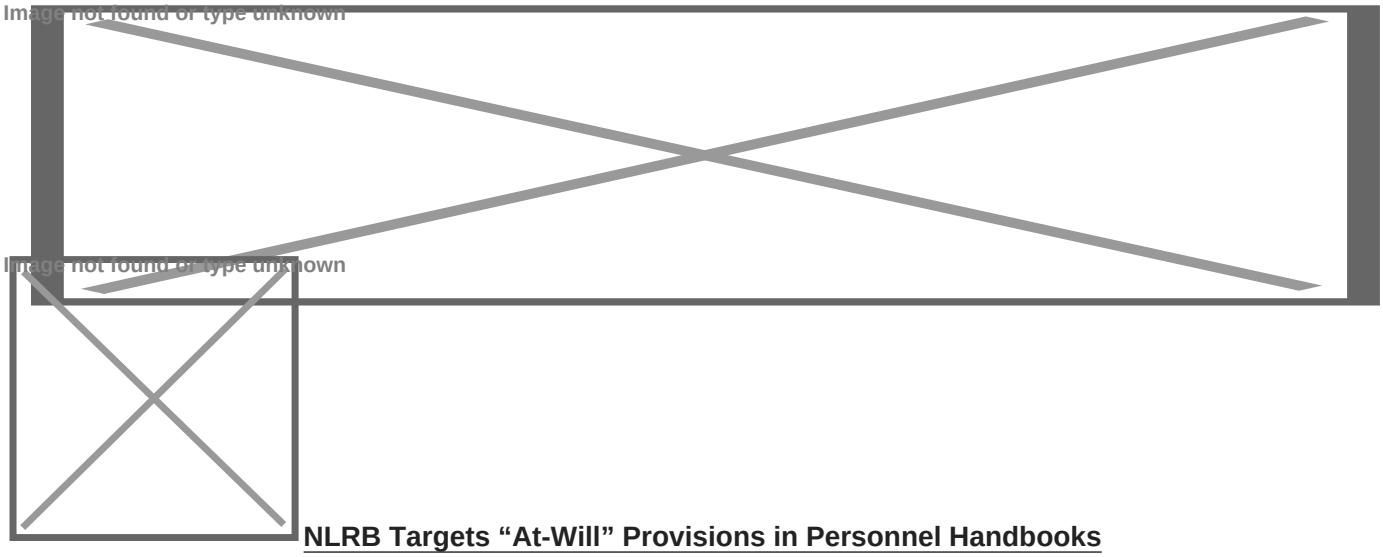
Tucker Ellis LLP

Employer Survival Guide – Summer 2012

JULY 2024



NLRB Targets "At-Will" Provisions in Personnel Handbooks

The "at-will" employment concept allows employers to terminate an employee for any reason, or no reason at all, so long as the termination does not violate state or federal public policies or anti-discrimination laws. To avoid arguments by "at will" employees that their status changed after they were hired, employee handbooks commonly contain language stating that the employees' "at-will" status can only be changed by a separate written agreement. The National Labor Relations Board (NLRB) is now scrutinizing such provisions and pursuing administrative claims based on the concept that such provisions may violate the National Labor Relations Act (NLRA).

In February 2012, an NLRB Administrative Law Judge (ALJ) held that the Arizona American Red Cross was in violation of Section 8(a)(1) of the NLRA because its handbook required employees to acknowledge: "I further agree that the at-will employment relationship cannot be amended, modified or altered in any way." The ALJ concluded that this provision was too broad and could violate the employees' right to collectively bargain and potentially change their at-will status. Bolstered by this ruling, the NLRB later filed a similar charge against Hyatt Hotels, asserting that its handbook was illegal because it stated that employees' "at-will" status could be changed only by a separate written agreement. The NLRB's Acting General Counsel recently announced that the Board may further expand its nationwide efforts to pursue administrative claims against employers whose handbooks include such provisions, arguing that such provisions can chill employees' rights to potentially negotiate or attempt to

change their at-will status.

The ALJ's approach to this issue might suggest a need for minor modifications in the phrasing of employers' handbooks or policies; however, the NLRB's opposition to policies stating that an employee's at-will status can be changed only by a separate written agreement may present far greater problems to employers. Such policies were at least partially intended to avoid employee misunderstandings or prevent claims that binding oral promises of continued employment were made by unauthorized lower-level supervisors. Nevertheless, reviewing and updating existing policies may help employers avoid the expense associated with defending against an NLRB unfair labor practice charge or a civil lawsuit by a terminated employee maintaining that such provisions were contrary to law or public policy and therefore unenforceable.

Tucker Ellis helps its clients proactively update their employment policies and procedures in keeping with recent legal precedents and administrative challenges to best protect against costly and disruptive litigation and regulatory proceedings.

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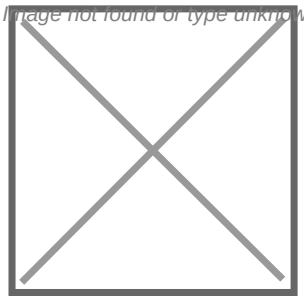


Employee Use of Personal Automobiles Becomes Employers' Problem

Employees often find it convenient or even necessary to use their personal automobiles to perform job tasks. Because of the enormous liability risks associated with personal motor vehicle use, recent decisions imposing and negating employer liability when employees engage in driving diversions or misconduct suggest a need to review and update companies' governing policies and employee training.

