

Reducing Employee Hours to Evade ACA Health Insurance Requirements Results in Suit

AUTHOR: SANDBERG PHOENIX

By Thomas Berry

While ERISA has long regulated employer provided group health insurance plans, it had never in the past dictated which employees should be eligible to receive health insurance. When Congress enacted the Patient Protection and Affordable Care Act in 2013 (“ACA”), it required for the first time that an employer provide health insurance to all employees who work on average at least 30 hours a week. The failure to cover all eligible employees, as now defined by the ACA, would subject employers either to the increased expense for having to provide affordable health insurance to a greater percentage of employees than in the past or to the “employer mandate” financial penalties.

Critics of the ACA initially suggested that employers would simply reduce the scheduled hours of their employees below the 30 hour/week threshold. Neither the Obama Administration nor the Department of Labor, which is responsible for enforcing much of the ACA requirements, endorsed this strategy or recognized that it would be an effective way to evade and avoid either providing health insurance to a greater percentage of employees or facing the financial penalties arising from the employer mandate. In fact, many of the proponents to the ACA took a contrary view and asserted that an employer that deliberately and intentionally reduced the scheduled hours of employees in order to evade and avoid the ACA coverage requirements would likely face litigation challenging such practices.

In possibly the first of many, Dave & Busters, a popular entertainment restaurant for families and children, was recently named as a defendant in a federal court class action lawsuit. In *Parra Marin v. Dave & Buster's, Inc.*, Case No. 1:15-cv-3608 (S.D. NY), the plaintiff alleges that prior to enactment of the ACA, she routinely worked between 30 to 45 hours a week at the Times Square location for Dave & Buster's. According to the allegations in the Complaint, Dave & Buster's launched a corporate-wide initiative in the summer of 2013 in order to "right size" its work force due to the perceived added expenses that would be associated with greater health insurance coverage. Dave & Buster's additionally noted in several regulatory filings with the SEC that it faced earnings challenges due to the increased costs it perceived associated with the health insurance mandates required by the ACA.

Following the "right size" initiative announcement, Ms. Parra Marin alleges her work hours dropped from 30 to 45 hours/week to less than 20 hours/week. Consequently, she lost her previously provided health insurance as an employee of Dave & Buster's. In addition to losing her health insurance, her average weekly wages dropped precipitously as well. Because § 510 to ERISA, which has been in effect for many years, prohibits an employer from taking any retaliatory action designed to evade and avoid employee benefit obligations, the plaintiff filed a class action on behalf of herself and thousands of other Dave & Buster's employees nationwide, challenging the actions to reduce work hours below the 30 hour/week ACA threshold.

In addition to seeking an order from the federal court requiring Dave & Buster's to provide and reinstate her health insurance coverage and reimburse her for any medical expenses that were not paid in the interim due to the lapse in coverage, Ms. Parra Marin also seeks money damages for her lost wages in the form of an equitable remedy of restitution, together with her litigation costs and attorneys' fees. Similarly, she seeks such relief on behalf of thousands of other employees that she contends were negatively affected by the right sizing initiative announced by Dave & Buster's in 2013. Until such time as the courts weigh in on the legal theory of the class action, employers should carefully consider all compliance aspects of the ACA. Simply reducing the hours of an employee to avoid coverage may not be an effective strategy and could result in similar litigation as well as significant legal fees and damages.