ACA Employer Mandate and ERISA Implications

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Many in the legal community warned of possible Employee Retirement Income Security Act of 1974 ("ERISA") implications and litigation risk surrounding scheduling decisions made by employers in order to avoid being subjected to an Affordable Care Act ("ACA") penalty for failure to offer coverage to full-time employees.

Although full-time status has historically been determined by employers, the ACA created a standard definition of full-time employees. As a result of this change, and the requirement to provide benefits to those employees meeting this new definition, many organizations began evaluating their scheduling and staffing policies related to full-time and part-time employees in light of the cost burden imposed by the ACA. This article will provide an explanation of the case, a refresher on ERISA obligations and a discussion about potential ERISA implications following ACA strategy decisions.

In Marin v. Dave & Buster's Inc. et al., a class action case, the plaintiffs allege that in 2013, Dave & Buster's conducted a nationwide effort to "right-size" the number of full and part-time employees to avoid the expense of providing health coverage and complying with ACA requirements. Specifically, the plaintiffs assert that Dave & Buster's intentionally interfered with their rights as participants in the Dave & Buster's ERISA Health and Welfare Plan in order to avoid costs associated with providing ACA compliant health insurance to its full-time employees as a result of the ACA. The case was filed in May 2015. Dave & Buster's filed a motion to dismiss which was denied in February 2016. The case is still pending and may go to trial in the second quarter of this year.

The complaint contains the account of the lead plaintiff, Ms. Marin. In June 2013, management at Ms. Marin's location announced that compliance with the ACA would cost Dave & Buster's as much as $2 million and that, to avoid that cost, Dave & Buster's planned to reduce the number of full-time employees at that location. Following that meeting, Ms. Marin's hours were reduced. After a measurement period, Ms. Marin was notified that she was no longer qualified for coverage under Dave & Buster's Plan because she only averaged 17.43 hours per week.

The complaint suggests that the reduction in hours and full-time staff was the result of the employer's efforts to reduce costs arising from health care offerings. In addition to representations made by managers, it cites a Securities and Exchange Commission filing by Dave & Buster's in fall 2014 where Dave & Buster's disclosed its concern about the ACA's negative impact on its business. The filing affirmatively contemplates the effect that the ACA would have on business and identifies that penalties for failure to cover full-time employees will begin in 2015. It states 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[...]."

The plaintiffs alleged that after announcing the ACA would cost the business as much as $2 million, Dave & Buster's reduced its number of full-time employees.

So what's the big deal? After all, ACA penalties aside, employers are not required to provide benefits to their employees in the first place. Shouldn't an employer be able to make staffing and scheduling decisions in order to help its bottom line?

As a refresher, ERISA is a federal law that applies to most employers, excluding church, governmental and some tribal plans, that creates a trust-like arrangement between employers and participants of a health and welfare plan. ERISA Section 510 has been suggested as a method for employees to bring suit against their employer to recover for benefits reductions arising out of the ACA; it states, "It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising *any right to which he is entitled* under the provisions of an employee benefit plan, [...], or for the purpose of interfering with the attainment of any *right to which such participant may become entitled under the plan* [...]." The employees in this case state that converting Ms. Marin and other employees from full-time to part-time status interfered with the attainment of their right to participate in the Dave & Buster's Plan in violation of Section 510 of ERISA.

In Dave & Buster's motion to dismiss, the restaurant chain asserted that regardless of the results of its actions an employee must show "that an employer was at least in part motivated by the specific intent to engage in activity prohibited by [Section] 510." Among other arguments, it asserts that the employees only alleged that Dave & Buster's restructured its workforce in order to avoid the anticipated costs of providing ACA compliant health insurance coverage; it maintains that there was not an intent to interfere with a participant's plan benefits. The employer's motion was denied and the court will examine the employer's intent relative to a business decision to reduce costs in the face of the ACA. The court's analyses could have a significant impact on future claims against employers.

This case also signals some potential best practices that an employer should keep in mind when making staffing decisions. Even if the employees in this case are unsuccessful, a claim of this type is expensive to defend and harmful to an employer's reputation. Employers should avoid creating the fact pattern cited by the plaintiff employees in this case; primarily, those facts that demonstrate an intent to interfere with an employee's Section 510 rights. In this case, the employer is harmed by statements of managers asserting that staffing and scheduling changes arise solely from ACA consideration. Thus, affirmative statements to employees justifying a scheduling change should be carefully monitored. That said, scheduling policies and decisions made at the corporate level should be made in a manner that creates a clear business purpose, outside of pure cost savings from reduced health plan participation. If unsure that such a purpose can be established, legal counsel should be involved to ensure the confidentiality of any such discussions.

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Failure to ensure that an intent to interfere with participant benefits is unable to be established, employers face an increased risk of litigation. There are likely two types of plaintiffs that would seek ERISA Section 510 protections: an entire class of plaintiffs (class action) and individuals seeking reimbursement for large claims incurred outside the plan under the theory that the employee would have been entitled to such benefits had the participant been rightfully covered under the plan. It is helpful to remember the types of remedies available under ERISA. Stemming from a trust construct, only equitable remedies are available; thus, legal remedies such as pain and suffering and/or punitive damages are not available. Given the nature of available remedies, individual participant recoveries are limited but the availability of attorney's fees, especially in the context of a class action suit, are especially attractive to plaintiff's counsel.

Employers should keep an eye out for the resolution of this case and remember that the ACA does not operate in a vacuum. Its impact is still evolving in profound ways.

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Marin v. Dave & Buster's, Inc. et al, New York Southern District Court, Case No. 1:15-cv-03608
ERISA Section 510, 29 U.S.C. § 1140