

Preparing for 2013: A Look Back at Significant Labor and Employment Law Developments

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SEMINAR ROADMAP

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 - Title VII
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2012 LABOR LAW UPDATE

2012 NLRB ACTIVITIES

- Posting Requirement
- Social Media
- At Will Employment Disclaimers
- Class Arbitration Waivers

The NLRB Posting Rule

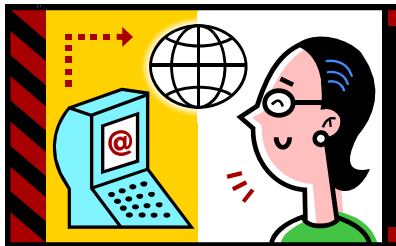
- The rule would have required most U.S. employers to post a notice to employees of their rights under the NLRA.
- The rule was scheduled to go into effect on April 30, 2012.
- The D.C. Circuit Court of Appeals enjoined enforcement of the rule.
- A South Carolina federal court also struck down the rule.
- As of today, the rule is not being enforced. It is likely that this issue will arise again in 2013.

The NLRB Begins Striking Down Social Media Policies

- In 2012, the NLRB issued multiple guidance documents regarding social media.
- In *Costco Wholesale Corp.*, the NLRB invalidated Costco's employee social media policy.
- The policy prohibited posting any messages that could "damage the Company, defame any individual or damage any person's reputation."
- The NLRB held that employees would reasonably construe this language as interfering with their Section 7 rights.
- In *Knaus Motors*, the NLRB also invalidated the employer's policy on employee courtesy, which prohibited employees from being "disrespectful," or using profanity or other language that "injures the image or reputation of the Dealership."
- The NLRB also invalidated Dish Network's policy, which prohibited disparaging statements about the company or negative electronic discussions on company time.

The NLRB Finally Finds a Social Media Policy It Can Live With

- The NLRB did finally APPROVE a social media policy in 2012.
- In its most recent policy guidance, the NLRB approved of Wal-Mart's social media policy. The Wal-Mart policy should serve as a guide to employers trying to ensure that their policy is in compliance.
- How do you make sure your policy is compliant?
- Model it after the Wal-Mart policy.
- Be very careful disciplining employees for social media posts.



NLRB Guidance on Employment At Will Disclaimers

- Recently, NLRB complaints have raised the issue of whether employers' at will disclaimers were overly broad and could curtail Section 7 rights.
- The NLRB had previously found that the language "I further agree that the at-will employment relationship cannot be amended, modified, or altered in any way" was a violation of the NLRA.
- The NLRB's General Counsel recently issued advice memos concluding that two employer handbooks did not violate the NLRA. Handbooks that provide that only certain managers or officials can alter at-will status are lawful. Also lawful are disclaimers that provide that no company representative has the authority to enter into an agreement changing the at-will relationship.



Class Arbitration Waivers



Class Arbitration Waivers

- Many arbitration agreements contain provisions that waive class arbitration of employment claims, so that employment claims must be brought individually in arbitration.
- The NLRB has held that an employer's use of these waivers violates the NLRA because a class action is a form of protected concerted activity. *D.R. Horton, Inc. and Michael Cuda*, Case 12-CA-25764 (January 3, 2012).
- Most Courts have not invalidated the waivers based on this decision.
 - U.S.D.C. for Western District of Wisconsin only Court to uphold *Horton*
- *Horton* on appeal in 5th Circuit Court of Appeals. (*D.R. Horton, Inc. v. NLRB*, Case No. 12-60031)

WHAT TO EXPECT IN 2013?

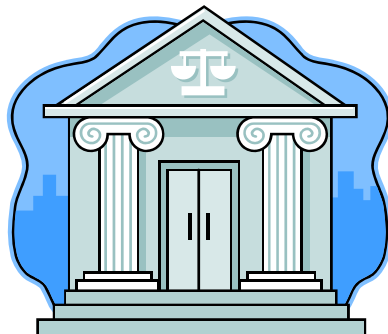
- **Labor Law:**

- Expect to see continued scrutiny of handbooks, personnel policies and social media policies. The NLRB may decide whether liking something on Facebook is protected activity.
- The NLRB will likely adopt a new standard for upholding the existence of micro-bargaining units, such as it did in the Specialty Healthcare dispute. Likewise, the Department of Labor (DOL) has been working on so-called "persuader" regulations, which would significantly expand the scope of employer activity and legal advice undertaken during a union organizing campaign that would trigger expansive reporting requirements under the Labor-Management Reporting and Disclosure Act. This obligation, in turn, would limit employers' ability to easily obtain legal counsel during union organizing, and thus "chill" their ability to effectively communicate with employees without fear of violating the NLRA.
- NLRB may expand its oversight over graduate student union organizing and employee off-duty access.
- Unions and the NLRB will try to move forward with the posting rule and we are likely to see further efforts to revise the NLRB's election rules.

