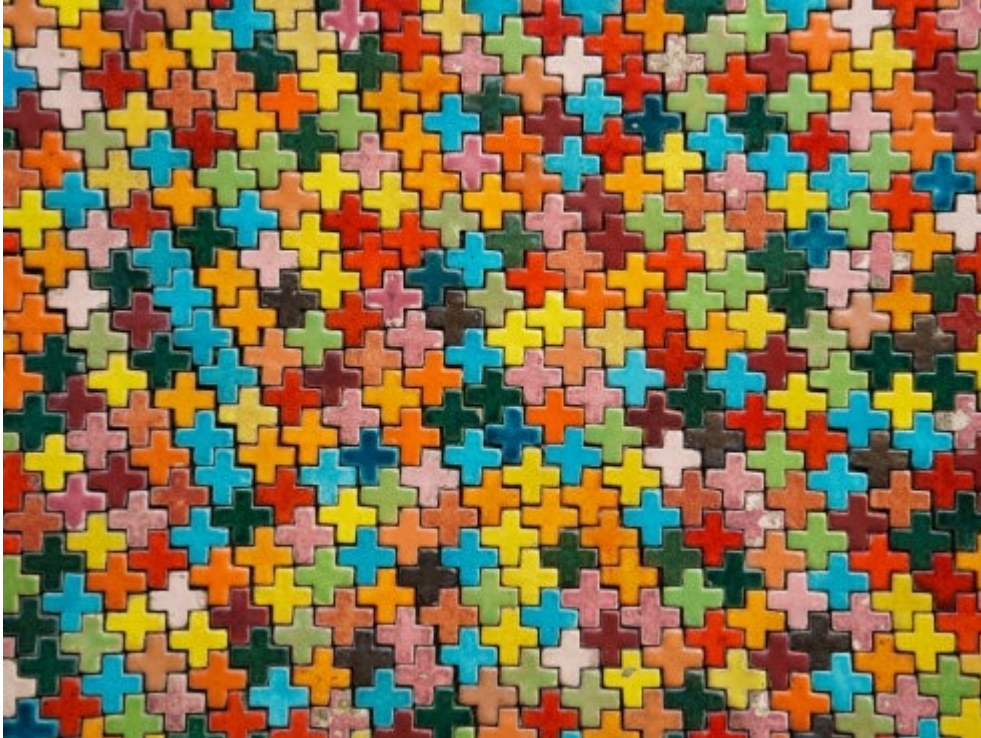


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February 28, 2023

February Tip of the Month: NLRB Ruling Affects Nondisparagement and Confidentiality Provisions



On February 21, 2023, the National Labor Relations Board (NLRB or the Board) issued a significant decision that dramatically affects employers' ability to include nondisparagement and confidentiality provisions in separation agreements and other employment-related documents. Regarding agreement provisions prohibiting an employee from (1) discussing with third parties certain terms and conditions of the separation agreement and (2) disparaging their now-former employer, the Board ruled that broad confidentiality and nondisparagement clauses of this nature violate the National Labor Relations Act (NLRA or the Act). Going further, the Board held that the mere offer of an agreement featuring provisions of this nature, regardless of whether the employee actually accepts the agreement, violates the Act because it may restrain an employee's ability to discuss the terms and conditions of their employment. Importantly, this ruling affects separation agreements offered to all nonsupervisory employees, *regardless of whether such employees are members of a union*.

In light of this ruling, employers should promptly review—and will likely need to revise—a range of agreements and policies to ensure, among other things: (1) nondisparagement, nondisclosure, and confidentiality provisions are appropriately tailored to avoid running afoul of the Act's protections and the Board's new decision; and (2) severability clauses ensure that such agreements can survive in the event that an individual provision is deemed to be unlawful.

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