A fundamental feature of the Patient Protection and Affordable Care Act (“ACA” or “Act”) is the introduction of health care exchanges, or marketplaces, where individuals and small businesses may purchase “affordable” and qualified health benefit plans. As summer fades to fall, employers must mark one important date on their calendars to ensure compliance with the ACA: October 1, 2013. This date marks the first day of open enrollment for both the individual Health Insurance Marketplace (“Marketplace”); the Small Business Health Options Program (“SHOP”); and the deadline for covered employers to provide notices to their employees about the marketplaces and their coverage options.

Open Enrollment Begins
Open enrollment for the Marketplace and the SHOP begins on October 1, 2013. Earlier this month, the U.S. Department of Health and Human Services announced that individuals can now create personal accounts on the Healthcare.gov website to begin the enrollment process, although applications for the Marketplace will not be available until open enrollment actually begins. The site provides a checklist for individuals to gather information to prepare for their applications, including the Employer Coverage form to collect information about their employers and any employer-provided health coverage available to the individual. Employers may be asked by their employees to complete the one-page form or to provide information necessary for the employee to complete the form, including whether the employee is eligible for coverage from the employer, whether spouses or dependents are also eligible, and details regarding the current plan. The Employer “Coverage Tool” mirrors some of the information an employer must provide in the new mandated notices to employees (discussed below); therefore, early compliance with the notice requirement will reduce or eliminate the number of individual requests for information from employees as October 1 nears.

The Department of Health and Human Services also recently announced the launch of a call center to serve small businesses interested in the SHOP. Under the ACA, employers with less than 50 full-time and full-time equivalent employees may use the SHOP to compare rates, coverage, and quality of health insurance plans to determine the best solution for their businesses and employees. Small employers are not required to provide insurance to their employees, nor are they subject to the shared responsibility payments applicable to large employers, but small businesses may elect to offer coverage to their employees through the SHOP. The SHOP Call Center is a new resource to help small businesses obtain information to make the best decisions for their employees. The Call Center is currently open on weekdays from 9 a.m. to 5 p.m. EST, with hours expanding after open enrollment begins on October 1.

Notice of Coverage Options
To facilitate the launch of the health insurance marketplaces, the ACA adds a new provision to the Fair Labor Standards Act (“FLSA”) requiring employers to give notice to employees of the coverage options available to them through the Marketplace. The deadline for providing the notice was originally March 1, 2013; however, the U.S. Department of Labor extended the deadline due to delays in establishing the Marketplace. Now employers must provide the notice to all current employees no later than October 1, 2013, the date open enrollment begins for the insurance exchanges. Employees hired after October 1, 2013 must also receive the notice at the time of hiring, although in 2014 the notice will be considered timely if provided within fourteen days of hiring. (cont. page 2)
All employers subject to the FLSA are required to provide a notice to each of their employees, regardless of status (full-time or part-time) or eligibility to enroll in a group health plan. The notice must be provided automatically, free of charge, in writing, and in a manner calculated to be understood by the average employee. (It is strongly suggested that a Spanish version of the notice may be appropriate in some workplaces.) The notice may be delivered by first-class mail or electronically in accordance with the Department of Labor’s electronic disclosure safe harbor regulations.

The Department of Labor recently issued two model employee notices, one for employers that do not offer a health plan and one for employers that do offer a health plan to some or all of their employees. Every notice must contain the following information:

- Inform the employee of the existence of the new Marketplace;
- Contact information and a description of the services offered by the Marketplace;
- A statement that the employee may be eligible to receive a premium tax credit if the employee purchases a qualified plan through the Marketplace; and
- A statement that, if the employee purchases a qualified health plan through the Marketplace, the employee may lose the employer’s contribution to any health benefit plan offered by the employer, and that all or a portion of the contribution may be excluded from income for federal tax purposes.

The model notices also contain an explanation that the employee will not be eligible for a tax credit through the Marketplace if the employer offers the employee a plan that meets the affordability and “minimum value” standards of the ACA, but the employee may be eligible for the tax credit if the employer does not offer a health care plan or if the plan offered does not satisfy these ACA requirements.

The model notice for employers who do not offer employees a health care plan contains all of the above information, as well as information about the employer that the employee must supply on his or her application for coverage in the Marketplace.

