From: (b) (6), (b) (7)(C)
To: Kerwin, Elizabeth; Karmol, Erikson C.; Knepp, Jason E.; Carol, Colleen J.; Hampton, Andrew
Cc: Bock, Richard; Lussier, Richard; Compton, Kayce R.; Dodds, Amy L.; Shorter, LaDonna
Subject: Promotional Concepts, 07-CA-322063 (case-closing email)
Date: Thursday, December 7, 2023 2:51:35 PM

The Region submitted this case for advice pursuant to GC 23-08, *Non-Compete Agreements that Violate the National Labor Relations Act*, dated May 30, 2023, on whether a non-compete provision in an employment agreement violated the Act as well as the legality of a lawsuit seeking to enforce that non-compete agreement. The Region also identified three other provisions in the employment agreement that may violate the Act, including business disclosures, duties of employees, and the termination provision. We conclude that the non-compete, business disclosures, and termination provisions are not unlawful and that the lawsuit seeking to enforce the non-compete provision does not violate the Act, but that the duties of employees provision is unlawful under *Stericycle, Inc.*, 372 NLRB No. 113 (2023).

The Charging Party signed the Employer's standard employment agreement when [redacted] began employment in [redacted] providing (b) (6), (b) (7)(C) to various customers. The agreement included, inter alia, a non-compete provision, a business disclosures (confidentiality) provision, as well as provisions governing the duties of employees during their employment and upon termination. In [redacted] of 2020, the Charging Party sought to amend the agreement and rescind the non-compete agreement, but the Employer refused. On (b) (6), (b) (7)(C), the Charging Party resigned from the Employer and took a job with one of the Employer's major competitors. Immediately after submitting [redacted] resignation to the Employer, the Charging Party emailed all of the Employer's customers with whom [redacted] had worked and informed them [redacted] was now working with the competitor. After taking the job with the competitor, the Charging Party continued working with some of the Employer's customers, including using some of the product designs from the Employer. On (b) (6), (b) (7)(C), the Employer sent a demand letter to the Charging Party and [redacted] new Employer stating that [redacted] was violating [redacted] employment agreement through [redacted] actions with the Employer's customers. When the parties did not resolve the issue, on (b) (6), (b) (7)(C), 2023, the Employer filed a civil lawsuit in (b) (6), (b) (7)(C) alleging breach of contract, breach of fiduciary duty, and misappropriation of trade secrets, seeking to enforce the noncompete and business disclosures provisions of the employment agreement. There is no evidence that the Charging Party engaged in any protected concerted activity in connection to these events.

1. Non-compete Agreement

   Employee agrees not to directly or indirectly compete with the Company during the period of employment and for a period of one year thereafter and notwithstanding the cause or reason for termination. The term "not compete" shall mean that the Employee shall not, on Employee's behalf or on behalf of any other party, solicit or seek the business of any customer, client or account of the Company existing during the term of employment and wherein said solicitation involves a product and/or service substantially similar to or competitive with any present or future product and/or service of the Company.

In GC 23-08, the General Counsel explained that non-compete provisions are overbroad when the provisions could reasonably be construed by employees to deny them the ability to quit or change jobs by cutting off their access to other employment opportunities that they are likely most qualified for based on their experience, aptitudes, and preferences. The memo also identified five specific types of protected activity chilled by such non-compete provisions. (b) (7)(A) [redacted] The provision at issue here however, defines "not compete" in a way that does not prevent an employee from accessing other employment opportunities. An employee is free to take a job with a competitor of the Employer's; the employee is only restricted from soliciting the Employer's existing customers in order to provide similar services for a period of one year. An employee may freely work for any other employer and with that employer's customers or cultivate new customers without violating this agreement. Since there is no evidence or suggestion that there is such a limited pool of customers in the industry that this provision effectively forecloses other employment opportunities for employees, we conclude that this non-compete provision, as limited, does not violate the Act.