2012 EMPLOYMENT
DISCRIMINATION UPDATE

APPLICATION OF THE CAT'S PAW THEORY OF SUPERVISORY LIABILITY

- The theory is that a biased supervisor can impute liability to the ultimate decision maker and the company will be liable, even if the decision maker was not biased.
- The U.S. Supreme Court affirmed the theory in 2011 and we are now seeing cases applying this theory in 2012.
- Chattman v. Toho Tenax America: Supervisor made racist remarks and plaintiff alleged that supervisor's bias was a factor in supervisor asking decision maker to fire plaintiff.



The Cat's Paw (cont'd)

- This arose out of comments made during 2008 presidential election.
- The Sixth Circuit held that the supervisor inserted himself into the decision-making process. He misinformed the decision makers, which led to plaintiff's termination.
- The bottom line is that it is harder and harder to insulate a manager by having a neutral decision maker make the termination decision.

NEW ADEA REGULATIONS

- The EEOC issued final regulations under the Age Discrimination in Employment Act (“ADEA”) on the reasonable factor other than age (“RFOA”) defense to disparate impact claims.
- In two Supreme Court decisions, the Court held that disparate impact claims were available under the ADEA but held that an employer did not have to prove the challenged practice was a “business necessity,” but only that the practice was based on a RFOA.
- The final rule makes the EEOC’s regulation consistent with Supreme Court and explains how the EEOC interprets the RFOA defense.



Reasonable Factors Other Than Age (cont'd)

The EEOC's guidance only applies to disparate impact claims based on a facially neutral policy that disproportionately affects older workers.

If the employee identifies a specific employment practice or policy and establishes that the policy harms older workers substantially more than younger workers, the employer can defend the claim by showing that its practice is based on a RFOA.

What Employers Must Show To Prove RFOA:

1. RFOA must be reasonably designed and administered to achieve a legitimate business purpose.
2. RFOA must be shown to be related to the employer's stated business purpose.
3. Employers must clearly define the factor and apply it fairly and accurately.

ADAAA: THE COURTS CONTINUE TO DEFINE REASONABLE ACCOMMODATION

- The 2009 amendments to the ADA greatly expanded the definition of “disability” and turned the focus of an employer’s defense of an ADAAA claim to issues of defining “reasonable accommodation,” “qualified individual,” “undue hardship,” and “essential functions.”
- In 2012, we started seeing these issues litigated.
- In *EEOC v. Eckerd Corp.*, the plaintiff was a cashier who suffered from osteoarthritis in both knees. She sought a reasonable accommodation of being allowed to sit for half of her work day.
- The court held that the plaintiff’s proposed accommodation was per se unreasonable because cashiers stock shelves, clean the stores, and work in the photo shop.



ADAAA Reasonable Accommodations (cont'd)

- An interesting point from this case is that the store's previous owners had granted her request for accommodation. This highlights the rule that an employer's willingness to provide an accommodation does not establish reasonableness.
- This case highlights the importance of determining a job's essential functions.
- The court also found that the proposed accommodation would have worked an undue hardship on Eckerd. The EEOC argued that the chair was cost free. The court agreed that there was a hardship because plaintiff was essentially to receive the same pay for doing half of the work of the other cashiers.

ADAAA Causation Standard

- In May 2012, the Sixth Circuit reversed almost 20 years of caselaw requiring that an employee show that his disability was the “sole factor” motivating an adverse employment action. In doing so, it joined the majority of other federal circuits in adopting a more lenient standard for causation under the ADA. *Lewis v. Humboldt Acquisition Corp.*
- The Sixth Circuit called its previous standard “wrong,” but also rejected the plaintiff’s argument that the test should be whether disability was a “motivating factor” in the adverse employment action.
- The Sixth Circuit now requires that an employee show that his disability was the “but for” cause of the adverse action.

STATE LEGISLATION: IMPACT OF LEGALIZED MARIJUANA ON EMPLOYER DRUG-FREE WORKPLACE POLICIES

- Colorado and Washington passed initiatives directing their states to decriminalize the possession of marijuana by adults for recreational use. These new laws join "medical marijuana" laws in 18 states and the District of Columbia.
- These laws are unlikely to impact private employers' drug-free workplace policies and may already address employers' rights.
- Employers in states with medical or legalized marijuana laws are advised to remind applicants and employees that their drug-free workplace policies remain in effect. This is especially true for employers in the transportation and other industries where federal regulations require routine testing for safety-sensitive positions.

