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Warning to Employers: Cutting Employee Work Hours to Avoid Affordable Care Act May Violate ERISA

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Section 1513 of the Affordable Care Act (the "ACA"), informally known as the employer mandate, requires employers of 50 or more full-time employees to offer affordable minimum-value health coverage to their full-time employees or pay penalties to the IRS. The ACA defines full-time employees as those who regularly work an average of at least 30 hours per week. Employers are generally not required to offer health coverage to employees working less than 30 hours per week on average.

Since its inception, ACA critics have speculated that qualifying businesses will attempt to avoid the employer mandate by structuring employee work hours and staffing to minimize the number of employees meeting the 30 hour per week threshold. This speculation raised an open question of whether such action could violate Section 510 of the Employee Retirement Income Security Act of 1974 ("ERISA"). Section 510 of ERISA makes it unlawful to "[retaliate] 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 . . . ."

Last year an employee instituted a putative class action against Dave & Buster's, Inc., a national restaurant and entertainment business, alleging that the company intentionally interfered with her attainment of her then current healthcare coverage by reducing her work hours to prevent her from attaining full-time status in violation of Section 510 of ERISA. *See Marin v. Dave & Buster's Inc., S.D.N.Y., Civil Action no. 1:15-cv-03608*, filed on May 8, 2015 in the United States District Court for the Southern District of New York. The suit seeks to certify a class of approximately 10,000 workers.

In response to the lawsuit, Dave & Buster's moved to dismiss, arguing that the plaintiff's complaint failed to demonstrate that the company reduced work hours with the specific intent to deny employees the right to group health insurance. The Court recently denied the motion finding that the plaintiff set forth sufficient allegations (including allegations of meetings where managers explained that compliance with the ACA would cost the company millions of dollars and that hours were being reduced to avoid that cost) to support her claim that her participation in the company's health insurance plan was discontinued because the company realigned its workforce to avoid compliance with the employer mandate.

It is important to note that the Court did not make any findings on the merits of the claim. However, large employers can be assured that employee-side employment attorneys are closely monitoring the case. Large employers considering a restructuring of their workforce resulting in a reduction in employee hours should seek the advice of counsel before communicating the rationale for the restructuring to their employees. If you have questions about how the ACA could affect your organization, please contact Scott Ohnegian, Daniel Zappo, or any member of Riker Danzig's Labor & Employment Group.

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