Marshall & Sterling
GROUP BENEFITS

Compliance E-Alert:
Reducing Employee Hours to Avoid ACA Penalties May Raise ERISA Issues

The Affordable Care Act (''ACA'') exposes applicable large employers to penalties if they do not offer full-time employees health insurance that meets the ACA's minimum value and affordability requirements. One strategy for minimizing exposure to penalties under the employer shared responsibility provisions of the ACA is to minimize the number of "full-time employees," meaning the number of employees working 30 or more hours per week on average. Employers can accomplish this by reducing the number of hours employees work so that they will not be considered to be "full-time" as defined by the ACA, which will require coverage to be offered to fewer employees.

In May 2015, a class action was filed by employees of Dave & Buster's asserting that the employer interfered with their rights under the Employee Retirement Income Security Act of 1974 ("ERISA") by reducing their work hours to below 30 in order to avoid the ACA's employer mandate. *Marin v. Dave & Buster's, Inc.* (S.D.N.Y.) involves potentially 10,000 employees whose hours were involuntarily reduced by Dave & Buster's from June 2013 to the present and whose reduction in hours resulted in either the loss of coverage under the company's health plan or a change to a less robust benefit option.

The employees allege that this practice violates ERISA section 510, which bans employers from discrimination regarding employee benefits. Specifically, employers may not "discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled or may become entitled under an ERISA plan."

On February 9, 2016, the court in *Marin* denied a defense motion to dismiss the claim under ERISA. The court found sufficient evidence that a store manager and assistant manager at the company's Times Square location announced at a staff meeting that work hours were cut because the employer determined that, without limiting the work schedules of its staff, the ACA could impose as much as two million dollars of new expense in 2015. The store's number of full-time employees fell from over 100 to about 40. That evidence was enough, said the court, to satisfy the requirement for proof of a specific intent to interfere with benefits.

Some observations: (1) the court's refusal to dismiss the claim does not mean that the employees will ultimately be successful on their claim—based on existing case law, the employees may find it difficult to assert that they are "entitled" or "may become entitled" to welfare benefits under ERISA, as nothing in ERISA requires employers to offer group health insurance; and (2) MB&W has been advising its clients for years to consider "grandfathering" existing employees who are already eligible for coverage during a move to reduce employee hours. It is hard to imagine that a newly hired employee who is never eligible for benefits under the employer's ERISA plan could mount a successful ERISA section 510 claim. Also, it is important to note that the employer's public statements about the reasons for dropping hours were apparently used against it. Employers implementing these programs should be very careful about the way in which they communicate the changes and the reason for the changes.

In any event, this is an important case for employers to watch, especially employers who may have taken similar actions or are thinking about taking similar steps to address their employer shared responsibility obligations under the ACA.