2012 EEOC UPDATE

RESTRICTIONS ON EMPLOYER'S USE OF CRIMINAL BACKGROUND CHECKS

- Arguably the most significant development of 2012.
- National incarceration rates support a finding of disparate impact based on criminal background checks.
- EEOC provided new guidance on what it considers lawful in employers' use of criminal background checks
- Blanket exclusion of individuals with a criminal record is unlawful.
- Arrests are not sufficient indicators of criminal conduct.

Criminal Background Checks (cont'd)

- The employer must create a “targeted screen” to analyze how specific criminal conduct is linked to a particular position. Factors include the nature of the crime, the nature of the job, and the time elapsed since the crime.
- In some cases, a targeted screen may be sufficient. The EEOC makes clear, however, that an individualized assessment, with notice to the applicant and an opportunity to demonstrate why he/she should not be excluded, should be conducted in most cases.

If you have not received and reviewed your background check policies, you need to do so.

On A Related Note . . .

- Remember that the Fair Credit Reporting Act also restricts your ability to conduct a background check.
- The FCRA requires written consent prior to a background check. The consent request must be a separate document.
- In Singleton v. Domino's Pizza, plaintiffs brought a class action because Domino's FCRA consent form had a release of liability attached to it. The Court ruled that the Domino's consent form violated the FCRA.
- Also notable is Pitt v. Kmart Corp., wherein plaintiffs challenged Kmart's use of an electronic signature as a written consent.

Takeaway: Plaintiffs' attorneys are getting creative on FCRA claims and will litigate even the tiniest of issues.



EEOC ADA/AA SETTLEMENTS

- A Minnesota company settled claims that their policy of requiring employees to come back to work with no restriction unless the injury was on the job. Settlement: \$61,824
- A Florida company settled claims that they failed to reasonably accommodate a nurse because they made her compete with other applicants in reassigning her to a vacant position. Settlement: \$65,000
- An Oregon company had to pay an applicant after it withdrew a job offer when a pre-employment drug screen revealed that she was taking an anti-epilepsy drug. Settlement: \$80,000
- A utility company settled a claim after an applicant for a position on a front-end loader was not hired after failing a DOT physical. The DOT did not require the physical for the particular position and the EEOC believed that an individualized assessment would have shown that the applicant was not a risk. Settlement: \$49,500

EEOC Settlements (cont'd)

- A Michigan company settled with the EEOC after withdrawing an offer of employment from an applicant who tested positive for tuberculosis. The EEOC determined that the applicant was not contagious and did not pose a risk to himself or others. Settlement: \$25,000
- Common threads in ADAAA cases in 2012:
 - Failure to perform and document the interactive process.
 - Failure to conduct an individualized assessment of the person's circumstances compared with the requirements of the job.
 - Failure to consider the reasonableness of accommodations and undue hardship.

NEW EEOC GUIDANCE EXPANDING TITLE VII AND ADAAA PROTECTIONS

PROTECTIONS FOR TRANSGENDER INDIVIDUALS

- On April 20, 2012, the EEOC determined that discrimination against a transgender individual because that person is transgender is sex discrimination and violates Title VII.
- The Case: Mia Macy, a transgender woman (man to woman), was denied a job with the ATF. Macy applied for the job as a male and was told it was “virtually guaranteed,” based on her military and police background and experience with the ATF’s ballistics system. After disclosing his gender transition, Macy was told the job’s funding was cut. She found out someone else was hired and she sued. The EEOC initially refused to consider her claim for sex-stereotyping/discrimination based on gender identity/sex change. She appealed to the EEOC, which held transgender discrimination equals sex discrimination.

Protection for Transgender Individuals (cont'd)

- Title VII prohibits discrimination based on “sex.” the courts have interpreted this to mean both sex - - the biological differences between men and women – and gender. *E.g., Price Waterhouse case.*
- In *Smith v. City of Salem*, the Sixth Circuit held that a biological male, who presented at work as a female and was suspended, could state a claim of sex discrimination. The Court held that punishing an employee for her gender non-conforming behavior was sex-stereotyping.
- The EEOC went beyond *Smith* in *Macy*. The EEOC will now consider discrimination because of transgender status to be sex discrimination regardless of whether the claim is based on a sex stereotyping theory.

Expanded Protection for Domestic Violence, Stalking, Sexual Assault

- The EEOC has also asserted that Title VII and the ADAAA applies to applicants and employees who are the victims of domestic or dating violence, sexual assault, or stalking.
- The EEOC's guidance, when viewed in conjunction with its recent Draft Strategic Enforcement Plan, reveals that the agency is committed to utilizing Title VII and the ADAAA to protect members of the Lesbian, Gay, Bisexual and Transgender community, as well as victims of domestic violence, stalking and sexual assault under an expanded view of the statutorily protected classes thereunder.