The model notice for employers who do offer health coverage to some or all of their employees contains all of the information above, plus basic information about the health plan offered by the employer. The employer should indicate which types of employees are eligible for coverage, whether dependents are covered, and whether the plan meets the minimum value and affordability standards, based on employee wages. The model notice also includes an optional section that mirrors part of the Employer Coverage Tool form, which an individual will use to complete an application for the Marketplace, should he or she choose to investigate coverage through the Marketplace.

As October 1, 2013 is fast-approaching, every employer should prepare to distribute information to its employees regarding their coverage options. If you need any assistance in this area, LeClairRyan has an Affordable Care Act team that can provide assistance in this highly technical area.

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On June 26, 2013, the Supreme Court issued decisions in two landmark cases, finding Section 3 of the Defense of Marriage Act (“DOMA”) unconstitutional and paving the way for the resumption of same-sex marriage in California. The fallout of these rulings will have an instant and dramatic impact on employee benefit packages as they relate to same-sex couples. Due to the fact that the Supreme Court rulings will take immediate effect, employers should be developing plans for how to handle benefits for same-sex spouses based on the outcome of these cases.

Previous State of the Law
DOMA was enacted by Congress in 1996. At that time, no state had legalized same-sex marriage; however, a number of states seemed prepared to do so. States that did not want to legalize same-sex marriage were concerned that they would have to legally recognize out of state marriages under the Full Faith and Credit Clause of the Constitution. DOMA offered two main provisions in response to these concerns. First, Section 2 states, “No State…shall be required to give effect to any public act, record, or judicial proceeding of any other State…respecting a relationship between persons of the same-sex that is treated as a marriage under the laws of such other State…, or a right or claim arising from such relationship.” Section 3 goes on to define marriage on the federal level as being “only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.”

In the years following the enactment of DOMA, twelve states have legalized same-sex marriage. During that same period, thirty states have amended their state constitutions, prohibiting the recognition of same-sex marriage. An additional eight states have statutorily prohibited such recognition. These laws and amendments have been nicknamed state “mini-DOMA’s.”

Proposition 8 is California’s mini-DOMA amendment to its state constitution. On November 4, 2008, Proposition 8 narrowly passed a statewide vote ending a four month period where same-sex marriages were legal in California. The amendment provided that “only a marriage between a man and a woman is valid or recognized in California.”

Cases Decided by the Supreme Court
In U.S. v. Windsor, the surviving spouse of a legally married same-sex couple who had been together for 44 years challenged the constitutionality of Section 3 of DOMA. Edith Windsor sued to recover over $350,000 in federal estate taxes she paid following the death of her spouse. Had she been married to an individual of the opposite sex, the federal government would not have required the payment of these taxes. Windsor argued that DOMA violated the Equal Protection Clause of the Fifth Amendment based on the fact that it recognized marriages between individuals of the opposite sex and not between same-sex couples. The Obama administration expressly stated that it would not defend the constitutionality of DOMA. In response, the Bipartisan Legal Advisory Group (“BLAG”) of the U.S. House of Representatives retained attorneys to defend DOMA’s constitutionality. After the Southern District of New York ruled in favor of Windsor, the Second Circuit affirmed, holding that Section 3 of DOMA was an unconstitutional violation of the Equal Protection Clause because it did not substantially relate to an important government interest.

The Supreme Court heard oral arguments in Windsor on March 27 of this year. On appeal, the Court focused on three issues while considering whether Section 3 of DOMA was unconstitutional. The first two issues were procedural, while the third was substantive. The Court determined whether it had jurisdiction to hear the case given that the Obama administration had stated that Section 3 of DOMA was unconstitutional. Second, the Court decided whether BLAG would have been injured and, therefore, had standing to defend the case if DOMA were to have been ruled unconstitutional. If the procedural matters were resolved, the Court had to determine whether Section 3 of DOMA did in fact violate the Equal Protection Clause as held by the Second Circuit.

Hollingsworth v. Perry was filed on behalf of two same-sex couples who were denied the ability to marry after Proposition 8 passed in November of 2008. This case was initially filed against California’s Governor and Attorney General; however, both declined to defend the constitutionality of Proposition 8. Instead, ProtectMarriage.com, the original proponents of Proposition 8, intervened to defend the case. In February of 2012, the Ninth Circuit held that California had no legitimate interest in amending the state constitution to remove same-sex couples’ right to marry.

