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Health Care Law Today Podcast
Episode 32: Let's Talk Compliance: What the FTC's Ban on Non-Competes Means for the Health Care Industry

In this episode, Benjamin Dryden, vice chair of Foley's Antitrust & Competition Practice Group and David McMillan, managing principal of consulting and chief financial officer at PYA, discuss the FTC's most recent decision to ban non-competes and how this ban will affect the health care & life sciences industry.

Angie Caldwell

Hello, and welcome to the Let's Talk Compliance podcast series on Health Care Law Today, presented by Foley & Lardner and PYA. I'm your co-host, Angie Caldwell, consulting principal of PYA.

Jana Kolarik

And I'm your other co-host, Jana Kolarik, a partner in Foley's Health Care Practice Group. We're excited to have you join us today. Before we begin our show, we want to remind you to subscribe to Health Care Law Today, either on iTunes or your preferred podcast app. Please visit healthcarelawtoday.com or pyapc.com.

For today's show, Ben Dryden, the vice chair of Foley's Antitrust and Competition Practice Group and David McMillan, PYA's managing principal of consulting and chief financial officer, are discussing the U.S. Federal Trade Comission's (FTC) most recent ruling on banning non-competes and how this will affect the healthcare compliance industry. I'm going to turn it over to Ben and David to introduce themselves.

Ben Dryden

Thank you, Angie and Jana. I'm Ben Dryden. I am an antitrust partner in the Washington D.C. office at Foley & Lardner LLP, where my practice focuses on antitrust issues that arise in mergers and acquisitions as well as antitrust issues facing the health care sector and antitrust issues in labor and employment.

David McMillan

And I'm David McMillan. I'm a principal of PYA leading our consulting practice. I've spent time with primarily health care providers throughout the last three decades working on transactions

and various other opportunities and compliance matters. I have had the great fortune of working with our friends at Foley for almost three decades, and happy to be with you here today.

So as we get started, Ben, since the FTC's non-compete rule was released, there's been all sorts of discussion and literature and podcasts so we want ours to be a little bit different. We're going to dive a little deeper into some of the background behind non-competes in general. Talk about some things like ethics and some things that are maybe just a little different than what our listeners may have heard in other podcasts, but then we absolutely want to finish with looking ahead to this July 3rd ruling and what we might expect there. So with that as a brief agenda, Ben, why don't you get us started by just highlighting what is this FTC non-compete rule all about for those who might be listening and have heard about it but perhaps don't have any context to process some of what we might talk about today?

Ben Dryden

Sure. Thank you, David. First things first, we're talking about employee non-compete agreements, which are agreements between an employer and an employee that prevent that employee from working for a competitor after the end of their employment or starting a new competing business after the end of their employment. And employee non-compete agreements go back centuries. They're enforceable in 46 of the 50 states under various levels of scrutiny that vary on a state by state basis. They're very common.

The Federal Trade Commission came out and in one fell regulatory swoop banned non-compete agreements. They said that, in their view, employee non-compete agreements are an unfair method of competition prohibited by the Federal Trade Commission Act and the FTC has voted to adopt a regulation that in black letters bans non-competes on the basis of them being unfair methods of competition.

They've made a little bit of an exception for non-compete agreements with senior executives, which they define as people who have C-suite authority and who make at least $151,164 a year. But the focus is really on C-Suite authority. And they say for non-compete agreements entered into with senior executives, those people have a little bit more bargaining power than, say, employees making minimum wage. So for senior executives, the FTC has said, going forward, we are going to ban non-compete agreements, but if non-compete agreements are already in place with senior executives, we won't retroactively invalidate those. But otherwise, for the 99 plus percentage of workers who are not senior executives as defined by the FTC, their non-compete agreements will be banned by this FTC rule effective September 4th.

David McMillan

So, when we look back at the Federal Trade Commission Act itself, which I think is the basis for the interpretation that the FTC is taking today, that act was signed into law in 1914. So this interpretation is a new interpretation of a very old, if we will, piece of legislation. Is that right, Ben?