THE EEOC'S SYSTEMIC LITIGATION PROGRAM

- In a series of rulings, courts across the country have challenged the EEOC's methods in bringing class action/pattern or practice cases. These cases arise out of the EEOC's systemic enforcement initiative, in which the EEOC targets systemic discrimination affecting large numbers of workers or a particular industry.
- The EEOC's tactic has been to file a case on behalf of multiple employees based on a single investigation, often without investigating anything beyond the individual's claim and often without identifying the class members.



The EEOC's Systemic Litigation Program (cont'd)

- This “file first and investigate later (or never)” tactic shirks the EEOC’s duty to investigate and conciliate claims before filing suit. It also makes it difficult to resolve claims without litigation, as employers are not willing to pay before the EEOC has made its case that wrongdoing occurred.
- Courts have gone both ways on this issue. Expect to see more litigation over how the EEOC handles large multi-plaintiff cases.

2012 DOL UPDATE

FLSA PRIVATE SETTLEMENTS

- Most courts require the DOL or courts to approve a FLSA settlement.
- This requirement is based on a thirty-year-old case.
- In August 2012, the Fifth Circuit called this case into question and held that private parties may settle cases involving FLSA issues without approval.
- This is important because employers can keep settlements confidential to discourage copycat filings.

FLSA GUIDANCE ON ALTERING WORK SCHEDULES TO CUT DOWN ON OVERTIME

- Can you lawfully cut an employee's hours to prevent him/her from working overtime?
- In *Abshire v. Redland Energy Services* (October 2012), the Eighth Circuit upheld this practice.
- Employees worked seven consecutive days, twelve hours a day, followed by seven days off. To cut overtime, the company changed the schedule to a Sunday-to-Saturday schedule.
- Employees filed a collective action, claiming that Redland could not change an existing work week to avoid overtime.
- The Court held that as long as the change is permanent and is implemented in accordance with the FLSA, the employer's reasons for the change are irrelevant.



THE FALSE CLAIMS ACT AND WAGE AND HOUR ISSUES

- The False Claims Act allows whistleblowers to file suit on behalf of the United States if a federal contractor is allegedly defrauding the government and gives the plaintiff a cut of any recovery.
- The FCA applies to federal contractors.
- In Circle K Construction, the Sixth Circuit affirmed the use of the FCA in minimum wage cases. In other words, the plaintiff sued on behalf of the U.S.A. because the contractor was allegedly not complying with federal wage laws. Expect to see this tactic used more in employment cases.

2012 IMMIGRATION UPDATE

HIGH PROFILE RULINGS ON STATE IMMIGRATION STATUTE

- Arizona Immigration Law: The U.S. Supreme Court delivered a split opinion on the constitutionality of Arizona's controversial 2010 immigration law.
 - The Court struck multiple provisions but upheld the most controversial "papers please" provision... for now.
- Alabama, Georgia, Indiana, South Carolina and Utah have already passed similar laws.
- Kansas, Mississippi, Missouri, Nebraska and Pennsylvania are expected to follow suit.

ICE'S I-9 ENFORCEMENT EFFORTS

- **Record Number Of I-9 Inspections:** ICE sent a record number of Notices of Inspection (NOIs) to employers of all sizes in every state across the country. It is expected that ICE will have performed well over 3,000 I-9 audits this year. Targets were primarily employers who have previously been audited and/or had problems with DOL or DHS, as well as employers in high-profile agriculture, restaurant, food manufacturing, energy, and infrastructure industries.
- **Quiet Threat.**
- **Penalties for non-compliance:**
 - Up to \$3,200 per unauthorized worker (1st violation)
 - Up to \$6,500 per unauthorized worker (2nd violation)
 - Up to \$16,000 per unauthorized worker (after 2nd violation)
 - Up to \$1,100 per worker for paperwork mistakes
- **2011 Enforcement Statistics:**
 - 2,496 I-9 audits conducted.
 - 221 employers criminally arrested.
 - 115 individuals and 97 businesses debarred.
 - \$10.4M + in fines to be collected from 385 Final Orders.
- **Audits Target Administrative Errors As Well As Undocumented Workers.**

WHAT TO EXPECT IN 2013?

A LOOK AHEAD

WHAT TO EXPECT IN 2013? COURT DECISIONS AND LEGISLATIVE CHANGES.

- More to come on social media. Several states have enacted social media laws. For example, one law prohibits employers from asking for employee passwords.
- The US Supreme Court will decide whether a supervisor must have the ability to hire and fire.
- US Supreme Court ruling on the University of Texas's "affirmative action" policies.
- We will continue to see ADAAA decisions giving further guidance on reasonable accommodation issues.
- The EEOC's tactics in litigation will continue to be litigated.
- Immigration Legislation: Congress is expected to take up comprehensive immigration reform. In the meantime, Department of Homeland Security employer-based audits will likely continue.

