UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

MOBILE PHLEBOTOMY OF CENTRAL MICHIGAN, LLC, d/b/a MPCM SERVICES,

Respondent

and **Case No. 07-CA-330791**

KAYLEIGH SOBANSKI, an Individual

Charging Party

Dynn Nick, Esq.,
for the General Counsel.
Nicholas Feinauer, Esq.,
for the Charging Party.
Errick A, Miles, Esq.,
for the Respondent.

DECISION[1]

STATEMENT OF THE CASE

RENÉE D. MCKINNEY, Administrative Law Judge. This case was tried[2] in Bay City, Michigan, on January 15, 2025. Kayleigh Sobanski, an individual, filed the charge in Case No

[1] I use the following abbreviations in this decision: "Tr." for transcript; "GCX" for General Counsel exhibit; "RX" for Respondent exhibit; "JX" for joint exhibits; "GC Br." for the General Counsel's brief; and "R. Br." for Respondent's brief. Although I have included citations to the record to highlight particular testimony or evidence, my findings and conclusions are based not solely on the evidence specifically cited but rather are based on my review and consideration of the entire record, which may include the demeanor of the witnesses. I have also considered the relevant factors in making my credibility findings which includes: "the weight of the respective evidence, established or admitted facts, inherent probabilities, and 'reasonable inferences that may be drawn from the record as a whole.'" *Daikichi Corp*., 335 NLRB 622, 623 (2001) (quoting *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996), enfd. 56 Fed.Appx. 516 (D.C. Cir. 2003)).

[2] During my review of the record, I identified the following transcript corrections that are warranted: p. 55, line 3: replace "Judge McKinney" with "Mr. Nick"; p. 113, line 23: replace "The Witness" with "Judge McKinney"; p. 339, line 2: replace "Big B" with "Biggby".

07-CA-330791 on November 22, 2023 and the first amended charge on March 11, 2024.[3] The General Counsel[4] issued a complaint and notice of hearing on October 8, 2024 and an amended complaint and notice of hearing on November 4, 2024. Respondent MPCM Services ("MPCM") filed a timely answer to the complaint on October 14, 2024; an answer and affirmative defenses to the amended complaint on November 5, 2024; and a second amended answer on December 9, 2024.

The complaint, as amended, alleges that since about May 28, 2022, Respondent intentionally misclassified phlebotomist employees as independent contractors to discourage employees from engaging in protected concerted activities and maintained overly broad or otherwise unlawful provisions in its Independent Contractor Staffing Agreement, MPCM Services Non-Disclosure Agreement, and MCPM Services Non-Compete Agreement. The complaint, as amended, also alleges that about May 4, 2023, by Amanda Breasbois, Respondent told employees in writing that they are prohibited from discussing their contract service and pay scale; that about October 13, 2023, Respondent filed a lawsuit with an unlawful objective under Federal law against the Charging Party and other employees in the State of Michigan Saginaw County Circuit Court seeking to enforce various provisions of the preceding Agreements; and that the allegations in the state lawsuit are pre-empted by the Act under *Loehmann's Plaza*, 305[5] NLRB 663 (1991). Finally, the amended complaint alleges that about June 29, 2023, Respondent discharged the Charging Party in retaliation for her protected concerted activities and to discourage employees from engaging in such activities.

Except for the contract provisions[6] relating to intentionally misclassifying employees as independent contractors, the foregoing acts are alleged to be violations of Section 8(a)(1) of the Act.

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[3] All dates herein 2023 unless otherwise indicated.

[4] On February 3, 2025, President Donald J. Trump appointed William B. Cowen Acting General Counsel, replacing former General Counsel Jennifer Abruzzo. For ease and consistency, I will refer to the Acting General Counsel, the former General Counsel, and counsel for the General Counsel collectively as the General Counsel.

[5] The amended complaint erroneously references 303 NLRB 663 (1991), which does not exist.

[6] The General Counsel's post-hearing brief states that due to a change in prosecutorial policy, as reflected in GC Memo 25-05 (Feb. 14, 2025), the following statements are not being pursued as violations of the Act:

> **NCC-Non-Compete Clause**. This protects the Independent Contractor and MPCM Services, to dissolve this you must have a written letter from the management team. All MPCM NCC expire after 5 years.

(GC Br. 5, fn 6; JX 65; GCX 35.) (2022 Independent Contractor Staffing Agreement)

> The Independent Contractor agrees not to enter into competition with MPCM Services for 5 years from the date of termination of contract.

(GC Br. 6, fn 7; JX 66; GCX 34.) (2022 Non-Disclosure Agreement)

> **All Competitors.** Regardless of whether a competitor is offering the same or similar Protected Practices the Recipient, the Recipient [sic] shall be prohibited from being associated with any third party deemed a competitor of the Owner.

Respondent denies that its actions violated the Act because the Charging Party was an independent contractor—not an employee. In addition to a multiplicity of boilerplate affirmative defenses, Respondent's answer maintains that the Charging Party lacks standing; that the National Labor Relations Board ("the Board") lacks jurisdiction over the issues in this case; and that venue is improper.[7] Finally, Respondent maintains that if Charging Party Sobanski is a statutory employee, she is an employee of Respondent's client and non-party, Covenant HealthCare.

All parties were afforded the right to call and examine witnesses, present any relevant documentary evidence, and argue their respective legal positions. After the conclusion of the trial, Respondent and the General Counsel filed briefs, which I have carefully considered.

Based on the entire record, including my credibility determinations, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a limited liability company with an office and place of business located in Merrill, Michigan. Respondent provides phlebotomy staffing services to healthcare institutions. In conducting its operations during the calendar year ending December 31, 2023, Respondent

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(GC Br. 7, fn 8; JX 67; GCX 36.) (2022 Non-Compete Agreement)

> **All Customers.** The Recipient shall be prohibited from engaging with any former or current customers, clients, and similar parties of the Owner under which a business relationship has been created.

(GC Br. 7, fn 9; JX 67; GCX 36.) (2022 Non-Compete Agreement)

I am treating these disclaimers in the General Counsel's brief as a motion to withdraw the relevant aspects of the allegations of paragraphs 7, 8, 9, as well as the applicable legal conclusions in paragraphs 14, and 15 of the amended complaint. As the General Counsel, who has prosecutorial discretion, no longer wishes to pursue these allegations and the motion is unopposed, I hereby grant it.

[7] Respondent's affirmative defenses from the answer included estoppel, collateral estoppel, improper choice of forum, unclean hands, laches, and the risk of inconsistent rulings between the state and federal lawsuits and the instant case under the National Labor Relations Act ("the Act"). Respondent did not adduce testimony or brief any of these affirmative defenses, nor did Respondent brief its defenses asserting that the Charging Party lacks standing; that the Board lacks jurisdiction over the issues in this case; and that venue is improper. Accordingly, other than jurisdiction, I deem these defenses waived. See *Yorkaire, Inc.*, 297 NLRB 401 (1989), enfd. 922 F.2d 832 (3d Cir. 1990).

As to jurisdiction, I find that Respondent is a statutory employer. I also find that the instant matter is a labor dispute that arises under the Act. See 29 U.S.C. § 152(9) (a labor dispute is "any controversy concerning terms, tenure or conditions of employment…in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee."). The Board clearly has jurisdiction over the instant matter.

I address Respondent's defenses that the Charging Party was an independent contractor or an employee of Covenant HealthCare below.

provided services in excess of $50,000 to healthcare institutions with offices and places of business in the State of Michigan, including McLaren Medical Center-Central Michigan, Covenant Healthcare ("Covenant"), and Mid-Michigan Medical Center. During the calendar year ending December 31, 2023, each of these healthcare institutions, in turn, derived gross revenues in excess of $5,000 directly from points outside the State of Michigan. I further find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Respondent's Business and the Relevant Employment Agreements

Respondent is solely owned by Amanda Breasbois. (Tr. 374.) The company contracts with health care institutions for staffing of phlebotomists. (Tr. 374.)

Respondent requires the phlebotomists it supplies to health care institutions to sign three agreements: the Independent Contractor Staffing Agreement, the Non-Compete Agreement, and the Non-Disclosure Agreement.

The first agreement is the Independent Contractor Staffing Agreement, which designates the phlebotomist an independent contractor. (GCX 2; JX 62.) The Independent Contractor Staffing Agreement provides that the phlebotomist is responsible for "all personal taxes" and all "income and FICA incurred while performing services" under the agreement. The Independent Contractor Staffing Agreement states that Respondent will not "withhold FICA tax" or "make FICA tax payments on 'Contractors' behalf." Nor would Respondent make state or federal unemployment contributions "on Contractors' behalf" or withhold state or federal income tax.

The Independent Contractor Staffing Agreement sets forth certain terms and conditions governing the relationship between Respondent and the phlebotomists. (GCX 2; JX 62.) These terms and conditions include Respondent's position on COVID-19 vaccination, its refusal to pay phlebotomists who contract the disease for missed workdays but that Respondent will find coverage for three days of "bereavement leave" for phlebotomists who lose a child or significant other and that Respondent will pay half a scheduled day's "wages" on the day of the funeral. The Independent Contractor Staffing Agreement also provides that phlebotomists on "sick/surgery leave" will not be paid and are responsible for finding coverage for their absences but must let Respondent know if surgery is scheduled and if they are unable to find coverage.

The Independent Contractor Staffing Agreement also provides that Respondent can "request" a random drug screen to be performed at "the office location" and the conditions under which it may "terminate" an independent contractor: habitual tardiness, no call-no show, constant "call outs," poor work ethic, "attitude to other team contractors or contracted staff," lying, discussing non work related matters, and bringing non work "drama" to work. The Independent Contractor Staffing Agreement also purports to require 2 weeks' notice to leave in writing, without which notice the phlebotomist will be assessed a fine in the form of a "Termination Contract Fee."

Finally, the Independent Contractor Staffing Agreement sets forth "Pay Shift Levels" with amounts keyed to the shift worked. Level 1 for working 5:00 AM – 6:00 PM and Level 2

for working 6:01 PM – 5:00 AM. The rates are different for Monday – Friday, weekends, and holidays. There is no mention of an overtime rate in the agreement. The pay in each agreement is specific to the phlebotomist and "will not be discussed at any time." The agreement also provides for a training wage until the phlebotomist is "fully trained and working on their own."

Turning to the second agreement, the Non-Compete Agreement (GCX 3.), this document purports to bind the phlebotomist for five years from the signature date and apply within the State of Michigan. The agreement provides that the phlebotomist "shall not be allowed to provide the same or similar products, services, content, or duties that engage in any other way or version of representation of any other business of a similar nature to the Owner." This restriction includes work with Respondent's competitors and Respondent's former or current clients or independent contractors.

