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# The "I"s Have It: NLRB Says Don't Shred Those At-Will Disclaimers Just Yet

If you are a non-union employer, you likely have an employee handbook that sets forth the policies and procedures that guide your relationship with your employees. And, if you have an employee handbook, it likely contains a disclaimer stating that employees are at-will, that employees can be fired at any time for any reason, and that nothing in the handbook alters that at-will status. Indeed, employers commonly deploy these disclaimers to avoid claims by employees that the handbook creates a binding and enforceable contract.

Consider the following three at-will disclaimers, taken from real, live employee handbooks:

1. I further agree that the at-will employment relationship cannot be amended, modified or altered in any way.

2. The relationship between you and Mimi's Cafe us 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.

3. 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

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> the authority to make any such agreement and then only in writing.

What's the difference between these three policies? According to the February 1, 2012, opinion of a National Labor Relations Board Administrative Law Judge, #1 is an illegal and overly broad restraint on the right of employees to engage in protected concerted activity. According to two advice memoranda published yesterday by NLRB Acting General Counsel Lafe Solomon, #2 and #3 pass muster and are not illegal.

According to Mr. Solomon, the distinction lies in the use of the personal pronoun, "I."

> 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." Thus, the provision in *American Red Cross* more clearly involved an employee's waiver of his Section 7 rights than the handbook provision here.

By comparison, the Mimi's Cafe and Rocha Transportation disclaimers merely serve to reinforce the unambiguously-stated purpose of the employers' at-will policies, and do not require employees individually to agree never to alter their at-will status.

These distinctions are nuanced, and the NLRB recognizes their unsettled nature. From the NLRB's website:

> Because Board law in this area remains unsettled, the Acting General Counsel is asking all Regional Offices to submit cases involving employer handbook at-will provisions to the Division of Advice for further analysis and coordination.

It is refreshing (surprising? relieving?) to see that the NLRB's Office of General Counsel is backing off the position that any at-will disclaimer violates the NLRA, and is willing to evaluate them on a case-by-case basis.

For now, you should take a look at your handbook disclaimers and consider scrubbing them of personal pronouns. Instead, consider using the examples from either Mimi's Cafe or Rocha Transportation as a template.

Of course, the validity of that template to avoid a binding contract under state law could vary from state to state. For this reason, you are best served running any disclaimer by your employment counsel before rolling it out to your employees.