WHAT TO EXPECT IN 2013?

ENFORCEMENT AGENCIES

Generally, we expect to see continued aggressive enforcement by federal agencies in President Obama's second term.

- **EEOC:** Continued focus by the EEOC on large-scale, systemic cases.
- **Wage & Hour:** The DOL's "Plan, Prevent, Protect" strategy will press on; in 2013 we expect to see:
 - Proposed rules updating employers' recordkeeping requirements under the FLSA, requiring employers to provide employees with notice about how their pay is computed and requiring them to perform a classification analysis for each worker excluded from FLSA coverage.
 - A finalized rule revising the FLSA's companionship regulations for home health care workers, as well as a continued focus generally on misclassification issues.
 - The DOL also may move forward with "Right to Know" regulations, which would require employers to prepare a classification analysis explaining why a worker is classified as an employee or an independent contractor.

WHAT TO EXPECT IN 2013? ENFORCEMENT AGENCIES (cont'd)

- **Employee Benefits Law:**

- The Employee Benefits Security Administration is expected to again propose a rule that would clarify who constitutes a "fiduciary" under ERISA when providing investment advice to retirement plans and other employee benefit plans.
- In 2014, employers with 50 or more full-time employees or equivalents will pay a tax if they do not offer their full-time employees (and dependents) health coverage that is both "affordable" and provides "minimum value." Accordingly, employers will soon have to determine whether they will continue to provide employees with health care coverage and, if so, how to do so. The current absence of regulatory direction on key aspects of this "Pay-or-Play" penalty renders this a difficult calculation. Accordingly, we expect relevant agencies to issue numerous ACA regulations in the coming months.

WHAT TO EXPECT IN 2013?

ENFORCEMENT AGENCIES (cont'd)

- **Federal Contractors:** OFCCP is expected to finalize rules requiring government contractors to establish a hiring goal of seven percent for individuals with disabilities; broaden affirmative action obligations by requiring contractors to track data and establish hiring benchmarks for veterans; and gather and report compensation data.
- **Occupational Safety and Health Law:** Employers should prepare for the OSHA to complete rules requiring employers to implement an injury and illness prevention program establishing a catch-all safety and health standard which may conflict with voluntary programs already in place at a number of workplaces.

QUESTIONS?



United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: October 31, 2012

TO: Cornele A. Overstreet, Regional Director
Region 28

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: SWH Corporation d/b/a Mimi's Café
Case 28-CA-084365

512-5012-0125
530-6067-2080-1200

TO
FR
S
This case was submitted for advice as to whether the portion of the Employer's employment at-will policy stating that "[n]o representative of the Company has authority to enter into any agreement contrary to the ... 'employment at will' relationship" violates Section 8(a)(1). We conclude that, given its context in the employee handbook, employees would not reasonably construe this provision to restrict Section 7 activity. Accordingly, the Employer's maintenance of this provision does not violate Section 8(a)(1), and the Region should dismiss the allegation, absent withdrawal.

The Employer, Mimi's Café, is a restaurant operator with locations in 24 states, including a restaurant in Casa Grande, Arizona, where the Charging Party was employed. All of the Employer's new employees sign for and receive a copy of a Teammate Handbook, which provides details about the applicable terms and conditions of employment. The Handbook applies to all Employer facilities and contains the following language regarding employees' "at-will" status:

AT-WILL EMPLOYMENT

The relationship between you and Mimi's Café is referred to as "employment at will." This means that your employment can be terminated at any time for any reason, with or without cause, with or without notice, by you or the Company. **No representative of the Company has authority to enter into any agreement contrary to the foregoing "employment at will" relationship.** Nothing contained in this handbook creates an express or implied contract of employment.

(Emphasis supplied.) The Charging Party alleges that the bolded language violates Section 8(a)(1) because it is overbroad and would reasonably chill employees in the

exercise of their Section 7 rights to select union representation and engage in collective bargaining.

An employer violates Section 8(a)(1) of the Act through the maintenance of a work rule or policy if the rule would “reasonably tend to chill employees in the exercise of their Section 7 rights.”¹ The Board has developed a two-step inquiry to determine if a work rule would have such an effect.² First, a rule is unlawful if it explicitly restricts Section 7 activities. Second, if the rule does not explicitly restrict protected activities, it will nonetheless be found to violate the Act upon a showing that: (1) employees would reasonably 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.³

The Board has cautioned against “reading particular phrases in isolation,”⁴ and will not find a violation simply because a rule could conceivably be read to restrict Section 7 activity.⁵ Instead, the potentially violative phrases must be considered in the proper context.⁶ Rules that are ambiguous as to their application

¹ *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enforced mem.*, 203 F.3d 52 (D.C. Cir. 1999).