The phlebotomist cannot purchase a release from the restrictions of the Non-Compete Agreement. Nor may the phlebotomist share any "technical nor non-technical information provided by the Owner." The restriction specifically covers but, by its terms, is not limited to:

> data or other proprietary information relating to products, inventions, plans, methods, processes, know-how, developmental or experimental work, computer programs, databases, authorship, customer lists (including names, buying habits or practices of any clients), names of vendors or suppliers, marketing methods, reports, analyses, business plans, financial information, statistical information, or any other subject matter pertaining to any business of the Owner or any of its respective clients, consultants, or licensees that is disclosed to the Recipient under the terms of this Agreement.

The confidentiality restriction also extends to any "subject matter pertaining to any business of the Owner or any of its respective clients, consultants, or licensees..."

The Non-Compete Agreement provides that it is to be governed by and construed in accordance with the laws of the State of Michigan and disputes are to be "heard in a court of appropriate jurisdiction of the Owner's principal office."

The third Agreement that Respondent requires phlebotomists to sign is the Non-Disclosure Agreement. (GCX 4.) The Non-Disclosure Agreement further defines confidential information that may not be disclosed:

> (1) business plans, methods, and practices; (2) personnel, customers, and suppliers; (3) inventions, processes, methods, products, patent applications, and other proprietary rights; or (4) specifications, drawings, sketches, models, samples, tools, computer programs, technical information, or other related information[.]

The Non-Disclosure Agreement includes a 5-year non-compete limitation from the agreement termination date.

B. *Charging Party Sobanski's Terms and Conditions of Employment*

Owner Breasbois informed Sobanski that she would be working as an independent contractor, which meant that she would be required to pay her own taxes. (GCX 2, JX 62.) Sobanski maintained at hearing that Breasbois did not further explain the meaning of being an independent contractor and that she had never worked as an independent contractor before. (Tr. 31 and 32.) Yet, Sobanski was presented with a copy of the Independent Contractor Staffing Agreement for review and advised by Breasbois to consult her attorney as to her decision. Sobanski did not consult counsel as to the terms of the Independent Contractor Staffing Agreement but signed the Independent Contractor Staffing Agreement. Sobanski signed two more Independent Contractor Staffing Agreements in 2021 and 2022, as well as Non-Compete Agreements and Non-Disclosure Agreements. (GCX 2-4, 34-36, JX 62, 63, 64, 65, 66, 67.) Respondent required all phlebotomists to sign these three Agreements to work. (Tr. 387, 462.)

Charging Party Kayleigh Sobanski was placed at Covenant in Saginaw, Michigan, about December 2020 as a phlebotomist. (Tr. 24, 27, 32.) She was scheduled to work 80 hours per two-week pay period on the third shift. (Tr. 30, 32-33, 217.) Sobanski was paid hourly and according to her shift, with weekends paid at a higher hourly rate than weekdays; holidays paid at a higher hourly rate than weekends; and the third shift paid more highly than first or second shift. (Tr. 77-79, GCX 2.) The phlebotomists were paid directly by Respondent based, at first, on paper time sheets which the workers used to record their time; Respondent later converted to an online system. (Tr. 64-69, 245, GCX 19.) Sobanski's half-hour lunch was unpaid and automatically deducted from her paycheck. (Tr. 79.)

Yet, the record shows that Respondent changed the pay rate at will to reward and discipline the phlebotomists—disregarding the terms of the Independent Contractor Staffing Agreement. Phlebotomist Jason Hoppe's Independent Contractor Staffing Agreement stated that he would be paid $25.00 per hour. (Tr. 238, GCX 35.) However, Breasbois decided sua sponte to give Hoppe a raise to $27.00 an hour. (Tr. 238.) Breasbois rescinded the raise after she learned that Hoppe had discussed his pay with Sobanski. (Tr. 246-248, GCX 37.) About a month later, Breasbois moved Hoppe's rate of pay back up to $27.00 an hour after Hoppe promised not to discuss his pay rate with anyone again. (Tr. 249, GCX 38.)

While the phlebotomists could refuse any placement, Respondent was only able to offer work at those facilities and on those shifts the health care facilities sought to fill. (Tr. 33,195-196, 374, 375.) Breasbois testified that Covenant would send an email to her informing her that it needed, for example, two phlebotomists to work the night shift on a certain date. (Tr. 377, 380, 446, RX 15.) Covenant apparently retained—and on at least two occasions—exercised the right to exclude or refuse to accept phlebotomists whose work fell below its standards. (Tr. 139, 140, 321, 399; RX 35.)

Respondent chose which the phlebotomists to offer an available shift based on their requests or expressed schedule preference. (Tr. 167, 264, 375, 380.) For example, while Sobanski was on maternity leave, Respondent gave her full-time shift to another phlebotomist. Upon her return to work, Breasbois assigned Sobanski reduced hours for a month. (Tr. 36, 208.) Breasbois informed the Charging Party that she made the schedule change because "she figured" Sobanski would like to spend more time with her newborn. (Tr. 36.) Yet, Respondent also apparently tried to accommodate the phlebotomists' specific schedule preferences. When in

2022, Sobanski requested that she be placed on day shift, but there were no immediate openings for a day shift phlebotomist, she was placed on the day shift at McLaren in February 2023. (Tr. 217, 222-223.) In March 2023, at Sobanski's request, Respondent placed her back at Covenant.

The phlebotomists received their monthly schedules by email from Respondent. (Tr. 88.) Breabois attempted to equalize hours between phlebotomists. (Tr. 244; GC 41.) Sobanski testified that phlebotomists were not allowed to "subcontract" their shift to another phlebotomist or "sell" their shift to another phlebotomist. (Tr. 88.) Respondent found coverage for phlebotomists who informed Respondent they would be absent. (Tr. 37-42, 166, 385; GCX 5-8, 10, 39, 187.)

For example, in a November 1, 2022, email, Breasbois informed phlebotomists "For scheduling you just need to email the days you want off [.] I will do my very best to get them off!" (GCX 11.) In a June 7, 2023, text message between Breasbois and Sobanski in response to her impression that Sobanski was unappreciative of Breasbois' efforts on her behalf, Breasbois wrote "I will just have to go to the original way and not help cause I don't want anyone thinking I'm doing more for one and not the other". (GCX 9.)

At Covenant, the phlebotomists wore a Covenant badge identifying them as contractors and a second badge with Respondent's logo on it, as well as a Respondent-provided uniform with Respondent's logo embroidered on it; these were mandated by Covenant. (Tr. 56, 59, 246, 445.) Respondent also provided a million dollars of liability insurance for each phlebotomist and paid for their background checks, which were required before they could be assigned to a client. (Tr. 495, 499-500.) The same practices generally applied for those phlebotomists working at McLaren. (Tr. 331-332.)

The phlebotomists were required to follow the assigned facility's dress code, break times, procedures, and work rules (including regarding attendance and cellphone use). (Tr. 134, 135, 142, 143, 192-194, 200, 201, 331, 441; RX 37, 42, 84.) Yet, Respondent also promulgated its own work rules to the phlebotomists. For example, Respondent announced, via email, new work rules regarding smoking and punching out when they leave the facility to go to their cars. (Tr. 81; GCX 14.)

A more experienced phlebotomist assigned to the client site by Respondent trained new workers as to the layout of the Covenant facility and work-related issues. (Tr. 62.) Those trainers were paid an extra $50 a day by Respondent. (Tr. 62; GCX 19.) There were no Respondent-employed supervisors at the job site. (Tr. 287.)

At Covenant, both the direct employees and contractor phlebotomists were supervised on a day-to-day basis by Andrew Adkins, Jennifer Aldrich, and Shannon Kostal, who were Covenant employees. (Tr. 129, 142, 310, 431.) The phlebotomists working at McLaren were likewise supervised by McLaren-employed supervisors. The Covenant supervisors made the decision whether to send the referred phlebotomists home early and also decided whether to send a phlebotomist to a different Covenant location. (Tr. 257, 318.) Later, Terrence Wernette began overseeing the phlebotomists as Covenant's Director of Laboratory Services. (Tr. 126.)

Covenant tracked phlebotomists' performance closely. (Tr. 315, 417.) Elina Porchia[8] testified that these statistics were compiled monthly and a Covenant employee named Tricia[9] would address deficiencies in performance with both the employee and outside phlebotomists directly. (Tr. 316.) Breasbois apparently received these monthly reports—or some aspects of the information therein: in an all-staff email, she urged staff to "make sure [to] always" exceed blood draws by phlebotomists directly employed by the health care facilities by a three to one ratio. (GCX 26.) Breasbois, however, denied that she monitored performance directly, testifying that Adkins informed her of performance issues at Covenant and she would pass his comments on to the phlebotomists. (Tr. 395-397, 399; RX 25, 27, 29, 37, 44, 46.)

Using a handheld device known as a Rover, Respondent's phlebotomists at Covenant routinely worked beside phlebotomists directly employed by the health care facilities or other staffing agencies. (Tr. 80, 178, 262; GCX 13.) In addition, the phlebotomists referred by Respondent participated in a two-day Covenant-led orientation, which included Covenant's policies and procedures and how to access them on Covnet, the facility intranet; how to access the medical records software application, Epic; where to park;[10] where to enter the building; where the break room was located; and the location of supplies, among other such matters.[11] (Tr. 130, 132, 136, 149, 178, 308.)

The phlebotomists carried a Respondent-provided notebook at work, in which they were to document incidents occurring on their shifts such as missed blood draws. (Tr. 57.) Neither the time sheets nor the incident reports were provided to the client. Respondent discouraged the phlebotomists from communicating problems and work conflicts to its clients. (Tr. 57-58, 70, 71, 260, 273.) Rather, Respondent reminded the phlebotomists that their role was to draw blood and that Respondent "handled the management drama" with clients. (GCX 21.) Breasbois,[12] on March 8, 2022, and May 4, 2023, forbade the phlebotomists from speaking to anyone working at a client facility about their pay and counseled that they needed to "keep [their] mouth shut. . ." (GCX 12, 13.)

C. Charging Party Sobanski's Refusal to Sign a New Non-Compete Agreement and Termination of Employment

On June 7, 2023, via text message, Sobanski asked Breasbois to release her from her Non-Compete Agreement and allow her to work for Respondent on a part-time basis as a casual employee, while seeking a job elsewhere—or if Breasbois was not interested in having the

[8] Porchia identified herself as an independent contractor phlebotomist but also is a close friend and was a business partner with Breasbois in a different venture. The General Counsel seeks (GC Br. 16, fn 27.) to have Porchia's entire testimony discredited because she did not fully affirmatively state the close personal and business nature of her relationship with Breasbois on her direct examination by Respondent's counsel. I see no basis for discrediting Porchia because of her relationship with Breasbois. When her status was probed by the General Counsel on cross examination, Porchia answered his questions without attempting to evade them or be obstreperous.

[9] Last name unknown.

