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Erik Carlson

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EXTENDING THE AUTHORITY OF NO DISPARAGEMENT CLAUSES TO VOLUNTEERS: ADD IT TO A LONG LIST OF 2016 ELECTION SURPRISES

The 2016 United States Presidential election brought a new surprise at every corner and for several, has never ceased to amaze. One such example is the tens of thousands of individuals who have now, through a nondisclosure agreement required for all volunteers with The Trump campaign, agreed to never criticize Donald Trump or the Trump family for the rest of their lives. Throughout the campaign, pundits and lay persons the like flocked to any kind of media or social media to express their “outrage” over the words said, or the actions taken by Mr. Donald Trump. But this time, the outrage might be different.

Yes, Mr. Trump’s 2,271-word nondisclosure agreement (Agreement) caused the same uproar as several other campaign tactics, but this time there is a legal question: Is a nondisclosure agreement forced upon volunteers with a lifetime no disparagement commitment enforceable?

Agreements, like this one, are not new to Donald Trump; he has been quite successful over the years enforcing such contracts with former employees and even against an ex-wife.¹ Considering Mr. Trump’s perceived transferability from business to politics, it should come as no surprise that Mr. Trump believes a nondisclosure agreement could bind a volunteer in the same manner as an employee. However, even though the waters of volunteer nondisclosure agreements are unchartered, an application of the basic rules of employment contracts will likely prevent enforceability of said agreement.

I. AGREEMENT

There are five articles defining the scope of the Agreement: (1) no disclosure of confidential information, (2) no disparagement, (3) no competitive services, (4) no competitive solicitation, and (5) no competitive intellectual property claims.² A brief overview of articles (1) and (3) are included below and articles (4) and (5) are essentially omitted from this discussion. Article (2) is covered in more depth and reads as follows:

No Disparagement. During the term of your service and at all times thereafter you hereby promise and agree not to demean or disparage

1. Elizabeth Preza, *Trump’s Insane Nondisclosure Agreement Forbids All Volunteers from Saying Anything Bad about Him, Ever: The Campaign is Desperate to Control the Conversation Around Donald Trump*, ALTERNET (September 6, 2016), <http://www.alternet.org/election-2016/trump-nda-forbids-volunteers-dissing-candidate> (last visited September 28, 2016).

2. Agreement, <http://talk.donaldjtrump.com/User/NonDisclosureAgreement> (last visited September 8, 2016).

publicly the Company, Mr. Trump, and Trump Company, and 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 Restricted Means and Contexts and to prevent your employees from doing so.³

II. ENFORCEABILITY

a. A typical employer-employee restrictive covenant with good business intention is presumed enforceable.

Nondisclosure agreements, non-compete agreements, no disparagement clauses, and other restrictive covenants have long been employed by employers and are presumed to be enforceable by courts.⁴ In recent years, businesses have expanded the use of nondisclosure agreements to protect business reputation and product or service evaluation.⁵ Seemingly, the realm of “silence contracts” could be infinite as any individual could persuade another individual to sign such an agreement to remain quiet.⁶

To limit the endless possibilities of contracts available, courts have held that contract principles dictate that such promises only become enforceable contracts when there is consideration from the party accepting the vow of silence.⁷ As understood in contract law, in an absence of formal consideration, courts may still enforce a contract that is a promise-for-a-promise.⁸ However, a court may find a contract unenforceable if it is deemed unconscionable.⁹ The defense of unconscionability is seemingly one of the strongest arguments against enforcement of Mr. Trump’s nondisclosure agreement. An imbalance of power, lack of complete mutual consent, and contracts between companies and low level employees generally give rise to a higher likelihood of finding the contract unconscionable.¹⁰

A court’s presumption on an employee restrictive covenant is that the agreement is enforceable.¹¹ Consequently, a Trump volunteer who is sued for violation of the agreement, will have the burden of proving the nondisclosure agreement is unenforceable. Pursuing an unconscionability defense is still likely the best argument. Knowing that courts treat em-

3. *Id.*

4. Lucille M. Ponte, *Protecting Brand Image or Gaming the System? Consumer “Gag” Contracts in an Age of Crowdsourced Ratings and Reviews*, 7 Wm. & Mary Bus. L. Rev. 59, 72 (2016).

5. *Id.* at 75.

6. Alan E. Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 Cornell L. Rev. 261, 268 (1998).

7. *Id.*; see also Restatement (Second) of Contracts §§ 71-94 (1981).

8. Garfield, *supra* note 3, at 279.

9. *Id.*

10. *Id.* at 285–86.

11. See *Id.* at 282.

ployees with low power and a great distance from their employer more favorably, a challenging volunteer will present evidence to show the power disparity. The question courts have not answered, and would likely be the crux of this lawsuit, is: What is the power balance between a politician and a volunteer?

b. To contest a restrictive covenant, the employee must prove the covenant is unreasonable.