² *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646–47 (2004).

³ *Id.* at 647.

⁴ *Id.* at 646.

⁵ *Id.* at 647 (“[W]e will not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule *could* be interpreted that way”). See also *Palms Hotel and Casino*, 344 NLRB 351, 355–56 (2005) (“We are simply unwilling to engage in such speculation in order to condemn as unlawful a facially neutral workrule that is not aimed at Section 7 activity and was neither adopted in response to such activity nor enforced against it”).

⁶ Compare *Flex Frac Logistics, LLC*, 358 NLRB No. 127, slip op. at 3 (September 11, 2012) (finding context of confidentiality rule did not remove employees' reasonable impression that they would face termination if they discussed their wages with anyone outside the company), and *The Roomstore*, 357 NLRB No. 143, slip op. at 1 n.3, 16-17 (December 20, 2011) (finding employees would reasonably interpret the employer's “negativity” rule as applying to Section 7 activity in context of prior employer warnings linking “negativity” to the employees' protected discussions concerning their terms and conditions of employment), with *Wilshire at Lakewood*, 343 NLRB 141, 144 (2004) (finding lawful handbook provisions prohibiting

to Section 7 activity, and contain no limiting language or context that would clarify to employees that the rule does not restrict Section 7 rights, are unlawful.⁷ In contrast, rules that clarify and restrict their scope by including examples of clearly illegal or unprotected conduct, such that they could not reasonably be construed to cover protected activity, are not unlawful.⁸

Here, the Employer's at-will policy does not explicitly restrict Section 7 activity. Moreover, there is no indication that the Employer promulgated its policy in response to union or other protected activity or that the policy has been applied to restrict protected activity. Thus, under the *Lutheran Heritage*⁹ standard, the Employer's maintenance of the contested handbook provision is only unlawful if employees would reasonably construe it in context to restrict Section 7 activity.

We conclude that the contested handbook provision would not reasonably be interpreted to restrict an employee's Section 7 right to engage in concerted attempts to change his or her employment at-will status. First, the provision does 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 provision simply highlights the Employer's policy that its own representatives are not authorized to modify an employee's at-will status. Moreover, the clear meaning of the provision at issue is to reinforce the Employer's unambiguously-stated purpose of its at-will policy: it explicitly states "[n]othing contained in this handbook creates an express or implied contract of employment." It is commonplace for employers to

employees from "abandoning [their] job by walking off the shift without permission of [their] supervisor or administrator"; in context of direct patient care, employees "would necessarily read the rule as intended to ensure that nursing home patients are not left without adequate care during an ordinary workday"), *vacated in part on other grounds*, 345 NLRB 1050 (2005), *revd. on other grounds sub nom., Jochims v. NLRB*, 480 F.3d 1161 (D.C. Cir. 2007).

⁷ See, e.g., *Claremont Resort and Spa*, 344 NLRB 832, 836 (2005) (rule proscribing "negative conversations" about managers that was contained in a list of policies regarding working conditions, with no further clarification or examples, was unlawful because of its potential chilling effect on protected activity).

⁸ See, e.g., *Tradesmen Intl.*, 338 NLRB 460, 460-62 (2002) (prohibition against "disloyal, disruptive, competitive, or damaging conduct" would not be reasonably construed to cover protected activity, given the rule's focus on other clearly illegal or egregious activity and the absence of any application against protected activity).

⁹ 343 NLRB at 646-47.

rely on policy provisions such as those at issue here as a defense against potential legal actions by employees asserting that the employee handbook creates an enforceable employment contract.¹⁰ Accordingly, we conclude that employees would not reasonably construe this provision to restrict their Section 7 right to select a collective-bargaining representative and bargain collectively for a contract when considered in context.¹¹ The Region should therefore dismiss, absent withdrawal, the Charging Party's allegation that the Employer's employment at-will policy violates Section 8(a)(1).

We recognize that 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."¹² Applying the *Lutheran Heritage*¹³ standard, the ALJ found that the signing of the acknowledgement form, whereby the employee—through the use of the personal pronoun "I"—specifically agreed that the at-will agreement could not be changed in any way, was "essentially a waiver" of the employee's right "to advocate concertedly ... to change his/her at-will status."¹⁴ Thus, the provision in *American Red Cross* more clearly involved an employee's waiver of his Section 7 rights than the handbook provision here. The parties settled that case before Board review of the

¹⁰ See *NLRB v. Ace Comb Co.*, 342 F.2d 841, 847 (8th Cir. 1965) ("It must be remembered that it is not the purpose of the Act to give the Board any control whatsoever over an employer's policies, including his policies concerning tenure of employment, and that an employer may hire and fire at will for any reason whatsoever, or for no reason, so long as the motivation is not violative of the Act"); *Aeon Precision Company*, 239 NLRB 60, 63 (1978) (same); *Aileen, Inc.*, 218 NLRB 1419, 1422 (1975) (same).