[10] The phlebotomists working at Covenant parked at the back of the parking lot reserved for visitors; they did not have parking passes. (Tr. 272.)

[11] The healthcare facilities, including Covenant, provided the referred phlebotomists with the supplies and equipment needed to perform their duties. (Tr. 142, 168-169, 170, 177-179, 271.)

[12]

Sobanski work as a casual employee, she was giving her two-week notice. (Tr. 85, GCX 24.) The reason for this decision, as Sobanski testified, was that she wanted "a stable job" because Covenant was cutting Respondent's hours for outpatient phlebotomy. (Tr. 88.) On June 8, Breasbois replied by text that she was willing to discuss the Charging Party becoming a casual employee and would speak to her lawyer about the necessary steps. (GCX 24.)

About June 12, Sobanski received an amended Non-Compete Agreement from Respondent via Docusign, with the agreement only allowing her to work at MyMichigan, where Sobanski was previously employed and where Respondent had only a home care contract. (Tr. 90-92, 493-494; GCX 15, 22.) Breasbois and Porchia testified that, contrary to the plain language of the Non-compete Agreement, employees were previously informed that they could work anywhere Respondent did not have a contract. (Tr. 299, 493-494.)

Sobanski called Breasbois after receiving the amended Non-Compete Agreement and informed her that she did not want to go back to work for MyMichigan—she wanted to work for Covenant. Breasbois refused to agree to that. (Tr. 92.) Sobanski did not sign the amended Non-Compete Agreement. (Tr. 92; GC 22.)

On June 22, Sobanski's retained counsel sent to Breasbois a letter asserting that the "No-competition Agreement" that she signed in October 2022 was unenforceable as to scope and duration, as well as other legal infirmities, and threatening to seek a court order so stating. (Tr. 85; GCX 23.) The letter does not mention the confidentiality provision of the Non-Compete Agreement as a basis for Sobanski's objection to continuing to work for Respondent. Respondent did not release Sobanski.

On June 27, Sobanski texted Breasbois asking if she would be working that week as scheduled. (Tr. 100, 252-253; GC 42.) Breasbois did not respond. (Tr. 100.) Sobanski did not work her scheduled hours and apparently, never worked at Covenant under Respondent's aegis again. Jason Hoppe also declined to sign an updated Non-Compete Agreement and contends that he was discharged as a result. (Tr. 251; GCX 40.) Hoppe's asserted discharge is not alleged in the amended complaint.

On July 10, Sobanski began working as a Covenant-employed phlebotomist. (Tr. 105.)

D. Respondent's October 13, 2024 State of Michigan Lawsuit and the Charging Party's Federal Labor Standards Act Lawsuit

On October 13, 2023, Respondent filed a lawsuit against Covenant and Sobanski and Hoppe in the State of Michigan Saginaw County Circuit Court, seeking a judgment against the defendants. (Tr. 103-104, 463-464; GCX 25.)

On October 9, through legal counsel, a former contracted phlebotomist, Tonzania Rayford, filed a Fair Labor Standards Act lawsuit against Respondent alleging that she and others, including Sobanski, were misclassified as independent contractors and seeking a judgment against Respondent as the defendant. (GCX 1(n).)

On October 8, 2024, Region 7 of the National Labor Relations Board sent a letter to Respondent asserting that Respondent's state lawsuit was preempted until such time as the Board

holds that Sobanski's actions were not protected concerted activity under the Act. (Tr. 103-104; GCX 1(a) and 33.)

DECISION AND ANALYSIS

A. Charging Party Sobanski was an Employee

In determining the status of employees, the Board employs a "right of control" test. *Standard Oil Co.*, 230 NLRB 967 (1977); *NLRB v. United Insurance Co*., 390 U.S. 254 (1968). Pursuant to *The Atlanta Opera, Inc*., 372 NLRB No. 95, slip op at 3 (2023) (overruling *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019), which, in turn, overruled *FedEx Home Delivery*, 361 NLRB 610 (2014), enforcement denied, 849 F.3d 1123 (D.C. Cir. 2013)), independent-contractor status is evaluated "in light of the pertinent common-law agency principles." "All of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *The Atlanta Opera, Inc*., 372 NLRB No. 95, slip op. at 3. "In the context of weighing all relevant, traditional common-law factors, including those identified in [Section 220 of the Restatement (Second) of Agency], the Board also considers whether the evidence tends to show that the putative independent contractor is, in fact, rendering services as part of an independent business." Id. at 12. Moreover, the Board "should give weight only to actual (not merely theoretical) entrepreneurial opportunity, and should necessarily evaluate the constraints imposed by a company on the individual's ability to pursue this opportunity." Ibid.

As part of this independent-business analysis, the Board will consider whether the putative contractor has a realistic ability to work for other companies, has proprietary or ownership interest in their work, and has control over important business decisions. Id. at 13. The Board considers whether the employer has effectively imposed constraints on an individual's ability to render services as part of an independent business. For example, limitations placed on an individual's ability to work for other companies or restrictions on the individual's control of important business decisions. This necessitates examining whether the terms and conditions under which the individuals operate are set unilaterally by the company. Id.

The factors considered by the Board, which are not exhaustive, include: (1) extent of control which, by the agreement, the employer may exercise over the details of the work; (2) whether or not the worker is engaged in a distinct occupation or business; (3) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (4) skill required in the occupation, (5) whether the employer or the worker supplies instrumentalities, tools, and place of work for the person doing the work; (6) the length of time for which the person is employed; (7) method of payment, whether by the time or by the job; (8) whether or not work is part of the regular business of the employer; (9) whether or not the parties believe they are creating an employer-employee relationship; and (10) whether the employer is or is not in business. Id. at 2.

The burden of proof is on the party asserting independent-contractor status. *BKN, Inc.*, 333 NLRB 143, 144 (2001). The Board then considers whether the evidence tends to show that the worker is, in fact, rendering services as an independent business. *The Atlanta Opera, Inc*., 372 NLRB No. 95, slip op. at 18-19.

Here, I find that the relevant factors tend to show that Sobanski was an employee—not an independent contractor.

1. The Extent of Control by the Employer

Respondent argues that it "did not have any control over any of its contractors' day-to-day work." (R. Br. 23.) This is because "information" was communicated from the health care facilities to Respondent, who, in turn, communicated it to the referred phlebotomists. (R. Br. 23.) Moreover, Respondent notes, on-site training, direction, and correction were provided by the health care facilities' supervisors directly to the referred phlebotomists and from the facilities' supervisors to Respondent to pass along to the referred phlebotomist. (R. Br. 24.)

The General Counsel argues that by unilaterally setting all of the terms contained in the mandatory Independent Contractor Staffing Agreement, Non-Compete Agreement, and Non-Disclosure Agreement, Respondent "exerted significant control" over the referred phlebotomists, including, of course, forbidding current or future work for five years with any competitor or client and discussion of their pay. (GC Br. 19-20.) The General Counsel notes that Respondent also assigned the phlebotomists to their shifts, which the phlebotomists were not then free to simply change at will. (GC Br. 20.) Further, the General Counsel points, as evidence of control, to Respondent's various directives to the referred phlebotomists regarding the number of blood draws the phlebotomists were to perform compared to the client's own employees; informing the client's management of work-related problems; not smoking at work; and exiting the facility. (GC Br. 21.) Further, the General Counsel points out that Respondent disciplined Hoppe by cutting his pay in retaliation for Hoppe discussing his pay, which shows significant control. (GC Br. 21.) (citing *Sisters' Camelot*, 363 NLRB 162, 163 (2015)).

In addition to the facts identified by the General Counsel, I note that Respondent reinforced and expanded its contractual prohibition on discussing pay to include sharing the identities of other contractors. (GCX 13.) Respondent also sent a "High Alert" to the phlebotomists working at Covenant to remind them to clock out if they take breaks of any kind and to "CYA" by documenting to Respondent any work-related problems.

Contrary to Respondent's contention, these are instances of Respondent taking measures to directly communicate its own work rules on the phlebotomists working at a client site. (GCX 14.) General Counsel's Exhibit 14 evinces a purpose to impose these strictures on the phlebotomists to safeguard Respondent's contractual relationship with its client in the face of a changing healthcare landscape: "[t]he goal is to take this over. We will get push back now that covid [sic] is going down". Given the record as a whole—and Respondent's express written warning to employees of the consequences of failure (e.g. the loss of the client) to follow its directives in this exhibit—I do not credit owner Breasbois' testimony (repeated in Respondent's brief) that she simply passed on client communications regarding performance to the phlebotomists.

I agree with the General Counsel that this factor tends to show that Respondent exercised significant control over the work of the phlebotomists—both "by agreement" and in fact—weighing in favor of employee status.

2. Whether the Worker is Engaged in a Distinct Occupation or Business

Respondent takes the position that the phlebotomists it refers to clients are engaged in the distinct occupation of "providing phlebotomy services" while Respondent "is a general contractor and/or staffing agency providing independent contractors to healthcare providers that are in need of phlebotomists." (R. Br. 2, 24.) Further, citing *FedEx Home Delivery*, 361 NLRB at 622, Respondent argues contends that, unlike the *FedEx* drivers, who did "business in the name of FedEx rather than their own," and relied on the employer's infrastructure and equipment to operate, the phlebotomists are not "fully integrated" into Respondent's operations, do not receive "considerable assistance and guidance" from Respondent, and that Respondent does not provide an infrastructure[13] upon which the phlebotomists rely. (R. Br. 25.)

The General Counsel argues that the phlebotomists are not engaged in a distinct occupation or business and do not render services as an independent business because it is Respondent's regular business to provide contract phlebotomy services. (GC Br. 21.) In support, the General Counsel relies on Sobanski's and Hoppe's testimony that they did not advertise or promote their phlebotomy services but were employees prior to joining Respondent and these witnesses' total reliance on Respondent for work. (GC Br. 21.)

It is evident from the record that Respondent's core business is to supply phlebotomy staff to health care institutions. As such, I find, contrary to Respondent, that here, as in *FedEx Home Delivery*, 361 NLRB at 622, and *Sisters' Camelot*, 363 NLRB at 164 (citing *Roadway Package System Inc*., 326 NLRB 842, 851 (1998)), the key to this factor is that the phlebotomists, in performing their work, clearly identify themselves as working for the Respondent. To that end, the phlebotomists wear badges and scrubs with Respondent's company name while working at client sites.

Further, it is evident that Respondent is well aware that the phlebotomists it refers to client sites are considered by its client to be Respondent's representatives. Respondent's May 4, 2023 email to the Covenant-placed phlebotomists states as much in that she specifically thanks them for "representing MPCM Services." (GCX 13.)

