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Between a Rock and a Hard Place: How the ACA Exposes Employers to New Class Action Risks




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The Affordable Care Act (''ACA'') exposes applicable large employers to penalties if they do not offer employees who regularly work 30 or more hours per weekhealth insurance that meets the ACA's minimum value and affordable requirements. Given the high cost of health insurance, an employer could conclude that by scheduling employees for less than 30 hours it could avoid the ACA's coverage obligations and save money. But how and, perhaps more importantly, why an employer executes such an approach may prove crucial in light of Section 510 of the Employee Retirement Income Security Act of 1974 (''ERISA''). Section 510 of ERISA provides that, ''It shall be unlawful for any person to . . . discriminate against a participant or beneficiary . . . *for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan* . . . . .'' (emphasis added)

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Class Action Under ERISA 510

Recently, the first case accusing an employer of violating ERISA Section 510 by reducing the hours of employees below 30 a week in order to avoid being required to provide health insurance under the ACA was filed in the U.S. District Court for the Southern District of New York (*Marin v. Dave & Buster's Inc.* (91 PBD, 5/12/15; . It will likely be the harbinger of a flood of such litigation in the coming months and years. Employers should therefore take heed to protect against this litigation threat and consider carefully the allegations in the *Marin* complaint.

Marin is a putative class action against a restaurant chain that allegedly instituted an employee ''right sizing'' program. The alleged purpose of this program was to reduce a large number of full time employees to schedules averaging less than thirty hours per week thus making them ineligible for employer-sponsored health care plans. In announcing the workforce changes, the employer was accused of stating that compliance with the ACA would have cost the employer as much as ''two million dollars.'' The Employer is also alleged to have adverted to the ''significant negative impact on our business'' from the effects of the ACA in SEC filings. That, of course, is not really evidence of anything, certainly nothing improper, as it is simply a statement of fact that offering health insurance meeting the various requirements of the ACA to those deemed full time at only 30 hours per week can be quite costly and thus a negative for employers on their balance sheets.

The class action seeks both to restore the health benefits to those whose hours were reduced, and to recover back pay for the allegedly lost hours despite the fact that such a backpay remedy is not available under ERISA because it is not a plan benefit.

Prevailing Under ERISA 510. Plaintiffs' likelihood of success in *Marin* is certainly questionable. Generally, unless an ERISA plaintiff produces direct evidence that the employer had a specific intent to violate ERISA Section 510, courts will analyze a Section 510 claim using the same *McDonnell Douglas-Burdine* burden-shifting approach followed in employment discrimination cases. A plaintiff lacking direct proof must first establish a prima facie case by showing: (1) he or she was engaged in activity protected by ERISA 510, *e.g.*, the plaintiff had the opportunity to attain rights under the plan and was qualified for the position at issue; (2) he or she suffered an adverse employment action; and (3) a causal connection exists between the protected activity and the adverse action. In turn, the employer must then produce admissible evidence of a legitimate, nondiscriminatory reason for the action taken. If the employer does so, the employee has the ultimate burden of persuasion to establish that the employer was motivated by the specific intent to avoid providing the benefit. An ERISA 510 claim does not succeed if the interference with a participant's attainment of a benefits right is a mere consequence of an adverse action taken for legitimate reasons.

If an ERISA 510 claim is to succeed, any relief will likely be premised on ERISA Section 502. Section 502 allows appropriate equitable relief to redress violations of ERISA or to enforce the provisions of ERISA or the terms of a plan. As such, Section 502 could entitle a participant to payment of the value of the health care benefits the employee would have received as a full-time employee, if plaintiffs prove their hours were reduced in violation of ERISA Section 510. This might hit an employer especially hard if the plan was fully-insured and the insurer is unwilling to retroactively re-enroll the affected participants.

Adjusting for the ACA: Business Decision or Benefits Interference? In the context of reducing employees' hours, the decisive issue under ERISA Section 510 may boil down to whether managing the hours of the workforce constitutes a legitimate entrepreneurial decision involving management of costs or an intentional interference with an employee's benefit rights. It is significant that in *National Federation of Independent Business v. Sebelius*, the Supreme Court held that the ACA's employer mandate penalties are taxes—and employers often lawfully implement favorable tax planning strategies as a matter of course, including strategies that require adjustments in workforce (125 PBD, 6/29/12).

