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Legal Update

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NLRB CLARIFIES POSITION ON AT-WILL EMPLOYMENT, CLASS ACTION WAIVERS

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Our October Legal Update covered the National Labor Relations Board's (NLRB) recent decision striking down routine employment policy language informing employees that their employment is "at will" and can be terminated at the employer's discretion. In the case in question, *American Red Cross Arizona, Blood Services Region and Lois Hampton*, the NLRB found that a policy requiring an employee to agree that the at-will relationship "cannot be amended, modified, or altered in any way," operated as a "waiver in which an employee . . . relinquish[es] his/her right to advocate . . . to change his/her at-will status." The NLRB determined that the language violated the National Labor Relations Act (NLRA), which protects the right of most private-sector employees to join together, with or without a union, to improve wages and working conditions.

On October 31, 2012, the NLRB's Office of the General Counsel issued two Advice Memoranda attempting to clarify the Board's position on this issue. The first Advice Memorandum discussed a policy informing employees that their at-will employment can only be modified in writing by the employer's president and stating that "nothing in the employee handbook creates or is intended to create a promise, contract, or representation of continued employment." The NLRB determined that this language *did not* violate the NLRA because it 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." It merely expressed the employer's own policies and procedures.

The second Advice Memorandum discussed a statement in a handbook that "[n]o representative of the Company has authority to enter into any agreement contrary to the . . . 'employment at-will' relationship" and that "[n]othing contained in this handbook creates an express or implied contract of employment." The Board again upheld the handbook language because it "simply highlights the Employer's policy that its own representatives are not authorized to modify an employee's at-will status." The Memorandum noted that the language is intended to ensure that the handbook by itself does not create a contract for a term of employment—not to prohibit employees from bargaining for one separately.

The Advice Memoranda distinguishing the NLRB's controversial decision in the *Red Cross* case are a positive sign that the Board does not intend to reprimand every employer whose handbooks contain commonplace language regarding at-will relationships. Nonetheless, the NLRB is requiring employers to walk a fine line by stating their own policies without implying that employees lack the right to attempt to change those policies. To avoid problems, employers should avoid including any language in their policies that can be construed as a waiver of employee rights. For example, it appears the NLRB would likely favor language that serves to inform an employee of the company's policies regarding at-will

employment over language indicating that an employee agrees to at-will employment forever simply by signing a handbook. Employers should also ensure that circumstances surrounding the adoption of policy language regarding at-will employment do not suggest that the language was added to prevent employees from unionizing or otherwise seeking to affect their wages or working conditions. For example, the NLRB might view policies adopted immediately after a dispute or complaint skeptically.

In another recent decision, an administrative law judge (ALJ) with the NLRB determined that a provision prohibiting employees from pursuing class action claims in employment disputes violated the NLRA. The ALJ in *24 Hour Fitness USA Inc. and Alton J. Sanders* declined "to establish an employer's right to restrict employees, in order to hold a job, from exercising their statutory right to use the full-range of legal remedies generally available to all citizens." Although the handbook at issue allowed employees to opt out of the restrictions on class actions, the ALJ determined that the employer could not require employees to "affirmatively act to preserve rights already protected by [the NLRA]."

Courts have generally been more receptive to class action waivers than the NLRB, and it is likely that *24 Hour Fitness* or similar cases will be appealed. Nonetheless, employers should consider the NLRB's position before implementing policies that limit employees' rights to pursue class action claims, whether through litigation or arbitration.

Employers would be wise to seek assistance from their legal counsel in sorting out the NLRB's mixed messages on these and other issues covered in our October and September Legal Updates.