Ben Dryden

That is right. And the history here really is fascinating. I mean, going back to 1914, the Federal Trade Commission was established, and they were given this charge of preventing unfair methods of competition. And for their first 50 some odd years of existence, the FTC would go about identifying and stopping unfair methods of competition on a case-by-case enforcement basis. They would see something out in the marketplace being done by a particular company, and they would sue that company alleging that that company is engaged in an unfair method of

competition. Well, starting in the '60s and going into the '70s, the FTC came to the view that they have a broader power than just bringing case-by-case enforcement actions. In the '60s and in the '70s, the FTC started to pass regulations that would identify certain types of conduct as unfair methods of competition.

And these regulations were very, very just hyper-specific. I mean, one example was The Tablecloth Rule. They said that if a tablecloth manufacturer didn't disclose the cut and finished sizes of the tablecloth, then that's an unfair method of competition. So there was nothing that broadly applied to the entire American economy. But the FTC, what they're arguing today is that, hey, they set this precedent in the '60s, that they have the power to pass regulations. And the FTC's view is that this is just a continuation of that power from the '60s and '70s to adopt substantive regulations defining what an unfair method of competition is.

Now that raises the question, well, what's happened since the '60s and '70s, and the answer to that question is the FTC after about 10 years of very aggressive rulemaking faced a very strong backlash in Washington, where the Chamber of Commerce was calling the Federal Trade Commission the second most powerful legislative body in the United States, and it prompted a backlash.

And so Congress scaled back some of the FTC's powers and just through the political process and through regulatory self constraint, the FTC stopped for about 40 years doing these regulations that define business conduct to be unfair methods of competition. But what the FTC is doing here is they're rediscovering this power that they just haven't flexed for 50 years. And it's a very live issue whether this power that they flexed in the '60s and '70s was valid back then or whether it's still valid today. And so this is drifting into litigation, which you previewed, but it's a very live issue whether the FTC has this power or not.

David McMillan

So to be specific, on the 23rd of April, they flexed their muscle and put this rule into place pertaining to the prohibition against non-competes and decided to make that prohibition effective as of September 4th of this calendar year, which doesn't give a lot of runway between the actual vote and the effective date, as you mentioned, for this litigation to occur. So it sounds like things have been moving pretty quickly since the rule was voted and adopted by the FTC back at the end of April.

Ben Dryden

That's exactly right. And the history here is kind of funny. The FTC first began this rulemaking process early in 2023, and right off the bat groups like the U.S. Chamber of Commerce more or less threw down the gauntlet and said that [this] poses an existential threat to the rule of law for businesses in this country. So the Chamber of Commerce made clear over a year ago, if the FTC goes forward with a rule like this, they're going to take it all the way to the Supreme Court. And so this has been simmering for over a year and there was a rulemaking process and tens of thousands of comments were submitted with thoughtful comments in favor of the ban and very thoughtful comments opposing the ban.

Well, in the middle of April, the FTC put out a press release, "One week from today we're going to vote on the proposed non-compete rule." And so the vote was on a Tuesday, the Monday before the vote, the Chamber of Commerce held a press conference and they said, "We are going to file a lawsuit on Wednesday, two days from today, on Wednesday we're going to file a lawsuit challenging whatever rule the FTC might adopt on Tuesday." So jump forward to the

next day the FTC votes in the afternoon to go forward with this rule to adopt the rule. Everyone knew the Chamber of Commerce was going to file a lawsuit within 24 hours, but in the intervening 24 hours, some other party filed a lawsuit in a different court. It was a tax preparation firm represented by Gibson, Dunn & Crutcher and a former secretary of the Department of Labor, they wanted to be the first in court.

