

COMMENTARY

The NLRB and You

Questions have streamed in about the National Labor Relations Board rule requiring private-sector employers to remind employees of their rights under the National Labor Relations Act with another lengthy, decorative poster by Nov. 14. Will this new rule apply to the average medical private practice?

The answer proved more difficult to nail down than I anticipated. A National Labor Relations Board (NLRB) spokesperson said he thought that it would indeed apply to medical offices, but he would get back to me with an authoritative answer. (At press time, he had not.) A prominent labor lawyer was certain that it would not apply, in most cases; but another opined that the answer was irrelevant since it wouldn't matter either way.

Before explaining this disparity and revealing who (if anyone) is right, let me start from the beginning. The National Labor Relations Act (NLRA) is the federal law that guarantees the rights of employees to organize and bargain collectively with their employers, or not, as they choose. The NLRB is the federal agency charged with enforcing the NLRA. Last year the NLRB decided that labor rights should be displayed in writing in virtually every private-sector business, and in late August of this year it issued a ruling to that effect. The notice, which must also appear on the company's Internet site, in-

forms employees of their right to act together to improve wages and working conditions, to form a union, to bargain collectively, and to refrain from any of these activities – and to not be penalized for their choices.

The NLRB noted that the new requirement applies to all private-sector work places, unionized or not, except for farms, railroads, airlines, and the U.S. Postal Service. That would seem to include private medical offices; however, according to the NLRB, they have “chosen not to assert [their] jurisdiction over very small employers whose annual volume of business is not large enough to have more than a slight effect on interstate commerce.”

It's hard not to engage in interstate commerce; most of the supplies you buy probably come from another state, for example; and you might send your billing or pathology services out of state – and so on. But the NLRB seems to be saying that such commerce is okay as long as it has no more than a “slight effect” on the grand scheme; but no one has defined “slight.”

Treatment and procedures in a small office within a single state are not “interstate commerce,” and are unlikely to affect interstate commerce, no matter how many supplies you purchase or what services you outsource. (That's why one lawyer told me the rule would not apply.) But if you have a large multispecialty clin-

ic, or multiple offices in more than one state (or in one state that draws patients from more than one state), the NLRB might argue that you're within its jurisdiction. Unions are irrelevant – the NLRA applies to all workplaces, unionized or not.

Complicating this are questions of whether the rule is necessary – or even legal – and whether it will withstand court challenge. The NLRA contains no provision authorizing the board to make such a rule. Indeed, after the rule was announced, one of the NLRB's own members wrote a blistering dissent charging that the board had acted in excess of its authority, and predicting that a reviewing court would soon “save the Board from itself” by striking the rule. Even if the courts uphold the rule and it takes effect as scheduled in November, the NLRB has admitted that it has no authority to enforce it. (That's why the other lawyer thought the answer wouldn't matter.)

What does it all mean for the average private practice?

Small offices seem likely to be in the clear; and with a court challenge looming, even if you run an operation big enough to have a measurable effect on interstate commerce, my suggestion is to wait and see. ■

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BY JOSEPH S. EASTERN, M.D.

Judge Strikes Mandate in Pa.

A federal judge in Harrisburg, Pa., ruled Sept. 13 that the Affordable Care Act's requirement that individuals purchase health insurance is unconstitutional.

U.S. District Judge Christopher Conner struck down the so-called individual mandate, saying that the government overstepped its constitutional authority to regulate interstate commerce by requiring that individuals buy health insurance.

This is the fourth time in a month that the courts have ruled on the individual mandate. In August, a federal appeals court in Atlanta struck down the individual mandate saying it violated the Commerce clause.

And on Sept. 8, a three-judge panel of the Fourth Circuit Court of Appeals in Richmond, Va., dismissed two separate lawsuits challenging the Affordable Care Act's individual mandate, both on procedural grounds. Legal experts predict that the constitutionality of the individual mandate will ultimately be decided by the Supreme Court.

The Harrisburg case was brought by Barbara Goudy-Bachman and Gregory Bachman, a married couple from Etters, Pa., who argued they would be adversely affected by the requirement to purchase insurance in 2014. The couple is self-employed and do not have health insurance.

In court documents, the Bachmans said that if they were required to purchase health insurance, they would not be able to afford the payments on a new car they want to purchase.

—Mary Ellen Schneider

Virginia Appeals Court Dismisses Lawsuits Challenging ACA's Mandate

BY MARY ELLEN SCHNEIDER

Supporters of the Affordable Care Act scored a legal victory as a federal appeals court dismissed a pair of lawsuits challenging the constitutionality of the so-called individual mandate to buy health insurance.

On Sept. 8, a three-judge panel of the Fourth Circuit Court of Appeals in Richmond, Va., tossed out a suit brought by Virginia's Attorney General Ken Cuccinelli. They concluded that Virginia did not have the legal standing to challenge the individual mandate because it will affect individuals, not the state.

Mr. Cuccinelli argued that the individual mandate violated the Virginia Health Care Freedom Act, a state law that says no resident can be required to obtain insurance. The judges rejected that argument, writing that the Virginia law, signed after the Affordable Care Act was enacted, was a ploy to set up a legal challenge to the health reform law. The appeals court did not address whether the individual mandate was constitutional.

In the second ruling on Sept. 8, the same three-judge panel dismissed a challenge brought by Liberty University, a Christian college in Lynchburg,

Va. In that case, the university charged that the law's tax penalties for individuals and employers were unconstitutional. The appeals court ruled that the university also lacked standing because it cannot challenge the provisions until they take effect in 2014.

Both cases were sent back to district court with instructions that they be dismissed.

There are currently more than 25 active legal challenges to the Affordable Care Act working their way through courthouses around the country. One of those cases is expected to reach the Supreme Court in the next few years. ■

Atlanta Federal Appeals Court Declares ACA's Individual Mandate Unconstitutional

BY MARY ELLEN SCHNEIDER

A federal appeals court in Atlanta has struck down the Affordable Care Act's requirement that individuals purchase health insurance.

In a 2-1 ruling issued Aug. 12, the court declared that the so-called individual mandate violates the Commerce Clause of the U.S. Constitution and that Congress overstepped its authority in creating the requirement to buy insurance. The lawsuit was brought by a coalition of 26 states that oppose the ACA on the grounds that the mandate infringes

on the constitutional rights of individuals not to purchase insurance, and that the expansion of Medicaid will create an undue burden on state governments.

The appeals court affirms in part a ruling issued by U.S. District Court Judge Roger Vinson of Pensacola, Fla., in January. The appeals court disagreed with Judge Vinson's decision to declare the entire ACA unconstitutional. The higher court concluded that the individual mandate could be stripped out, allowing the rest of the law to stand.

Stephanie Cutter, deputy senior adviser to President Obama, wrote in a

blog post Aug. 12 that the White House was disappointed in the ruling but confident that it would be overturned.

“The individual responsibility provision ... is constitutional,” Ms. Cutter wrote. “Those who claim this provision exceeds Congress' power to regulate interstate commerce are incorrect. Individuals who choose to go without health insurance are making an economic decision that affects all of us – when people without insurance obtain health care they cannot pay for, those with insurance and taxpayers are often left to pick up the tab.” ■