2. Business Disclosures Provision

> Employee agrees that during the term of his employment with Employer and thereafter she will not disclose or use any information related to the Employer's business and the business of the Employer's present or prospective customers, including, but not limited to, any promotional concepts, marketing plans, strategies, drawings, customer lists or other information not otherwise made available to the general public. Employee acknowledges that the list of the Employer's present and prospective customers as it may exist from time to time, along with the Employer's promotional concepts, marketing plans, strategies and drawings and are valuable, special and unique proprietary properties of the Employer and constitute a trade secret. …

We find that the business disclosure policy in the employment agreement does not violate the Act. In *Stericycle, Inc.*, 372 NLRB No. 113 (2023), the Board built upon the standard used in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), and held that when analyzing work rules, the General Counsel must prove that an employer's rule has a reasonable tendency to chill employees from exercising their Section 7 rights. 372 NLRB No. 113, slip op. at 2, 9-10. If an employee, who is understood to be economically dependent on the employer and who contemplates Section 7 activity, *could* reasonably interpret the rule to be coercive, the General Counsel has carried their burden and the rule is presumptively unlawful even if there is also a reasonable non-coercive interpretation. *Id.* [1]

This provision, relating to information about the Employer's business, lists as examples things that are clearly proprietary and trade secrets. There is no reference to employee information, wage information or anything else relating to terms and conditions on employment. In *G4S Secure Solutions (USA) Inc.*, 364 NLRB 1327 (2016), the Board considered a confidentiality rule prohibiting disclosure of "G4S or client information" and found it to be lawful because employees would reasonably understand the rule as limiting only the disclosure of proprietary information. The Board noted a "critical distinction" between the language of the rule and other rules found to be unlawful that include prohibitions on disclosure of information about fellow employees. *Id.* at 1330-31 (discussing *Flamingo Hilton-Laughlin*, 330 NLRB 287 (1999), which prohibited revealing confidential information about fellow employees). Instead, the Board likened the rule to the one in *Super K-Mart*, 330 NLRB 263 (1999), where the Board had said employees would reasonably understand a rule stating that "company business and documents are confidential" would apply to proprietary information and not limit discussion of wages and working conditions. The Board concluded that there is nothing in the rule or otherwise that suggests that the employer considered employee information proprietary. 364 NLRB at 1331. Similarly, here the lack of any mention of employee information or things related to terms and conditions of employment distinguish this policy from other rules that the Board found unlawful under *Lutheran Heritage*. *See, e.g.*, *Caesars Entertainment d/b/a Rio All-Suites*, 362 NLRB 1690 (2015) (prohibition on employees sharing "any information about the Company which has not been shared by the Company with the general public" was unlawful considering the list of examples included "salary structure" and policy manuals); *Schwans Home Service, Inc.*, 364 NLRB 170, 171 (2016) (company information rule unlawful because even though it focused on trade secrets and intellectual property, it also mentioned information concerning "employees," which creates sufficient ambiguity). The fact that the employees here regularly work with designs and other intellectual property for their customers coupled with the lack of any indication that the Employer considers employee information or other working conditions to constitute trade secrets, we conclude that this policy would not have a reasonable tendency to chill employees in the exercise of their Section 7 rights. Thus, we would not find that the employee who is economically dependent on their employer and who contemplates Section 7 activity could reasonably interpret this provision to be coercive. Accordingly, the business disclosures provision does not violate the Act.

3. The Lawsuit

The Employer's lawsuit against the Charging Party seeks to enforce the non-compete agreement and the business disclosures provision, alleging that the Charging Party utilized trade secret information to solicit and acquire the Employer's customers for (b) (6), new employer. Since we have concluded that

these two provisions in the employment agreement do not violate the Act, the lawsuit to enforce them does not have an illegal objective and is not preempted, as contemplated in footnote 5 of *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 737 n.5 (1983). The lawsuit is also not unlawful under a traditional *Bill Johnson's* analysis, since it does not lack a reasonable basis in law or fact and was not commenced with a retaliatory motive, as there is no assertion that the Charging Party engaged in any protected activity. *Id.* at 748-49. Since the lawsuit does not otherwise infringe on Section 7 rights, its maintenance does not violate Section 8(a)(1) of the Act.

4. Termination Provision

> This is an employment at will, and the Employer or the Employee may terminate this AGREEMENT at any time without cause upon fourteen (14) days written notice to the other party. Upon termination of employment, Employee agrees to surrender and return to Employer all company property, including but not limited to, drawings, marketing plans, customer lists, company manuals, data, correspondence, keys, files and records. Employee agrees that she will not duplicate or otherwise copy any such property. Thereafter, any mail received by Employee relating to the Employer's business will be immediately forwarded to the Employer.