And so that's the case that's actually the leading case. The Chamber of Commerce case filed the next day ended up getting more or less consolidated with the case brought by the tax preparation firm, but everyone was moving at breakneck speed and they immediately filed a motion for a preliminary injunction. And the court said, pursuant to the local rules of that court, there is a set schedule that the court has to rule on a motion for a preliminary injunction. And under that schedule set forth under the court's local rules, July 3rd is the date. So by July 3rd of this year, we will know whether the court is granting a preliminary injunction to block this rule or whether this rule will be allowed to move forward. And if the decision from the judge is to allow this rule to move forward the effective data is set for September 4th.

David McMillan

Interesting, and thanks for all that history. That's really helpful. And for the process itself, it's sort of fascinating to understand how this has unfolded so quickly since the 23rd. Like you said, there have been comments in the process that certainly predated that for the better part of the year.

Well, before we go any further, there may be some folks listening to this that are wondering, "Gosh, I may have some sort of restrictive agreement or I am aware of clients of mine who utilize restrictive agreements." When we look at non-competes through the broader lens of restrictive agreements such as non-solicitation agreements and perhaps others, can you give us just a little bit more color there? Is this particular rule specific to non-competes, or is it broader and does it cover some of those other types of restrictive agreements? And in answering that, Ben, do you mind to introduce our listeners that may not be familiar with it, with maybe some other types of restrictive agreements and whether they're included or not?

Ben Dryden

Absolutely. And the short answer is going to be it depends and it's not entirely clear, but let me try to unpack that. So the rule that the FTC is adopted applies to non-compete clauses, which there's a definition for in the rule, it's, "A term or a condition that prohibits, penalizes, or functions to prevent a worker from either seeking or accepting a job in the United States with a different employer at the end of their employment, or operating a business in the United States after the end of their employment."

So it doesn't have to be a freestanding contract that says at the top "Restrictive Covenant" or "Non-Compete Agreement." It doesn't have to be that at all. It could be a single paragraph in a 100-page agreement There's no requirement to revise or reform the 100-page agreement, just the effect of the FTC rule is that one paragraph in the larger agreement can no longer be enforced and you can't represent that it can be enforced. In fact, you're obligated to inform an employee that that clause cannot be enforced.

So that's the idea that they're preventing non-compete clauses, not necessarily non-compete agreements. Where this gets very messy is it happens all the time that a non-compete clause will be included in an agreement that has other restrictive covenants, and so you give the example of a non-solicitation agreement. There's a lot of different species of non-solicitation agreements, but a classic one is, "Employee, after you leave this company, after your time here,

you won't solicit any of the customers who you interacted with during your employment," and we call that a customer non-solicit clause. Another type of clause is, "Employee, after the end of your employment here, you won't solicit any of your former coworkers." We call that an employee non-solicitation clause. You won't solicit your former coworkers to join you to whatever future organization you're going to after the end of your employment.

So non-solicitation clauses of either species probably are not non-compete agreements as defined, but I say probably because the FTC and the rulemaking notice said, "Well, we have to think about them. We have to look at a case-by-case basis." They give an example, not of a non-solicitation agreement, but a non-disclosure agreement, something that prohibits an employee from disclosing company trade secrets after the end of their employment, or if not trade secrets, other confidential company information. The FTC said, sometimes you'll see a nondisclosure agreement that's written just breathtakingly broadly to prohibit an employee from using information that they may have learned in the course of their employment to benefit a future employer. Even if that's publicly available information that they're just learning about how the industry works, sometimes employers will aggressively say, "No, you can't use anything that you learned while you were an employee of me to go benefit a competitor." And the FTC said, in that situation, that might be a non-compete. If it functions to prevent an employee from taking another job after the end of their employment, that's the test under the FTC rule.

So they've not been very clear about where the line begins and ends, and I think it probably is ultimately going to be a case-by-case judgment call.

David McMillan

Fascinating, really helpful information, Ben, and I hope that folks listening to this episode of our podcast are finding this really practical information helpful to them as well.

