



COLLEGE of AMERICAN  
PATHOLOGISTS

# Federal Trade Commission (FTC) Final Rule

## Banning Non-Competes

**Moderator:** Karim Sirgi, MD, MBA, FCAP

**Subject Matter Experts:**

Elizabeth Sullivan, Attorney

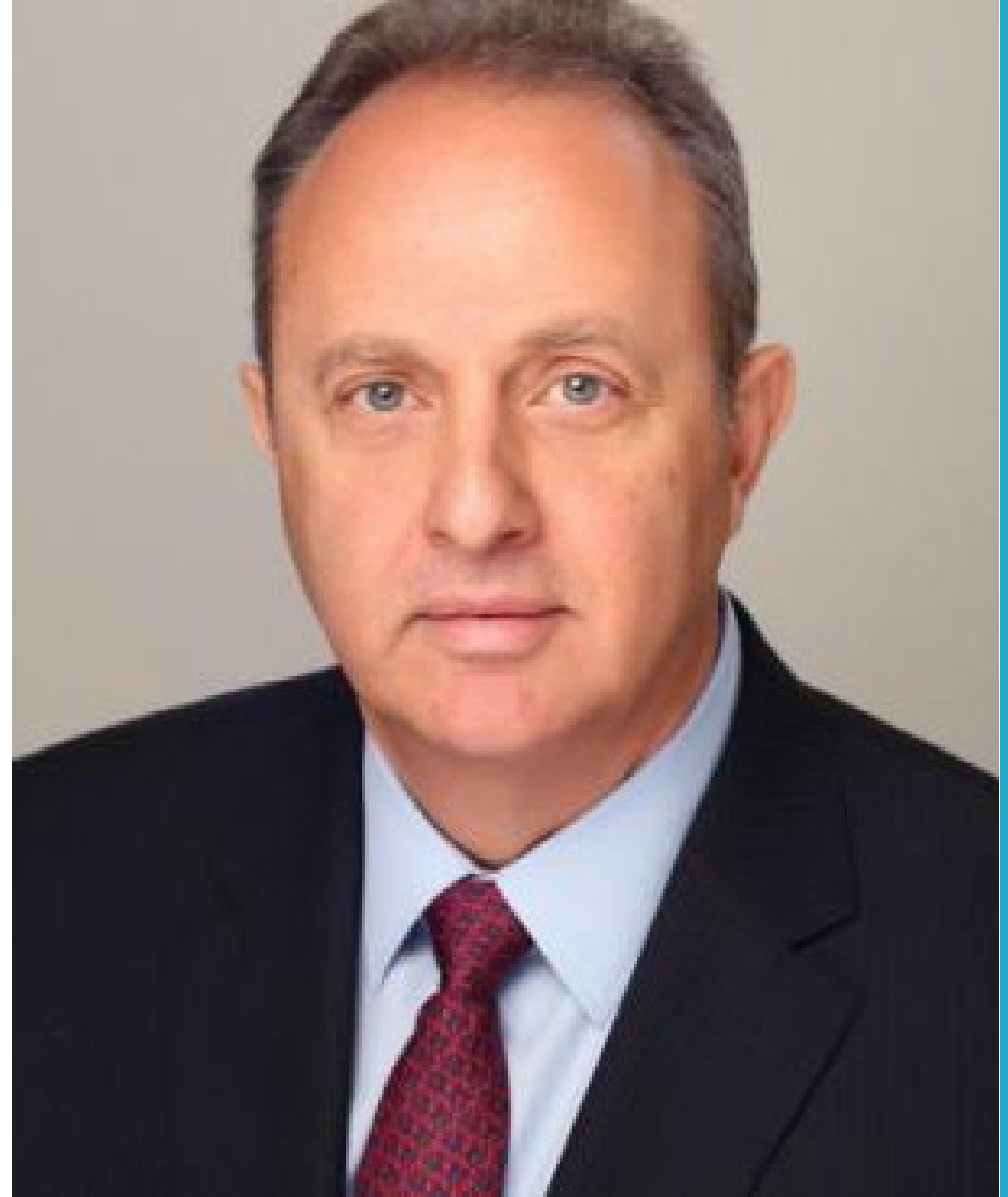
Emily Johnson, Attorney

Karina Conley, Attorney

July 16, 2024

# Karim E. Sirgi, MD, MBA, FCAP

- **Chair – Practice Management Committee**
- **Owner - CEO Sirgi Consulting LLC Denver, CO**
- **Chief Science Officer, BreathTech**
- **Chair, Colorado Delegation to CAP House of Delegates**
- **Past-President, CAP Foundation**
- **Board certified AP/CP and Cytopathology**
- **Fellowships in Cytopathology and Surgical Pathology**



# Disclaimer

**The information presented today represents the opinions of the panelists and does not represent the opinion or position of the CAP.**

**This should not be used as a substitute for professional assistance.**

**The information in this presentation is provided for educational purposes only and is not legal advice.**

# Non-Compete: A Multi-Faceted Issue in Healthcare



- **A major source of heartburn for individual physicians**
  - Punitive
  - Unfair
  - Restrictive
  - Un-American (as it literally restricts competition)
- **A source of reassurance for employers**
  - Protective of the business and its human capital

# Elizabeth Sullivan, Attorney

- **Chair, Healthcare Practice Group  
McDonald Hopkins LLC**
- **[esullivan@mcdonaldhopkins.com](mailto:esullivan@mcdonaldhopkins.com)**
- **216.348.5401**



# Emily Johnson, Attorney

- Member, Healthcare Practice Group  
McDonald Hopkins LLC
- [ejohnson@mcdonaldhopkins.com](mailto:ejohnson@mcdonaldhopkins.com)
- 312.642.1798



# Karina Conley, Attorney

- **Member, Labor & Employment,  
Litigation, and Executive  
Compensation Practice Groups  
McDonald Hopkins LLC**
- **[kconley@mcdonaldhopkins.com](mailto:kconley@mcdonaldhopkins.com)**
- **216.348.5804**