The Agreement provides for each volunteer to personally subject themselves to jurisdiction in New York. Thus, legal analysis of these covenants will be specific to New York. New York relies on a reasonableness test in determining employee--employer restrictive covenants.¹² This reasonableness test balances the interests of the employer against the burden on the employee and the interests of the public.¹³ To determine reasonableness, New York has adopted the common law test for enforceability of restrictive covenants.¹⁴ Specifically, a covenant will be enforced if it: “(1) is no greater than is required for the protection of the legitimate interest of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public.”¹⁵ In weighing these factors, courts must “focus on the particular facts and circumstances giving context to the agreement.”¹⁶ One example of factors courts look into is if the employer and employee are both members of a learned profession.¹⁷ In that instance, a court should look more favorably on restrictive covenants, especially contrasting a situation where a large power imbalance exists between the two parties signing the covenant.¹⁸

III. OUTCOME

New York courts have not specifically ruled on the enforcement of restrictive covenants between a politician and a volunteer, so the outcome of contesting Mr. Trump’s agreement is uncertain. However, there are enough similar elements of the Agreement to various employment contracts that a legal prediction based on enforcement or non-enforcement is reasonable.

It is likely that a court would partially enforce the Agreement. The New York Court of Appeals in *BDO Seidman v. Hirshberg*,¹⁹ representative of New York law and procedure, held that an agreement with an overbroad provision was enforceable, with the exception of the specific

12. *BDO Seidman v. Hirshberg*, 712 N.E.2d 1220, 1224 (N.Y. 1999).

13. *Id.* at 1223.

14. *Id.*

15. *Ashland Mgmt. Inc. v. Altair Investments NA, LLC*, 869 N.Y.S.2d 465, 472 (N.Y. App. Div. 2008), *aff’d as modified*, 925 N.E.2d 581 (N.Y. 2010).

16. *BDO Seidman*, 712 N.E.2d at 1224.

17. *Id.*

18. *Id.*

19. 712 N.E.2d 1224 (N.Y. 1999).

overbroad provision.²⁰ The *BDO Seidman* court specified that restrictive covenants should be evaluated on a case-by-case basis, looking at the legitimacy of the whole document, as well as specific provisions.²¹

Not all provisions in Mr. Trump's volunteer agreement are unreasonable. For example, the non-compete provision is limited in scope and duration, which probably makes it enforceable.²² Additionally, the confidential campaign information, in conjunction with the non-compete provision look like legitimate business interests. Similar to a business that, for the interest of maintaining success and typically a client base, requires employees to sign a geographical non-compete for a certain period of time. To compare a business to a campaign, Mr. Trump has a legitimate interest in keeping confidential campaign interests protected in the immediate future. Certain confidential information, if presented to an opponent or the public, could have significantly damaging effects on his campaign.

However, the no disparagement clause in Mr. Trump's volunteer agreement is overbroad in breadth and duration. To begin with duration, this clause will likely fail on the first prong of the reasonableness test. Prohibiting volunteers from disparaging Mr. Trump after the election is over does not seem to fit into a legitimate business interest. For instance, business interests are usually connected to protecting a client base or the good will of a company.²³ Here, the likely business interests for Mr. Trump would be to protect his interests in running for President of the United States. Certainly reputation plays a factor in a candidate's likelihood of being elected; perhaps requiring volunteers to refrain from disparaging during the campaign would protect his reputation and consequently his "business interest" of being elected. However, when a campaign is over, win or lose, the business interests of being elected are, for all extents and purposes, gone. Thus, prohibiting disparagement beyond the interest of being elected is likely to be deemed overly broad by the courts.

In addition to overbroad duration, the Agreement is overbroad in its scope of coverage. The Agreement seeks to prohibit disparagement of not only Mr. Trump, but also any Trump Company or family member. Additionally, the no disparagement clause extends beyond the volunteer to include the volunteer's employees. Each of these extensions of restriction is likely to fail the second prong of the reasonableness test by placing an undue burden on the volunteer. The broad inclusion of any Trump Company or family member places a burden on the volunteer to be aware of, and know, each of Trump's companies and family members

20. *Id.* at 1226.

21. *Id.*

22. See Ponte, *supra* note 4, at 72.

23. *BDO Seidman*, at 1224.

in order to comply. Even while avoiding the issue of duty or ability to control one's employees, the expansiveness and inclusiveness of the no disparagement clause is likely to be deemed overbroad and unenforceable by going beyond the business interests and relationship between Mr. Trump and his volunteers.²⁴

If this covenant were to be challenged in New York courts, it would likely be upheld in part and reversed in part. *BDO Seidman* reinforced the ability of the courts to partially enforce restrictive covenants, on the relevancy of an employer's business interest.²⁵ The non-compete clause seems to be limited in scope and duration and connected close enough to business interests to be enforceable, but the no disparagement clause seems to be overbroad in several respects, which would likely be ruled unenforceable by a court.

IV. CONCLUSION

There is no doubt that the 2016 United States Presidential Election will be historical on several accounts. The question posed here, however, is whether Mr. Trump's volunteer agreement will set a new precedent of enforceable nondisclosure agreements between politicians and volunteers. After exploring New York's laws regarding enforceability of employment contracts, though Mr. Trump may find these agreements beneficial a court is not likely to enforce them. One can only hope a court strikes its enforceability before an expanded "silent contract" precedent is set in the political volunteer setting.

*Erik Carlson**

24. The issue of liability of employee's behavior as well as your own is too complex and outside of the basic scope of this article. There are obvious legal concerns with such provision, such as employer/employee coercion, but the argument against enforceability of such provision is intentionally omitted from this piece.

25. *BDO Seidman*, at 1226.

* JD Candidate 2018, University of Denver Sturm College of Law and Staff Editor for the *Denver Law Review*