So let's keep digging and pulling on that thread just a little bit. So, "it depends", which is everybody's least favorite answer from any of us providing professional services, is very real, right? This "it depends" answer also applies to the July 3rd ruling, and what that might mean in terms of the landscape we're operating under today. "It depends" also depends on what state you're in, because as an employer there's this tapestry of different rules, regulations, and legislation on a state- by- state basis that employers need to be aware of as it relates to restrictive agreements and non-compete agreements. Anything you want to add to that perspective for those that may be listening that have employees in multiple states?

Ben Dryden

Absolutely. One of the issues that's really animating the FTC here is that the FTC has cited research that finds that even in states that ban non-competes, the classic example is California. California has banned employee non-compete agreements for over a century, but the FTC found that even California or other states that ban non-compete agreements, you still see non-compete agreements. You'll have these multi-state employers that just have a template employment agreement that they ask everyone to sign and sometimes employers aren't good about tailoring those from state to state to state. Or maybe an employee moves in the course of their employment and they thought that they were governed by the same contract but by virtue of moving locations, a new state's law applies.

And so there is a tremendously complicated patchwork of laws and it varies from state by state by state by state. There are four states that broadly ban non-compete agreements. There are some states that have no statute at all on the books, but just evaluate the enforceability of a

non-compete on a classic, common law, case-by-case basis, and that is the quintessential, “it depends” situation where it just depends on the facts, it depends on this particular employee and you really don't know what the result is until you get it before a judge. In a very real sense it depends on the judge.

Other states still have adopted statutes that might draw clear lines. And as a lawyer, I like clear lines;it allows me to give clients advice other than “it depends.” What's really interesting, and I think germane for this audience is a lot of states have passed statutes like this setting clear lines for when non-competes can be enforced or not that are specific to the health care sector. So it's something like 20-odd states have laws that are specific about when a non-compete agreement can be signed with a physician. Because in the case of physicians, the non-compete agreement affects more than just the doctor, it affects the doctor's patient and it affects the health of the overall community. So a lot of states have come to recognize that health care is special, health care is different, and the rules for non-compete agreements in health care need to be specially tailored for these special problems.

David McMillan

So probably the best advice we can give to those listening who are not experts in this area and have employees in multiple states, is contact a good counsel who has experience in this area before you get too deep into a one size fits all approach on your restrictive agreements.

Ben Dryden

This is the quintessential situation where one size does not fit all. Under current state law there is a very diverse patchwork of approaches, and you need to know which state's law applies, what are the particulars of this employee, what is the legitimate business purpose that's being served by the non-compete? And you just have to think through all these issues before you bind someone to a non-compete agreement.

David McMillan

Great. I understand. So we've talked a lot about the rule, the regulation, the body of law that have sort of been building over the course of many years surrounding restrictive agreements and this most recent rule from the FTC, that's really the subject that's resurfaced all this dialogue. But underlying all of this is certainly business ethics and the idea of, well, just because something is legal doesn't mean it's right, or just because something's illegal doesn't mean that it's not right. And so I would imagine that all of this dialogue around restrictive agreements and non-competes have begun to surface some of those old ethical arguments or perspectives as it relates to non-competes and other types of agreements, and maybe fostering conversation about new ethical considerations. Can you give us a glimpse into what you're hearing and what you're experiencing with respect to not simply the regulation, but just the idea of, hey, let's look at this from a more holistic perspective?

Ben Dryden

Absolutely, and I'll approach this two ways. I'll talk about the economic literature and then I'll talk about ethics, right and wrong and good and bad. So the economic literature in this area is relatively new. And what's prompted this, there have been a number of states over the past, I'll say 20 years, that have tinkered with their non-compete rules. They've either restricted the parameters where a non-compete can be enforced or they draw up categories where, such as physicians, we are going to say non-competes are no longer permissible for this set of employees, or they'll draw a salary band above $100,000 is only where a non-compete is

enforceable. That change on a state-by-state basis has enabled a new area of economics where academic economists are now able to study, okay, what are the actual empirical effects of non-competes. When a state changes its non-compete law, what does that mean for the people who work in the state?

