

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

Advice Memorandum

DATE: October 31, 2017

TO: Nicholas H. Lewis, Acting Regional Director
Region 2

FROM: Jayme L. Sophir, Associate General Counsel
Division of Advice

SUBJECT: The Trump Corporation a/k/a The Trump	280-8650
Organization, Inc., and Donald J. Trump for	512-5012-0125-0000
President, Inc.	240-0150
Case 02-CA-183801	240-0167-6700-0000
	177-2401-6750-0000
Trump for America, Inc.	
Case 02-CA-191078	

The Region submitted these cases for advice concerning whether Donald J. Trump for President, Inc. (“Trump Campaign”); Trump for America, Inc. (“Trump Transition”); and The Trump Organization, Inc., and related charged parties, promulgated and maintained unlawfully overbroad work rules in violation of Section 8(a)(1), and whether the Board has jurisdiction over the Trump Campaign and the Trump Transition. We conclude that the charges should be dismissed, absent withdrawal.

The Trump Campaign is the Federal Election Commission-registered political action committee supporting the Republican Party ticket of Donald Trump and Mike Pence in the 2016 United States Presidential Election. The Trump Organization is the privately-held international conglomerate composing the business interests of Donald Trump and his family. The Trump Transition was an organization established under Section 501(c)(4) of the Internal Revenue Code to prepare for the new administration’s leadership following President Trump’s election victory.

On September 2, 2016,¹ the Committee to Preserve the Religious Right to Organize (the “Charging Party”) filed a charge alleging that the Trump Organization violated Section 8(a)(1) by promulgating and maintaining overbroad work rules in a document (the “Confidentiality Agreement”) that purports to bind any employees, independent contractors, and volunteers to various confidentiality, non-disparagement, and mandatory arbitration provisions, among others. On September

¹ All dates hereinafter are in 2016 unless otherwise indicated.

16, the Charging Party amended the charge to name the Trump Campaign as an additional charged party, and further amended the charge on November 21 to include certain Trump family members and a thirty-four page list of Trump-related business entities. The November 21 amended charge further alleged that the terms of the Confidentiality Agreement apply to the Trump Campaign, the Trump Organization, and all of the additional charged parties or, alternatively, that the charged parties are joint employers, single employers, and/or single integrated enterprises. On January 9, 2017, the Charging Party filed a separate charge against the Trump Transition, alleging that certain work rules contained in its Code of Ethical Conduct are unlawfully overbroad, in violation of Section 8(a)(1).

Regarding the allegation against the Trump Campaign, we conclude that, even assuming that the Board has jurisdiction over that entity and that the Confidentiality Agreement contains overbroad work rules that have been applied to statutory employees at some point within the 10(b) period, it would not effectuate the policies and purposes of the Act to issue complaint. First, the Trump Campaign was created for a specific and limited purpose, its primary function ended with the election, and there is no evidence that it has employed workers covered by the Act since November 15. The Trump Campaign acknowledges that it had 200 paid employees at its peak staffing level in the ninety days prior to the election, all of whom were required to adhere to the allegedly unlawful Confidentiality Agreement, but asserts that it has not employed any statutory employees since November 15 and does not anticipate altering current staffing levels. Rather, it states that its remaining fourteen employees are “managerial employees” excluded from the Act’s coverage.² The Board defines “managerial employees” as those who “formulate and effectuate high-level employer policies,” have “discretion in the performance of their jobs independent of their employer’s established policy,” and/or otherwise take or recommend “discretionary actions that effectively control or implement employer policy.”³ The Charging Party has provided no evidence to suggest that the fourteen remaining

² See, e.g., *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 289 (1974) (concluding that “the Board’s early decisions, the purpose and legislative history of the [Act], the Board’s subsequent and consistent construction of the Act for more than two decades, and the decisions of the courts of appeals all point unmistakably to the conclusion that ‘managerial employees’ are not covered by the Act”); *Columbia University*, 364 NLRB No. 90, slip op. at 5 (Aug. 23, 2016) (giving employee status to managers, who would be expected to be on the employer’s side in bargaining, would violate the NLRA’s “design and purpose of facilitating fairness in collective bargaining” by “eviscerat[ing] the traditional distinction between labor and management”).