# The FTC Final Rule

- The Federal Trade Commission (FTC) issued its final rule on April 23, 2024 barring certain workplace non-competition agreements across the U.S (“FTC Rule”).
- The effective date for the FTC Rule is September 4, 2024.
- If implemented as drafted, the FTC Rule will invalidate most existing non-competes for workers of for-profit entities.
- While current legal challenges may impact the implementation of the FTC Rule, it is critical that healthcare entities prepare now to comply with the FTC Rule if implemented on September 4, 2024.



# General Overview

- The FTC Rule is applicable to workers of for-profit entities.
  - During the rulemaking process, an exemption for the healthcare industry was raised and the FTC expressly declined extend a specific exemption to the healthcare industry.
  - The definition of “workers” under the FTC Rule is not limited to employees, but also other individuals that provide services for healthcare entities, such as independent contractors, interns, volunteers.
- While non-profit entities are outside the purview of the FTC, some non-profit organizations could be scrutinized, for example if the organization has significant business that is not directly mission-based or holds for-profit subsidiaries, the FTC may evaluate certain specific situations.

# Additional Limited Exceptions

- Senior Executives –
  - Existing non-competes with senior executives will remain enforceable after the FTC Rule takes effect; however new non-competes for senior executives will not be permitted.
  - To qualify as a senior executive, the individual must make more than \$151,164 annually and have a policymaking role within the organization. The FTC estimates that less than 1% of workers will be considered “senior executives” pursuant to the FTC Rule.
  
- Sale of a Business –
  - Non-competes that are applicable to individual owners that are the result of a sale of a company are not prohibited by the FTC Rule.