And I'm not an economist, but I've read the literature pretty well and I'm not yet persuaded that the methodology is terribly sound. But, there have been some interesting results and these results are really what are animating the FTC here. I'll just say what the FTC has found to be the teachings of the economic literature: According to the FTC, banning non-compete agreements is going to result in between $400 billion and $488 billion in increased wages over the next decade, which translates to over $500 per worker per year. They're saying that employees make more money when there are no non-compete agreements. Interestingly, the FTC finds that that effect holds whether an employee is bound by a non-compete agreement or not. In other words, the FTC is finding that even if you've never signed a non-compete agreement, you will make more money if non-compete agreements are banned because that just means there's more competition out in the marketplace for jobs in general. And the view of the FTC is that there's going to be a rising tide that lifts all boats.

The FTC has also found that banning non-competes is going to result in 8,500 new businesses being created each year, tens of thousands of additional patent filings being made each year. So the FTC's view is that this is going to be just a tremendous, tremendous stimulus for the American economy. It is going to result in not only a larger economy but more wealth trickling down to the people who need it the most.

Now, one thing the FTC has also found is that physician spending is going to go down, they estimate, by between $74 billion and $194 billion over the course of the next decade. What I would posit right there is, well, how can that be that wages go up, but spending on physician services goes down? How can that be? Either there's something wrong in the math, or there's just a tremendous market failure where health care systems are pocketing money that should be going to physicians. Those are the two possible explanations.

And I would suggest based on my own independent read of the academic literature that the FTC's analysis is wrong. Because there's only been one study done that's really looked at an apples-to-apples basis, just asking the simple question, okay, doctors, how much money do you make? How much money have you made over your career? And are you subject to a non-compete? There's only one study that that was the methodology, just direct surveys to primary care physicians. And they did this across five different states. And the authors of that study found that doctors actually make more money when they are subject to non-competes, a lot more money, 14% more money to start. And, doctors enjoy greater earnings growth over time when they are subject to a non-compete agreement.

And intuitively you say, "Well, how could that be? How can someone make more money when they're bound by a non-compete?" The authors' theory is, well, the nature of a medical practice is it's not so much the doctor that goes out and attracts the patients, it's the practice that runs ads on buses or on television, and it's the practice that generates the patient relationships and gets the patients in the door. And then once the patient's foot's in the door and meets their doctor, then the relationship really translates to the doctor, it becomes a true personal relationship. But to allow a practice to have the confidence to make those investments of running advertisements, the doctor has to be bound by a non-compete. In other words, the practice needs to be confident that the doctor's not going to just ramp up a panel of patients, get really busy and then immediately bolt, go across the street and poach all the patients. So the

theory is that non-compete agreements, at least in the business of medicine, create a win-win that benefits both the employer and the employee. So that's a pretty interesting finding.

Pivoting to the ethics of the question, meaning good/bad, right/wrong, the economics is certainly informative of what's good/bad and right and wrong. But I'm a lawyer. I just have to begin with the observation that it's long been the rule that for lawyers, non-compete agreements are unethical. And the reason is that lawyers are adversarial agents for their clients. And anything that restricts the ability of an independent adversarial agent from switching jobs has an indirect effect on the client. And so to protect clients, lawyers have agreed that it is a rule of ethics that lawyers will not be bound by non-competes.

And you can make the exact same argument for doctors. Because as we've been discussing, non-competes for doctors or other health care providers affect more than just the worker, they also affect the patients. And in fact, the American Medical Association (AMA) has a provision in their Code of Medical Ethics about non-competes. And it doesn't ban non-competes, but according to the AMA Code of Medical Ethics, "Physicians should not enter into covenants that unreasonably restrict the right of a physician to practice medicine after the end of their relationship." And, physicians also "should not enter into covenants that do not make reasonable accommodation for a patient's choice of physician." Now those rules of ethics don't have the force of law and doctors aren't going to get, they're not going to lose their license if they sign a non-compete that's overbroad. But it's interesting that that is a fairly longstanding provision in the AMA Code of Medical Ethics.

