



Morgan Lewis

**ADVANCED TOPICS IN
PRIVATE FUND PRACTICES
CONFERENCE**

Manager and Investor Perspectives

BOSTON

Thursday, June 15, 2023

Employment and Compensation Plans

Speakers



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Equity Participation Considerations



What are we sharing?

- Management fee participation?
- Carry participation?
- Share of capital proceeds upon firm sale?
- Offering employee investment opportunities in fund?



How are we sharing?

- Phantom vs. true equity. Follow the money...
- Are we planning on “vesting?” (Your friend 409A wants to have a chat...)
- Structure considerations: employee/partner status and effects, tax efficiency, and current carry arrangements.
- Are we “in the money” yet?

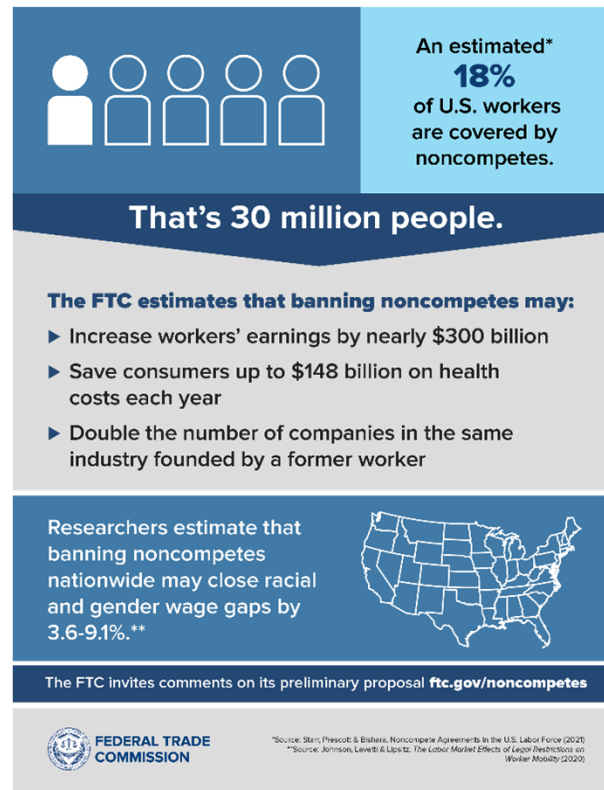


What happens upon termination of service?

- Forfeiture for “cause”
- Clawbacks
- Covenant compliance

Noncompetes Under Attack

- Federal Trade Commission (FTC)
- National Labor Relations Board (NLRB)
- Increasing patchwork of state laws



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.”

- The 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 is in connection with sale of business**, for noncompetes applicable to “substantial owners,” defined to mean those owning more than 25% of business

NLRB's GC: Noncompetes Violate Federal Labor Law

- **May 30, 2023:** NLRB's general counsel issued guidance announcing that many noncompetes violate the National Labor Relations Act (NLRA) unless narrowly tailored to special circumstances justifying the restrictions.
 - Does not apply to agreements with statutory supervisors and managerial employees, as those positions have been specifically excluded under the NLRA.
 - Contends that the proffer, maintenance, and enforcement of noncompete agreements could in theory “reasonably be construed by employees” to interfere with their exercise of Section 7 rights.
 - Gives NLRB regional offices permission to seek information from employers on noncompete agreements during pending or future investigations; likely means that employers will face inquiries during investigations asking whether they require noncompete agreements.

Patchwork of Different State Laws



California and several other states prohibit noncompetes

Increasing number of state laws restrict but still allow noncompetes, for example:

- Massachusetts
- Illinois
- Washington

In many states, still no statutory restrictions on noncompete covenants, which generally remain enforceable **if they satisfy certain criteria**

Executive and legislative efforts at the federal and state level, including in New York and Connecticut, reflect trend to promote employee mobility

Other Measures to Protect Confidential Information

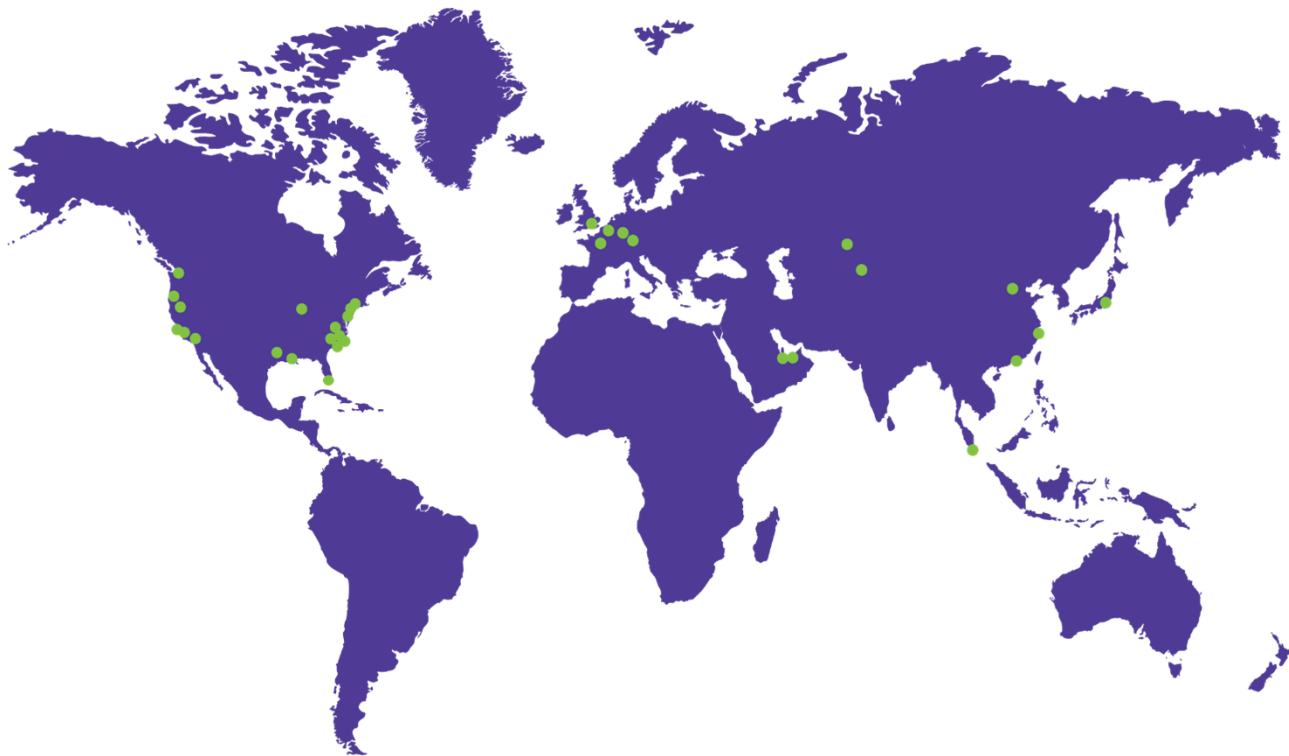
- ✓ Nondisclosure/confidentiality agreements
- ✓ Marking confidential and trade-secret documents
- ✓ Restricting disclosure and access based on need-to-know basis
- ✓ Restricting how and where access is granted, prohibiting access on personal devices and accounts
- ✓ Employee training regarding data security and confidentiality obligations
- ✓ Facility security measures (e.g., locked cabinets, clean desk policy)
- ✓ Contractual obligations for employees, including post-employment obligations (return of all confidential information, return of computers and cell phones, etc.)

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