No. 20-60472

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

LOWES HOME CENTERS, L.L.C.,

[Petitioner Cross-Respondent]

v.

NATIONAL LABOR RELATIONS BOARD,

[Respondent Cross-Petitioner]

Petition for Review of Decision and Order of the
National Labor Relations Board, Case No. 19-CA-191665

RECORD EXCERPTS OF PETITIONER

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November 13, 2020

Respectfully submitted,

/s/ Peter J. Rusthoven

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CERTIFICATE OF SERVICE

This is to certify that on November 13, 2020 the foregoing Record Excerpts of Petitioner has been served via the Court's ECF filing system in compliance with Rule 25(b) and (c) of the Rules of Appellate Procedure on all registered counsel of record unless otherwise noted as follows:

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Tab 1

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Lowe's Home Centers, LLC *and* Amber Frare. Case 19–CA–191665

December 12, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN AND KAPLAN

On April 17, 2018, Administrative Law Judge Amita Baman Tracy issued the attached decision. The Respondent Lowe's Home Centers, LLC, filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

ORDER

The National Labor Relations Board orders that the Respondent, Lowe's Home Centers, LLC, Mill Creek, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a Code of Business Conduct and Ethics that requires employees to keep salary information confidential.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) To the extent it has not already done so, rescind the section of the Code of Business Conduct and Ethics that requires employees to keep salary information confidential, or revise it to limit that requirement to proprietary salary information maintained in its confidential records.

(b) Furnish employees with an insert for the current Code of Business Conduct and Ethics that (1) advises that the unlawful provision has been rescinded, or (2) provides a lawfully worded provision on adhesive backing that will cover the unlawful provision; or publish and distribute to employees a revised Code of Business Conduct and Ethics that (1) does not contain the unlawful provision, or (2) provides a lawfully worded provision.

(c) Within 14 days after service by the Region, post at its facilities nationwide copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative,

[1] In adopting the judge's finding that the Respondent violated Sec. 8(a)(1) by requiring employees to maintain the confidentiality of "salary information," Chairman Ring and Member Kaplan note that, in circumstances not present in this case, employers have a legitimate interest in restricting employees' unauthorized access to, and dissemination of, information stored in their employer's confidential records, including salary information contained in such records. See, e.g., *Asheville School, Inc.*, 347 NLRB 877, 877 fn. 2 (2006) (finding lawful discharge of payroll accountant who disclosed wage and salary information contained in confidential records within her special custody); *International Business Machine Corp.*, 265 NLRB 638 (1982) (finding lawful discharge of employee for disclosing wage data employer had compiled and classified as confidential). In this case, however, the Respondent's limitation of covered proprietary information to information "entrusted" to employees was insufficient to convey to a reasonable employee that the policy's restriction on disclosure of salary information did not interfere with employees' exercise of their core Sec. 7 right to engage in protected discussion or disclosure of their own salaries, particularly given that the policy was directed to all employees, not just those given access to the Respondent's confidential records. Indeed, for most employees without special access to confidential records, the only salary information they could reasonably view as "entrusted" to them under this policy is their own salary information. Accordingly, they agree with the judge's determination that the rules at issue restricting the disclosure of salary information fall within the scope of *Boeing* Category 3. See *Boeing Co.*, 365 NLRB No. 154, slip op. at 4 (2017). They do not agree, however, with the judge's invocation of the principle that any ambiguity in a workplace rule is construed against the drafter, a principle the Board in *Boeing* clearly rejected. See id., slip op. at 9–10 fn. 43, 13 fn. 68.

Member McFerran adheres to her dissent in *Boeing Co.*, above, slip op. at 29–44, but she agrees that the Respondent's confidentiality policy here is unlawful. Nothing in the policy or its surrounding context would reasonably convey to employees that discussion of their own salary and that of their coworkers is permitted or that the policy is addressed only to maintaining the integrity and confidentiality of the Respondent's business records. See *Mediaone of Greater Florida, Inc.*, 340 NLRB 277, 279 (2003) ("[D]iscussion of wages is part of organizational activity and employers may not prohibit employees from discussing their own wages or attempting to determine what other employees are paid.") (citing *International Business Machines Corp.*, above); cf. *Macy's, Inc.*, 365 NLRB No. 116, slip op. at 1 (2017) (an employer may lawfully prohibit disclosure of certain information obtained from its confidential records). In *Boeing*'s terms, then, she agrees that the policy's plain interference with employees' exercise of protected rights cannot be justified, and thus the policy belongs in *Boeing* Category 3: always unlawful.