³ *Wolf Creek Nuclear Operating Corp.*, 364 NLRB No. 111, slip op. at 3 (Aug. 26, 2016) (internal quotations omitted).

staffers are statutory employees, and there is no reason to question the Trump Campaign's assertion that this small group of staffers are all managerial employees.

Second, the Charging Party does not purport to have filed its charge on behalf of any of the Trump Campaign's employees. While the Board administers public policy and its processes may be invoked by any person who believes such policies have been violated,⁴ the absence of any connection between the Charging Party and any Trump Campaign employees further supports exercising the General Counsel's Section 3(d) prosecutorial discretion to decline to issue a complaint here.

We similarly conclude that the allegation against the Trump Organization and related charged parties should be dismissed on non-effectuation grounds. The Charging Party has submitted no evidence indicating that the Trump Organization or related charged parties has ever applied the Confidentiality Agreement to statutory employees. In this regard, we note that the employee handbook used by the Trump International Hotel, Las Vegas (Case 28-CA-176943), one of the businesses within the Trump Organization, contains none of the Confidentiality Agreement's allegedly unlawful work rules. In addition, the Charging Party does not purport to have filed the charge on behalf of any particular Trump Organization employees.⁵

Finally, as to the charge against the Trump Transition, we conclude that, even assuming the Board has jurisdiction over that entity and that the Code of Ethical Conduct has been applied to statutory employees,⁶ the charge lacks merit because the rules are not unlawfully overbroad. The mere maintenance of an overly broad work rule violates Section 8(a)(1) because it "tends to inhibit or threaten employees who desire to engage in legally protected activity but refrain from doing so rather than risk discipline."⁷ The Board has developed a two-step inquiry to determine if a work

⁴ See, e.g., *Castle Hill Health Care Center*, 355 NLRB 1156, 1190 (2010) (anyone may file a charge with the Board); *NLRB v. Ind. & Mich. Elec. Co.*, 318 U.S. 9, 17-18 (1943) (even a "stranger" to the dispute may file a Board charge).

⁵ Moreover, the Charging Party's claim that the Trump Organization and related charged parties are joint or single employers with the Trump Campaign is also without evidentiary support.

⁶ We note that the Charging Party found the unsigned Code of Ethical Conduct as a stand-alone document without any context on a news website, and could provide no evidence that it had been applied to statutory employees.

⁷ *Beverly Health & Rehabilitation Services*, 332 NLRB 347, 349 (2000), *enforced*, 297 F.3d 468 (6th Cir. 2002). See also *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998)

rule would reasonably tend to chill protected activities.⁸ First, a rule is clearly unlawful if it explicitly restricts Section 7 activities. Second, if it does not, the rule will violate Section 8(a)(1) only 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.⁹ In determining how an employee would reasonably construe a rule, particular phrases should not be read in isolation, but rather considered in context.¹⁰ Rules that are ambiguous as to their application 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.¹¹ Indeed, any ambiguity in an employer's rule

(finding that the mere maintenance of a rule that would reasonably have a chilling effect on employees' Section 7 activity violates Section 8(a)(1)), *enforced mem.*, 203 F.3d 52 (D.C. Cir. 1999).

⁸ *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646-47 (2004). *See generally* Memorandum GC 15-04, "Report of the General Counsel Concerning Employer Rules," dated Mar. 18, 2015.

⁹ 343 NLRB at 646-47. In *Lutheran Heritage*, the Board expressly warned that it will not conclude that a reasonable employee would read a rule to apply to Section 7 activities "simply because the rule *could* be interpreted that way." *Id.* at 647 (emphasis in original).

¹⁰ *Id.* at 646.