¹¹ We note that notwithstanding this provision, the Employer would have an obligation to bargain in good faith with a union selected by its employees, including an obligation to bargain over a just cause discipline proposal. Cf. *J.I. Case v. NLRB*, 321 U.S. 332, 337 (1944) (finding individual employment contracts predating the selection of a collective-bargaining representative cannot limit the scope of the employer's duty to bargain over terms and conditions of employment).

¹² 2012 WL 311334, Case 28-CA-23443, JD(SF)—04-12 (ALJD dated February 1, 2012).

¹³ 343 NLRB at 646-47.

¹⁴ JD(SF)—04-12 at 20-21.

ALJ's decision. Because the law in this area remains unsettled, the Regions should submit to the Division of Advice all cases involving employer handbook provisions that restrict the future modification of an employee's at-will status.

/s/
B.J.K.

United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: October 31, 2012

TO: William A. Baudler, Regional Director
Region 32

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Rocha Transportation
Case 32-CA-086799

512-5012-0125
530-6067-2080-1200

This case was submitted for advice as to whether the Employer violated Section 8(a)(1) by maintaining an employment at-will policy, which states that the “at-will” provision can only be modified in writing by the Employer’s president. We conclude that employees would not reasonably construe this provision to restrict Section 7 activity. Accordingly, the Employer’s maintenance of this provision does not violate Section 8(a)(1), and the Region should dismiss the allegation, absent withdrawal.

The Employer, Rocha Transportation, is a Modesto, California company that transports containerized freight to and from California’s Central Valley and the Port of Oakland. All of the Employer’s new employees receive a copy of the Rocha Transportation Driver Handbook, which provides details about the applicable terms and conditions of employment. The Handbook contains the following language in its “Statement of At-Will Employment Status”:

Employment with Rocha Transportation is employment at-will. Employment at-will may be terminated with or without cause and with or without notice at any time by the employee or the Company. Nothing in this Handbook or in any document or statement shall limit the right to terminate employment at-will. **No manager, supervisor, or employee of Rocha Transportation 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.**

(Emphasis supplied.) In addition, the Handbook contains an “Acknowledgement of Receipt” that employees are required to sign. This provision, which reiterates the

bolded language, also clarifies that “nothing in the employee handbook creates or is intended to create a promise, contract, or representation of continued employment....” The Charging Party alleges that the at-will language in the Employer’s Handbook violates Section 8(a)(1) because it is overbroad and would reasonably chill employees in the exercise of their Section 7 rights.

An employer violates Section 8(a)(1) of the Act through the maintenance of a work rule or policy if the rule would “reasonably tend to chill employees in the exercise of their Section 7 rights.”¹ The Board has developed a two-step inquiry to determine if a work rule would have such an effect.² First, a rule is unlawful if it explicitly restricts Section 7 activities. Second, if the rule does not explicitly restrict protected activities, it will nonetheless be found to violate the Act upon a showing that: (1) employees would reasonably 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.³

The Board has cautioned against “reading particular phrases in isolation,”⁴ and will not find a violation simply because a rule could conceivably be read to restrict Section 7 activity.⁵ Instead, the potentially violative phrases must be considered in the proper context.⁶ Rules that are ambiguous as to their application

¹ *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enforced mem.*, 203 F.3d 52 (D.C. Cir. 1999).

² *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646–47 (2004).

³ *Id.* at 647.

⁴ *Id.* at 646.

⁵ *Id.* at 647 (“[W]e will not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule *could* be interpreted that way”). *See also Palms Hotel and Casino*, 344 NLRB 351, 355–56 (2005) (“We are simply unwilling to engage in such speculation in order to condemn as unlawful a facially neutral workrule that is not aimed at Section 7 activity and was neither adopted in response to such activity nor enforced against it”).