[2] We shall modify the judge's recommended Order to conform to the Board's standard remedial language, and we shall substitute a new notice to conform to the Order as modified.

In its brief, the Respondent maintains that it has already complied with some of the terms of the judge's recommended Order by rescinding the policy at issue after the judge issued her decision. The legal effect of any efforts by the Respondent to remedy the violation found by the judge may be addressed in compliance. Cf. *Postal Workers Local 735 (Postal Service)*, 342 NLRB 545, 545 fn. 5 (2004)

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 1, 2016.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 19 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 12, 2019

John F. Ring, Chairman

Lauren McFerran, Member

Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

federal law gives you the right to

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a Code of Business Conduct and Ethics that requires you to keep salary information confidential.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, to the extent we have not already done so, rescind the section of the Code of Business Conduct and Ethics that requires employees to keep salary information confidential, or WE WILL revise that section to limit the requirement to proprietary salary information maintained in our confidential records.

WE WILL furnish you with an insert for the current Code of Business conduct and Ethics that (1) advises that the unlawful provision has been rescinded, or (2) provides a lawfully worded provision on adhesive backing that will cover the unlawful provision; or WE WILL publish and distribute to you a revised Code of Business Conduct and Ethics that (1) does not contain the unlawful provision, or (2) provides a lawfully worded provision.

LOWE'S HOME CENTERS, LLC

The Board's decision can be found at _____ or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Mary Ana Hermosillo, Esq., for the General Counsel.
Robert T. Quackenboss, Esq. and *Cullan Jones, Esq.,* for the Respondent.

DECISION

STATEMENT OF THE CASE

AMITA BAMAN TRACY, Administrative Law Judge. Lowe's Home Centers, LLC (Respondent) maintains nationwide two versions of a confidentiality of information (Confidential Information) rule in its original and revised Code of Business Conduct and Ethics, to which its employees are bound. These Confidential Information rules prohibit employees from discussing salary information, and employees face a variety of disciplinary actions if they violate these rules. As discussed below, both versions of

Respondent's Confidential Information rule violate Section 8(a)(1) of the National Labor Relations Act (the Act).

In detail, the General Counsel alleges, in the April 27, 2017 complaint, and September 20, 2017 amended complaint, based on a charge and amended charges filed by Amber Frare (Charging Party) on January 23 and 31, and February 1, 2017, that Respondent violated Section 8(a)(1) of the Act by unlawfully maintaining two versions of a Confidential Information rule in its original and revised Code of Business Conduct and Ethics.[1] Respondent filed a timely answer and amended answer.

The parties originally filed a joint motion and stipulation of facts on July 10, 2017 (Original Stipulation), but after orders granting requests for extensions of time, on September 18, 2017, the parties jointly requested to reopen the record which we granted on September 20, 2017. On October 27, 2017, the parties filed a revised joint motion and amended stipulation of facts (Revised Stipulation), pursuant to Section 102.35(a)(9) of the National Labor Relations Board's (the Board) Rules and Regulations, requesting that this case be decided without a hearing and based on the stipulated record. On October 30, 2017, I granted the revised joint motion and approved the amended stipulation of facts via written order. Thereafter, the parties filed briefs on December 4, 2017.

On December 15, 2017, due to the Board's decision in *Boeing Co.*, 365 NLRB No. 154 (2017) (applying a new balancing test to matters involving alleged unlawful employers' rules retroactively to all pending cases no matter the stage of litigation) overruling portions of the standard set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), I ordered the parties to state their positions as to whether this matter should be reopened for further evidence and/or supplemental briefing. After an extension of time to respond, the parties filed their responses on February 6, 2018, declining to reopen the record. I provided the parties an opportunity to file supplemental briefs, which they did.

