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The Apprentice and The President's NDA: Lessons for Protecting Confidentiality

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A New York Arbitrator's recent decision invalidating the non-disclosure agreement ("NDA") signed by former Apprentice star turned White House advisor Omarosa Manigault Newman ("Omarosa") is a cautionary tale for employers who make regular use of such agreements with their employees.

In 2018, Donald Trump's Presidential Campaign filed an arbitration claim against Omarosa alleging breach of contract related to various disparaging statements she made, including those in her book, Unhinged, about Mr. Trump, his administration, and others. The claim alleged that the disparaging statements, as well as alleged disclosure of confidential information, violated the NDA entered into by Omarosa when she began her employment for Mr. Trump's 2016 Presidential Campaign (hereinafter the "Trump Campaign").

The NDA

The NDA contained confidentiality and non-disparagement provisions, both of which the Trump Campaign claimed Omarosa breached. The NDA's confidentiality provisions defined "confidential information" broadly:

> All information … of a private, proprietary or confidential nature or that Mr. Trump insists remain private or confidential, including, but not limited to, any information with respect to the personal life, political affairs, and/or business affairs of Mr. Trump or of any Family Member, including but not limited to, the assets, investments, revenue, expenses, taxes, financial statements, actual or prospective business ventures, contracts, alliances, affiliations, relationships, affiliated entities, bids, letters of intent, term sheets, decisions, strategies, techniques, methods, projections, forecasts, customers, clients, contacts, customer lists, contact lists, schedules, appointments, meetings, conversations, notes, and other communications of Mr. Trump, any Family Member, any Trump Company or any Family Member Company.

(emphasis added).

As to the non-disparagement provision, the NDA language protected large groups of vague individuals and entities:

> You hereby promise and agree not to demean or disparage publicly the Company, Mr. Trump, any Trump Company, any Family Member, or any Family Member Company or any asset any of the foregoing own, or product or service any of the foregoing offer, in each case by or in any of the Restricted Means and Contexts and to prevent your employees from doing so.

(emphasis added). Interestingly, the terms "disparage" and "disparagement" are not actually defined in the Agreement.

The Decision

Omarosa moved for summary judgment on all of the Trump Campaign's claims, alleging that the NDA was vague and unenforceable. This arbitration took place in New York, and the parties did not dispute that New York contract law governed interpretation of the NDA. Generally, the Trump Campaign used the same standard NDA for its employees—and the Arbitrator relied heavily on a recent decision by a federal judge in the U.S. District Court for the Southern District of New York, which served as persuasive authority and found the same non-disclosure and non-disparagement provisions invalid and unenforceable as to a different employee.

In reviewing the confidentiality provision, the Arbitrator noted that there was no objective way for Omarosa to know if she was in breach of the Agreement because only "Mr. Trump" can determine if disclosed information is confidential and covered by the Agreement. As a result, there was no "objective standard" to determine the applicability of the provision, and thus the Arbitrator held it to be "vague and indefinite."

In support of its case, the Trump Campaign presented a chart which detailed Omarosa's numerous statements which it claimed violated the confidentiality provision. However, the Arbitrator found the statements to be primarily Omarosa's personal opinions about Mr. Trump, his family, and her "dealings with" them. None of those statements, per the Arbitrator, "disclosed confidential information." As a result of the foregoing and other reasons, the Arbitrator invalidated the NDA's confidentiality provision and found it unenforceable.

With regard to the non-disparagement provision, the Arbitrator determined that it was "indefensibly vague and indefinite" as to those individuals and/or entities that were purportedly protected from disparagement: "There is no way for [Omarosa] to determine how many individuals or entities may be covered by the scope of the Agreement," noting that Mr. Trump is "affiliated with more than five hundred companies." Likewise, the non-disparagement provision was struck down.

Lessons for Employers

There are some lessons that can be learned from this decision:

Written confidentiality provisions should be specific about the types of information the provision is meant to cover. For example, "customer lists," "private information," "personnel information," "financial information," and similar categories are generally types of information which can be objectively identified and distinguished as confidential (versus other types of information) when created or stored. If possible, employers should be conscious about handling of

confidential information, including labelling such information as confidential.

Generally, non-disparagement provisions can be difficult to enforce, and employers do not often file claims to enforce such provisions, even if they believe there has been a breach. However, if including this provision in a contract, it should, first of all, define "disparagement." For example, a disparaging statement can be defined as "any communication, written or oral, which could cause or tend to cause humiliation and embarrassment or to cause a recipient to question to business condition, integrity, product and services, quality, competence or good character of the other." Also, as we learned from the Trump Campaign's NDA, such a provision should specify the person and/or entity it is meant to protect, and should not be overbroad

Nexsen Pruet's Employment and Labor Law Group is well-versed on these topics, and regularly assists employers with crafting strong NDAs, and advises clients on related issues surrounding confidentiality, non-disclosure, and non-disparagement provisions. Please reach out to any of the lawyers in our group for assistance with these complicated issues.