We conclude that the termination provision of the agreement does not violate the Act. The provision requires an employee to return Employer property upon separation of employment and does not implicate information known to employees that may be utilized in Section 7 activity. Therefore, we conclude that this requirement would not have a reasonable tendency to chill employees in the exercise of their Section 7 rights. And, as with the business disclosures provision, we would not find that the employee who is economically dependent on their employer and who contemplates Section 7 activity could reasonably interpret this provision to be coercive. Accordingly, the termination provision does not violate the Act.

5. Duties of Employee Provision

> Except as hereinafter provided, the Employee shall at all times during the continuance of this AGREEMENT devote her full time to the conduct of the business of the Employer and shall not directly or indirectly, during the term of this AGREEMENT engage in any activity competitive with or adverse to the Corporation's business or welfare whether alone, or as a partner, officer, director, Employee, advisor, agent or investor of any other individual corporation, partnership, joint venture, association, entity or person.

We find that the duties of employee provision in the agreement is unlawfully overbroad pursuant to *Stericycle*. This policy would have a reasonably tendency to chill employees in the exercise of their Section 7 rights. An employee economically dependent on their employer and contemplating Section 7 activity could reasonably read this rule as prohibiting them from engaging in union organizing or protected concerted activities that the Employer may deem to be "adverse" to the Employer's business, such as speaking out publicly about terms and conditions of employment. *See, e.g., First Transit, Inc.*, 360 NLRB 619 (2014) (rule prohibiting conduct "detrimental to the interest or reputation of the Company" unlawful); *Schwan's Home Service, Inc.*, 164 NLRB 170, 174 (2016) (rule prohibiting conduct "which is detrimental to the best interests of the company" unlawful). The Employer's asserted interest of ensuring full-time salaried employees devote their working time to the Employer while the Employer is contractually obligated to pay them does not rebut the presumption that this rule has a reasonable tendency to chill Section 7 activity.

The provision could also reasonably be read to prevent an employee from engaging in outside employment while employed by the Employer because of the restriction on being an "employee" of another entity. The General Counsel takes the position that rules or contract provisions directly or indirectly prohibiting moonlighting are generally unlawful, and the Board has expressed an intent to revisit extant law concerning an employer's maintenance of moonlighting restrictions. (b) (5), (b) (7)(A) [redacted] whether the Board should continue to hold that rules prohibiting outside employment as addressed in *Nicholson Terminal & Dock Co.*, 369 NLRB No. 147 (2020), and

Newmark Grubb Knight Frank, 369 NLRB No. 121 (2020), are always lawful to maintain)); *see also* General Counsel's Brief to the Board in *Stericycle*, Case 04-CA-137660 et al., at 11 n.16 (filed Mar. 7, 2022). Thus, rules or contract provisions that broadly prohibit outside employment implicitly prohibit, among other things, working as a paid union salt. *See NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 87, 98 (1995) (holding that union salts are not excluded from the Act's protection and can be dually loyal to the union and the employer); *cf. Schwan's Home Service*, 164 NLRB 170, 173-74 (2016) (conflict-of-interest rule).

Since the Charging Party separated from employment in (b) (6), (b) (7)(C) of 2022 and the Employer's lawsuit filed in (b) (6), (b) (7)(C) of 2023 did not seek to enforce this provision of the employment agreement, the Charging Party's July 2023 charge concerning the maintenance and enforcement of "overbroad and coercive noncompete agreements" does not properly allege a violation based on this provision of the Charging Party's employment agreement. However, the Employer admits that the identical language of the Charging Party's employment agreement was in effect for several other current employees as of the date the charge was filed – underscoring the appropriateness of applying *Stericycle* generally. The Region should advise the Charging Party of the determination (b) (5)

Based on the foregoing, the Region should dismiss the charge, absent withdrawa (b) (5) This email closes this case in Advice as of today. Please contact us with any questions or concerns.

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

> Please be aware that this email may be subject to public disclosure under the Freedom of Information Act or other authorities, though exceptions may apply for certain case-related information, personal privacy, and other matters.

---

[1] Although this provision and others are contained in employment agreements, application of *Stericycle* is still wholly appropriate. Given that the Employer requires all of its employees to sign identical employment agreements, these provisions are fairly characterized as policies or rules as the Employer will not allow employees to work without agreeing to them. (b) (5), (b) (7)(A)