On the entire record, including the amended stipulated facts and exhibits,[2] and after considering the briefs and supplemental briefs filed by the General Counsel and Respondent,[3] I make the following

Findings of Fact and Analysis

I. Jurisdiction

Respondent, a State of North Carolina limited liability company with offices and places of business throughout the United States, including Mill Creek, Washington (Mill Creek facility), is engaged in the retail sale of home improvement goods, where it annually derived gross revenues in excess of $500,000 and purchased and received at its Mill Creek facility goods valued in excess of $50,000 directly from points outside of the State of Washington. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Based on the above, I find that these allegations affect commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

II. The Confidential Information Rule

At all relevant times, Respondent maintained nationwide its Code of Business Conduct and Ethics (Original Code) with the following "Confidential Information" rule:

> This Code of Business Conduct and Ethics ("Code") applies to every Lowe's employee (hereinafter referred to as "Employees"). [. . .] All Employees should read, review and understand these standards because, as an Employee, you must conduct yourself in accordance with this Code and help ensure that others do as well. If objections, conflicts or possible conflicts, or disagreements with this Code arise, or if you become aware of violations or potential violations of this Code, it is important that you resolve them promptly, following the guidance provided in this Code. Employees are encouraged to talk to supervisors, managers or other appropriate personnel about observed illegal or unethical behavior and, when in doubt, about the best course of action in a particular situation.
>
> [. . .]
>
> 5. Confidential Information:
> Employees must maintain the confidentiality of information entrusted to them by Lowe's or its suppliers or customers, except when disclosure is authorized by Lowe's General Counsel and Chief Compliance Officer or disclosure is required by law, applicable governmental regulations or legal proceedings. Whenever feasible, Employees should consult with the company's General Counsel and Chief Compliance Officer before disclosing confidential information if they believe they have a legal obligation to do so.
>
> Confidential information includes all non-public information that might be of use to competitors of the company, or harmful to Lowe's, its suppliers or customers, if disclosed. It includes all proprietary information relating to Lowe's business such as customer, budget, financial, credit, marketing, pricing, supply cost, personnel, medical records and salary information.

(Exh. G, emphasis in original.)

Also, since at least May 31, 2013, Respondent has maintained the following "Confidential Information" rule in its Code of Business Conduct and Ethics policy (Revised Code):

> Employees must maintain the confidentiality of information entrusted to them by Lowe's, its suppliers, its customers, or its competitors, except when disclosure is authorized by the Chief Compliance Officer or required by law. Employees must consult with the Chief Compliance Officer before disclosing any information that could be considered confidential.
>
> Confidential information includes, but is not limited to:
>
> - Material, non-public information; and

[1] On July 5, 2017, the Regional Director of Region 19 of the Board issued an order severing complaint allegations.

[2] Other abbreviations used int his decision are as follows: Other abbreviations used in this decision are as follows: "Ex." for exhibit; "GC Br." for the General Counsel's brief; "GC Supp. Br." for the General Counsel's supplemental brief; "R. Br." for Respondent's brief; and "R. Supp. Br." for Respondent's supplemental brief.

[3] The Charging Party did not file a separate posthearing or supplemental brief.

- Proprietary information relating to Lowe's business such as customer, budget, financial, credit, marketing, pricing, supply cost, personnel, medical records or salary information, and future plans and strategy.

(Exh. 13.) The forward and introduction of Respondent's Revised Code indicates that the policy applies to all employees as well as nonemployees. Employees must read, review and understand the Code, and failure to abide by the terms may result in a variety of disciplinary actions.

The Original and Revised Code, which both appear to be in effect, apply to virtually anyone who performs business on behalf of Respondent including employees. The Original and Revised Codes contain rules including social media, employee relations and confidential information.

Any violations of the Confidential Information rule in the Original and Revised Code could result in a variety of disciplinary actions from a warning to termination (Exh. H, 13).