One day prior to hearing the Windsor case, the Supreme Court heard oral arguments in Hollingsworth. Here again the Court was asked to resolve both a procedural and a substantive issue. First, as in Windsor, the Court had to decide whether ProtectMarriage.com had any standing to defend the case. Second, provided the procedural matter was resolved, the Court had to determine whether Proposition 8 was an unconstitutional violation of the Equal Protection Clause.

Rulings and Their Effect on Employee Benefit Plans
Ultimately, the Court held that Section 3 of DOMA was unconstitutional while finding that the proponents of Proposition 8 did not have legal standing to defend it. The aggregation of these decisions will dramatically affect the landscape of employee benefit obligations as they pertain to spousal and even child benefits. While these rulings will have the effect of extending numerous benefits to same-sex spouses at the federal level, they will also likely create a state of chaos for employers attempting to determine what obligations they owe employees’ same-sex spouses.

First, the Court simply declined to rule on the substantive issues contained in the Hollingsworth case. With the presence of procedural questions regarding proper jurisdiction and standing, the Court punted the substantive issue, overturning the case on procedural grounds. This ruling cleared the way for the resumption of gay marriage in California while avoiding the substantive issue of constitutionality.

The Supreme Court did rule on the substantive issue in Windsor, finding Section 3 of DOMA unconstitutional. (cont. page 4)
Same-Sex Spousal Benefits cont.

In doing so, the court recognized that its ruling has wide reaching affects, as DOMA was applicable to over 1,000 federal laws and regulations. A portion of those laws police federally mandated employee benefits. Generally speaking, by ruling that Section 3 of DOMA was unconstitutional, the Court has stated that all federally mandated benefits that are currently extended to opposite-sex spouses will be immediately extended to same-sex spouses. However, the consequences of this ruling are not nearly so simple. Some of the major benefits that are at issue include:

- The right to take leave under the Family and Medical Leave Act (FMLA) to care for a same-sex spouse;
- Coverage to same-sex spouses under the Consolidated Omnibus Budget Reconciliation Act (COBRA);
- Enrollment rights under Health Insurance Portability and Accountability Act (HIPAA);
- Joint and survivor annuities to same-sex spouses in defined benefit pension plans;
- Federal income tax treatment of health coverage for an employee’s same-sex spouse;
- Beneficiary designations under 401(k) plans;
- More favorable tax status for same-sex couples’ children and step children; and
- Hardship distributions under the Pension Protection Act of 2006.

These federal benefits are now owed to employees who work and live in the twelve states that legally recognize and allow same-sex marriages. Employers in these jurisdictions should review and amend their benefit plans to come into compliance with the mandates of the federal law. The Windsor ruling will make thing easier for these employers in the long run, once the initial updates to their plans are completed, by letting them treat all married employees in these states the same way for benefit purposes.

Though the Court’s ruling has simplified things for employers operating solely in the twelve states that have legalized same-sex marriage, it simultaneously has created numerous questions and complexities for employers throughout the rest of the country. First, it is unclear how an employer should handle an employee who was married in a jurisdiction that recognizes same-sex marriages but lives and works in a state that does not. Due to the fact that Section 2 of DOMA was not challenged in the Windsor case, states where laws or amendments have been passed strictly defining marriage as a union between a man and a woman will still not be required to recognize same-sex marriages entered into in states where such marriages have been legalized. This will lead to situations where couples who are legally married in one state move to a state with a valid mini-DOMA law and are no longer recognized as being married. It is unclear what effect this will have on employee benefit plans. If these individuals are not recognized as being married at the state level, it seems plausible they will not be recognized as legally married at a federal level. This could mean that same-sex spouses, who are legally married in one state, could potentially not be entitled to mandated federal or state spousal benefits as a result of living in a state with a mini-DOMA law. The other possibility is that the federal government would recognize these individuals as legally married while the mini-DOMA state would not. This would result in inconsistencies and confusion throughout the federal and state systems regarding what individuals are and are not entitled to federal and state mandated benefits.