# Other Restrictions

- While new non-competes will be prohibited after the FTC Rule takes effect September 4, 2024, other types of reasonable restrictions are still permissible:
  - Non-solicitation provisions, non-disclosure agreements, etc.
- Such limitations are permissible so long as they are not so broad that they function as a non-compete.

# Notice of the FTC Rule

- Entities subject to the FTC Rule will be required to provide notice to affected workers informing the workers that existing non-competes will not be enforceable.
- A model notice is available on the FTC website in various languages and other resources are available on the FTC website:
  - <https://www.ftc.gov/legal-library/browse/rules/noncompete-rule>

# Court Challenges

- ***Ryan, LLC v. Federal Trade Commission (Northern District of Texas)***
  - On July 3, 2024 the court issued a limited injunction for the plaintiffs named in the case; however the court denied the plaintiffs' request for a broader nationwide injunction.
  - Although the ruling did not result in a nationwide injunction against the FTC Rule, the court's discussion indicated that the court doubted the FTC's ability to issue the nationwide ban, and leaves open the possibility that the court will issue a broader injunction against the rule in its final decision, which is scheduled for August 30, 2024.
- ***ATS Tree Services, LLC v. The Federal Trade Commission (Eastern District of Pennsylvania)***
  - Nationwide injunctive relief has been requested in this case as well.
  - The court has indicated it will issue its decision by July 23.

# How to Prepare

- Use this time to take stock of current non-competes and other restrictive covenants.
  - Existing non-competition provisions remain enforceable and new non-competes can still be entered into until the FTC Rule takes effect.
  - Non-competes entered into prior to the effective date of the FTC Rule will remain effective for senior executives, so existing non-competes with senior executives should be prioritized.
  - Evaluate other restrictive covenants, such as non-solicitation provisions.
- Healthcare entities should also prepare to comply with the notice requirement, as notice is required prior to implementation of the FTC Rule.
  - Entities should not yet send FTC Rule notices, because there are two prominent legal challenges currently proceeding that could result in a stay or injunction of the Final Rule prior to September 4, 2024.

