The Region submitted this case as a possible vehicle to seek to overturn Boeing Co., 365 NLRB No. 154 (2017), as clarified by LA Specialty Produce Co., 368 NLRB No. 93 (2019), and return to the Lutheran Heritage standard, for employer workplace rules. At issue here are an allegedly overly broad non-disclosure provision and a non-disparagement provision, both of which are contained in an employment agreement. We conclude that these provisions in the agreement are lawful under extant Board law and that this case is not a good vehicle for seeking to overturn Boeing and its progeny. Accordingly, the Region should dismiss the charge, absent withdrawal.

The Employer is a non-profit organization providing disaster relief and related crisis-response services for underserved communities. It requires all employees, as a condition of employment, to enter into an employment agreement which includes a non-disclosure provision and a non-disparagement provision. The non-disclosure provision prohibits employees from disclosing confidential information, which it defines as “any and all ideas, facts, or other information regarding [the Employer], its officers, directors, independent contractors and/or volunteers, of whatever type and in whatever form, which is not publicly available, and which is disclosed or otherwise made available to me through the services I perform as an Employee/Volunteer.” The provision further states that confidential information includes any information about the Co-founder and Chairperson of the organization, who is a well-known celebrity.

The non-disparagement provision states that employees agree to:

not in any way disparage, denigrate or derogate any of the businesses or activities of [the Employer], any of its affiliates, or any of its or their respective directors, officers, employees, or volunteers; or any product, service or activity of [the Employer] or its affiliates, whether or not such disparaging, denigrating or derogatory statements shall be true or are based on acts or omissions which occurred or are learned prior to, during, or after my employment. A statement shall be deemed disparaging, denigrating or derogatory if it adversely affects the regard or esteem in which the businesses, activities, products or services of [the Employer], any affiliate of [the Employer] or any of their respective directors, officers, employees and volunteers are held by investors, lenders, donors, advertisers, customers, clients, suppliers, or licensing, rating or regulatory agencies, or members of the public generally.

At the end of the two-page agreement, there is a provision entitled “Entire Agreement” which contains a savings clause that states, “Nothing in this Agreement is intended to limit the Employee/Volunteer to lawfully discuss wages and working conditions.” There is no evidence that this employment agreement was implemented in response to Section 7 activity or that it has been applied to restrict employees’ Section 7 activities.

We conclude that under extant law, the Board would not find that a reasonable employee would interpret the non-disclosure provision to interfere with Section 7 rights. See Medic Ambulance Service, Inc., 370 NLRB No. 65, slip op. at 3 (2021) (rule prohibiting disclosure of information regarding “the company or your coworkers” lawful because of context, the following sentence references copyrights or trademarked information and trade secrets, and no mention of employee contact information, wages, or other terms and conditions of employment); Motor City Pawn Brokers, Inc., 369 NLRB No. 132, slip op. at 5 (2020) (confidentiality provision lawful because employees would reasonably understand from the examples of confidential information that only disclosure of legitimately confidential and proprietary information is prohibited); Argos Ready Mix, LLC, 369 NLRB No. 26, slip op. at 2-3 (2020) (employees would not reasonably interpret a confidentiality agreement prohibiting the disclosure of, among other things, the company’s “earnings” or “employee information” as prohibiting Section 7 activity because of overall context); Newmark Grubb Knight Frank, 369 NLRB No. 121, slip op. at 2-3 (2020). The provision does not include information about “employees” in the definition of confidential information. Instead, only
information about “officers, directors, independent contractors and/or volunteers” are referenced. See Medic Ambulance Service, 370 NLRB No. 65, slip op. at 3. Therefore, under extant law, the Board would not conclude that employees would reasonably interpret this provision as prohibiting disclosure of information about their terms and conditions of employment.

Further, under extant law, the savings clause supports finding that a reasonable employee would not interpret the non-disclosure provision as limiting Section 7 activity. See Maine Coast Memorial Hospital, 369 NLRB No. 51, slip op. at 2-3, n.8 (2020) (finding amended media rule lawful because of the disclaimer that excluded “communications by employees... concerning a labor dispute or other concerted communications for the purpose of mutual aid or protection” from the rule); Shamrock Foods Co., 369 NLRB No. 140, slip op. at 2 n.7 (2020) (clause in blogging policy that states the employer “will not construe this policy nor apply it in a manner that interferes with associates’ rights under Section 7 of the NLRA” further signals to employees that the policy does not restrict protected activity); Motor City PawnBrokers, 369 NLRB No. 132, slip op. at 5 n.12. Here, the clause is a plain language statement that employees are free to discuss their terms and conditions of employment and the savings clause is prominent and proximate enough, under extant Board law, to inform the reasonable employee’s understanding of the non-disclosure provision. As in Motor City PawnBrokers, we need not rely on the savings clause in finding that the non-disclosure provision is lawful, it merely further supports that conclusion. Since we conclude that under current Board law the Board would conclude that a reasonable employee would not interpret this provision as impacting Section 7 activity, there is no need to analyze the Employer justifications at the second step of the Boeing framework. See, e.g., Argos Ready Mix, 369 NLRB No. 26, slip. op at 3.

We also conclude that under extant law, the Board would not find that a reasonable employee would interpret the non-disparagement provision as infringing on Section 7 rights. See Motor City PawnBrokers, 369 NLRB No. 132, slip op. at 6-7 (finding lawful rule prohibiting employees from, among other things, communicating statements “the effect of or intention of which is to cause embarrassment, disparagement, damage or injury to the reputation, business, or standing in the community of [c]ustomers, [e]mployer and/or [r]elated [e]ntities”); Medic Ambulance Service, 370 NLRB No. 65, slip op. at 5 (finding lawful rule prohibiting employees from using social media “to disparage the company, its associates, customers, vendors, business practices, patients, or other employees of the company”); BMW Mfg. Co., 370 NLRB No. 56, slip op. at 2-3 (2020) (finding lawful rule requiring employees to “[d]emonstrate respect for the [c]ompany” and “[n]ot engage in behavior that reflects negatively on the [c]ompany”). The Board has recognized that these types of rules are lawful under Boeing because the employer’s substantial and legitimate justifications associated with the rules outweigh any potential adverse impact on protected rights. Id.

Since we determined that both provisions in the employment agreement are lawful under extant law, this case does not present an appropriate vehicle to argue for a change in the law. (b) (7)(A)

Accordingly, the Region should dismiss this charge, absent withdrawal.

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

[1]

[2]
The Region also submitted this case over a concern that Employer’s counsel would request a meeting with the General Counsel in the event merit is found. Based on the conclusions of the Regional Advice Branch as set forth herein, a meeting with the Employer is unnecessary.

(b) (6), (b) (7)(C)