Second, more confusion will arise for employers who operate across state lines. The Court’s ruling in Windsor does not state that same-sex marriage is a constitutional right, and, as previously, mentioned the mini-DOMA laws of thirty eight states are still valid. As a result, large multistate employers will need to determine what benefits are owed to employees in different jurisdictions. This will create a web of complexity for multistate employers, which will likely result in inconsistencies in employee benefit plans across companies based on the different laws of the locations in which they operate. It is unclear whether employers should or will use a single standard for their plans across all states in which they conduct business. It is also unclear whether federal law now deems it discriminatory to administer a plan recognizing same-sex spouses residing in one state but not in a state which does not recognize such unions.

Third, there is the issue of retroactivity. It is unclear whether plans should be administered prospectively from the date of the decision or whether must they be applied retroactively. By holding Section 3 of DOMA unconstitutional, the Supreme Court has essentially said that DOMA should never have been in effect. Though the Court did not speak on the issue of retroactivity directly, the ruling may have the effect of exposing employers and the government to retroactive benefit claims. Things like tax refunds on employer and employee payroll taxes that were paid on imputed income from health benefits received by same-sex spouses or death benefits provided by pension plans could be sought retroactively by same-sex couples.

There is an additional lack of clarity with regard to whether employers are going to be granted a grace period to make corrections to their plans in order come into compliance with the changing laws. What is clear is that the holdings in these cases will require additional clarification from the courts and federal and state agencies.

Employers still have some flexibility in deciding whether to offer certain non-mandated benefits to same-sex spouses. An example would be an employer’s ability to determine what benefits are offered in a group health plan. Because of this flexibility, employers should also be considering the liability exposure created by granting benefits to opposite-sex spouses and then denying those benefits to same-sex spouse, especially now that the federal government does not distinguish between the two. Though it is unclear whether the rulings in these cases will result in employers being subject to federal mandates in certain states, treating same-sex and opposite-sex couples differently could make employers vulnerable to discriminations suits.

Employers should review their benefit plans to determine whether their current plans will require amendments to affect change to federally mandated benefits to same-sex spouses. Prior to the issuance of any additional guidance from the courts, or federal or state agencies, employers are free to make decisions about how to proceed on the multitude of unanswered issues. Ideally, employers should choose a reasonable course of action and adhere to it, communicating their decisions amongst their workforces in an effort to avoid confusion and future litigation.

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On August 15, 2013, the U.S. Court of Appeals for the Sixth Circuit affirmed the National Labor Relations Board’s ("NLRA" or the "Board") controversial 2011 decision in Specialty Healthcare and Rehabilitation Center of Mobile v. NLRB. The Sixth Circuit’s decision in Kindred Nursing Centers East, LLC (f/k/a Specialty Healthcare) v. NLRB represents a major victory for organized labor because the scope of a bargaining unit is critically important to the success or failure of a union organizing campaign. Many have argued that the Specialty Healthcare decision boosts union organizing efforts by promoting “micro-unions” in the workplace. These so-called micro-unions allow organized labor to hand pick employees who want to form a union, thereby overriding the preference of employees at large and instead forming bargaining units based on discrete sections, units, departments, factions, or even job classifications within the workplace. In more plain terms, Specialty Healthcare has made it easier for unions to shrink the size of bargaining units in workplaces and assert control in workplaces where the majority of workers may not necessarily support unionization.

The National Labor Relations Act (the "NLRA" or the "Act") requires private sector employees who wish to be represented by a union to petition the board and hold an election to determine if an employer establishes that the majority of employees in the workplace share the desire to unionize. Section 9(b) of the NLRA gives the Board broad discretion to determine what the appropriate “bargaining unit” is—i.e. what group of employees will vote on union representation—based on whether the employees share a "community of interest" sufficient to justify their mutual inclusion in a single bargaining unit. To determine whether or not employees share a community of interest, the Board looks to the following five factor test: (1) similarity in skills, interests, duties and working conditions; (2) functional integration of the plant, including interchange and contact among the employees; (3) the employer's organization and supervisory structure; (4) the bargaining history; and (5) the extent of union organization among the employees.