3. Whether the Work is Usually Done under the Direction of the Employer or by a Specialist Without Supervision

Respondent contends that the workers at issue are "specialists in performing phlebotomy services" who have formal training and education, making them more likely to be independent contractors. (R. Br. 25.) Further, after the phlebotomists receive training specific to the client health care facility, they go about their day-to-day jobs independently by choosing the next assignment from the Rover and performing the necessary blood draws. (R. Br. 25.) Finally. Respondent contends that it does not supervise the phlebotomists in any way, leaving all such supervision to the client. (R. Br. 25-26.)

[13] Respondent's opening statement (Tr. 20.) and brief at various points posit that, to the extent that the phlebotomists it refers to client sites are employees and not independent contractors, they are employees of their clients, e.g. Covenant or McLaren. I reject this argument as a defense as it is irrelevant to the merits. No employer other than Respondent was named in the amended complaint or charges—not even as a joint employer.

The General Counsel counters that although the phlebotomists perform their work outside of Respondent's immediate oversight, Respondent does provide supervision in the form of its directives that they report any work-related issues—be they technical or interpersonal—to Respondent, not the client. (GC Br. 22.)

I find that the preponderance of the credited evidence shows that the work of the phlebotomists referred by Respondent, was, in fact, done under supervision. Even where work is performed under the employer's noncontinuous supervision, this factor weighs in favor of an employee-employer relationship. *FedEx Home Delivery*, 361 NLRB at 622 (finding that, "[a]lthough drivers are ostensibly free of continuous supervision in their work duties," the employer directs them through tracking mechanisms and guidelines).

Here, the phlebotomists perform their work under both day-to-day supervision by the client's supervisory personnel and subject to Respondent's supervision generally. Respondent required the phlebotomists to report any work-related issues directly rather than reporting them to the client. (GCX 12.) Further, it is one of Respondent's referred phlebotomists already familiar with the client site who walks the newly placed workers through the blood-drawing process even though it is Covenant that later closely monitors their quality and productivity. Respondent pays these trainers an additional $50.00 a day to provide these services. Moreover, Respondent apparently receives reports on productivity from the client such that Breasbois had enough information to be able to instruct the phlebotomists to strive to outpace Covenant's own employee-phlebotomists by a three to one ratio. This is comparable to the guidelines and tracking mechanisms to which the Board pointed to finding that the *FedEx* drivers work was done under supervision and weighs in favor of employee status.

4. The Skill Required in the Occupation

Respondent argues that the phlebotomists' skills are specialized and non-routine. (R. Br. 26.) In support, Respondent points to the phelbotomists' "formal training and education" needed to perform the work, which favors a worker being an independent contractor, not an employee. (R. Br. 26.) Respondent cites *Prime Time Shuttle International*, 314 NLRB 838, 840 (1994) for this principle. However, in that case, the administrative law judge found that the drivers, who already possessed a driver's license, underwent a mere three days of training—and therefore no special skills were required, which tended to show that the drivers were employees.

The General Counsel contends that while performing phlebotomy "arguably" requires specialized, albeit unlicensed, skills, for which Sobanski took a nine-week certificate program, "the phlebotomist's skills are inherent to the performance of their duties in furtherance of the Respondent's business, consistent with the common-law definition of an employee." (GC Br. 22.) (citing *Restatement Second of Agency* § 220(2) (1958), comment i). Further, the General Counsel relies on the "new employee" training provided at Covenant to demonstrate that the phlebotomists are not independent contractors. (GC Br. 22-23.)

I disagree with the General Counsel as to the significance of the "training" provided at Covenant to new phlebotomists. The two-day training appears to be a general orientation to that organization's administration and leadership staff, policies, procedures, and physical layout. Certainly, there is a follow-along done by more experienced phlebotomists at the start of employment, but that appears to be simply to make sure that the newly referred phlebotomist

understands and employs Covenant's way of doing the job. It is not the same as taking an untrained worker to teach them phlebotomy skills.

Rather, I agree with Respondent that the phlebotomists possess specialized skills in that they have training specific to their field. Yet, I find that the General Counsel has the more convincing position as to this factor because in the words of comment i of the Restatement:

> Even where skill is required, if the occupation is one which ordinarily is considered as…an incident of the business establishment of the employer, there is an inference that the actor is a servant.

Supplying phlebotomists to staff health care facilities is the whole purpose of Respondent's business, which makes their work routine for the company. I find that the skill factor weighs in favor of employee status.

5. Whether the Employer or the Worker Supplies Instrumentalities, Tools, and Place of Work for the Person Doing the Work

Respondent argues that the phlebotomists are not employees because the supplies they use are provided by the client health care facilities—and not Respondent. (R. Br. 27.) The General Counsel counters that by arranging in its contracts with the clients that the client would provide necessary supplies to the phlebotomists, Respondent actually provided those supplies, which tends to show that the phlebotomists are employees and not independent contractors. (GC Br. 23.)

Although I do not adopt his reasoning on the import of the supplies provision in Respondent's client services contracts, I find that the General Counsel is correct in concluding that because the phlebotomists do not furnish their own supplies for their work, this factor favors viewing them as employees rather than as independent contractors. I have not located a Board case that considers, in the absence of a joint employer allegation, whether a third party employer's provision of tools or supplies to a putative independent contractor favors employee or independent contractor status. Yet, "in an employer-employee relationship, the employer generally supplies the instruments and tools of work." *The Atlanta Opera Inc.*, 372 NLRB No. 95, slip op. at 17 (2023). See *Minnesota Timberwolves Basketball, LP*, 365 NLRB 1214, 1222 (2017) (this factor tended to show that crewmembers, other than the Engineer in Charge, who do not utilize any of their own tools while working for the employer, were employees, not independent contractors); c.f. *Porter Drywall, Inc*., 362 NLRB 7, 10 (2015) (apart from drywall panels, which were supplied by the employer, crew leaders were independent contractors where they are responsible for their crews' tools, supplies, and transportation, and insuring that their equipment is in working order).

6. The Length of Time for Which the Worker is Employed

While an indefinite period of employment tends to show employee status, see *Velox Express, Inc*., 368 NLRB No. 61 slip op. at 4 (2019) (employer and drivers had an open-ended relationship that resembled at-will employment) (citing *A. S. Abell Publishing Co.*, 270 NLRB 1200, 1202 (1984)), service for a finite period of time tends to show independent contractor status. *Atlanta Opera, Inc.*, 372 NLRB No. 95, slip op at 36 (citing *Pennsylvania Academy of the*

Fine Arts, 343 NLRB 846, 847 (2004) (employer and models did not have an ongoing relationship indicative of employee status where the model's contract was limited to a single semester).

Respondent argues (R. Br. 27-28.) that this factor tends to show that the phlebotomists were independent contractors because, citing *Porter Drywall*, 362 NLRB at 10, "the contractors here have other jobs" and have a "temporary" relationship with Respondent, which is terminable at will.. To the extent that the phlebotomists have entered into serial one-year contracts, Respondent contends (R. Br. 28.) that such annually renewed contracts amount to nothing more than a business repeatedly using the same subcontractors.[14] Finally, Respondent argues (R. Br. 29.) that the working relationship between the phlebotomists and itself lacks a "sense of permanency" because its clients' needs "fluctuate frequently."

The General Counsel counters (GC Br. 24.) that the phlebotomists' tenures, although ostensibly for just a year per their contracts, are routinely and serially renewed. Furthermore, the phlebotomists are not hired for a specific project but assigned to a client on an ongoing basis. These characteristics distinguish the phlebotomists from, for example, the *Porter Drywall*, 362 NLRB at 10, crewmembers who were recruited to work for specific projects, not for an indefinite time period. The General Counsel, therefore, argues that this factor tends to support the conclusion that the phlebotomists are employees.

The record indicates that, although the contract term of the Independent Contractor Staffing Agreement for is one year, the potential for long-term working relationships between Respondent and the phlebotomists exists; many phlebotomists have worked with Respondent over the course of several years under serial agreements. Accordingly, I find this factor is neutral as the relationship between Respondent and the phlebotomists is both finite and open-ended, giving it characteristics of both employee status and independent contractor status.

7. The Method of Payment, Whether by the Time or by the Job

Respondent contends (R. Br. 29.) that, although the phlebotomists are paid hourly, this is not indicative of an employer-employee relationship because it is common to pay independent contractors, such as roofers and disaster remediation companies, by the hour rather than by the job. The General Counsel simply counters (GC Br. 24.) that Board precedent, *Atomic Fire Protection*, 373 NLRB No. 109, slip op. at 13 (2024) (employees paid biweekly but issued a 1099, not a W-2), indicates that being paid by the hour rather than by the job weighs in favor of employee status.

The Board has considered similar facts present in this case, with *Atomic Fire Protection* being one such recent case. Here, Respondent unilaterally determines the method and the frequency of pay. Thus, this essential term and condition of employment was controlled by Respondent, not the phlebotomists. The phlebotomists lack "the independence to engage in entrepreneurial opportunities" with regard to the method of pay. See *Roadway Package Systems, Inc.*, 326 NLRB 842, 851 (1998). This lack of "meaningful opportunity for economic

[14] In support of this contention, Respondent's brief purports to quote to what is apparently a court case referred to only as "Donovan" without any other citation information. While it is certainly not unusual that specific case citations get lost in the brief editing process, my research has not uncovered the referenced case.

gain…through their own efforts and initiative, weighs heavily against a finding that they are independent contractors." *Intermodal Bridge Transp.*, 369 NLRB No. 37, slip op. at 3 (2020) (citing *Velox Express*, 368 NLRB No. 61, slip op. at 4).

Respondent does not pay fringe benefits, paid holidays, sick days, vacation days or health insurance, which might be considered as tending to show independent contractor status. Yet, as noted by my colleague Judge Montemayor, many statutory employees do not receive such benefits either. See *Intermodal Bridge Transp*., 369 NLRB No. 37, slip op. at 15.

On balance, I agree with the General Counsel that the method of payment in this case favors employee status.

8. Whether or Not Work is Part of the Regular Business of the Employer

Respondent argues (R. Br. 30.) that it is "general contractor and/or staffing agency that provides duly-trained and certified contractors to healthcare providers in need of phlebotomists" and not "in the business of performing phlebotomy services". Therefore, Respondent contends that as the company itself does not perform blood draws or other phlebotomy services, the phlebotomists that it provides to clients do not perform work that is part of the regular business of the employer. The General Counsel reasons (GC Br. 24.) that "Respondent is engaged in the business of providing phlebotomy services to the contracting hospitals, and the phlebotomists working for it perform those services on its behalf."

I find no substantive merit in Respondent's sophistry. Just as the Board found that where The Atlanta Opera's regular business was to stage operas, the stylists performed a function that was integral to that endeavor, here I find that Respondent's regular business is providing phlebotomy staffing services to healthcare institutions, and the phlebotomists perform a function that is integral to that endeavor. See *The Atlanta Opera Inc*., 372 NLRB No. 95, slip op. at 10. Indeed, Respondent cannot operate without the phlebotomists that it refers to its clients, which, in my view, conclusively establishes that their work is a part of the regular business of the employer.