David McMillan

That is pretty fascinating. And I like the way that you described the reasoning for attorneys' view on the ethics of a non-compete and how that might have some similarities to the physician/patient relationship.

I think the one thing that might deserve a little more explanation whether we do this now or in a future episode following the July 3rd ruling, is whether that non-compete is for the entirety of professional services within a prescribed geography or a subset of those services. For example, if I'm an owner-physician that has ownership interest let's say in some sort of outpatient venture, an ambulatory surgery center, is a non-compete associated with my ownership in that ambulatory surgery center, is that restrictive covenant reasonable because the patient has choice about where they might receive that service even if I'm the one providing it as opposed to the entirety of my professional services within a geography? So Ben, I don't want to put you on the spot by trying to answer that today, but I think to your point about it, it depends, there are nuances within these restrictive covenants that have to be considered.

Ben Dryden

Yeah, well, what I would say about that just quickly is it's not immediately clear whether that form of a non-compete agreement, that's just a clause in the limited liability company agreement that makes the doctor a partner of the ambulatory surgery center, however that's structured, that's not necessarily a non-compete clause within the meaning of the FTC rule because the FTC rule is focused on non-compete agreements with employees, but there's a whole species of non-compete agreements that apply outside of the employee/employer context. A quintessential example is a staffing agreement. If I'm hiring a staffing firm, I can expect that staffing firm not to compete with me in my primary business. If I'm going to bring in employees to come in and treat my patients, I can expect those staffing employees not to turn around and

poach the patients, and that's not going to be affected by the FTC rule. So I mean, there's certainly a whole other podcast we could do on that topic, but it's a really interesting point.

David McMillan

Well, it is interesting. And for firms like PYA who are involved in compensation plan design, certainly compensation valuation opinions associated with various professional services and certainly a vast majority of those being services provided by physicians and other providers, these issues are very real because as you mentioned in the empirical evidence cited in the study that you were referencing, oftentimes the presence of a non-compete can be and often is of interest to a valuator and trying to apply judgment with respect to whether that value is, like you were just most recently mentioning, the value of an interest in a business or whether that has to do with the value of compensation associated or between an employer and an employee, in this case of physician. These promulgations, these regulations from a force of law standpoint have one perspective, but I think the audience and I certainly appreciate your perspective about when you're thinking through the ethics, did the economics in terms of how the marketplace rewards that sort of restrictive covenant, consistent with the philosophy underpinning the law that's trying to create an equal playing field.

And so all of that is to say there's a very real possibility if on July 3rd the rule is upheld that through economic forces, some physicians and others that might've been subjected in the past to a restrictive covenant that is now no longer released, I think what we hear the empirical evidence saying is in time we might see that that's actually a depression of wages on those providers. I know that's not anything that's for certain, but is it a fair statement to make that that's a possibility that we might see emerge over time?

Ben Dryden

It's absolutely a fair statement to say that that's a possibility. I go back to the California example, where non-compete agreements have been banned in California for over a century. And doctors are able to make a living in California. So I don't think this is necessarily going to be a "sky is falling" situation, but on the margins, it's going to have an effect. And effects do happen on the margins. So if that means that doctors make a little bit less money after graduating from med[ical] school, well that's going to mean there are that many fewer doctors applying to school or fewer qualified doctors applying to med[ical] school. And in a country that has tremendous physician shortages as it is, that's a cause for concern.

David McMillan

I appreciate that logical thinking. Well, as we start to wrap up our time together here with our audience today, we started our podcast with an overview of the FTC proposed rule, and we've tried to give our listeners some more context within which to process not just the rule itself, but some of the challenges that are surfacing to the rule. Can you give our listeners in anticipation of July 3rd, what are some things to potentially look for in that ruling or just some other material that a practitioner and employer may want to keep in mind while we wait on this July 3rd ruling?