The Specialty Healthcare Decision
In Specialty Healthcare, a union petitioned for a bargaining unit consisting of only certified nursing assistants ("CNAs") and excluding other non-supervisory service and maintenance employees in the workplace. For the preceding two decades, the Board had applied the standard set forth in Park Manor Care Center when considering how to determine the appropriate bargaining unit in non-acute health care facilities like Specialty. The Board overruled Park Manor Care Center, and articulated a new rule under which a unit of “all employees performing the same job at a single facility” is presumptively appropriate as a general matter in all industries. Additionally, the Board placed the burden of proving that a bargaining unit is inappropriate on the party challenging the appropriateness of the bargaining unit. Specifically, the Board stated that:

We reiterate and clarify that, in cases in which a party contents [sic] that a petitioned-for unit containing employees readily identifiable as a group who share a community of interest is nevertheless inappropriate because it does not contain additional employees, the burden is on the party so contending to demonstrate that the excluded employees share an overwhelming community of interest with the included employees...

This standard gives presumptive weight to the petitioned-for unit, a course of action which Section 9(c)(5) of the NLRA, which states that the “extent of organizing” may not be given controlling weight by the Board, explicitly disfavors. Although the Board contended that it had not articulated a new rule, and that the decision would not have broader implications on other industries, NLRB Member Brian E. Hayes stated the following in his dissent: “Make no mistake . . . Today’s decision fundamentally changes the standard for determining whether a petitioned-for unit is appropriate in any industry subject to the Board’s jurisdiction.”

Specialty refused to bargain with the group of CNAs despite the Board’s determination that the bargaining unit was appropriate, and the union subsequently filed an unfair labor practice charge. After Specialty was found to have violated the Act, it petitioned the Sixth Circuit Court of Appeals for review of the Board’s decision.

The Kindred Nursing Centers East Decision
In Kindred Nursing Centers East, the Sixth Circuit heard the employer’s appeal of the Board’s decision in Specialty Healthcare. The court affirmed the Board’s decision, and held that the Board has broad discretion when it comes to finding the appropriate bargaining unit, and that it must uphold a Board decision unless the employer establishes that the Board decision was arbitrary, unreasonable, or an abuse of discretion.

The court addressed four principal arguments asserted by Kindred: First, Kindred argued that the Board abused its discretion by departing from the long standing community of interest standards of its prior precedent. (cont. page 6)
The court rejected this argument, and stated that that an agency may depart from its prior precedents and, so long as the departure is explained, the court's review is “limited to whether the rationale is so unreasonable as to be arbitrary and capricious.” Accordingly, the court ruled that because the Board adopted a community of interest test based on some of its own prior precedents and explained its reasons for doing so, the Board did not abuse its discretion by applying a different version of the community of interest test to find the specific bargaining unit to be appropriate.

Next, the court evaluated Kindred’s argument that the Board abused its discretion by adopting an “overwhelming community of interest test” in any situation where an employer attempted to challenge the appropriateness of the proposed unit due to the exclusion of employees. The court also rejected this argument, reasoning that the Board explained its reasons for adopting the overwhelming-community of interest standard and that the Board applied a standard that was supported by precedent. Specifically, the court pointed to the D.C. Circuit's 2008 decision in Blue Man Vegas, LLC v. NLRB. In Blue Man, the D.C. Circuit held that an employer claiming that a unit should include more employees could not merely show that there is another appropriate unit, because “more than one appropriate bargaining unit logically can be defined in any particular factual setting.”

The court evaluated Kindred’s argument that the Board abused its discretion by adopting the “overwhelming community of interest test” in any situation where an employer attempted to challenge the appropriateness of the proposed unit due to the exclusion of employees. The court also rejected this argument, reasoning that the Board explained its reasons for adopting the overwhelming-community of interest standard and that the Board applied a standard that was supported by precedent. Specifically, the court pointed to the D.C. Circuit’s 2008 decision in Blue Man Vegas, LLC v. NLRB. In Blue Man, the D.C. Circuit held that an employer claiming that a unit should include more employees could not merely show that there is another appropriate unit, because “more than one appropriate bargaining unit logically can be defined in any particular factual setting.” The Blue Man court noted that if excluded employees share an overwhelming community of interest with included employees, there was no legitimate reason to exclude them from the bargaining unit. Based on this precedent, the Sixth Circuit held that the Board was entitled to overrule some of its own precedents and follow the precedent approved by the court in Blue Man as long as it explained why. The Sixth Circuit accepted the Board’s explanation that it needed to clarify its law because it had sometimes used different words to describe the standard and sometimes decided cases similar to Specialty Health without articulating a clear standard, and ruled that there was no abuse of discretion.