9. Whether Or Not the Parties Believe They Are Creating an Employer-Employee Relationship

Respondent correctly observes (R. Br. 30.) that the phlebotomists who testified and Porchia all stated that they knew they would be working as independent contractors when they entered into the Agreements with Respondent. In further support of its position that this factor favors a finding that the phlebotomists were independent contractors, Respondent also relies (R. Br. 30.) on record evidence that the phlebotomists and Porchia signed the Independent Contractor Agreement, which specifically designates the phlebotomists as independent contractors and understood that they would receive a 1099 and not a W2. Respondent also cites (R. Br. 31.) to Sobanski's testimony that she wished to no longer work full-time with Respondent in June 2023 because she wanted benefits and "a stable job" as evidence that she understood herself not to be an employee. [15]

[15] In addition, Respondent claims support for its position in Breasbois' testimony that the phlebotomists

The General Counsel does not contest (GC Br. 25.) that the phlebotomists signed the Independent Contractor Agreements or the substance of the agreement's terms. Rather, the General Counsel argues that Sobanski and Hoppe, having no prior familiarity with the independent contractor role, did not actually understand the import. While the General Counsel (GC Br. 25.) states that Breasbois did not explain the Agreements to the phlebotomists, Sobanski admitted on cross examination (Tr. 168.) that Breasbois gave her "the basics", such as "I'm not paying your taxes." Hoppe testified (Tr. 234.), however, that Breasbois told him that the Agreements were "[j]ust basic new hire documents."

While I understand the General Counsel's argument that the phlebotomists, as represented by witnesses Sobanski and Hoppe, are not sophisticated parties who understood all of the legal implications of signing the Independent Contractor Agreement, I have not found any Board case that requires that they do. Nor does any Board case I have found require an employer to explain such legal implications to the worker. Further, it is uncontroverted that Breasbois advised both witnesses to seek legal advice on the Agreements' terms but neither did so. As such, I find that there is insufficient evidence that the phlebotomists "did not have the opportunity to bargain over the terms of the agreements…", *Sisters Camelot*, 363 NLRB 162, 165 (2015), such as to exclude from consideration the Independent Contractor Agreements as to the intent factor.

With regard to the fact that Respondent does not withhold any taxes and issues 1099 tax forms to the phlebotomists, this is indicative of independent contractor status. However, the Board looks beyond tax treatment in making a determination of employee status. See *Elite Limousine Plus*, 324 NLRB 992 (1997) (drivers found to be employees where there was little evidence of entrepreneurial activity but, they were issued 1099 forms by the employer which did not withhold Federal income tax, FICA, or unemployment insurance from their pay, the company did not provide them with disability or workmen's compensation insurance, and they could employ other drivers).

I find that under all of the relevant circumstances, the intent factor tends to show that the parties did not believe they were creating an employer-employee relationship and supports the conclusion that the phlebotomists are independent contractors.

10. Whether the Employer is or is not in Business

The parties did not address this factor. Respondent rather addressed (R. Br. 31.) whether Respondent was engaged in the same business as the phlebotomists, which factor was already covered. The General Counsel addressed (GC Br. 25.) whether the phlebotomists were operating "an independent business", which is, as analyzed by *The Atlanta Opera* Board, a different factor—and discussed entrepreneurial opportunity as part of that analysis.

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negotiated their pay and what Respondent contends (R. Br. 31.) is Sobanski's testimony that she later negotiated different pay than reflected in General Counsel Exhibits 2 and 3. As a point of clarification, the "Sobanski" testimony that Respondent cites to on Transcript page 351 was given by Porchia, not Sobanski. Unlike the other workers, Porchia consulted counsel about the agreement. Further, the record reflects that Porchia played a distinct role as a liaison between client Covenant and Respondent; she was not just a phlebotomist. On that basis, I have difficulty concluding that her experience in negotiating her pay was the same as that of the phlebotomist-only workers.

I have already found that Respondent is in the business of providing phlebotomy staffing services to healthcare institutions, and the phlebotomists are the ones who perform that work for Respondent's clients on Respondent's behalf. Accordingly, I find that this factor weighs in favor of employee status.

11. Whether the Evidence Tends to Show that the Worker is, in Fact, Rendering Services as an Independent Business

Respondent did not address this factor directly. However, in my view, Respondent's support for its contention that the phlebotomists are independent contractors appears under various Restatement (Second) of Agency factors throughout the post-hearing brief, painting a picture with broad brushstrokes of the phlebotomists as choosing when and where they work with Respondent, as well as for what pay, and as being responsible for their own businesses with themselves as the sole providers of phlebotomy services for those businesses.

The General Counsel, on the other hand, views (GC Br. 26.) the independent business factor narrowly, specifically citing to the three relevant aspects identified by the Board in *The Atlanta Opera*:

> In determining whether someone is operating as an independent business, relevant factors include whether the person: "(a) has a realistic ability to work for other companies; (b) has proprietary or ownership interest in their work; and (c) has control over important business decisions, such as the scheduling of performance; the hiring, selection, and assignment of employees; the purchase and use of equipment; and the commitment of capital." *The Atlanta Opera*, supra, 372 NLRB No. 95, slip op. at 18 (internal citations omitted). The Board also considers entrepreneurial opportunity, but only in assessing whether an asserted contractor is operating as an independent business, and will "give weight only to actual (not merely theoretical) entrepreneurial opportunities." *Id*.

The General Counsel concludes (GC Br. 26.) that the phlebotomists evince none of these factors identified in *The Atlanta Opera*: the Non-Compete Agreement prevents them from working as phlebotomists anywhere else in Michigan; they are paid a set hourly rate regardless of performance; and they have no control over hiring, assignment or placement, or scheduling; they do not purchase or choose what equipment to use; and they do not invest their own capital in the business.

I find that, under all of the circumstances here, the independent business factor supports the conclusion that the phlebotomists are employees, not independent contractors. There is insufficient evidence here of a proprietary interest held by the phlebotomists.

Considering all of the relevant factors, I find that the strongest factor in favor of independent contractor status for the phlebotomists is the belief of the parties when they established their relationship. The testimony and documentary evidence make it clear that Sobanski and Hoppe[16] believed that they would be independent contractors while

[16] This also applies to Porchia, although, as stated above, I view her circumstances differently in that she

working for Respondent—as did Breasbois. However, in analyzing the Restatement (Second) of Agency factors, "all of the incidents of the relationship must be asserted and weighed with no one factor being decisive." *The Atlanta Opera*, 372 NLRB No. 95, slip. op. at 1, quoting *FedEx*, 361 NLRB at 61. Thus, I find that the weight of the evidence establishes that the phlebotomists, including Sobanski, were employees of Respondent during the relevant time period.

That Sobanski was an employee necessarily means that she was misclassified by Respondent as an independent contractor. However, Board precedent does not mandate a finding that this misclassification was an independent violation of Section 8(a)(1) of the Act.

B. Respondent's Misclassification of Sobanski was Not an 8(a)(1) Violation of the NLRA

The General Counsel's post-hearing brief asserts (GC Br. 37-40.) that by sending the May 4, 2023, e-mail to employees, reducing Jason Hoppe's wages because he discussed his pay with other employees, and filing the lawsuit against Sobanski and Hoppe, Respondent "invoke[ed] a misclassification to 'prohibit employees from engaging in Section 7 activity." (citing *Velox Express*, 368 NLRB No. 61, slip op. at 7.) I find that none of these arguments have merit.

Hoppe's mid-January 2023 reduction in pay, in addition to being unalleged, is untimely,[17] with the initial charge in this case having been filed on November 22, 2023 and served on November 28, 2023, and the pay reduction taking place in mid-January 2023. Likewise, I also find untimely May 4, 2023 email forbidding employees from discussing their pay. Finally, I disagree that the Michigan state court lawsuit filed by Respondent against employees Sobanski and Hoppe was unlawful. That issue is addressed in detail below.

Accordingly, I dismiss amended complaint allegation in paragraph 6 that the misclassification of employees was an independent Section 8(a)(1) violation of the Act.

C. The Independent Contractor Agreement, Non-Disclosure Agreement, and the Non-Compete Agreement Were Overly Broad in Part

In employment policies, as with handbook rules, the Board considers whether an employer violates Section 8(a)(1) of the Act by maintaining a work rule that would reasonably tend to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. mem. 203 F.3d 52 (D.C. Cir. 1999). If the rule explicitly restricts Section 7 rights, it is unlawful. *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). If it does not, the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in

plays a client liaison role in the company that goes beyond that of phlebotomist.

[17] A *Redd-I*, 290 NLRB 1115, 1116 (1988) analysis could be applied to determine whether Respondent's action against Hoppe, though untimely, may properly be addressed in this case. Yet, the General Counsel did not see fit to include the allegation in the amended complaint or file a motion to add it. I decline to stand in his stead.

response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. Id. at 647.

Thus, an employer violates Section 8(a)(1) of the Act when it maintains workplace rules or policies that would reasonably tend to chill employees in the exercise of their Section 7 rights. See *Lafayette Park Hotel*, supra. The Board has long held that the mere maintenance of rules may violate the Act without regard for whether the employer ever applied the rule for unlawful purposes. *Rio All-Suites Hotel & Casino*, 362 NLRB 1690, 1698 (2015). With respect to facially neutral work rules that may be reasonably interpreted to restrict Section 7 activity, the Board interprets these rules "from the perspective of an employee who is subject to the rule and economically dependent on the employer, and who also contemplates engaging in protected concerted activity." *Stericycle, Inc*., 372 NLRB No. 113, slip op. at 9 (2023).

Accordingly, if an employee could reasonably interpret the rule to have a coercive meaning, the General Counsel will carry their burden, even if a contrary, noncoercive interpretation of the rule is also reasonable. Ibid. The Board in *Stericycle* made clear that *Lafayette Park Hotel*, supra, and *Lutheran Heritage Village-Livonia*, supra, set forth the proper interpretive focus for determining the perspective of a reasonable employee subject to a challenged work rule. *Stericycle*, 372 NLRB No. 113 at 7–8. A "typical employee interprets work rules as a layperson rather than as a lawyer." Ibid. Moreover, any ambiguity in a rule is interpreted against the drafter. See, e.g., *Lafayette Park Hotel*, 326 NLRB at 828 & fn. 22 (citing *Norris/O'Bannon*, 307 NLRB 1236, 1245 (1992)).

Thus, if the General Counsel carries their burden, the rule is presumptively unlawful. *Stericycle*, 372 NLRB No. 113, slip op. at 9. That is so even if the rule could also be reasonably interpreted not to restrict Section 7 rights and even if the employer did not intend for its rule to restrict Section 7 rights. Id. at 9–10. However, the employer may rebut[18] that presumption by proving that the rule advances a legitimate and substantial business interest, and that the employer is unable to advance that interest with a more narrowly tailored rule. Id. at 10. If the employer proves its affirmative defense, then the work rule will be found lawful to maintain. Ibid.

