

Senators ask FTC to explain due process in LabMD case

(October 12, 2016) - Two senior Republicans on the Senate Judiciary Committee are questioning the constitutionality of the Federal Trade Commission's data security enforcement in the closely watched LabMD Inc. case.

Their letter to FTC Chairwoman Edith Ramirez last month posed pointed questions about due process in the agency's recent decision against LabMD, which reversed the dismissal of the case by an administrative law judge who found no harm resulted from a 2008 theft of patient data.

The letter was included as an exhibit in an Oct. 6 filing by LabMD's founder and CEO, Michael Daugherty, in the 11th U.S. Circuit Court of Appeals in Atlanta, where the defunct medical testing firm is appealing the FTC's decision and an order requiring patient notification and new computer system safeguards.

The two senators who signed the letter — Jeff Flake, R-Ariz., and Mike Lee, R-Utah — said they are reviewing the FTC's LabMD decision.

"However, a more immediate and persistent concern is the extent to which the FTC's cybersecurity regime complies with the protections of due process under the constitution," they wrote.

Flake is the chairman of the Senate Judiciary Subcommittee on Privacy, Technology and the Law, while Lee is chairman of the panel's Subcommittee on Antitrust, Competition and Consumer Rights.

The senators asked the agency to explain several technical legal questions raised by its LabMD decision, starting with its rejection of LabMD's defense that the FTC's data security enforcement standards are unconstitutionally vague.

They also asked whether the agency's enforcement standards are guided by a cost-benefit analysis of what is reasonable.

"What, if any, guidance has the FTC given as to how small businesses are to weigh the costs and benefits of data security?" they wrote. "How was the commission's cost-benefit analysis conducted in the commission's order in LabMD?"

LabMD has argued its data security practices were reasonable for a company of its size at the time.

"How does the relative size or sophistication of a business affect the extent to which the FTC's enforcement regime gives it adequate notice of its cybersecurity obligations?" the senators asked. "How many other cybersecurity enforcements had the FTC completed prior to LabMD's 2008 breach?"

LabMD's patient data was downloaded by a cybersecurity firm, using a peer-to-peer program installed without authorization on a LabMD computer. When LabMD refused to hire the firm to prevent future data leaks, the file eventually was turned over to the FTC, which then launched its investigation.

By Paul Merrion, CQ Roll Call

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