Kindred’s third argument was that the test articulated by the Board in Specialty Healthcare went against the explicit provisions of the Act. Specifically, Kindred argued that the Board violated Section 9(c)(5) of the NLRA, which forbids the NLRB from making the extent of union organizing the controlling factor in determining an appropriate unit. Kindred argued that the heavy burden of requiring the employer in a given case to establish an “overwhelming community of interest” between the proposed unit and others who should also be in the unit made the union proposed unit—which would undoubtedly be based on the extent of the union’s organizing—the controlling factor in most cases, and rendered the union’s initial choice of unit practically impervious to attack.

The court found no such violation of the Section 9(c)(5) of the Act, and again rejected Kindred’s argument. Specifically, the court stated that “Section 9(c)(5) appears to have been added to prevent the Board from . . . (determining) a bargaining unit without applying any kind of community of interest analysis, but solely on the basis that the workers wanted to organize a union.” The court continued that:

Kindred’s argument misses the mark, because here . . . the Board did not assume that the CNA-only unit was appropriate. Instead, it applied the community-of-interest test . . . to find that there were substantial factors establishing that the CNAs shared a community of interest and therefore constituted an appropriate unit—aside from the fact that the union had organized it. Indeed, nowhere in its briefs, nor before the Board, did Kindred dispute that the CNAs shared a community of interest. Therefore, the Board’s approach . . . did not violate section 9(c)(5). Kindred’s final argument was that the Board abused its discretion by adopting a generally applicable rule through adjudication rather than rulemaking. The court again rejected Kindred’s argument and held that the Board did not abuse its discretion. The court noted U.S. Supreme Court authority that held that the Board was not precluded from announcing new principles in an adjudicative proceeding and that the Board has discretion in the decision of whether to promulgate new rules through rulemaking or adjudication. The Sixth Circuit acknowledged, as did the Supreme Court, that some situations where the Board relies on adjudication rather than rulemaking might be a violation of the NLRA, but that Kindred had not explained why the Board’s choice of adjudication in this case amounted to an abuse of discretion or a violation of the Act.

What this Means for Employers

The full effect of “micro unions” and union efforts to create such unions are still relatively unknown, but this certainly won’t be the last word from the NLRB on the issue. As things stand today, the law makes it much more likely for an employer to have to deal with the disruptive effect of having multiple bargaining units under one roof; if an employer has eight groups of employees with differing job titles, it is not inconceivable that the employer will be forced to bargain with each of those eight groups individually.

With this in mind, employers should be wary of creating too much compartmentalization within their workforce, as unions may seize on the ready made micro-units during future organization efforts. Employers should also keep in mind some of the community of interest factors in organizing their workforce in order to better support arguments that a proposed unit is not appropriate. For example, employers can create cross-training programs for their workforce in order to ensure the similarity in skills, interests, and duties of workers or create a supervisory structure where employees in various departments report to the same supervisors in order to present a strong argument of overwhelming community interest.

If you are not sure whether your business is employing the best practices and procedures to help protect it and your employees, the Labor and Employment team at LeClairRyan is available to help you evaluate your current practices, procedures and policies.

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Employers are faced with numerous issues after a work accident, but are not always sure of their rights and duties following these incidents. One major concern is how an injured employee will obtain treatment for his or her condition. Virginia law actually speaks directly to that point, and requires an employer to provide a panel of physicians to an injured employee. Surprisingly, many employers do not know of this requirement. The Virginia Workers’ Compensation Act states that employers shall provide injured employees with a panel of physicians from which to select a treating physician. The law serves several purposes, including (1) ensuring that injured employees are provided with care options; (2) ensuring that employers provide injured employees with prompt access to capable medical professionals; and (3) reducing the cost of workers’ compensation medical and disability claims for employers and workers’ compensation insurance providers by directing injured employees to a pre-selected panel of trustworthy physicians that are focused on the employees’ full recovery and quick return to work.