Ben Dryden

Sure, I'll begin with this litigation's very interesting, and it has the potential to turn into a seminal Supreme Court case about the separation of powers because it really is an issue where Congress has decided not to pass a law. I mean, Congress has considered non-compete legislation every term going back years and years and years, and there's never been the political will to do something. So Congress has declined to act. The states have tremendous

historical and current regulation of non-competes, but the executive branch has come in and with one stroke of a pen purported to do something that Congress has never done and to override the laws of 46 states. So now it's falling on the courts to say what is the power of the executive branch in comparison to 46 states and in a situation where the legislative branch has declined to take action for failure to achieve political consensus.

And so it's a fascinating separation of powers question, and we can get really, really in the weeds. I'll say that the parties that filed their lawsuit within hours after the FTC vote, they have a certain political agenda. They don't just want to stop the non-compete rule. They want it to be the case that it is a settled principle of law that the FTC does not have the power to pass any substantive regulations, and they're trying to get the court to do something more than just prevent this non-compete rule from taking effect. And when you reach farther than you need to reach, you are taking a risk of overreaching.

And so it's going to fall on this judge to decide, does the FTC have the statutory authority under the FTC Act? Do they have the power to do this? If they do, does that pose some constitutional separation of powers issue?

David McMillan

It is certainly going to be interesting, and as you mentioned, it has the potential to be a seminal case that I think as you're sort of referencing, whose implications might go further than the FTC's ability in the future to do rulemaking like this, but really to the beginning of your comment could impact the executive branch's ability to do this outside the reach of Congress. Did I understand you correctly in case there are other non-attorneys listening who are trying to interpret that?

Ben Dryden

That's right. And the phrase the Supreme Court has used over the past three terms is “major questions.” When the Supreme Court is asked to review major rulemakings or major regulatory actions by federal agencies such as the decision to forgive student loans, the Supreme Court has asked, is this a major policy question? And if the answer is yes, this is a major policy question, the Supreme Court says, okay, if a regulatory agency is making a major regulatory policy decision, they're asked to be, at a minimum, a very, very clear congressional delegation of authority from Congress to the regulator to allow the regulator to make that policy decision. Congress has to be very clear that the regulator is authorized to make this decision, and that's the test that the Supreme Court has articulated. But I can't say that direction clearly controls the outcome of this case. It's going to be really interesting to see.

David McMillan

Well, it's a fascinating topic. Thank you for sharing your expertise with me and with our audience today, Ben. We certainly welcome any feedback from our audience and questions. You should be able to look Ben's name up on the Foley website and get to his contact information, you can do the same on the PYA website to get to me. We're all looking forward to what happens next.

And the optimist in me says, "Hey, look, no matter what direction this comes down on July 3rd, we know that there's a chance that the litigation and the legal process is going to continue up to and including a Supreme Court ruling," but the dialogue... we're all better for the dialogue. We're more informed. It's making us think more critically about these matters, both in terms of contract law for contracts between employees and employers, but as we've talked about today, the ethical issues surrounding it, and the economics that surround this matter. Like I said, the

optimist in me says, "Hey, we're better for the conversation." And so Ben, we're better for your expertise today in the conversation that you've led us through, and we thank you for your time.

Ben Dryden

Well, thank you, David, and thanks to PYA and to Foley for having me.

David McMillan

Absolutely. Well, with that, Jana and Angie, we'll turn it back over to you.

Angie Caldwell

Thank you, Ben and David for a great discussion. We appreciate you taking the time to join us today. We want to thank our listeners for joining our Let's Talk Compliance podcast series with Health Care Law Today, your connection to timely legal updates in the health care and life sciences industry. We encourage you to subscribe to this podcast. Please visit Foley's Health Care Law Today blog at healthcarelawtoday.com, and pyapc.com. If you liked this show, don't forget to subscribe and be sure to rate us five stars. Until next time, I'm Angie Caldwell at PYA.

Jana Kolarik

And I'm Jana Kolarik at Foley & Lardner. Thanks so much for listening.