III. STIPULATED ISSUE AND CONTENTIONS OF THE PARTIES

In the Revised Stipulation, the parties agreed that the issue to be resolved in this matter is whether Respondent's maintenance of both versions of Confidential Information provision in its Original and Revised Code violates Section 8(a)(1) of the Act because it interferes with employees' exercise of their Section 7 rights to discuss salary information and subjects them to discipline for any such discussion.[4]

The General Counsel's position is that Respondent's maintenance of both versions of the Confidential Information rule in its Original and Revised Code interferes with, restrains, and coerces employees in the exercise of their rights under Section 7 of the Act, in violation of Section 8(a)(1) of the Act. Specifically, both versions of the rule prohibit discussion of salary information, and any violations of such would be subject to discipline. Under *Boeing*, the counsel for the General Counsel argues that prohibition on discussion of salary information has been deemed unlawful by the Board as a category 3 rule and thus, no balancing test of Respondent's business justification and employees' Section 7 rights needs to occur (GC Supp. Br. at 3–4). In the alternative, the General Counsel argues that Respondent's purported business justification does not outweigh the employees' Section 7 rights to discuss their wages (GC Supp. Br. at 4). Moreover, as this is a nationwide policy, the General Counsel requests a nationwide remedy. The Charging Party concurs with the General Counsel's position.

Respondents' position is that both versions of the Confidential Information rule do not prohibit or discourage employees from discussing terms and conditions of their employment including salary information. Respondent asserts that the Original and Revised Code applies to employees and non-employees, and is not found in its personnel policies. Respondent argues that the Confidential Information provision relates to situations in which a person who is entrusted with non-public information relating to Respondent's business shares such information; Respondent argues that the Confidential Information provision does not prohibit employees from discussing salary information with one another. Moreover, under the balancing test set forth in *Boeing,* Respondent claims that its business justifications for the Confidential Information rule outweighs the employees' section 7 rights (R. Supp. Br. at 3–8). Finally, Respondent argues that since the categories set forth by the Board in *Boeing* "are not part of the test itself," Respondent would not address these categories (R. Supp. Br. at 3, fn. 4, citing *Boeing*, supra, slip op. at 5).

IV. ANALYSIS

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 [of the Act]." Section 7 provides that "employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities." Specifically, Section 7 protects employees' right to discuss, debate, and communicate with each other regarding workplace terms and conditions of employment.

Under Board law, a work rule is unlawful if "the rule *explicitly* restricts activities protected by Section 7." *Lutheran Heritage*, supra at 646 (emphasis in original). Moreover, if a work rule does not explicitly restrict protected activities, it nonetheless may violate Section 8(a)(1) if "(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." Id. at 647. But in *Boeing Co.*, supra, the Board overruled the "reasonably construe" standard in prong 1 of *Lutheran Heritage* and replaced it with a new standard. The Board stated, "When evaluating a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, *and* (ii) legitimate justifications associated with the rule." Id., slip op. at 3 (emphasis in original). The Board continued, "*the Board* will conduct this evaluation, consistent with the Board's 'duty to strike the *proper balance* between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy', focusing on the perspective of employees, which is consistent with Section 8(a)(1)." Id. (Emphasis in original, footnotes omitted).

Furthermore, the Board, as a result of this balancing, created three categories of employment policies, rules and handbook provisions:

- *Category 1* will include rules that the Board designates as lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii)

[4] Counsel for the General Counsel, in her brief, alleges that the prohibition on disclosure of "personnel information" also violates Sec. 8(a)(1) of the Act (GC Br. at 6, fn. 2). As the parties did not include "personnel information" as a stipulated issue, I decline to address whether both versions of the Confidential Information rules are unlawful for their inclusion of "personnel information" and limit my analysis only to the inclusion of salary information in the rules.

the potential adverse impact on protected rights is outweighed by justifications associated with the rule. Examples of Category 1 rules are the no-camera requirement in this case, the "harmonious interactions and relationships" rule that was at issue in *William Beaumont Hospital*, and other rules requiring employees to abide basic standards of civility.

- *Category 2* will include rules that warrant individual scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.
- *Category 3* will include rules that the Board will designate as unlawful to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule. An example of a Category 3 rule would be a rule that prohibits employees from discussing wages or benefits with one another.

Id., slip op. at 3–4, 15 (citing *William Beaumont Hospital*, 363 NLRB No. 162 (2016)). These categories are not part of the balancing test but rather categorical assignment of a rule by the Board after the decision is made. Id.