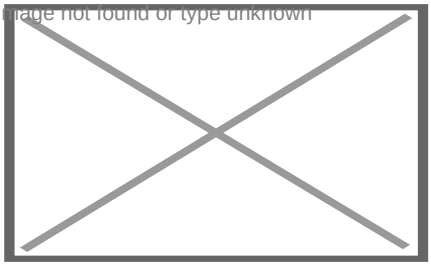
In *Engler v. Gulf Interstate Engineering, Inc.* (July 2012), the Arizona Supreme Court negated employer liability for an accident that occurred as the employee was returning to his hotel after dinner during an extended business trip. Because the employee was engaged solely in personal activities at the time of the accident (personal meal during off-duty hours), the Court concluded that it would be unfair to hold the employer liable under those circumstances. In contrast, a California jury in *Smallwood v. Huber* (August 2011) held a school district liable for an accident involving an intoxicated off-duty teacher traveling a day early to a conference (not required for his job, and for which he was paying his own expenses) in order to see his son.

The jury and trial judge held that because the school district gave the teacher a paid day off to attend the conference, and because the accident happened during paid time off, there was a sufficient nexus to his employment to hold the school district liable.

In seeking financial recovery for significant personal injury claims in which the responsible driver/owner has limited insurance coverage, plaintiffs' attorneys are also suggesting in their blogs and complaints that employers should be held liable for accidents caused by their off-duty employees' "distracted" driving caused by business-related cell phone calls and/or texting. These efforts are supported by recent cases (e.g., *Zivali v. AT&T Mobility*, 2011 WL 1815391 (S.D.N.Y. 2011)) and public agency reports (*Cong. Research Service Rpt.*, Sept. 12, 2011) stating that non-exempt employees have a potential right to compensation/overtime compensation when they respond to work-related phone calls/e-mails while "off-duty." When these types of off-duty activities lead to "distracted" accidents, the tangential work-relationship may be sufficient to create employer liability, or the employer may at least find itself a named defendant in the litigation.

Given these trends and exposures, employers would be wise to review and update their personnel policies and/or handbooks to: (1) prohibit "distracted" driving, whether during the business day or during off-hours with respect to "business"-related matters; (2) prohibit employees from operating motor vehicles for employment-related activities after having consumed alcohol, drugs, or prescription medication that might affect their ability to safely operate a vehicle; and (3) confirm that the employee's personal automobile insurance coverage will be primary to the employer's coverage whenever possible under governing law and the employee's anticipated "omnibus insured" coverage clause. Employers may also wish to consider establishing minimum liability limits for their employees' automobile policies to help provide appropriate protection.

Tucker Ellis attorneys assist clients in updating policies and handbooks to address risks and exposures arising from employment and quasi-employment-related situations. We help employers ensure that employee rights and independence are properly maintained, while also supporting prudent risk management objectives.



Crossing the Boundary in Employment Cases: Current Efforts to Reach Deep Pockets of Franchisors, Developers, and General Contractors

Franchisors, developers, and general contractors are facing enhanced litigation exposures in claims brought by employees of their franchisees and subcontractors. In light of the types of arguments successfully raised in *Patterson v. Domino's Pizza, Inc*. (Cal.App., June 2012), *Charter v. Waterford Marriot Hotel* (W.D.Ok., June 2012), and *Hall v. AIMCO*, 2011 WL 940185 (N.D. Cal., 2011), summary dismissal from such lawsuits may become more difficult to obtain unless special precautions are taken.

As a general rule, franchisees and subcontractors are "independent contractors" ("ICs") whose acts or omissions cannot result in liability imposed on the franchisor or an involved developer/general contractor ("Principal"). In the employment context, this general rule of non-liability can be avoided when the Principal becomes actively involved in a franchisee's employment-related decisions. Purposeful and affirmative Principal involvement in decision making includes designating who can be hired, fired, promoted, or disciplined; how individual employees will perform their jobs or be compensated; or what employment policies or practices must be adopted and implemented. Depending on the extent of its involvement, the Principal may face liability as an "aider and abetter" to the IC's wrongful employment conduct or as a "joint employer." The Principal may also unexpectedly find, as was the case in *Hall*, that the "administrative exhaustion" defense is unavailable even though the IC's employee did not name the Principal in the required pre-suit EEOC/DFEH filing. In *Hall*, the Court held that the employee's administrative complaint filed only against the IC was sufficient because it asserted alleged wrongful acts that involved the Principal.

Particularly when an IC is no longer in business or is facing significant financial difficulties, a "deep pocket" Principal becomes a more likely litigation target for IC employees or employee groups. Principals should therefore proactively consider protective policies and employee training in order to maintain appropriate "boundaries" between the ICs' employment policies or decisions and the Principals' business operations.

Tucker Ellis assists clients in both developing appropriate policies and providing training and litigation defense to Principals seeking to prevent or defend against alleged liability arising from the acts or omissions of their ICs. We work with clients to develop strategies that strengthen the Principal/IC relationship while still managing and avoiding litigation risks.

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Client Alert