The Employer’s Rights and Duties under the Law
The panel of physicians must be provided within a reasonable time after a work accident, otherwise the employee may seek treatment from a physician of his or her own choice. The appropriate time in which a panel may be furnished varies from case to case depending upon the different circumstances involved. An employer’s delay in providing a panel of physicians would be reasonable where the employer did not know of the need for medical treatment, and where the employee has not commenced a course of treatment with his own physician. Posting a notice or advising employees of the company panel during safety meetings is not sufficient.

The panel of physicians must contain the names of at least three qualified physicians selected by the employer and located within a reasonable distance from the employee’s residence. The panel should also consist of physicians familiar with the employer, able to meet the needs of the employee’s injuries, and knowledgeable about the employer’s return to work program. The panel should not contain names of physicians who share an interest in the same practice and it also should not contain names of medical facilities (as opposed to the designation of physicians). The employer cannot refuse to provide the employee with full medical service and also insist that he or she seek medical care only from physicians it selects, because such a policy would require an employee to seek treatment from a physician chosen by the employer but would not require the employer to pay the physician’s charges.

The Employee’s Rights and Duties under the Law
The employee is required to make a selection from the panel of physicians if it is a proper panel and if it is offered before the employee forms a treating physician relationship. The employee is also required to accept treatment from the chosen physician and change to another physician unless referred by the treating physician, confronted with an emergency, or given permission by the employer and/or its insurer or the Virginia Workers’ Compensation Commission. If no panel is offered, the employee is free to choose his or her own physician. Moreover, an employee may select a physician of his or her own choosing when an employer or carrier has denied a claim.

The Impact of the Law
Requiring employers to provide injured employees with a panel of physicians may seem burdensome but, in the long-run, this requirement is helpful for the employer. Providing a panel of physicians is one way for the employer to reduce the cost of workers’ compensation claims and better manage medical treatment and disability by directing the injured employee to a panel physician.

Workers’ compensation insurance carriers are required to offer policy-holders physician or panel suggestions. Regardless of whether a company has an established physician panel, in the event of an emergency, injured employees should be taken to the hospital or emergency care facility of their choosing or closest in proximity for immediate attention.

If your business does not have a panel of physicians, now is as good a time as ever to set up your panel so that you are compliant with the law. Doing so will not only ensure that you are following the law, but will also help you provide better care to your workers and save your business insurance premium cost, health care costs, and the costs associated with lost productivity.

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Fourth Circuit Strikes Down NLRB Notice-Posting Rule by J. Fielding Douthat, Jr. Esq. with Brandon Lee Wolff, Summer Associate
The Fourth Circuit joined the D.C. Circuit in striking down the National Labor Relations Board’s (“Board” or “NLRB”) notice-posting rule in Chamber of Commerce of the United States v. NLRB. The District of South Carolina granted summary judgment and held that the NLRB exceeded its own authority in violation of the Administrative Procedure Act. The Fourth Circuit affirmed in a unanimous opinion.

The Rule
The Notification of Employee Rights under the National Labor Relations Act was promulgated in 2011. During the public comment period after promulgation, the Board received 7000 submissions, many of which claimed that the Board lacked authority to promulgate the rule. In addition, Board Member Brian Hayes dissented because he also did not believe the Board had authority to promulgate the rule in the absence of a specific unfair labor practice charge.

The rule would have required employers to post notices to employees of their rights under the National Labor Relations Act (“NLRA” or “Act”) and failure to post would have been an unfair labor practice. (cont. page 8)
NLRB Notice-Posting Rule cont.

If an employee filed an unfair labor practice charge based on the failure to post, the employee would have still been allowed to file another unfair labor practice charge in the next six months. If an employer knowingly and willfully refused to comply with the rule, this could have been used as evidence of an employer’s unlawful motive in another NLRB proceeding.

The NLRB stated that the rationale behind the rule was the fact that many employees, including immigrants, high school students, and those who are not represented by unions, are largely ignorant of their rights under the NLRA. In addition, the Board recognized that the NLRA is one of the few federal labor laws that does not require the posting of laws. The rule would have applied to any employer whether they had union employees or not. However, it would have been more important for employers who did not have union employees because the notice would have been advising employees on how to form a union.