1. <u>The Independent Contractor Staffing Agreement</u>

The General Counsel contends (GC Br, 31-34.) that three provisions of the Independent Contractor Staffing Agreement are overly broad or otherwise unlawful: the prohibition on being seen using cell phones; the 5-year non-disclosure of pay; and the prohibition on disclosing pay shift levels or the amount earned to anyone.

Taking the two non-disclosure of pay provisions first, these terms explicitly restrict employees' Section 7 rights. They are therefore unlawful. *Lutheran Heritage Village-Livonia*, 343 NLRB at 646. It is foundational under the Act that employees have the right to discuss their wages and terms and conditions of employment both with one another and with third parties.

[18] In this case, Respondent's brief does not address whether the provisions of the Agreements were lawful under the Act, and, therefore, does not assert any defenses under *Stericyle*. However, the answers appear to admit the existence of the Agreements as alleged in paragraphs 7, 8, and 9, but deny that they were "overly broad or otherwise unlawful". The answers also deny the legal conclusions in paragraphs 14 and 15.

Alternative Energy Applications, Inc., 361 NLRB 1203, 1203 (2014) (citing *Waco, Inc*., 273 NLRB 746, 747-748 (1984)), enfd. 858 F.3d 393 (6th Cir. 2017); *Victory Casino Cruises II*, 363 NLRB 1578, 1580 (2016).

The prohibition on being seen using cell phones and contract termination fee do not explicitly restrict Section 7 rights and therefore the question is whether employees would reasonably construe the language to prohibit Section 7 activity. *Lutheran Heritage Village-Livonia*, 343 NLRB at 647. As to the prohibition on "being seen on [their] phone", the General Counsel first argues (GC Br. 31.) that Respondent's cell phone rule is actually a camera rule, maintaining that the rule prevents employees from "using their phones to document dangerous or unsanitary equipment" pursuant to *Whole Foods Market, Inc*., 363 NLRB 800, 802 (2015). The rule in *Whole Foods Market* was specific as to the recording of conversations, phone calls, images, or company meetings with a camera or recording device. It was not a rule about being seen using cell phones. I reject the General Counsel's attempt to extend *Whole Foods* to cover the contract provision at issue here.

I likewise reject the General Counsel's argument (GC Br. 31.) that the cell phone provision is unlawful because of a failure to distinguish the applicability of the rule during working and non-working time. The contract clause at issue expressly explains the reasoning for the rule: "our job is to be there to work." Given this explanation in the rule itself, I am hard pressed to conclude that an employee who is subject to the rule, economically dependent on the employer, and who also contemplates engaging in protected concerted activity could conclude that the rule applies to prohibit cell phone use during break time, which is generally and unambiguously understood to be non-working time.

Accordingly, I find Respondent has violated Section 8(a)(1) of the Act by maintaining the two non-disclosure of pay clauses in the Independent Contractor Agreement as alleged in paragraph 7 of the amended complaint. The remaining allegations of paragraph 7 are dismissed.

2. The Non-Disclosure Agreement

The General Counsel asserts (GC Br. 33-34.) that the Non-Disclosure agreement is overly broad or otherwise unlawful in that it applies to personnel; applies to such information for a term of five years; requires non-disclosure of the terms of the agreement; and entitles the aggrieved party to obtain injunctive relief, including actual and exemplary damages.

I agree with the General counsel that the application of confidentiality regarding "personnel", without being more specific, is overly broad under Board law—whether for five years or not. I further agree that it is unlawful, as explained above, to prohibit employees from disclosing the existence of the agreement, which is one of their terms and conditions of employment.

As to the entitlement of the aggrieved party regarding damages, I infer that the General Counsel reasons (GC Br. 34.) that because Board case law protects employees who make lawful disclosures, the Agreement provision providing for a remedy in the event of such disclosure would itself be unlawful. The cases cited by the General Counsel do not go so far as to say this

but do order the employers to cease and desist applying a confidentiality rule.[19] Yet, it seems to me that the result is the same whether only the confidentiality provision of the Non-Disclosure Agreement is unlawful or the confidentiality rule and the applicable damages provision are both unlawful.

Accordingly, I find that, as alleged in paragraph 8 of the amended complaint, Respondent has violated Section 8(a)(1) of the Act by maintaining the non-disclosure provision for personnel information; by prohibiting disclosure of the existence of the Non-Disclosure Agreement for five years; and by maintaining a broad employment contract provision that subjects employees to legal action for disclosing personnel information.

3. The Non-Compete Agreement

The General Counsel contends (GC Br. 34-37.) that three provisions of the Non-Compete Agreement are unlawful. The first is the provision prohibiting associating with Respondent's "current or former independent contractors, affiliates, and similar parties of the Owner under which a business relationship has been created."[20] As employees have the right to discuss wages, hours, and terms and conditions of employment—and "employees" includes former employees—I find that Respondent violated Section 8(a)(1) of the Act in maintaining this provision in the Non-Compete Agreement as alleged in paragraph 9 of the amended complaint. See *Briggs Mfg. Co.*, 75 NLRB 569, 570–571 (1947) (the Act's broad definition of "employee" includes applicants for employment, former employees, employees of other employers, and workers, generally).

The second provision in the Non-Compete Agreement to which the General Counsel objects is the prohibition of releasing confidential information. The General Counsel argues this on two fronts: first, that the language is overly broad because it references "work…financial information, statistical information, or any other subject matter pertaining to any business of the Owner or respective clients…that is disclosed to [employees]", and second, that the prohibition

[19] Cease and desist "[d]isciplining or warning, orally or in writing, an employee for engaging in protected concerted activity by providing employee names …", *Albertsons, Inc*., 351 NLRB 254, 259, 261 (2007) (unlawful broad rule that "subjected employees to immediate discharge for disclosing confidential information" and related discipline) and "from discharging employees or otherwise discriminating against them… for engaging in concerted union activity for their mutual aid or protection …." *Ridgely Mfg. Co.*, 207 NLRB 193, 197 (1973), enfd. 510 F.2d 185 (D.C. Cir. 1975) (employer's discharge of employee who memorized timecard names to provide to the union unlawful).

[20] Despite footnote 9 of the General Counsel's post-hearing brief, which disclaims an intent to pursue limitations on associating with customers, it appears on page 34 of the brief that the General Counsel *is* taking issue with this aspect of the Non-Compete Agreement:

> [The Non-Compete Agreement's] prohibition against employees associating with or "engaging" with any current or former employees "and similar parties," *including Respondent's customers*, is presumptively overbroad under *Stericycle*, in that it explicitly restricts § 7 activities such as employees' communications about terms and conditions of employment amongst themselves.

(emphasis added)

I am proceeding under the assumption that this clause referring to Respondent's customers is a remnant of an abandoned theory and reflects an editing oversight.

prevents employees from disclosing the information to "any other third party," which employees would interpret as preventing them from communicating this work-related information to Board agents, a union, the public, or other employees.

Yet, the confidentiality provisions in the Non-Compete Agreement differ significantly from that in the Non-Disclosure Agreement. The Non-Disclosure Agreement broadly defined confidential information as that including but not limited to:

> (1) business plans, methods, and practices; (2) personnel, customers, and suppliers; (3) inventions, processes, methods, products, patent applications, and other proprietary rights; or (4) specifications, drawings, sketches, models, samples, tools, computer programs, technical information, or other related information[.]

The General Counsel only took issue with the Non-Disclosure Agreement to the extent that it would be interpreted by employees to prevent them from disclosing personnel-related information, such as employee wages or names.

The Non-Compete Agreement has more detail and does not explicitly reference employee-related information at all:

> The Recipient shall be prohibited from expressing or sharing any and all technical and non-technical information provided by the Owner, including but not limited to: data or other proprietary information relating to products, inventions, plans, methods, processes, know-how, developmental or experimental work, computer programs, databases, authorship, customer lists (including names, buying habits or practices of any clients), names of vendors or suppliers, marketing methods, reports, analyses, business plans, financial information, statistical information, or any other subject matter pertaining to any business of the Owner or any of its respective clients, consultants, or licensees that is disclosed to the Recipient under the terms of this Agreement.

The General Counsel argues that "financial information, statistical information, or any other subject matter pertaining to any business of the Owner", read alone, could be seen as broad enough to encompass employee-specific information. However, the Board does not read words or particular phrases in work rules in isolation. *Lutheran Heritage Village*, 343 NLRB at 646. I find that given the context of the other terms in the list, which focus on proprietary, business-specific information, a reasonable employee, reading the entire list as a layperson and not a lawyer, would not conclude that it applies to protected activity. See *Mediaone of Greater Florida,* 340 NLRB 277, 278-279 (2003) (lawful confidentiality policy prohibited the disclosure of "proprietary information, including information assets and intellectual property").

Accordingly, I find that the Non-Compete Agreement's confidential information strictures are lawful and their maintenance does not violate Section 8(a)(1) of the Act as alleged in paragraph 9 of the amended complaint.

The third provision in the Non-Compete Agreement to which the General Counsel objects is the requirement governing law/remedies provision that employees who release

confidential information be subject to a restraining order and/or preliminary injunction without Respondent posting a bond. It seems to me that this is essentially the same objection that the General Counsel has to the damages provision of the Non-Disclosure Agreement. Namely, it must be unlawful to seek legal action against an employee who discloses what is incorrectly considered confidential information.

However, unlike the Non-Disclosure Agreement, which seeks to punish employees who disclose information that they have the right to share with anyone, the Non-Compete Agreement only applies to those employees who share information that the Board has long recognized is not within employees' right to disclose.

Accordingly, I find that the maintenance of this governing law/remedies provision in the Non-Compete Agreement does not violate Section 8(a)(1) of the Act as alleged in paragraph 9 of the amended complaint.

B. The Amended Complaint Allegation Regarding Owner Breasbois' May 4, 2023 Written Prohibition on Discussion of Employees' Contract Service and Pay Scale is Untimely

Paragraph 10 of the amended complaint alleges that Breasbois' May 4, 2023 e-mail forbidding the phlebotomists from speaking to anyone working at a client facility about their pay and instructing them to "keep [their] mouth shut" interfered in employees' Section 7 rights.[21] This allegation is untimely.[22]

Section 10(b) of the Act provides in pertinent part that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made."

The initial charge in this case, filed on November 22, 2023 and served on November 28, 2028, does not mention the May 4, 2023 e-mail message. (GCX 1(a-b).) Even if it did so, May 4 is 24 days prior to May 28, which date would be six months before the initial charge was filed and served.