# What Questions Can We Answer for You?



**Elizabeth Sullivan**  
esullivan@mcdonaldhopkins.com  
216.348.5401



**Emily Johnson**  
ejohnson@mcdonaldhopkins.com  
312.642.1798



**Karina Conley**  
kconley@mcdonaldhopkins.com  
216.348.5804



COLLEGE of AMERICAN  
PATHOLOGISTS



# Membership

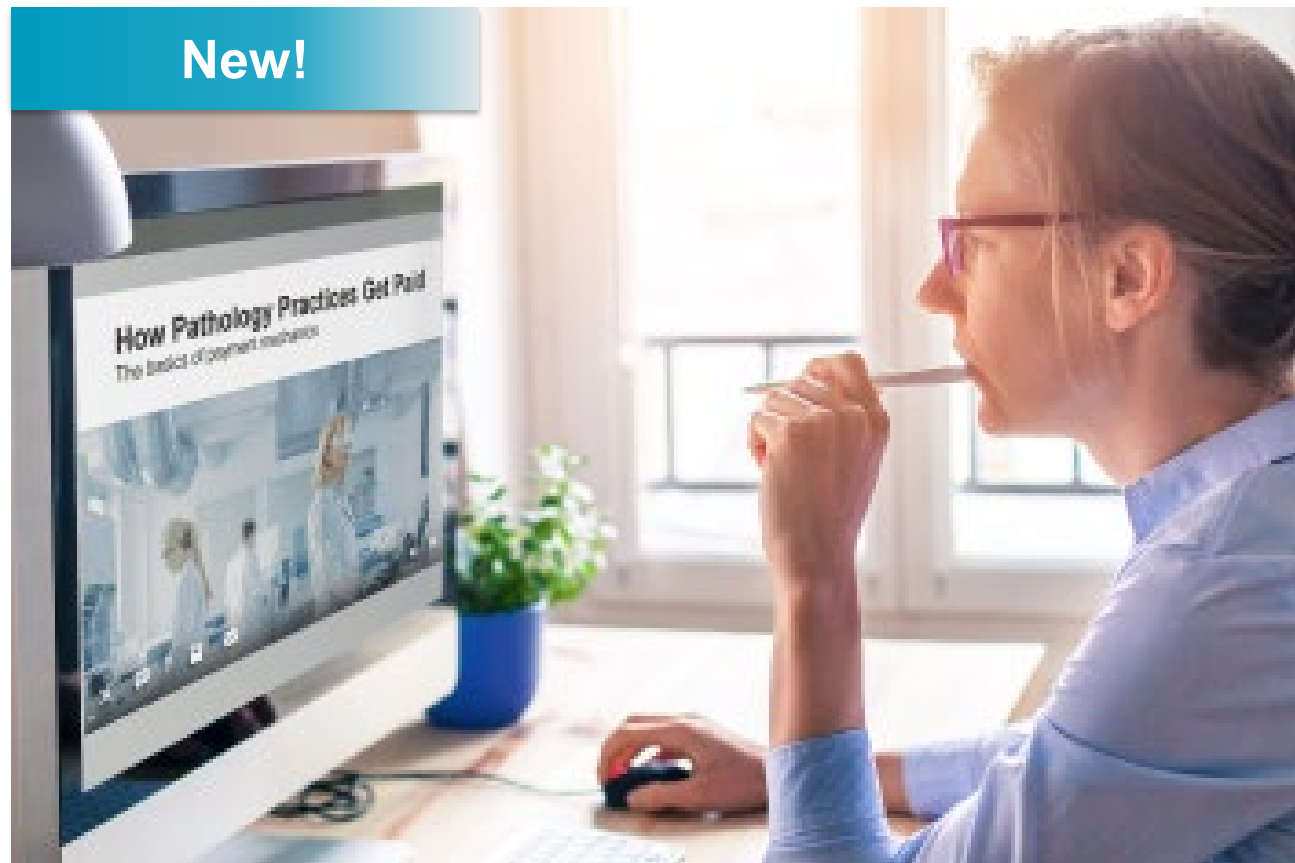
Did you find this information useful?

This program was funded by your CAP membership. Please be sure to keep your membership current so we can continue to bring timely and relevant resources like this to you.

Visit [cap.org](https://cap.org) to renew your membership or email [membership@cap.org](mailto:membership@cap.org).

# Pathology Business Fundamentals

Essential online courses to help grow your management skills to lead your practice



1. Relative Value Units (RVU's)—Understanding the Basics
2. How Pathology Practices Get Paid
3. Revenue Cycle Management
4. Analysis and Interpretation of Billing Reports
5. Basic Practice Cost Analysis
6. Capacity Management and Workflow Analysis
7. Basic Contracting and Fee Analysis
8. Basic Budget Development

Learn more  
and register





## Starting a New Job?

Join the Job Prep Bootcamp December 2024 for a fast-paced interactive review of cases and panel discussions on professional development courses.

Learn More



# Additional Resources

- **Practice Management Webpage**
  - <https://www.cap.org/member-resources/practice-management>
- **Previous and Upcoming Roundtables/Webinars**
  - <https://www.cap.org/calendar/webinars/listing/practice-management-webinar>
- **Articles Authored by Members of the CAP Practice Management Committee**
  - <https://www.cap.org/member-resources/articles/category/practice-management>
- **Practice Management Networking Community**
  - <https://www.cap.org/member-resources/practice-management/practice-management-networking-community-application>
- **Practice Management Frequently Asked Questions**
  - <https://www.cap.org/member-resources/practice-management/frequently-asked-questions>

# We value your feedback!



If after attending this discussion and later you applied any of what you learned to your practice, please share your feedback of how it worked for your practice at <https://www.cap.org/member-resources/practice-management/practice-management-inquiry-form> .



Watch for the session evaluation form. Your feedback is important!