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'Right-Sizing' Full-Time Employees to Reduce ACA Obligations May Lead to ERISA Class Action Exposure

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Compliance with the ***Affordable Care Act (ACA)*** has resulted in increased health benefit costs for many employers. A recent court decision demonstrates that while programs to reduce the number of full-time employees may lower health care costs in the short run, they also may lead to ***ERISA*** class action litigation. In ***Marin v. Dave and Buster's***, a federal district judge in the Southern District of New York denied a motion to dismiss a class action lawsuit claiming that the Dave and Buster's amusement chain violated ERISA by cutting employee hours to avoid providing health care benefits to a class of employees.

The ACA's employer shared responsibility requirements obligate large employers to offer minimum essential health coverage to substantially all of their full-time employees, or to pay significant penalties if just one such employee qualifies for a premium subsidy on a public health insurance exchange. There are also penalties if an employer offers coverage to its full-time employees but the coverage is not affordable for such employees or is not of minimum value. Specifically, the ACA defines a full-time employee as an employee who regularly works on average at least 30 hours per week. Employers are not exposed to penalties under the ACA for failure to offer coverage to part-time employees. As a result, some employers have considered moving employees to part-time status in order to avoid triggering penalties under the ACA for failure to offer health insurance coverage to such workers.

Section 510 of ERISA makes it unlawful for any person to discriminate against any participant or beneficiary for exercising a right under ERISA or an ERISA benefit plan. The plaintiffs alleged that by reducing employees' hours to keep them below the 30-hour weekly average to qualify as a full-time employee, Dave & Buster's interfered with the attainment of the affected employees' right to be eligible for company health benefits.

Two things are particularly notable about the court decision denying a motion to dismiss the case. First, while the complaint includes claims for past and future health benefits and for "incidental" lost wages, the opinion focuses on ERISA Section 510 and holds that the plaintiff has a viable claim that reducing her work hours was done for the purpose of interfering with her right to benefits under the company health plan. Second, the opinion finds that the complaint successfully alleged the employer's "unlawful purpose" and intention to interfere with benefits, pointing to allegations that company representatives publicly stated that they were reducing the number of full-time employees

to avoid ACA costs.

This court decision will encourage plaintiffs' class action lawyers and should be of concern to employers. Plaintiffs' lawyers now have a model for a class action complaint under Section 510 of ERISA when employers limit their full-time employee staff. Further, when plaintiffs are able to get past a motion to dismiss and take discovery, depositions and document production will be difficult for employers if avoiding or reducing ACA benefits has been part of the internal discussion about employee status and staffing, particularly if the restructuring is done in a manner that attempts to evade ACA requirements. Employers contemplating staffing changes in response to ACA employer shared responsibility requirements, such as reducing employee's work hours or requiring breaks in service to avoid service bridging, are encouraged to contact legal counsel before implementing such workforce policies.

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