Reducing Employees' Hours Could Lead to Discrimination Claims Under ERISA

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The District Court for the Southern District of New York recently denied a motion to dismiss a case alleging that Dave & Buster's "right-sized" its workforce for the purpose of avoiding healthcare costs. As the first case of its kind, and notwithstanding that the district court has not yet made any final findings on the merits, *Marin v. Dave & Buster's, Inc.*, S.D.N.Y. 1:15-cv-36081, could have major implications for companies contemplating a workforce realignment. Any such companies should pay very close attention as this case progresses.

The Affordable Care Act (the "ACA") requires that employers who employ 50 or more full-time employees offer affordable minimum-value coverage to full-time employees and their dependents (the "Employer Mandate"). Many commentators have argued that, in response to the costs associated with providing ACA-compliant coverage, some employers will likely seek to avoid the Employer Mandate by reducing the number of working hours for certain groups of employees (because if an employee works less than 30 hours per week, he or she will not be considered a full-time employee and the employer is not required to extend an offer of affordable minimum-value coverage to that employee).

However, such actions could violate Section 510 of the Employee Retirement Income Security Act of 1974 ("ERISA"), which forbids discrimination and retaliation against plan participants and beneficiaries. More specifically, Section 510 prohibits employers from interfering "with the *attainment* of any right to which such participant *may become* entitled under the plan." (Emphasis added.) Because many employment decisions may affect the right to present or future benefits, courts generally require that plaintiffs show specific employer intent to interfere with benefits to prevail under Section 510. Remedies are limited to "appropriate equitable relief," which can include reinstatement, restitution and back pay.

Marin is the first case to address whether a workforce realignment allegedly done for the purpose of avoiding the Employer Mandate constitutes a violation of Section 510. The case was commenced as a putative class action alleging that Dave & Buster's reduced its number of full-time employees to avoid costs associated with providing ACA-compliant healthcare coverage. Dave & Buster's moved to dismiss, arguing that the complaint failed to (i) set forth allegations demonstrating that Dave & Buster's reduced work hours with the specific intent to deny employees the right to participate in the healthcare plan and (ii) demonstrate that the plaintiff was ever entitled to such participation. The district court disagreed and denied Dave & Buster's motion. The district court found that the plaintiff set forth sufficient allegations to support her claim that her participation in Dave & Buster's health insurance plan was discontinued because Dave & Buster's realigned its workforce to avoid ACA-related costs (e.g., the complaint alleged that meetings were held during which managers explained that the ACA would cost the company millions of dollars and that hours were being reduced to avoid that cost).

More cases like *Marin* are likely to surface, and engaging in workforce realignment to reduce the number of employees working more than 30 hours per week (or to reduce the size of the workforce to less than 50 full-time employees) could very well lead to being named as a defendant in one of those suits. Although some employers might weigh the costs of ACA compliance against the risks of restructuring or realigning their workforces, they should seek the advice of counsel when doing so.

If you have any questions regarding the topic in this alert, please contact your Andrews Kurth labor and employment section attorney.