¹¹ *Compare 2 Sisters Food Group*, 357 NLRB 1816, 1817 (2011) (finding rule that subjected employees to discipline for "inability or unwillingness to work harmoniously with other employees" unlawful, absent definition of "work harmoniously," because rule was sufficiently imprecise that it would encompass any disagreement or conflict among employees, including discussions or interactions protected by Section 7), *and University Medical Center*, 335 NLRB 1318, 1320-22 (2001) (finding work rule that prohibited "disrespectful conduct towards [others]" unlawful because it included "no . . . limiting language [that] removes [the rule's] ambiguity and limits its broad scope"), *enforcement denied in relevant part sub nom. Cmty. Hosps. of Cent. Cal. v. NLRB*, 335 F.3d 1079 (D.C. Cir. 2003), *with Copper River of Boiling Springs, LLC*, 360 NLRB 459, 459 n.3, 471 (2014) (finding rule prohibiting "lack of respect and cooperation with fellow employees or guests" lawful, because there was sufficient limiting language to clarify that challenged rule only prohibited unprotected conduct that interfered with employer's legitimate business concerns).

is construed against the employer as the promulgator of that rule.¹² In contrast, rules that clarify and restrict their scope by including examples of clearly illegal or unprotected conduct, such that they would not reasonably be construed to cover protected activity, are not unlawful.¹³

The Code of Ethical Conduct contains twelve numbered rules, which address, among other things, conflicts of interest, lobbying activities as defined by the Lobbying Disclosure Act, use of non-public information, use of federal property, receipt of gifts, and representation of foreign governments or political parties. The Charging Party alleges four provisions to be unlawful, two of which (Items 6 and 7) restrict the use of “non-public information,” and two of which (Items 8 and 9) restrict appearances before federal departments or agencies:

6. I will keep confidential any non-public information provided to me in the course of my duties with the transition and will use such information exclusively for purposes of the transition.

7. I will not use or permit to be used any non-public information provided to me in the course of my duties with the transition, in any manner, for any private gain for myself or any other party, at any time during or after the transition.

8. During my service with [the Trump Transition], I will not, on behalf of any person or entity, communicate with or appear before, for compensation, any federal department or agency seeking official action for such person or entity with respect to a particular matter for which I have direct and substantial responsibility as part of [the Trump Transition].

9. If Donald J. Trump wins the election and I continue working with [the Trump Transition], for 6 months after I leave, I will not on behalf of any other person or entity communicate with or appear before, for compensation, any federal department or

¹² *Lafayette Park Hotel*, 326 NLRB at 828 (citing *Norris/O'Bannon*, 307 NLRB 1236, 1245 (1992)).

¹³ *See Tradesmen International*, 338 NLRB 460, 460-62 (2002) (determining that prohibition against “disloyal, disruptive, competitive, or damaging conduct” would not be reasonably construed to cover protected activity, given rule’s focus on other clearly illegal or egregious activity and absence of any application against protected activity).

agency seeking official action for such person or entity with respect to a particular matter for which I had direct and substantial responsibility during my service with [the Trump Transition].

We conclude that Items 6 and 7 of the Code of Ethical Conduct are facially lawful. Both rules require staff to keep non-public information obtained in the course of their duties with the Trump Transition confidential. A confidentiality rule that broadly encompasses “employee” or “personnel” information, without further clarification, will reasonably be construed by employees to restrict Section 7-protected communications.¹⁴ In contrast, broad prohibitions on disclosing confidential information have been found lawful when they did not reference information regarding employees, wages, or anything that would reasonably be considered a term or condition of employment, because employers have a substantial and legitimate interest in maintaining the privacy of certain business information.¹⁵

Here, although Items 6 and 7 broadly restrict the use of non-public information, they contain no references to employees or anything that employees would reasonably consider to be a term or condition of employment. Moreover, both rules limit the non-public information employees are prohibited from using to that which is provided to employees “in the course of [their] duties with the transition.” For these reasons, employees would not reasonably construe the “non-public information” prohibition to encompass Section 7-related information concerning employees, wages, or other terms and conditions of employment.¹⁶ Furthermore, although Item 7’s language concerning “private gain for myself or any other party” could be interpreted to refer to employee attempts to secure more favorable wages or working conditions, employees