Further, the first amended charge contains the first mention of the allegation found in paragraph 10 of the amended complaint. It alleges that Respondent violated the Act by "[i]ssuing an overly broad directive in about May 2023, which prohibits discussions about wages, hours, and other terms and conditions of employment." This first amended charge was filed on March 11, 2024 and served on March 12, 2024, which service date is more than 10 months after the allegedly violative conduct. (GCX 1(c-d).) Therefore, paragraph 10 of the amended complaint is also untimely as to the first amended charge.

[21] Were the allegation not untimely, I would find that the e-mail message violated Section 8(a)(1) of the Act. See *Boyds Drug*, 373 NLRB No. 143, slip op. at *1 (2024) (unlawful to tell employees that it was not appropriate and disruptive for them to discuss other employees' wages and to tell employees that their way of communicating created a problem and must stop).

[22] The General Counsel did not attempt to justify the inclusion of this allegation under *Redd-I*, 290 NLRB 1115 (1988) or any other Board precedent.

Accordingly, I dismiss as untimely the allegation that by telling employees that they were prohibited from discussing their contract service and pay scale, Respondent violated Section 8(a)(1) of the Act as alleged in amended complaint paragraph 10.

C. Respondent's October 13, 2023 State of Michigan Lawsuit Did Not Have an Illegal Objective under the NLRA and is not Pre-empted by the NLRA

The General Counsel's brief (GC Br. 40.) accurately summarizes the Board's legal standard for evaluating whether filing and maintaining a civil lawsuit violates Section 8(a)(1) of the Act:

> A party may violate [Section] 8(a)(1) by filing and maintaining a civil lawsuit under any of three theories: (1) the lawsuit has an "illegal objective." *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 737 n.5. (1983); *BE & K Construction Co.*, 351 NLRB 451, 457 (2007), on remand from 536 U.S. 516 (2002); *Manufacturers Woodworking Ass'n. of Greater New York, Inc.*, 345 NLRB 538, 540 (2005); (2) the lawsuit is preempted by the Act. *Makro, Inc., d/b/a Loehmann's Plaza*, 305 NLRB 663, 670 (1991) (*Loehmann's I*), supp. on other grounds, 316 NLRB 109 (1995); *Webco Indus.*, 337 NLRB 361, 363 (2001); or (3) the lawsuit lacks a reasonable basis in law or fact and was commenced with the motive of retaliating against the exercise of [Section] 7 activity. *Bill Johnson's Restaurants*, 461 U.S. at 748–49; *Atelier Condominium & Cooper Square Realty*, 361 NLRB No. 111, slip op. at 3 (2014), enf'd, 653 F. App'x 62 (2d Cir. 2016).

The General Counsel argues that Respondent's lawsuit in the State of Michigan Saginaw County Circuit Court is pre-empted by the Act (GC Br. 42-47.) and has an illegal objective in that it seeks to enforce all three Agreements, with their allegedly unlawful provisions, against Sobanski and Hoppe. (GC Br. 42.)

I find that Respondent's apparent motive in filing the state court lawsuit was to seek a remedy for what it believed were breaches of the Non-Compete Agreement and non-compete clauses in the other Agreements. As such agreements and language are not alleged to be unlawful in the instant case, I cannot conclude that the state court lawsuit was filed with the intent of retaliating against employees Sobanski and Hoppe. Nor do I conclude that the state court lawsuit is pre-empted or targets activity that is protected by the Act.

1. <u>Respondent's State Court Lawsuit Against Covenant and Employees Sobanski and Hoppe</u>

Respondent's state court complaint (GCX 25.) names three Defendants: Covenant, Sobanski, and Hoppe. The complaint alleges that Sobanski and Hoppe had agreements with Respondent that contained "valid, binding and enforceable noncompetition clauses", in particular, in paragraph 15, a "noncompete agreement". The state court complaint also alleges that at all pertinent times, Respondent and Covenant had a contract "wherein [Respondent] would provide Covenant with duly trained and qualified phlebotomists."

The complaint goes on to allege, in paragraphs 20 and 21, that Covenant "has been intentionally and deliberately encouraging, aiding and causing" Respondent's contractors to breach their agreements with Respondent and then hiring the contractors as phlebotomist employees of Covenant.

Respondent's state court complaint contains five allegations against Covenant (1) tortious interference with contract, (2) tortious interference with business relationship and/or expectancy, (3) breach of contract, and (4) antitrust violations. The complaint contains three allegations each against Sobanski and Hoppe: (1) breach of contract, (2) tortious interference with business relationship and/or expectancy, and (3) tortious interference with contract. The complaint also contains a "criminal conspiracy or unlawful purpose" allegation against all three defendants.

The complaint asserts that the Defendants' actions caused the following damages: loss of goodwill, harm to Respondent's professional standing and reputation, loss of income, loss of business opportunities, out of pocket expenses, attorney fees, other damages that may be revealed by way of discovery, and exemplary or punitive damages.

As remedies, Respondent's state court complaint seeks a judgment in its favor "against Defendants, jointly and severally, in an amount the [c]ourt deems equitable and just under the circumstances, plus attorney fees and costs" as well as any other relief deemed appropriate by the court.

2. Respondent's Lawsuit is not Pre-empted by the Act

The General Counsel's amended complaint alleges that the Respondent's filing of the Michigan state court lawsuit violates Section 8(a)(1) of the Act because the lawsuit is preempted by the Act under *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959) and *Loehmann's Plaza*, 305 NLRB 663 (1991). He argues that the state court lawsuit is pre-empted because the allegations involve the asserted breach of agreements that condition employment on relinquishing Section 7 rights, which means that the lawsuit targets a central concern of the Act. (GC Br. 45.) (citing *McLaren Macomb*, 372 NLRB No. 58 (2023); *Fresh & Easy Neighborhood Market*, 361 NLRB 72 (2023)).

While admitting that Respondent's state court lawsuit "appears to focus on the Non-Compete Agreement signed by the Charging Party and other former employees" (GC Br. 45 fn. 34.), the General Counsel maintains that the confidentiality provision in the Non-Compete Agreement, being allegedly unlawful, chills Section 7 activity such that the state court lawsuit to enforce the Non-Compete Agreement as a whole runs afoul of *Garmon*. As part of this argument, the General Counsel is also contending that Respondent is seeking to enforce the Independent Contractor Staffing Agreement and Non-Disclosure Agreement—not just the Non-Compete Agreement.

In addition, the General Counsel argues (GC Br. 46.) that the "the portions of the lawsuit seeking to enforce the overbroad agreements signed by the Charging Party and other employees are preempted." The danger here, according to the General Counsel, is that the court could rule before the Board does, which could create a jurisdictional conflict if the court grants relief to Respondent.

I do not find merit in either of these pre-emption arguments. As to the General Counsel's first contention, for the reasons explained above, I have found the confidentiality provision in the Non-Compete Agreement neither facially unlawful nor overly broad. Thus, it does not chill Section 7 activity.

Nor do I agree that state court complaint's repeated use of "their agreements" necessarily reflects an intent to enforce the Non-Disclosure Agreement and Independent Contractor Staffing Agreement. Rather, when "their agreements" is used, read in context, it seems obvious to me that the phrase refers to the Sobanski's and Hoppe's non-compete agreements.

Further, neither the Independent Contractor Staffing Agreement nor the Non-Disclosure agreement is mentioned in the state court complaint. Yet, construing any ambiguity against the drafter, as is the Board's practice, *if* "their agreements" includes the Non-Disclosure Agreement and Contractor Staffing Agreement signed by Sobanski and Hoppe, it is only the non-compete provisions of the Agreements that the employees are accused of violating in Respondent's state court lawsuit—not the confidentiality, non-disclosure, or remedy provisions found unlawful above.

With regard to the General Counsel's second contention, there is no surviving allegation in this case that either the Non-Compete Agreement or the non-compete provisions in the Non-Disclosure Agreement or Independent Contractor Staffing Agreement are overly broad or otherwise unlawful. The only issue before the Michigan court involves non-competition. Because non-competition is not at issue in the instant Board case, there is no chance of a jurisdictional conflict.

3. Respondent's Lawsuit Did Not Have an Illegal Objective under the Act

The General Counsel observes that "[l]itigation has an illegal objective and violates the Act where it is 'simply an attempt to enforce an underlying act that is itself an unfair labor practice'", *Regional Construction Corp.*, 333 NLRB 313, 319 (2001), or where "it is aimed at achieving a result incompatible with the objectives of the Act", *Manno Electric, Inc.*, 321 NLRB 278, 297 (1996). Thus, again as correctly recited by the General Counsel, the Board "may enjoin such lawsuits even if they are otherwise meritorious, without infringing on the First Amendment right to petition the government for the redress of grievances. *Convergys Corp.*, 363 NLRB 477, 478 [f]n.5 (2015)."

Using what is essentially the same argument explained above for pre-emption, the General Counsel argues (GC Br. 42.) that because Respondent's state court lawsuit seeks to enforce the Contractor Staffing Agreement, the Non-Disclosure Agreement, and the Non-Compete Agreement, it seeks to enforce an underlying act that is itself an unfair labor practice.

I have explained above that although I agree with the General Counsel that the Contractor Staffing Agreement, the Non-Disclosure Agreement, and the Non-Compete Agreement have unlawful or overly broad provisions, I do not agree that Respondent's state court lawsuit is seeking to enforce any of them as a whole. Rather, the only aspect of these Agreements arguably at issue in the state court lawsuit are the non-competition clauses of these Agreements, for which I have made no recommendation as to their lawfulness at the General Counsel's request. Without a finding that the non-competition clauses of the Agreements are unlawful under the Act, I

certainly cannot find that Respondent's state court lawsuit seeking to enforce the non-competition provision is an unfair labor practice.

Accordingly, Paragraph 11 of the amended complaint, alleging that Respondent filed a lawsuit against employees that is illegal[23] and pre-empted is dismissed.

D. *Sobanski's Separation from Employment was Not Unlawful*

Paragraph 13 of the amended complaint alleges that about June 29, 2023, Respondent discharged Sobanski because she engaged in protected concerted activities, including "seeking her release from Respondent's unlawful agreements…and challenging their legality and enforceability." The General Counsel's brief[24] cites to *Long Island Association for Aids Care, Inc*., 364 NLRB No. 28 (2016) in support of this allegation.

In that case, the employer promulgated and maintained a confidentiality statement that the Board, affirming the judge, found pursuant to *Lutheran Heritage Village-Livoni*a, 343 NLRB 646, 646 (2004), employees would reasonably construe to prohibit them from discussing wages or other terms and conditions of employment with employees or nonemployees and the media. The judge also found that the Respondent violated Section 8(a)(1) by threatening to discharge and then discharging an employee because he opposed these unlawful terms and condition of employment. Because maintaining the confidentiality statement was unlawful, discharging the employee for refusing to agree to the unlawful confidentiality statement also violated Section 8(a)(1) of the Act.

