

From: (b) (6), (b) (7)(C)
To: [Walsh, Jack](#); [Sullivan, Suzanne](#); [SM-Region 2, Manhattan](#); [Ritter, Kristen](#); [Brooks, Eric](#)
Cc: [Bock, Richard](#); [Szapiro, Miriam](#); [Dodds, Amy L.](#); [Shorter, LaDonna](#); [Weth, Patricia](#)
Subject: DeNovo Legal LLC d/b/a Epiq Document Review, 02-CA-182019
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The Region submitted this case for advice as to whether a confidentiality rule and a conflict-of-interest rule are unlawful under *Boeing Co.*, 365 NLRB No. 154 (Dec. 14, 2017). We conclude that both rules are lawful in light of recent Board precedent.

In *Argos USA LLC d/b/a Argos Ready Mix, LLC*, 369 NLRB No. 26 (Feb. 5, 2020), the Board found that an “[e]mployee confidential information” policy prohibiting employees from disclosing confidential information such as “information regarding Argos’ customers, . . . production methods . . . , any non-published prices, discounts, commissions, costs, supplier information, *earnings*, contracts, *employee information*, . . . business plans, . . . training programs, computer software or programs” was a lawful Category 1(a) rule that merely encompassed proprietary business information given that it referenced the *company’s* information and given that the terms in dispute were surrounded by categories of obviously proprietary information. *Id.*, slip op. at 2-3 (emphasis added).

In *Interstate Management Company, LLC*, 369 NLRB No. 84 (May 20, 2020), the Board likewise found that an “Information Protection Policy” prohibiting disclosure of confidential information including “personal information . . . such as [a customer’s or employee’s] name, address, telephone number, e-mail address, bank and credit card information, social security number, etc.” was lawful because it was limited to sensitive information stored in company records. Given the policy’s references to “our Company’s” “information” and “assets,” the Board surmised that reasonable employees would understand that the policy does not restrict sharing generally known contact information that they learn through their personal and working relationships with their coworkers. *Id.*, slip op. at 4. Furthermore, the Board reasoned that even if there was some risk that employees would misunderstand the policy, any potential inference with Section 7 rights was slight and outweighed by the employer’s legitimate business justifications—which would have been reasonably obvious to employees—namely, protecting personal employee information (e.g. I-9 forms, bank information) and protecting itself from liability due to a data breach. *Id.*

Here, we conclude that reasonable employees would understand that the confidentiality provisions contained in section 4 of the “Employment, Confidential Information and Arbitration Agreement and Release” restrict disclosure of the Employer’s proprietary business information rather than employee wages and contact information. The section heading is entitled “Confidential [Employer] Information,” suggesting, as in *Argos*, that the policy covers proprietary or internal company information. Although it defines confidential information broadly to cover “information of [the Employer], its personnel, suppliers, distributors, [and] customers,” there is no indication that this language is targeting personnel information useful in Section 7 activities rather than staffing information or other private employee information, such as I-9s or bank information. In this regard, we do not construe the reference to “personally identifiable [sic] *financial* . . . information” or “business information (including . . . strategic and staffing plans and practices, training, . . . hiring . . . costs, *rate* and pricing structures . . .)” as covering employee wage rates given that the overall thrust of section 4 focuses on the protection of proprietary interests, such as strategic business plans, trade

secrets, and intellectual property. See *Argos*, 369 NLRB No. 26, slip op. at 2-3 (construing “earnings” as referring to things like revenue and profits, not wages, and “employee information” as referring to things like employer staffing information, not wages or contact information, in light of surrounding context). Even if employees would misread section 4 as prohibiting disclosure of employees’ wages or contact information rather than the Employer’s confidential information, as in *Interstate Management*, any potential interference is slight and would be outweighed by the Employer’s legitimate interest in maintaining confidentiality as to items such as staffing plans and truly private employee information. Although the proffered justifications focus almost exclusively on the need to protect client or customer information, the Employer also contends that the rule is a “broad ban on the disclosure of proprietary and sensitive information that does not specifically pertain to wages or terms and conditions of employment.”¹ Since its interest in protecting genuinely confidential or sensitive personnel information is patently obvious and sufficiently encompassed by its articulated interests, and reasonable employees would be unlikely to interpret the policy as infringing on their Section 7 rights, we conclude that dismissal, absent withdrawal, is warranted. (It follows that the prohibition on revealing confidential information contained in the Conflict of Interest Guidelines appended to this document, which references the definition of confidential information in section 4, is likewise lawful.)

Furthermore, we conclude that the prohibition on “[e]ngaging in any conduct which is not in the best interests of [the Employer]” contained in the Conflict of Interest Guidelines is lawful given the surrounding context. The preamble discusses avoiding activities that are in conflict with ethical principles and against the Employer’s interests. What follows is a list of “potentially compromising situations,” including, for example, acceptance of gifts or payments that constitute an undue influence, favoritism or retaliation based on a family or personal relationship, harassment, holding an outside directorship, improper use of proprietary information or trade secrets, disclosure of certain information to competitors, and so forth. The provision at issue here is the final example in this list. Given that the examples preceding it reflect legitimate conflict-of-interest concerns that do not touch upon Section 7 rights, reasonable employees would not read this catchall language at the end to target Section 7 activity. See *Argos*, 369 NLRB No. 26, slip op. at 3; *Schwan’s Home Service*, 364 NLRB No. 20, slip op. at 17-18 (June 10, 2016) (Miscimarra, dissenting, arguing that a catchall prohibition on “conduct on or off duty which is detrimental to the best interests of the company”—surrounded by examples such as supervising a family member, fraud, and maintaining a financial interest in a competitor—was a commonsense guideline to avoid conflicts of interest that neither had the aim nor the effect of dampening Section 7 activity). Since this rule is a lawful Category 1(a) rule, the Region should dismiss this allegation, absent withdrawal.

This email closes this case in Advice. Please contact us with any questions or concerns.

¹ We note that the Board disfavors consideration of whether a challenged rule could be more narrowly tailored because it does not further the *Boeing* analysis. See *LA Specialty Produce*, 368 NLRB No. 93, slip op. at 6 & n.17 (Oct. 10, 2019) (noting that “the question ‘Can it be tailored more narrowly?’ will almost always be answered ‘Yes’” and prevents the Board from providing clear guidance on work rules). Furthermore, we do not interpret the existence of section 6, which covers confidential information of “third parties,” as indicating that section 4’s focus is on employee information rather than confidential client information. Section 4 explicitly covers “information of

[the Employer], its personnel, suppliers, distributors, *customers*, agents, representatives, independent contractors, or other business relations” and many of the protected categories in section 4 have nothing to do with personnel.

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