Respondent's Confidential Information provision in both the Original and Revised Code prohibits employees from unauthorized disclosure of confidential information, including salary information, without specificity as to whom disclosure is prohibited. The provision, in the Original Code, notes that confidential information is defined as all nonpublic information that could be used by Respondent's competitors or that would be "harmful to Lowe's" if disclosed. In the Revised Code, confidential information includes material, nonpublic information. Employees may be issued a final warning or terminated as a consequence of violating the Original Code, and face a myriad of disciplinary actions as a consequence of violating the Revised Code.

Employee discussions regarding wages, the core of Section 7 rights, are "the grist on which concerted activity feeds." *Parexel International, LLC,* 356 NLRB 516, 518 (2011), citing *Aroostook County Regional Ophthalmology Center,* 317 NLRB 218, 220 (1995), enfd. in part 81 F.3d 209 (D.C. Cir. 1996). As such, the Board has consistently held that rules or provisions which prohibit employees from discussing wages are unlawful. See *Waco, Inc.*, 273 NLRB 746, 748 (1984) (absent a legitimate and substantial business justification, rule prohibiting employees from discussing their wages with one another is unlawful); *Jeannette Corporation*, 217 NLRB 653, 656 (1975) (unqualified rule prohibiting employees from discussing wages with other employees is unlawful regardless of whether the rule is deemed a company policy or not); cf. *Asheville School, Inc.*, 347 NLRB 877, 881 (2006) (employee discharged for divulging confidential wage information she learned as a result of her job function not protected activity); *Super K-Mart*, 330 NLRB 263 (1999) (employer rule barring disclosure of its confidential company business and documents lawful as the rule did not bar employees from discussing wages).

Also, according to the Board's holding in *Boeing*, a rule prohibiting wage discussion, defined as a Category 3 rule, is unlawful as its potential interference with the exercise of protected rights outweighs any possible justification. In this instance, both versions of the Confidential Information provision may be read to preclude employees from discussing their salary information with one another, as well as nonemployees such as union representatives and Board agents, which the Board has found to infringe on employees' Section 7 rights to discuss terms and conditions of their employment with others. See, e.g., *Triple Play Sports Bar & Grille*, 361 NLRB No. 31, slip op. at 7 (2014); *Bigg's Foods*, 347 NLRB 425, 425 fn. 4 (2006); *Flamingo Hilton-Laughlin*, 330 NLRB 287, 292 (1999) (finding unlawful handbook rule which prohibited disclosure of proprietary information to be sufficiently vague as to cover the discussion of wages). Respondent argues that the term "entrusted" indicates that the information covered by the rule would not cover wages, and that the focus of the Confidential Information rules are to avoid unfair competition and sharing of proprietary information. However, the Confidential Information rule in the Original Code is not limited to only sharing information with competitors, but includes overbroad, ambiguous language of sharing confidential information "harmful to Lowe's." Any ambiguities in a rule are construed against the drafter, and here, "focusing on the perspective of employees," the Confidential Information rule could not be read as Respondent offers. *Boeing*, supra, slip op. at 3; *T-Mobile USA, Inc.*, 363 NLRB No. 171, slip op. at 13 (2016); *Lily Transportation Corp.*, 362 NLRB 406 (2015); *Flex Frac Logistics, LLC*, 358 NLRB 1131, 1132 (2012), remanded on other grounds, 360 NLRB 1004 (2014), enfd. 746 F.3d 205 (5th Cir. 2014). To the contrary, the Confidential Information rule precludes discussion of salary information. In addition, employees face discipline if they violate the Confidential Information rule in the Original and Revised Code. Therefore, the Confidential Information rule is unlawful.[5]

Respondent claims that since the *Boeing* Board's categories are not part of the balancing test, the categories have no applicability in this instance. I disagree. I read the Board's *Boeing* holding to designate any rule prohibiting employees from discussing salary information as per se unlawful thus bypassing the need to conduct a balancing test. As the Board explained the "three categories will represent a classification of results from the Board's application of the new test [. . .] The Board will determine , in future cases, what types of additional rules fall into which category. Although the legality of some rules will turn on the particular facts in a given case, we believe adherence to the analysis we announce here will ultimately provide far greater clarity and certainty to employees, employers and unions regarding whether and to what extent different types of rules may lawfully be maintained." *Boeing*, supra, slip op. at 15. In Category 3, the *Boeing* Board exemplified rules prohibiting discussion of wages with one another as a type of rule which will be generally

[5] Respondent claims that the General Counsel failed to prove that the Confidential Information rule impacted any employees' Section 7 rights. However, the complaint does not allege that the Confidential Information rule of the Original and Revised Codes was promulgated in response to protected activity or applied to restrict protected activity under prongs two and three of *Lutheran Heritage*.

designated as unlawful. Id., slip op. at 4. By specifically prohibiting employees from disclosing of salary information, Respondent's confidentiality of information provision is unlawful and violates Section 8(a)(1) of the Act.

