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Employer Cannot Escape Claims That It Cut Employee Hours to Avoid ACA Requirements

A trial court recently refused to dismiss an ERISA lawsuit alleging that the employer intentionally interfered with employees' benefit rights by managing their work hours under 30 hours a week in order to avoid the requirement to offer health coverage or pay ACA assessments. This decision could encourage plaintiffs' attorneys to file lawsuits in similar circumstances. Employers considering workforce changes that could result in loss of health coverage can minimize their litigation risk by closely coordinating with legal counsel about actions and employee communications concerning those changes.

Background

The Affordable Care Act (ACA) imposes employer shared responsibility requirements that are commonly referred to as the "employer mandate." Beginning in 2015, large employers were required to offer minimum essential coverage to full-time employees and their dependents, or pay a non-deductible assessment if at least one full-time employee enrolls in marketplace coverage and receives a premium tax credit or cost-sharing reduction. Even if they offer employees coverage, large employers may still be subject to an assessment if the coverage they offer to full-time employees is "unaffordable" or fails to provide minimum value. For these purposes, a full-time employee is one who, for a given calendar month, either averages at least 30 hours of service per week, or has worked at least 130 hours that month. The ACA does not impose coverage requirements for part-time employees, meaning those who average fewer than 30 hours per week or fewer than 130 hours in a month. (See our April 17, 2014 *FYI In-Depth.*)

Non-ERISA plans, such as governmental plans, are not subject to ERISA Section 510. However, applicable state laws could prohibit similar conduct.

ERISA Section 510 prohibits employers from taking action — including a discharge, fine, suspension, expulsion, discipline or discrimination — against a participant or beneficiary for exercising a right under ERISA, and from interfering with a participant or beneficiary in attaining a benefit under an ERISA benefit plan (including a health plan).

Company Reduced Hours to Avoid Offering Coverage, Employee Claimed

In May 2015, Maria De Lourdes Parra Marin filed a class action lawsuit, *Marin v. Dave & Buster's, Inc. et al*, against Dave & Buster's (Company), alleging that it violated Section 510 by reducing employees' hours to avoid having to offer them coverage under the ACA's shared responsibility requirements. According to the complaint, Marin was employed as part of the kitchen staff at the Company's Times Square, New York location. She regularly worked about 30-45 hours per week until May 2013 and, as a full-time employee, participated in the Company's health plan (Plan). Marin alleges that, in June 2013, the Company reduced her hours to approximately 17 hours per week on average, with a corresponding loss of pay. In March 2014, almost a year after her hours were reduced, the Company officially informed her she had become a part-time employee and was no longer eligible for Plan coverage.

Marin brought a class action lawsuit on behalf of herself and other Plan participants whose hours the Company reduced beginning in June 2013, and who, as a result of the reductions, either lost coverage or received an inferior offer of coverage. She claims that the reductions were part of the Company's plan to cut the number of its full-time employees in order to lower costs associated with the ACA's employer shared responsibility requirements. Specifically, Marin alleges that:

- The Company announced at workplace meetings that it planned to reduce the number of full-time employees in order to lower costs associated with ACA compliance.
- An employee posted on the Company's Facebook page that the Company had informed employees they would lose "hours (pay) and health insurance" due to the ACA.
- The Company explained in a newspaper article that it "is in the process of adapting to upcoming changes associated with health care reform."
- In a Securities and Exchange Commission (SEC) filing, the Company stated that "Providing health insurance benefits to employees that are more extensive than the health insurance benefits we currently provide and to a potentially larger proportion of our employees, or the payment of penalties if the specified level of coverage is not provided at an affordable cost to employees, will increase our expenses."

Case Can Move Forward

The Company moved to dismiss the complaint. It argued that Marin had shown only the lost opportunity to accrue additional benefits, rather than interference with current benefits as Section 510 requires. The trial court denied that motion, finding that the Company acts Marin alleged affected her current benefits, in addition to interfering with her ability to attain future benefit rights. It further determined that Marin had sufficiently set forth the Company's specific intent to interfere with her ERISA benefits by curtailing her hours, which is critical to a Section 510 claim. Thus, the court decided that, at this stage in the proceedings, Marin's lawsuit could proceed. It also noted that Marin's claim for reinstatement of benefits includes a claim for related lost wages and salary.

> **Comment.** While a key victory for Marin, this ruling does not address the merits of her claims. Rather, it simply means she will have an opportunity to prove her allegations in future proceedings. Furthermore, the court has yet to determine if the case can move forward on a class action basis.

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Beware When Reducing Employee Hours

This ruling is expected to embolden plaintiffs' attorneys by giving them a road map for a successful Section 510 claim involving the ACA's employer shared responsibility requirements. Courts are likely to look to the decision in evaluating similar allegations.

Employers contemplating cutting employee hours, managing employee hours under 30 hours a week, changing employee classifications or break-in-service rules, or taking other actions that could adversely affect employees' eligibility for health coverage or options should be mindful of this case, and coordinate closely with legal counsel before proceeding. Employers should expect that employee communications (both oral and written) about such workforce changes, as well as with SEC filings, could be used to support a Section 510 claim.

> **Comment.** It is possible that an employer's decision to outsource or shift work from its employees to employees of a staffing agency as a way to reduce its ACA shared responsibility liability could be subject to a Section 510 claim.

ACA's "Whistleblower" Provision

Relatedly, the ACA contains a "whistleblower" provision, Section 1558, which is applicable to all employers — not just sponsors of ERISA plans. This provision prohibits an employer from discriminating against an employee's compensation, terms, conditions or other privileges of employment because an employee received a marketplace premium tax credit, or acted as a whistleblower on ACA violations.

Considerations Beyond ERISA Section 510

Employers routinely make staffing adjustments for legitimate business reasons, such as reacting to market conditions and managing costs. But they should be mindful that reorganizing, downsizing, rightsizing and other cost-cutting measures can create potential legal liability under a variety of employment and labor laws — such as Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Worker Adjustment and Retraining Notification Act and similar state and local laws. Additionally, employment contracts may limit employers' flexibility to implement workplace changes, and, in a unionized setting, staffing adjustments may spark an employer's obligation to bargain over a decision or its effects.

The workplace and legal landscapes are evolving. As employers look to new business models and non-traditional employment arrangements to effectively compete in the 21st century on-demand economy, they can anticipate additional — and likely novel — legal challenges by affected employees and their representatives, and increased scrutiny by regulatory agencies. As such, employers should take care to structure staffing changes in ways that minimize risk under applicable law and existing contracts.

In Closing

Employers should be aware that workforce changes resulting in loss of health coverage may be subject to a Section 510 claim. Coordinating actions and communications with legal counsel can help minimize litigation risk.

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