PROCEED WITH CAUTION: RISKS UNDER THE ACA IN REDUCING EMPLOYEE HOURS TO AVOID COSTS

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There are many discussions underway by employers and their advisors about cutting their workforce mix to minimize costs under the Affordable Care Act ("ACA"). One of the most controversial provisions of the ACA is Section 1513, informally known as the "Play or Pay" mandate. This provision applies to "large" employers, defined as employers of 50 or more full-time employees. Under the ACA, "full-time" employees are those employees that work 30 or more hours per week or 130 hours per month.

The "Play or Pay" mandate requires that employers of 50 or more full-time employees offer affordable, employer-sponsored health coverage to their full-time employees and their children, or else pay penalties to the IRS. The Obama Administration's July 2, 2013 announcement that the implementation of the "Play or Pay" mandate will be delayed until January, 2015, has given employers additional time to develop strategies to minimize costs under the ACA.

One approach that employers are considering is to minimize the number of employees working 30 or more hours a week so as not to fall under the ACA's definition of a "large employer" – and thus avoid the "Play or Pay" mandate. Employers, however, should proceed with caution in taking this approach because it may create unexpected legal exposure under ERISA.

ERISA governs almost all types of employer-sponsored health plans, and more than 137 million Americans are currently enrolled in employer-sponsored health plans having ERISA protections. One such protection is Section 510: Interference with Protected Rights. This Section protects participants and beneficiaries of employment benefit plans from losing their protected rights created by employment relationships. Specifically, Section 510 states: "It shall be unlawful for any person to discharge, fine, suspend, expel, discipline 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…" In short, employers may not use adverse employment action to interfere "with the attainment of any right to which such participant may become entitled under the Plan."

With the implementation of the ACA, the battle lines for future claims under ERISA Section 510 are already being etched out. Employees are likely to challenge workforce realignments, including, but not limited to, a change in status to part-time employment or any other act that results in employees working less hours, claiming the employer's decisions were either in retaliation for employees exercising rights under the plan or intended to interfere with employees' attainment of rights under the plan. Employers, on the other hand, are likely to respond that such decisions were based on legitimate business needs, including managing costs, and were neither retaliatory nor for the purpose of interfering with the employees' attainment of rights under any applicable benefit plan. While it is unclear who has the prevailing argument, it is virtually certain that ERISA Section 510 claims will be on the rise with the implementation of the ACA and employers' resulting decisions to reduce employee hours to minimize cost under the ACA. The bottom line is that employers may face legal exposure using the cut-in-hours approach to escape being under the "Play or Pay" mandate.

Employers should also be aware that the ACA has a whistleblower provision, that states that no employer shall discharge or discriminate against "any employee with respect to his or her compensation, terms, conditions, or other privileges of employment" because the employee has received a credit or subsidy provided by the ACA. In other words, an employer may not reduce an employee's hours or pay because the employee received a subsidy to purchase insurance through a public health insurance exchange. Thus, an employee who has received a subsidy under the ACA, and whose work hours were subsequently reduced by their employer, can assert that the reduction constitutes "adverse action" by the employer because of the past subsidy received, whereas the employer can assert that the purpose of the reduction is prospective – to avoid future costs under the ACA. It is, of course, impossible to know how courts will resolve such a dispute, but it is important to know that, unlike ERISA 510 complaints, the ACA whistleblower process places the burden of proof on the employer.

In sum, employers seeking to avoid the ACA's "Play or Pay" mandate through cutting employee hours may risk being sued under the ACA's whistleblower provision and ERISA Section 510. Given the risks involved, employers should consult with legal counsel before taking any action intended to avoid the ACA's coverage.

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