Even when conducting the *Boeing* balancing test, the adverse impact on employees' Section 7 rights outweighs Respondent's asserted business justifications. Most importantly for this analysis, Respondent failed to present any legitimate business justifications for precluding disclosure of salary information in its Confidential Information rule. Despite permitting the parties to re-open the record, Respondent declined and failed to present more than bare assertions for its alleged business justifications. Respondent claims that its Confidential Information rule is lawful "in preventing employees from engaging in insider trading," "to avoid unethical business conduct and unfair competition by members of the Lowe's community who have been entrusted with competitively sensitive information" and "to comply with antitrust laws" (R. Br. at 16; R. Supp. Br. at 7). Respondent cites to numerous cases where the Board has found a rule lawful due to an employer's well-established business justifications.[6] In each of these cited cases though, the employer presented evidence via witness testimony and documentary evidence to support its claimed business justification when the Board determined that the employer's need for the specific rule would not restrict employees' Section 7 activity.[7] For example, in *International Business Machines Corp.*, 265 NLRB 638 (1982), the Board determined that an employer's policy to treat as confidential wage data it compiled for internal use as lawful where the policy did not bar employees from compiling wage information on their own. Moreover, even in *IBM*, the employer presented evidence as to how its "closed" wage system was used to recruit and retain employees and prevent competitors from stealing employees. Id. Even in *Boeing*, the record is replete with evidence as to why the employer maintained a no-camera rule. Here, Respondent failed to establish any legitimate business justification for its Confidential Information rule to outweigh employees' Section 7 rights. Thus, even applying the *Boeing* balancing test, Respondent's Confidential Information rule, both versions, which prohibit discussion of salary information is unlawful under Section 8(a)(1) of the Act.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent violated Section 8(a)(1) of the Act by maintaining the following rules in the Original and Revised Codes:

> i. In the Code of Business Conduct and Ethics: **Confidential Information:**
>
> Employees must maintain the confidentiality of information entrusted to them by Lowe's or its suppliers or customers, except when disclosure is authorized by Lowe's General Counsel and Chief Compliance Officer or disclosure is required by law, applicable governmental regulations or legal proceedings. Whenever feasible, Employees should consult with the company's General Counsel and Chief Compliance Officer before disclosing confidential information if they believe they have a legal obligation to do so.
>
> Confidential information includes all non-public information that might be of use to competitors of the company, or harmful to Lowe's, its suppliers or customers, if disclosed. It includes all proprietary information relating to Lowe's business such as customer, budget, financial, credit, marketing, pricing, supply cost, personnel, medical records and salary information.
>
> ii. In the Code of Business Conduct and Ethics, dated May 31, 2013:
>
> Employees must maintain the confidentiality of information entrusted to them by Lowe's, its suppliers, its customers, or its competitors, except when disclosure is authorized by the Chief Compliance Officer or required by law. Employees must consult with the Chief Compliance Officer before disclosing any information that could be considered confidential.
>
> Confidential information includes, but is not limited to:
>
> - Material, non-public information; and
> - Proprietary information relating to Lowe's business such as customer, budget, financial, credit, marketing, pricing, supply cost, personnel, medical records or salary information, and future plans and strategy.

3. The above unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Moreover, as the nationwide Confidential Information rule in the Original and Revised Codes have been determined to be unlawful and violate Section 8(a)(1), a nationwide posting by Respondent is appropriate as the record shows that the unlawful rules and policies are maintained in effect at all of Respondent's facilities within the United States. See *Mastec Advanced Technologies*, 357 NLRB 103 (2011), enfd. sub nom. *DirectTV v. NLRB*, 837 F.3d 25 (2016); *Guardsmark, LLC*, 344 NLRB 809, 812 (2005).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

Respondent, Lowe's Home Centers, LLC, North Carolina and Mill Creek, Washington, at all of its facilities nationwide, its officers, agents, successors, and assigns, shall

[6] Respondent also cites to several administrative law judge decisions which are non-precedential.

