rights." First, a rule is unlawful if it explicitly restricts Section 7 activities. Second, if the rule does not explicitly restricted protected activities, it will nonetheless be found to violate the National Labor Relations Act upon a showing that: (1) employees would reasonable construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

Due to a significant uproar from employers, the NLRB issued two sets of advice memoranda on October 31, 2012 and February 4, 2013, back-pedaling on its position with regard to "at-will" employment statements. In these advice memoranda, the NLRB now takes the position

that an “at-will” statement will not be considered to interfere with employees’ Section 7 rights if the statement (1) does not explicitly restrict Section 7 rights, or (2) was promulgated in response to union or other protected activity, or (3) that the policy had been applied to restrict protected activity.

While most employers’ at-will statements will pass the NLRB’s scrutiny relative to employees’ Section 7 rights, this does not mean that all “at-will” statements, especially those that imply that there can never be any other employment relationship between the employee and employer, will be considered lawful under the National Labor Relations Act. To be prudent, employers should review their “at-will” employment statements in their employee handbooks to make sure that such statements do not foreclose to its employees the possibility of a potential modification of the at-will relationship.