Until this notice-posting rule, the Board rarely engaged in rulemaking and only enacted a notice-posting rule on a case by case basis for specific employers who had already committed an unfair labor practice. In this limited context, the Fourth Circuit accepts a notice-posting rule. The D.C. Circuit previously held that a rule that applies to all employers, even if they have not committed an unfair labor practice, violates Section 8(c) of the NLRA (which prohibits the Board from finding employer speech that is not coercive to be an unfair labor practice).

The Fourth Circuit's Opinion

The Board argued that it had the power to promulgate a rule unless Congress explicitly denied that authority. The Chamber of Commerce (“Chamber”) argued that the rule should be invalidated unless Congress intended to give the Board this rulemaking authority. The Fourth Circuit, relying on its own precedent, supported the Chamber’s argument. The panel emphasized that, in this case, there was no power to limit since the NLRB did not have power outside its reactive roles of conducting representation elections and addressing unfair labor practice charges. The panel agreed with the district court that, even though the Board is empowered to prevent unfair labor practices, the rulemaking function in the NLRA only allows the Board to react after there has been a claim of an unfair labor practice in violation of the Act. The reactive mandate of the NLRB contrasts greatly with the proactive role of other labor agencies.

The panel then followed the process articulated by the Supreme Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*. The first step in that process is to determine if the intent of Congress is clear. The Fourth Circuit looked at both the text and legislative history of the statute and determined that Congress’ intent was quite clear so it was not necessary to proceed to the second step of the *Chevron* test.

The National Labor Relations Act

The panel analyzed Section 1 (the purpose and aspirations behind the Act), Section 7 (rights protected under the Act) and Section 8 (definition of unfair labor practices), which do not give the Board authority to promulgate a notice-posting rule. Section 6 was the focus of the case because it gives the Board rulemaking power consistent with the Administrative Procedure Act to enact rules which are “necessary to carry out” the provisions in the NLRA. The appellate panel found the notice-posting rule was not “necessary to carry out” Sections 9 or 10, which concern the two reactive roles of the Board: adjudicating charges of unfair labor practices and conducting representation elections. Both of these roles are reactive because the Board does not act until a party files a charge or a petition.

The Fourth Circuit stated that, while it may be laudable that the Board wants to educate employees about their rights, nothing in the Act states that this task should be the burden of employers. Additionally, the court noted that there is “no indication in the plain language of the Act that Congress intended to grant the Board the authority to promulgate” a rule that requires employers, who have not committed labor violations, to inform employees about their rights under the NLRA. The panel also noted that the Board’s argument was circular because it could not “justify an expansion of its role to include proactive regulation of employers’ conduct by noting its reactive role under the Act.”

Legislative History

With regards to legislative history, the court acknowledged that other agencies such as the EEOC and OSHA, which also have notice-posting requirements, are proactive agencies, but that the legislative history of the NLRA indicated that the Board should be reactive and not proactive. The court noted that there was also no evidence that the Board should have the power to enact the notice-posting regulation. The court pointed to the fact that Congress had considered a notice provision in 1934, but a Senate committee had agreed unanimously to remove the section that contained the notice provision as evidencing the clear intent of Congress on the subject. The court further pointed to the fact that a notice provision added to the Railway Labor Act in the same year the notice posting provision was considered in the NLRA as evidencing Congressional intent that NLRA should not contain such a provision.

The court further noted that, from 1935 to 1974, other labor laws were amended to include notice provisions. One such statute, the Veterans’ Benefits Improvement Act of 2004, was a labor law that Congress amended to include a notice-posting requirement. During this time period, the NLRA was amended several times yet a notice provision was never included in any of those amendments. The court determined that the legislative history clearly showed that Congress did not grant the NLRB the authority to promulgate notice-posting rules despite giving other agencies this power at the same time Congress amended the NLRA. Accordingly, the Court held that if Congress wanted to include a notice provision in the NLRA it would have been included in the statute.

Conclusion

The Fourth Circuit’s decision to strike down the Board’s notice-posting rule and affirm the District of South Carolina’s grant of summary judgment is good news for employers, who now have one less NLRB posting requirement to concern themselves with.

Contact the author at fielding.douthat@leclairryan.com.
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