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ADVANCED TOPICS IN HEDGE FUND PRACTICES CONFERENCE

Manager and Investor Perspectives

NEW YORK

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Current Employment Considerations

Speakers

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Overview of FTC Proposed Rule

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FTC's Proposed Noncompete Rule

- **Proposed Rule Text**:

  Unfair methods of competition. It is an unfair method of competition for an employer to enter into or attempt to enter into a non-compete clause with a worker; maintain with a worker a non-compete clause; or represent to a worker that the worker is subject to a non-compete clause where the employer has no good faith basis to believe that the worker is subject to an enforceable non-compete clause.

- **Proposed Rule Would**:
  - **Ban noncompetes with "workers"**
    - Broad definition of "workers": any person "who works, whether paid or unpaid, for an employer"
    - Applies to explicit and de facto noncompetes
  - **Require rescission of existing noncompetes**, with notice to workers
  - Only **exception in connection with sale of business**, for noncompetes applicable to "substantial owners," which is defined to mean those owning more than 25% of business

Application of the FTC's Rule

Rule would apply nationally to the full extent of FTC jurisdiction

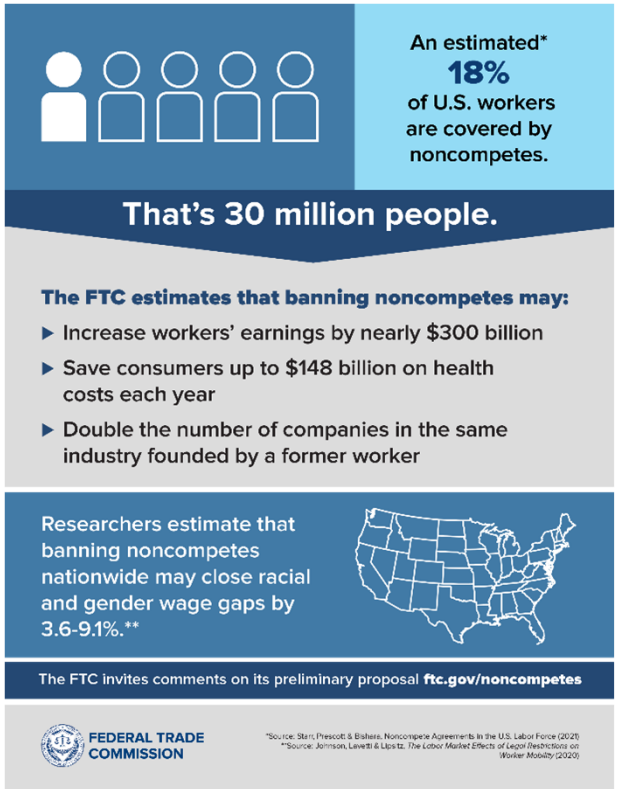
- FTC lacks jurisdiction over "banks, savings and loan institutions described in section 57a(f)(3) of this title, Federal credit unions described in section 57a(f)(4) of this title, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to part A of subtitle VII of title 49, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921"
- FTC lacks jurisdiction over most nonprofit organizations

No penalties or private causes of action are specified in the FTC Rule, but FTC may explore fines and the Rule could be incorporated automatically into state "Little FTC Acts"

- 20 states have Little FTC Acts that explicitly incorporate and require deference to FTC interpretations of "unfair methods of competition"
- Those state statutes permit civil penalties and most permit private rights of action, several with treble damages

FTC's Proposed Noncompete Rule

- FTC has and is considering alternatives and has specifically requested comments on:
  - Alternative #1 would categorically ban the use of noncompete clauses for some workers and apply a rebuttable presumption of unlawfulness to noncompete clauses for other workers.
  - Alternative #2 would categorically ban the use of noncompete clauses for some workers and not apply any requirements to other workers.
  - Alternative #3 would apply a rebuttable presumption of unlawfulness to noncompete clauses for all workers.
  - Alternative #4 would apply a rebuttable presumption of unlawfulness to noncompete clauses for some workers and not apply any requirements to the other workers.
- **COMMENTS DEADLINE: APRIL 19, 2023**



APA Rulemaking

- 60-day comment period, extended, ended April 19, 2023
- Next steps by the agency:
  - Reopen the comment period
  - Issue a new proposed rule
  - Terminate its rulemaking, or
  - Move on to a final rule
- Response to comments: "An agency must consider and respond to significant comments received during the period for public comment." *Perez v. Mortgage Bankers Ass'n* 575 U.S. 92, 96 (2015)
  - "[W]e find that the Commission's approval of FINRA's proposal was arbitrary and capricious under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), because the Commission failed to respond to significant and relevant concerns Bloomberg raised in its comments objecting to FINRA's proposal." *Bloomberg L.P. v. SEC*, 45 F.4th 462, 472 (D.C. Cir. 2022)