⁶ *Compare Flex Frac Logistics, LLC*, 358 NLRB No. 127, slip op. at 3 (September 11, 2012) (finding context of confidentiality rule did not remove employees' reasonable impression that they would face termination if they discussed their wages with anyone outside the company), *and The Roomstore*, 357 NLRB No. 143, slip op. at 1 n.3, 16-17 (December 20, 2011) (finding employees would reasonably interpret the employer’s “negativity” rule as applying to Section 7 activity in context of prior

to Section 7 activity, and contain no limiting language or context that would clarify to employees that the rule does not restrict Section 7 rights, are unlawful.⁷ In contrast, rules that clarify and restrict their scope by including examples of clearly illegal or unprotected conduct, such that they could not reasonably be construed to cover protected activity, are not unlawful.⁸

Here, the Employer's employment at-will policy does not explicitly restrict Section 7 activity. Moreover, there is no indication that the Employer promulgated its policy in response to union or other protected activity or that the policy has been applied to restrict protected activity. Thus, under the *Lutheran Heritage*⁹ standard, maintenance of the contested handbook provision is only unlawful if employees would reasonably construe it in context to restrict Section 7 activity.

We conclude that the contested handbook provision would not reasonably be interpreted to restrict an employee's Section 7 right to engage in concerted attempts to change his or her employment at-will status. The provision does 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 provision simply prohibits the Employer's own representatives from entering into employment

employer warnings linking "negativity" to the employees' protected discussions concerning their terms and conditions of employment), *with Wilshire at Lakewood*, 343 NLRB 141, 144 (2004) (finding lawful handbook provisions prohibiting employees from "abandoning [their] job by walking off the shift without permission of [their] supervisor or administrator"; in context of direct patient care, employees "would necessarily read the rule as intended to ensure that nursing home patients are not left without adequate care during an ordinary workday"), *vacated in part on other grounds*, 345 NLRB 1050 (2005), *revd. on other grounds sub nom., Jochims v. NLRB*, 480 F.3d 1161 (D.C. Cir. 2007).

⁷ See, e.g., *Claremont Resort and Spa*, 344 NLRB 832, 836 (2005) (rule proscribing "negative conversations" about managers that was contained in a list of policies regarding working conditions, with no further clarification or examples, was unlawful because of its potential chilling effect on protected activity).

⁸ See, e.g., *Tradesmen Intl.*, 338 NLRB 460, 460-62 (2002) (prohibition against "disloyal, disruptive, competitive, or damaging conduct" would not be reasonably construed to cover protected activity, given the rule's focus on other clearly illegal or egregious activity and the absence of any application against protected activity).

⁹ 343 NLRB at 646-47.

agreements that provide for other than at-will employment.¹⁰ Indeed, the provision explicitly permits the Employer's president to enter into written employment agreements that modify the employment at-will relationship, and thus encompasses the possibility of a potential modification of the at-will relationship through a collective-bargaining agreement that is ratified by the Company president. Accordingly, we conclude that employees would not reasonably construe this provision to restrict their Section 7 right to select a collective-bargaining representative and bargain collectively for a contract.¹¹ The Region should therefore dismiss, absent withdrawal, the Charging Party's allegation that the Employer's employment at-will policy violates Section 8(a)(1).

We recognize that 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."¹² Applying the *Lutheran Heritage*¹³ standard, the ALJ found that the signing of the acknowledgement form, whereby the employee—through the use of the personal pronoun "I"—specifically agreed that the at-will agreement could not be changed in any way, was "essentially a waiver" of the employee's right "to advocate concertedly

¹⁰ It is commonplace for employers to rely on policy provisions such as those at issue here as a defense against potential legal actions by employees asserting that the employee handbook creates an enforceable employment contract. *See NLRB v. Ace Comb Co.*, 342 F.2d 841, 847 (8th Cir. 1965) ("It must be remembered that it is not the purpose of the Act to give the Board any control whatsoever over an employer's policies, including his policies concerning tenure of employment, and that an employer may hire and fire at will for any reason whatsoever, or for no reason, so long as the motivation is not violative of the Act"); *Aeon Precision Company*, 239 NLRB 60, 63 (1978) (same); *Aileen, Inc.*, 218 NLRB 1419, 1422 (1975) (same).

¹¹ We note that notwithstanding this provision, the Employer would have an obligation to bargain in good faith with a union selected by its employees, including an obligation to bargain over a just cause discipline proposal. *Cf. J.I. Case v. NLRB*, 321 U.S. 332, 337 (1944) (finding individual employment contracts predating the selection of a collective-bargaining representative cannot limit the scope of the employer's duty to bargain over terms and conditions of employment).

¹² 2012 WL 311334, Case 28-CA-23443, JD(SF)—04-12 (ALJD dated February 1, 2012).

¹³ 343 NLRB at 646-47.

... to change his/her at-will status.”¹⁴ Thus, the provision in *American Red Cross* more clearly involved an employee’s waiver of his Section 7 rights than the handbook provision here. The parties settled that case before Board review of the ALJ’s decision. Because the law in this area remains unsettled, the Regions should submit to the Division of Advice all cases involving employer handbook provisions that restrict the future modification of an employee’s at-will status.

/s/
B.J.K.

¹⁴ JD(SF)—04-12 at 20-21.