Or as Judge Learned Hand so eloquently noted:

> ''Anyone may arrange his affairs so that his taxes shall be as low as possible; he is not bound to choose that pattern which best pays the treasury. There is not even a patriotic duty to increase one's taxes. Over and over again the Courts have said that there is nothing sinister in so arranging affairs as to keep taxes as low as possible. Everyone does it, rich and poor alike and all do right, for nobody owes any public duty to pay more than the law demands.''[1]

The issue of whether there is a legitimate business decision that collaterally affects employees' hours and ACA coverage versus an intentional effort to thwart health care coverage is one that could be litigated extensively and might ultimately have to be resolved by the U.S. Supreme Court.

The Supreme Court has already confirmed that employers are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate a welfare benefit plan, in *Inter Modal Rail Employees Association v. Atchison, Topeka & Santa Fe Railway*. In that case, the U.S. Supreme Court explained that ERISA Section 510 merely counterbalances this flexibility by ensuring that employers do not intentionally seek to circumvent the provision of promised benefits. More specifically, the *Inter Modal Rail* court held that ''when an employer acts without this purpose, as could be the case when making fundamental business decisions, such actions are not barred by ERISA 510.'' It is also significant that the ACA does not by its terms bar employer workforce management decisions so long as ACA's retaliation provisions are not violated.

Even if the better view prevails that reducing employee hours to avoid the costs and potential taxes associated with providing employees healthcare does not trigger a successful ERISA 510 claim, given that specific intent lies at the heart of such potential liability, employers contemplating any such actions should carefully consider how they characterize workforce management decisions both internally and publicly. Any misstatement could fuel costly litigation under ERISA 510 and possibly under the ACA and other laws.

In *Marin*, for example, the complaint alleges that the employer filed a Form S-1 with the SEC stating that the ACA ''may have an adverse effect on our business'' because ''[p]roviding 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 . . . will increase our expenses.'' The complaint also references a report that quotes a Human Resources VP as allegedly saying that ''[w]e take all decisions that affect our team members' hours seriously,'' but ''[l]ike many companies, D&B is in the process of adapting to upcoming changes associated with health reform.'' While these alleged public statements are likely taken out-of-context and certainly may be entirely lawful statements, concerning entirely lawful and reasonable business judgments to comply with the ACA, *Marin* indicates that for some, they purportedly serve as evidence of specific intent to interfere with employees' benefit rights.

Beyond ERISA 510: ACA Retaliation Provisions

Unfortunately, employees who seek to challenge an employer's right to reduce employee hours likely will not stop with allegations that such statements are evi-

[1] Gregory v. Helvering, 69 F.2d 809, 810 (2d Cir. 1934), aff'd, 293 U.S. 465, 55 S.Ct. 266, 79 L.Ed. 596 (1935).

dence of specific intent to interfere with benefits rights in violation of ERISA Section 510. An easy next step for these employees is to try to exploit the ACA retaliation provisions. The ACA's anti-retaliation provisions prohibit employers from discharging or discriminating against an employee with respect to the employee's compensation, terms, conditions, or other privileges of employment because the employee, among other things:

- received a premium tax credit or a cost-sharing reduction at an Exchange, or

- provided (or is about to provide) information to the employer, federal government, or any state attorney general relating to a violation or an act or omission that the employee reasonably believes is a violation of any provision of Title I of the ACA.

This means, for example, that if an employer chooses to adjust for costs associated with the new employer mandate by reducing full-time employee hours, and one of the employees whose hours were reduced either received a premium tax credit or contacted the DOL to discuss, *e.g.*, employer compliance with summary of benefits and coverage requirements, then the employer may face a retaliation claim under the ACA.

Proper Workforce Management

Between Sections 502 and 510 of ERISA and the ACA whistleblower provisions, the potential risks associated with reducing workforce hours in response to costs and taxes under the ACA can be daunting. Yet, the cost savings of proper workforce management may outweigh the risks, and, as clearly established by the U.S. Supreme Court, employers have the right to manage their workforces to meet their business needs—even if interference with a participant's attainment of a benefits right is a collateral consequence of such business management. Nor is there anything in the nearly 2000 pages comprising the ACA that outlaws employer workforce management.

Properly executing such workforce management in a way that avoids retaliation and discrimination risks is a goal worth significant and deliberate consideration. Employers contemplating significant reduction of substantial numbers of existing employees' hours should now be forewarned of the potential for litigation. This suggests that before such plans are formulated consultation with counsel who can advise the employer of the potential perils and available opportunities is desirable. In the face of this new litigation thrust it is especially important to not send potentially erroneous messages before carefully reviewing the attendant legal issues.