Other Constraints

- Office of Information and Regulatory Affairs reviews the rule and must provide a final analysis of the estimated cost of the rule, as measured by the rule's impact on the economy
- Congressional Review Act: House and Senate can disapprove rules

INFORMATION AND REGULATORY AFFAIRS

OMB

Possible Legal Challenges

Commissioner Wilson – The NPRM is vulnerable to meritorious challenges that:

1

The FTC lacks authority to engage in "unfair methods of competition" rulemaking

2

The major questions doctrine addressed in *West Virginia v. EPA* apply, and the FTC lacks clear congressional authorization to undertake this initiative

3

Assuming the agency does possess the authority to engage in this rulemaking, it is an impermissible delegation of legislative authority under the nondelegation doctrine

NLRB'S *McLaren Macomb* Decision

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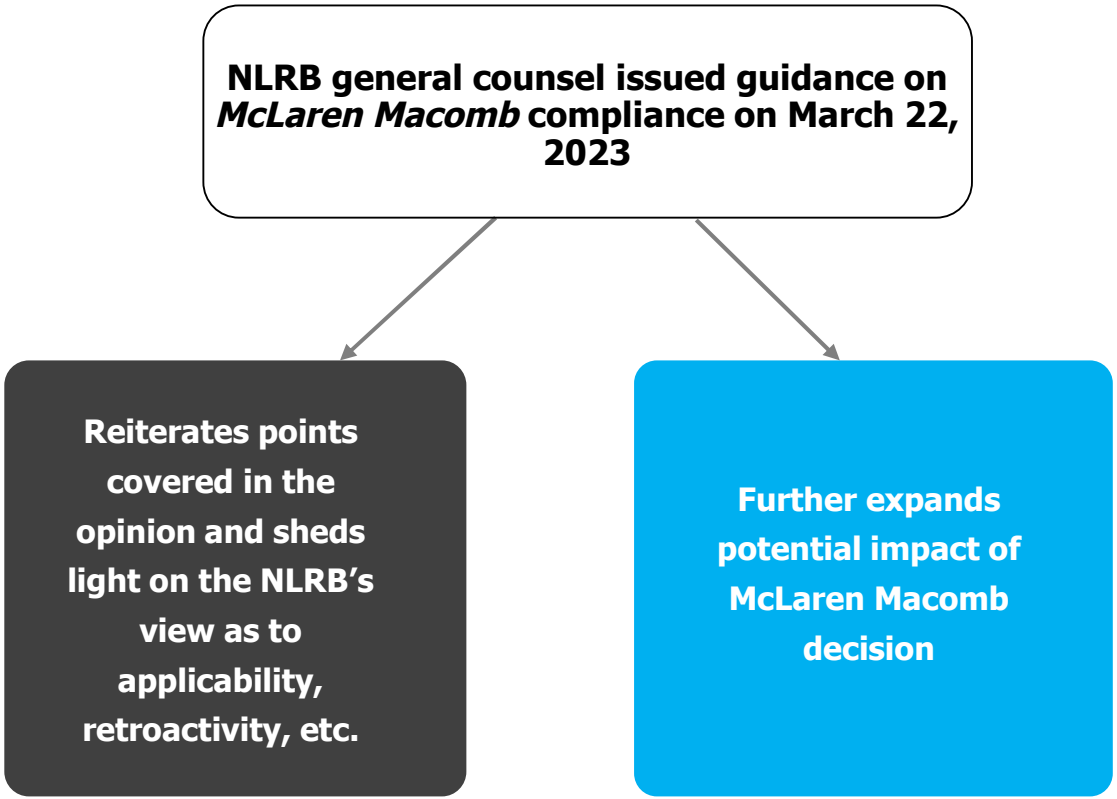
NLRB'S *McLAREN MACOMB* DECISION

- February 21, 2023 – NLRB issues decision in *McLaren Macomb*, 372 NLRB No. 58
  - Holds that employers violate the NLRA by offering severance agreements to employees with **confidentiality and/or non-disparagement provisions that facially restrict employees from discussing wages, hours, or other working conditions** (including management practices) (i.e., NLRA Section 7 rights)
    - Prior NLRB cases focused on the circumstances under which such agreements were presented. In the absence of other labor-law violations or employer conduct demonstrating improper motivation, confidentiality and nondisparagement restrictions were generally permissible (even if difficult—practically and legally—to enforce)
  - *McLaren Macomb* disregards contextual considerations in favor of a standard that looks solely at the terms of proffered severance agreements

Goals and Objectives



Key Takeaways

- NLRA excludes supervisory and managerial employees from NLRA coverage; *McLaren Macomb* does not apply to supervisory and managerial employees
  - Most employees with no direct reports, *even if salaried and/or exempt*, will still be covered by the NLRA
- GC memo confirms that NLRB intends retroactive application and that regional offices will apply decision retroactively
- NLRA contains a six-month statutory limitations period—employers cannot be held liable for conduct occurring more than six months prior to the filing of an NLRB charge. GC confirmed that severance agreements proffered within the six months prior to the decision will be subject to the standard
  - Attempted ***enforcement*** of unlawful confidentiality and/or nondisparagement provisions will revive the state of limitations
- GC memo says claims over executed/signed agreements containing unlawful confidentiality/nondisparagement provisions will never be time-barred if they contain no expiration date

Key Takeaways

- *McLaren Macomb* decision applies only to severance agreements, but GC memo states that NLRB views this as extending to all employer agreements and/or communications with employees and specifically flags preemployment communications such as offer letters. As such, all existing ***agreement* templates** with confidentiality and/or nondisparagement provisions should be reviewed.