[7] I.e, *Flagstaff Medical Center, Inc.*, 357 NLRB 659, 663 (2011) (employer rule against photographing hospital property does not expressly restrict Sec. 7 activity, employees would not reasonably interpret the rule as restricting Sec. 7 activity, and privacy interests of hospital patients are "weighty").

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from

(a) Maintaining the following unlawful rules:

In the Code of Business Conduct and Ethics: **Confidential Information:**

Employees must maintain the confidentiality of information entrusted to them by Lowe's or its suppliers or customers, except when disclosure is authorized by Lowe's General Counsel and Chief Compliance Officer or disclosure is required by law, applicable governmental regulations or legal proceedings. Whenever feasible, Employees should consult with the company's General Counsel and Chief Compliance Officer before disclosing confidential information if they believe they have a legal obligation to do so.

Confidential information includes all non-public information that might be of use to competitors of the company, or harmful to Lowe's, its suppliers or customers, if disclosed. It includes all proprietary information relating to Lowe's business such as customer, budget, financial, credit, marketing, pricing, supply cost, personnel, medical records and salary information.

ii. In the Code of Business Conduct and Ethics, dated May 31, 2013:

Employees must maintain the confidentiality of information entrusted to them by Lowe's, its suppliers, its customers, or its competitors, except when disclosure is authorized by the Chief Compliance Officer or required by law. Employees must consult with the Chief Compliance Officer before disclosing any information that could be considered confidential.

Confidential information includes, but is not limited to:

- Material, non-public information; and
- Proprietary information relating to Lowe's business such as customer, budget, financial, credit, marketing, pricing, supply cost, personnel, medical records or salary information, and future plans and strategy.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the unlawful rules as set forth above.

(b) Furnish employees with inserts for the Code of Business Conduct and Ethics original version and revised version dated May 31, 2013 that (1) advise that the unlawful rules have been rescinded, or (2) provide lawfully worded rules.

(c) Within 14 days after service by the Region, post at its facilities nationwide, copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 1, 2016.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., April 17, 2018.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Altogether with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain the following rules in the original and revised, dated May 13, 2003, version of the Code of Business Conduct and Ethics which could be understood to prohibit you from engaging in activities protected under Section 7 of the Act:

In the Code of Business Conduct and Ethics: **Confidential Information:**

Employees must maintain the confidentiality of information entrusted to them by Lowe's or its suppliers or customers, except when disclosure is authorized by Lowe's General Counsel and Chief Compliance Officer or disclosure is required by law, applicable governmental regulations or legal proceedings. Whenever feasible, Employees should consult with the company's General Counsel and Chief Compliance Officer before disclosing confidential information if they believe they have a legal obligation to do so.

Confidential information includes all non-public information

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

that might be of use to competitors of the company, or harmful to Lowe's, its suppliers or customers, if disclosed. It includes all proprietary information relating to Lowe's business such as customer, budget, financial, credit, marketing, pricing, supply cost, personnel, medical records and salary information.

In the Code of Business Conduct and Ethics, dated May 31, 2013:

Employees must maintain the confidentiality of information entrusted to them by Lowe's, its suppliers, its customers, or its competitors, except when disclosure is authorized by the Chief Compliance Officer or required by law. Employees must consult with the Chief Compliance Officer before disclosing any information that could be considered confidential.

Confidential information includes, but is not limited to:

- Material, non-public information; and
- Proprietary information relating to Lowe's business such as customer, budget, financial, credit, marketing, pricing, supply cost, personnel, medical records or salary information, and future plans and strategy.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.
WE WILL rescind/revise the unlawful rules listed above.
WE WILL furnish you with inserts for the original and revised, dated May 13, 2003, version of the Code of Business Conduct and Ethics that (1) advise that the unlawful rules have been rescinded, or (2) provide lawfully worded rules.

LOWES HOME CENTERS, LLC

The Administrative Law Judge's decision can be found at _____19-CA-191665 or by using the QR code be-low. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.