



Claim of Section 510 interference with ERISA rights survives motion for dismissal

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When the Affordable Care Act (ACA) was originally signed into law, many employers were concerned that the costs of complying with the new health care benefit mandates would be extremely expensive. ACA imposed an obligation on employers that had 50 or more full-time employees, or their equivalent, to either offer healthcare coverage for their full-time employees or to potentially pay an additional Employer Shared Responsibility payment to the IRS for such employees. For these purposes, "full-time" was deemed to be an average of 30 or more hours of service. Employees regularly working less than 30 hours would not need to be provided such coverage.

The plaintiffs in the case of *Marin v. Dave & Buster's, Inc.* S.D.N.Y., No. 1:15-cv-03608 claim that the defendant, Dave & Buster's, went to great lengths to reduce the number of full-time employees that would become eligible for such healthcare coverage. The complaint went on to state that Dave & Buster's, in a "preemptive strike against Obamacare," reduced the working hours of a large number of full-time employees in order to bring them below the 30 hours required to be treated as full-time under ACA.

The class action suit was brought on behalf of the more than 10,000 part-time employees of Dave & Buster's. The claim was filed under Section 510 of ERISA which, among other things, makes it unlawful for an employer to discharge, fire, suspend, expel, discipline, or discriminate against a participant or beneficiary for the purposes of interfering with such participant's attainment of any rights under ERISA. Traditionally these types of claims under Section 510 have failed since the employees had no entitlement to benefits not yet accrued under the plan. Prior courts have held that a "plaintiff must show more than simply a lost opportunity to accrue additional benefits" in order to support a claim under Section 510 of ERISA.

However, the Court found that the Plaintiff had alleged sufficient facts to support a claim that the employer's unlawfully motivated actions did more than eliminate the potential right such employees might have attained to participate in the plans in the future. That likely would not have been enough to defeat the motion to dismiss the ERISA Section 510 claim. Instead, the Court found that alleged facts support a potential claim that the unlawfully motivated actions of the employer resulted in the reduction in the hours being worked by full-time employees; thus, making them part-time employees and ineligible to continue to participate in such health plans.

The types of actions taken by Dave & Buster's to reduce their exposure to ACA-imposed coverage were consistent with the type of actions taken by other employers following the passage of ACA. Some employers implemented procedures to ensure that their part-time employees stayed below the 30-hour requirement that would qualify such employee for the health insurance coverage. Other employers took more aggressive approaches that included restructuring their workforce to eliminate full-time employees or to increase their utilization of part-time employees over full-time employees.

The District Court denied Dave & Buster's motion to dismiss the complaint. With the ruling, the plaintiffs will now have the ability to pursue their claim. This by no way indicates that the plaintiffs will ultimately prevail in their claim. However, should they do so, they will potentially become entitled to a restoration of their health benefits and other lost benefits and wages resulting from their reduction in hours to part-time status. Thus, the Court's ruling raises significant concerns for Dave & Buster's and for other employers that implemented similarly aggressive ACA-avoidance strategies.

While this case is a long way from being over, the fact that the complaint survived the motion to dismiss is significant. For those employers that implemented similar strategies in order to combat the costs of ACA, this case should be well worth watching.



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Having designed and handled employee benefits and executive compensation issues in hundreds of business transactions involving over \$30 billion, I bring a broad wealth of legal knowledge, experience and creativity to solving and resolving complex legal issues and problems.

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