While I have already found the confidentiality provision of the Non-Disclosure Agreement in this case to be overly broad, unlike in *Long Island Association for Aids Care*, I see no support in this record to find that an objection to overly broad confidentiality restrictions was the basis for Sobanski seeking release from the employment Agreements. Sobanski testified that she sought the release because she wanted a stable job and understood that Covenant, where she was placed by Respondent, was going to be cutting back on contractor hours.

Further, in her text message exchange with Breasbois on June 8, 2023, Sobanski gave a different reason for wanting to be released: she wanted to apply for a job where she could accrue paid time off. Either of these reasons would have caused a conflict, not with the confidentiality provisions of the Agreements, but only with the non-compete provisions, which, again, the General Counsel has declined to prosecute in this case.[25]

My understanding of Sobanski's reasoning is also informed by her counsel's letter to Breasbois on June 22. On her behalf, counsel specifically sought her release from the October

[23] Out of an abundance of caution, I wish to make clear that by and through this decision and recommended order. I am offering no judgment, conclusion, or finding whatsoever as to the merits of Respondent's lawsuit that is pending in the State of Michigan Saginaw County Circuit Court.

[24] Respondent did not address the allegations of amended complaint paragraph 13 in its brief but denied the allegation in the answers.

[25] Non-compete agreements are not per se unlawful under Board law.

2022 Non-Complete Agreement to allow Sobanski to continue to work in the phlebotomy field. That letter makes it obvious that it was the non-competition provisions that stood in Sobanski's path, not the confidentiality provisions. The letter did not mention confidentiality language at all.

Moreover, the facts here do not reflect that Sobanski was even discharged: she resigned. In the June 8 text message exchange between them Breasbois asked Sobanski whether by her request for a release, she was giving her two-weeks' notice. Sobanski affirmed that, unless Breasbois would release her from the Non-Compete Agreement, she "guess[ed]" that she was giving her notice. Therefore, as later events showed that Breasbois was not willing to fully release Sobanski from the Non-Compete Agreement, Breasbois treated Sobanski's June 8 text message as notice. By the time Sobanski sent the follow up message to Breasbois asking whether she should work her schedule on June 27, the two weeks had already elapsed.

Accordingly, paragraph 13's allegation that Respondent discharged Sobanski about June 29, 2023 is dismissed.

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. Since about May 28, 2023, Respondent has violated Section 8(a)(1) of the Act by maintaining, as a condition of employment, unlawful or overly broad provisions in its Independent Contractor Agreement, Non-Disclosure Agreement, and Non-Compete Agreement.

3. The unfair labor practices committed by Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

4. Respondent did not violate the Act in any other manner alleged in the amended complaint.

REMEDY

Having found that 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.

Respondent shall post an appropriate informational notice, as described in the attached appendix. This notice shall be posted in Respondent's facility in Merrill, Michigan wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since May 28, 2023. When the notice is issued to the Respondent, it

shall sign it or otherwise notify Region 7 for the Board what action it will take with respect to this decision.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[26]

ORDER

Respondent, Mobile Phlebotomy of Central Michigan, LLC, d/b/a MPCM Services, Merrill, Michigan, and, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Requiring employees, as a condition of employment, to sign any agreement that prohibits employees from discussing wages, hours, working conditions, or other terms and conditions of employment.

(b) Requiring employees, as a condition of employment, to sign any agreement that prohibits employees from discussing the existence of agreement or other terms and conditions of employment.

(c) Requiring employees, as a condition of employment, to sign any agreement that subjects employees to legal action for the disclosure of wages, hours, working conditions, or other terms and conditions of employment.

(d) Requiring employees, as a condition of employment, to sign any agreement that prohibits employees from associating with current and former contractors, affiliates, and similar parties of the Employer under which a business relationship has been created.

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

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

(a) For each of the listed portions of its employment agreements, inform its employees in writing that it has rescinded the unlawful portions of the employment agreements, or furnish employees with inserts for the current employment agreements that (1) advise that the unlawful provisions have been rescinded, or (2) provide lawfully worded provisions on adhesive backing that will cover the unlawful provision(s); or publish and distribute to employees revised employment agreements that (1) do not contain the unlawful provision(s), or (2) provide [a] lawfully worded provision(s).

(i) Independent Contractor Staffing Agreement

[26] 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.

NDA-Non-Disclosure Agreement. You are not to mention ANY communication of pay, not exact or allowing or giving examples to help, this is non-negotiable. This is for 5 years.

The MCPM Contractor is not to discuss in any way the Pay shift levels or the amount earned to anyone.

(ii) Non-Disclosure Agreement
WHEREAS the Parties agree that Confidential Information of a Party may include, but not be limited to, that Party's:… (2) personnel…

When informed of the proprietary and confidential nature of Confidential Information that has been disclosed by the other Party, the receiving Party ("Recipient") shall, for a period of 5 years from the date of disclosure, refrain from disclosing such Confidential Information to any contractor or other third party without prior, written approval from the disclosing Party and shall protect such Confidential Information from inadvertent disclosure to a third party using the same care and diligence that the Recipient uses to protect its own proprietary and confidential information, but in no case less than reasonable care. The Recipient shall ensure that each of its contractors, officers, directors, or agents who has access to Confidential Information disclosed under this Agreement is informed of its proprietary and confidential nature and is required to abide by the terms of this Agreement. The Recipient of Confidential Information disclosed under this Agreement shall promptly notify the disclosing Party of any disclosure of such Confidential Information in violation n of this Agreement or of any subpoena or other legal process requiring production or disclosure of said Confidential Information.

All Confidential Information disclosed under this Agreement shall be and remain the property of the disclosing Party and nothing contained in this Agreement shall be construed as granting or conferring any rights to such Confidential Information on the other Party. The Recipient shall honor any request from the disclosing Party to promptly return or destroy all copies of Confidential Information disclosed under this Agreement and all notes related to such Confidential Information. The Parties agree that the disclosing Party will suffer irreparable injury if its Confidential Information is made public, released to a third party or otherwise disclosed in breach of this Agreement and that the disclosing Party shall be entitled to obtain injunctive relief against a threatened breach or continuation of any such breach and, in the event of such breach, an award of actual and exemplary damages from any court of competent jurisdiction.

Neither Party will, without prior approval of the other Party, make any public announcement of or otherwise disclose the existence or the terms of this Agreement.

(iii) Non-Compete Agreement

INDEPENDENT CONTRACTORS. The Recipient shall not be allowed to associate themselves with the Owner's…
All Independent Contractors. The Recipient shall be prohibited from engaging with any former or current contractors, affiliates, and similar parties of the Owner under which a business relationship has been created.

(b) Post at its Merrill, Michigan facility and electronically copies of the attached notice marked "Appendix" on forms provided by the Regional Director for Region 7, after being signed by Respondent's authorized representative, shall be posted for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure the notices are not altered, defaced, or covered by any other material.

(c) 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 Respondent has taken to comply with this Order.

IT IS FURTHER ORDERED that the amended complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated at Washington, D.C., December 11, 2025.

Renée D. McKinney
Administrative Law Judge

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 interfere with, restrain, or coerce you in the exercise of the above rights.

WE WILL NOT maintain facially unlawful or overly broad employment agreements that

(a) prohibit employees from discussing wages, working hours, or other terms and conditions of employment;
(b) prohibit employees from employees from discussing the existence of agreement or other terms and conditions of employment;
(c) subject employees to legal action for the disclosure of wages, hours, working conditions, or other terms and conditions of employment;
(d) prohibit employees from associating with current and former contractors, affiliates, and similar parties of the Employer under which a business relationship has been created.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL rescind the unlawful portions of our employment agreements listed below. **WE WILL** furnish you with inserts for the current employment agreements that (1) advise that the unlawful provisions have been rescinded, or (2) provide lawfully worded provisions on adhesive backing that will cover the unlawful provisions; or **WE WILL** publish and distribute revised employment agreements that (1) do not contain the unlawful provisions, or (2) provide lawfully worded provisions:

(a) Independent Contractor Staffing Agreement

> **NDA-Non-Disclosure Agreement**. You are not to mention ANY communication of pay, not exact or allowing or giving examples to help, this is non-negotiable. This is for 5 years.
>
> The MCPM Contractor is not to discuss in any way the Pay shift levels or the amount earned to anyone.

(b) Non-Disclosure Agreement

> WHEREAS the Parties agree that Confidential Information of a Party may include, but not be limited to, that Party's:… (2) personnel…
>
> When informed of the proprietary and confidential nature of Confidential Information that has been disclosed by the other Party, the receiving Party ("Recipient") shall, for a period of 5 years from the date of disclosure, refrain from disclosing such Confidential Information to any contractor or other third party without prior, written approval from the disclosing Party and shall protect such Confidential Information from inadvertent disclosure to a third party using the same care and diligence that the Recipient uses to protect its own proprietary and confidential information, but in no case less than reasonable care. The Recipient shall ensure that each of its contractors, officers, directors, or agents who has access to Confidential Information disclosed under this Agreement is informed of its proprietary and confidential nature and is required to abide by the terms of this Agreement. The Recipient of Confidential Information disclosed under this Agreement shall promptly notify the disclosing Party of any disclosure of such Confidential Information in violation n of this Agreement or of any subpoena or other legal process requiring production or disclosure of said Confidential Information.
>
> All Confidential Information disclosed under this Agreement shall be and remain the property of the disclosing Party and nothing contained in this Agreement shall be construed as granting or conferring any rights to such Confidential Information on the other Party. The Recipient shall honor any request from the disclosing Party to promptly return or destroy all copies of Confidential Information disclosed under this Agreement and all notes related to such Confidential Information. The Parties agree that the disclosing Party will suffer irreparable injury if its Confidential Information is made public, released to a third party or otherwise disclosed in breach of this Agreement and that the disclosing Party shall be entitled to obtain injunctive relief

against a threatened breach or continuation of any such breach and, in the event of such breach, an award of actual and exemplary damages from any court of competent jurisdiction.

Neither Party will, without prior approval of the other Party, make any public announcement of or otherwise disclose the existence or the terms of this Agreement.

(c) Non-Compete Agreement

INDEPENDENT CONTRACTORS. The Recipient shall not be allowed to associate themselves with the Owner's…

All Independent Contractors. The Recipient shall be prohibited from engaging with any former or current contractors, affiliates, and similar parties of the Owner under which a business relationship has been created.

MOBILE PHLEBOTOMY OF CENTRAL MICHIGAN, LLC, d/b/a MPCM SERVICES,

_____

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation, and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

477 Michigan Avenue, Room 300, Detroit, MI 48226-2543
(313) 226-3200, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at https://www.nlrb.gov/case/07-CA-330791 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.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER (616) 930-9165.