

United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: October 2, 2018

TO: Ronald K. Hooks, Regional Director
Region 19

FROM: Jayme L. Sophir, Associate General Counsel
Division of Advice

SUBJECT: Uber Technologies, Inc.
Case 19-CA-199000

512-5012-0000
512-5012-0133
512-5012-1600
512-5030-8000

This case was submitted for advice as to whether the Employer violated Section 8(a)(1) when it 1) directed employees not to comment about an ongoing employee class-action lawsuit, and to contact in-house counsel if anyone contacted the employees about the case; and 2) issued an internal litigation hold to its employees informing them to preserve all communications with or about the plaintiff, a fellow employee, in the class-action lawsuit.

We conclude that the instruction not to comment about the litigation was an unlawful directive to refrain from engaging in Section 7 activity, but that the litigation hold was lawful.

FACTS

Uber Technologies, Inc., (“Employer”) operates a software application available on smartphones which matches riders seeking transportation with drivers offering transportation in their personal vehicles. The Charging Party (“plaintiff/employee”) was (b) (6), (b) (7)(C) at its Seattle office.

On May 22, 2016, the plaintiff/employee filed federal and state class-action lawsuits against the Employer alleging the Employer was not compensating employees in accordance with their contracts. Shortly thereafter, outside the Section 10(b) period, the Employer’s in-house legal team emailed several employees, including the plaintiff/employee, notifying them that the company was being sued by the plaintiff/employee, that employees were not to comment on the lawsuit, and that if anyone contacted them about the lawsuit, they should contact the in-house attorney. The plaintiff/employee complained to the attorney that the email infringed on

employee rights to discuss compensation issues. The attorney responded that employees would know they could still discuss compensation, and that the message was sent to the plaintiff/employee in error. Nevertheless, the same email was sent to the plaintiff/employee and other employees again in August 2016 and again in November 2016—within the Section 10(b) time period. The plaintiff/employee again complained that this directive interfered with his ability to discuss the compensation dispute with other similarly affected employees, but the Employer refused to notify the other employees of their right to discuss the dispute. The Employer also informed the plaintiff/employee’s attorney that the plaintiff/employee was not supposed to receive those emails, and that he needed to destroy them.

In February 2017, the Employer sent an internal litigation hold and document preservation email to several employees, but not the plaintiff/employee. This message repeated the earlier language that employees contacted about the lawsuit should not comment on it and should refer all inquiries to in-house counsel. The litigation hold also informed employees that they must preserve and protect any information in their possession relating to the case, including:

- All documents which contain communications pertaining to any allegation by Plaintiff that Uber treated him unfairly in regards to his employment with Uber;
- All communications with Plaintiff;
- All communications concerning Plaintiff
- [The email also instructed employees that the litigation hold applied to all files, including those on “home computer(s) (if used for work)” and any “other type of portable email devices (*i.e.*, PDAs; Blackberrys; iPhones; iPads).”]

The plaintiff/employee filed an unfair labor practice charge that the litigation hold and earlier directives were unlawfully preventing employees from discussing compensation issues. During the investigation, the Employer terminated the plaintiff/employee, and the Region has determined that discharge was due to the plaintiff/employee’s protected concerted and Board-related activities.

ANALYSIS

A. The Directive Not to Comment About Lawsuit is Unlawful

We conclude that the Employer’s instruction to employees not to comment about the lawsuit, and to contact the Employer’s attorney if anyone asked about the lawsuit, was an unlawful directive to refrain from engaging in Section 7 activity. The Employer’s instruction prevents employees from discussing the lawsuit or the common grievance from which it sprang with one another, or with media or third

parties. While the Employer's handbook states that employees are not restricted from discussing compensation, employees would reasonably infer that the Employer's repeated directive prohibiting discussion of the lawsuit or its underlying grievance supersedes the handbook. Employees' right to communicate with one another and with third parties and the media about grievances and potential remedies to those grievances, including lawsuits, is a significant Section 7 interest. This is especially true in the case of a class-action lawsuit, where plaintiffs or plaintiffs' attorneys may try to contact members of the class.

The Employer here does have a significant interest in limiting who speaks on its behalf with regards to a lawsuit, but this directive goes much further than that. Instead of merely informing employees that they were not authorized to speak *for the company* about the lawsuit, the directive covers even the employees' personal speech. The Employer's business interests could be protected with a much more narrowly drawn proscription that would not silence employees altogether.¹

Accordingly, the Region should issue complaint alleging that the Employer's directive violated Section 8(a)(1) of the Act.

B. The Litigation Hold Is Lawful

We further conclude that the litigation hold is lawful under *Boeing*.² The litigation hold does not explicitly address protected concerted activity, but rather "all communications" with or about the plaintiff/employee. Thus, it is tantamount to a facially neutral rule and a *Boeing* analysis is appropriate.

Employees would reasonably understand the hold to include protected concerted communications with or about the plaintiff/employee, and thus there is the potential that the hold will cause some chilling of protected communications.³ However, the

¹ See *Dish Network, LLC*, 365 NLRB slip op. at 3 n.8 (noting that the Board must weigh Section 7 rights with the employer's business interests in the case of alleged unlawful directives) (quoting *Inova Health System*, 360 NLRB 1223, 1229 n.16 (2014), *enforced*, 795 F.3d 68 (D.C. Cir. 2015)).

² 365 NLRB No. 154 (Dec. 14, 2017).

³ Cf. *Waggoner Corp.*, 162 NLRB 1161, 1162–63 (1967) (noting that when an employer "has manifested an interest in what the employee has to say about him [it] can only exert an inhibitory effect on employee's willingness" to say things damaging to the employer).

hold does not require employees to produce the communications, but merely tells employees to preserve them for possible production. This significantly lessens the potential that the hold will chill employees from engaging in protected communications.

In addition, the Employer has significant legitimate interests in imposing this litigation hold. Like all parties to a lawsuit, it is legally compelled to preserve evidence. Adherence to this duty is key to avoiding liability and damages for spoliation of evidence. While we have found no cases specifically holding that an employer must produce the private communications of its employees, this area of law is far from settled and it is appropriate for the Employer to err on the side of caution in complying with its legal obligation to preserve all documents that may constitute evidence in the ongoing litigation. Moreover, broad litigation holds serve not just employers' interest in avoiding penalization for spoliation of evidence, but also the interests of plaintiffs, intervenors, and the courts. The court system is reliant on parties preventing spoliation of evidence in their possession, and encourages liberal litigation holds. If employers must consider potential effects on Section 7 rights in imposing litigation holds, they may not comply as fully with their duty to the court, which in turn could interfere with the effective functioning of the judicial system.

Here, the broad litigation hold is not unreasonable, and is not focused on employee protected concerted activity. Moreover, there is no evidence that the hold has actually chilled any employee speech. Thus, any impact on Section 7 rights is outweighed by the important Employer and public interests at stake.

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

/s/
J.L.S.