- GC memo confirmed that generally the unlawful confidentiality and/or nondisparagement provisions will be void, but not the entire severance agreement

- NLRB's standard default remedies include:
  - *cease and desist* maintaining and/or offering agreements containing the unlawful provisions;
  - rescind and/or revise the *unlawful provisions* so that they comply with the law; and
  - *notify* each impacted individual who signed the agreement, in writing, that certain provisions were found to be unlawful, that the employer will not enforce those provisions, and that the employer has rescinded and/or revised those provisions so that they comply with the law

Key Employer Considerations

Important to generally assess the utility of existing confidentiality and nondisparagement clauses against the low probability of an NLRB charge

Increasing tension between NLRB compliance and preserving the intended benefit of confidentiality and/or nondisparagement provisions

Challenging to draft qualifying language in a manner that is sufficiently clear and unambiguous (from the current NLRB's extremely pro-employee perspective) to be understood by a "reasonable employee" trying to understand their rights

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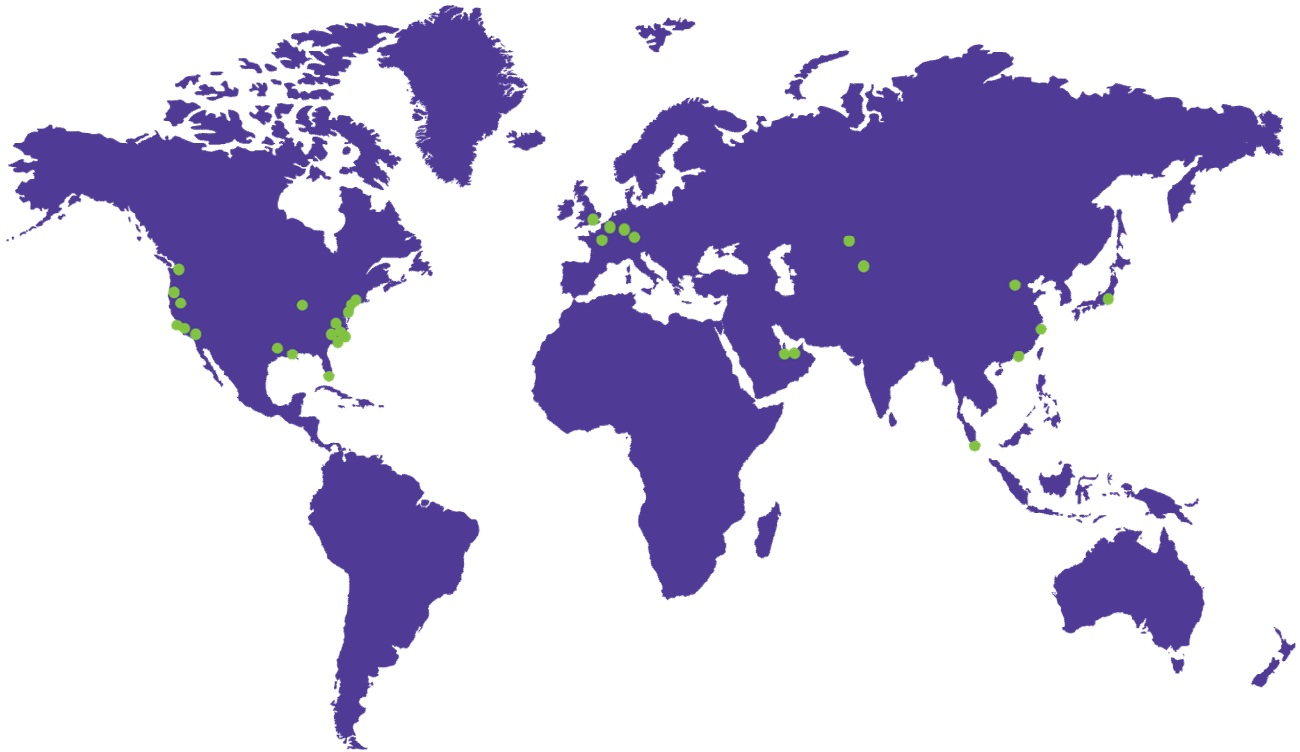

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THANK YOU

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