¹⁴ See *Schwan’s Home Service*, 364 NLRB No. 20, slip op. at 2-3 (June 10, 2016) (rule prohibiting disclosing information concerning customers, vendors or “employees” unlawful); *Flamingo-Hilton Laughlin*, 330 NLRB 287, 288 n.3, 291-92 (1999) (rule prohibiting revealing confidential information about customers, “fellow employees,” or the business unlawful).

¹⁵ See *Lafayette Park Hotel*, 326 NLRB 824 at 826 (rule prohibiting divulging “Hotel-private information” lawful); *Super K-Mart*, 330 NLRB 263, 263-64 (1999) (rule prohibiting disclosing of “company business and documents” lawful).

¹⁶ Cf. *Verizon Wireless*, 365 NLRB No. 38, slip op. at 2-3 (Feb. 24, 2017) (finding rule unlawful, in part, because it prohibited employees from “disclosing nonpublic company information,” which, in the context of that particular rule and in the absence of any limiting language, implicated terms and conditions of employment).

would more reasonably construe that language to refer to conduct unrelated to Section 7 activity, i.e., using confidential information for personal enrichment. This construction of the rule is further supported when viewed in context, as the other items in the Code of Ethical Conduct address legal and ethical issues that are unconnected to Section 7 activity.¹⁷

We also conclude that Items 8 and 9 of the Code of Ethical Conduct are facially lawful. The Charging Party asserts that these rules would prevent an employee from leaving the Trump Transition to work for a union, for instance by salting.¹⁸ No reasonable employee would interpret these rules to prohibit salting, as they do not even implicitly reference organizing an employer on behalf of a labor union. These rules do place some limits on employees' rights to "communicate with or appear" before a federal agency, and, in other contexts, restrictions on employees' access to federal agencies have been found unlawful.¹⁹ However, the rules clearly only prohibit a *paid* communication, on behalf of others, on a matter that would present a conflict of interest given the employee's work while employed by the Trump Transition. Viewed in this context, including the types of restrictions contained elsewhere in the Code of Ethical Conduct, employees would not reasonably construe Items 8 and 9 to restrict their ability to vindicate their protected workplace rights, or to generally assist other employees, before federal agencies.

¹⁷ See, e.g., *NPC International, Inc., d/b/a Pizza Hut*, Case 15-CA-105178, Advice Memorandum dated Dec. 3, 2013, at 11 (finding provision prohibiting disclosure of all "information acquired in the course of one's work" to be lawful, because it did not reference "employees" or similar phrases that would chill employee discussion of wages or other terms or conditions of employment, and it was situated among other rules and language that restricted use of proprietary business information and did not touch upon Section 7 activity).

¹⁸ "Salting" involves a union paying an individual to work at a non-union employer with the goal of spurring union organizing efforts there. See, e.g., *NLRB v. Town & Country Elec.*, 516 U.S. 85, 96-97 (1995).

¹⁹ See *U-Haul Co. of California*, 347 NLRB 375, 377-78 (2006) (provision requiring employees to arbitrate all disputes, including any "legal . . . claims and causes of action recognized by . . . federal law or regulations," interfered with employees' right to access Board processes in violation of Section 8(a)(1)), *enforced*, 255 F. App'x 527 (D.C. Cir. 2007); see also *NLRB v. Scrivener*, 405 U.S. 117, 121 (1972) (Congress sought for employees to be "completely free" to file charges with the Board, participate in a Board investigation, or to testify at a Board proceeding).

In accordance with the foregoing, the charges should be dismissed, absent withdrawal.

/s/
J.L.S.

H:ADV.02-CA-183801.Trump. (b) (6), (b)